No. 20-7065

IN THE SUPREME COURT OF THE UNITED STATES

ANIBAL CANALES, JR., PETITIONER,

v.

BOBBY LUMPKIN, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Brief of Arizona Capital Representation Project, Capital Appeals Project, Capital Post-Conviction Project of Louisiana, Center for Death Penalty Litigation, Georgia Resource Center, Justice 360, Louisiana Capital Assistance Center, Mississippi Office of Capital Post-Conviction Counsel, and Promise of Justice Initiative as *Amici Curiae* in Support of Petitioner

Alexis Hoag*
Associate Research Scholar & Lecturer
Columbia Law School
435 West 116th Street, Ste 605
New York, NY 10027
(203) 645-4918
alexis.hoag@law.columbia.edu

Heather Fraley
411 E. Bonneville, Ste 250
Las Vegas, NV 89101
(702) 388-5179
heatherfraley512@gmail.com

*Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

INTEREST OF AMICI CURIAE

Amici curiae are organizations from around the country that represent capital petitioners seeking post-conviction relief in both state and federal court. Amici share a common interest in preserving habeas corpus as a meaningful forum for vindicating the Sixth Amendment right to the effective assistance of trial counsel in capital cases. Amici also offer a shared expertise in habeas law generally, and, more specifically, in the various standards for assessing claims of ineffective assistance of counsel in both state and federal court.

The Arizona Capital Representation Project (ACRP) is a non-profit legal services organization that has, since 1988, been dedicated to ensuring that all capital defendants are treated fairly and receive effective representation. ACRP serves its mission by providing pro bono training and consulting to capital defense teams, appearing as amicus curiae in appropriate cases, and providing targeted direct representation. ACRP primarily serves Arizona defendants and defense teams, but also provides training and assistance in other jurisdictions.

The Capital Appeals Project (CAP) is a state-funded non-profit organization that represents individuals on Louisiana's death row in their post-trial, direct appeal and post-conviction proceedings and juveniles sentenced to life without parole in their sentencing proceedings, and provides consultation and support to capital trial practitioners.

The Capital Post-Conviction Project of Louisiana (CPCPL) provides high-quality direct representation to death-sentenced Louisiana clients in post-conviction

and acts as resource counsel for pro bono law firms representing capital post-conviction clients. State post-conviction representation provides the primary opportunity for a court to review newly discovered evidence that has come to light only after the original trial and death sentence have been finally adjudicated on direct appeal to the Louisiana Supreme Court.

The Center for Death Penalty Litigation (CDPL) is a non-profit law firm that represents people on North Carolina's death row, provides consultation and training to capital defense teams at trial and in post-conviction proceedings, coordinates capital litigation, and serves as a clearinghouse for accurate and timely information on the North Carolina death penalty.

The Georgia Resource Center is a nonprofit law office established in 1988 to provide representation to people on Georgia's death row in state and federal post-conviction proceedings, as well as clemency proceedings before the Georgia Board of Pardons and Paroles.

Justice 360 is a non-profit law firm that represents people facing the death penalty in South Carolina, generally in post-conviction proceedings in state and federal court, and represents juveniles facing life without parole sentences. Justice 360 also serves as a resource center for other attorneys in the state litigating capital trial and post-conviction cases.

The Louisiana Capital Assistance Center (LCAC) has operated as a non-profit law office specializing in capital defense for over twenty-five years, representing clients in capital proceedings in Louisiana, Texas and Mississippi.

The LCAC represents clients at trial, on appeal, and in state and federal habeas proceedings.

The Mississippi Office of Capital Post-Conviction Counsel (MOCPCC) is a statutory agency that is tasked with providing representation in state court post-conviction litigation to indigent defendants who are under a sentence of death after failing to retain relief via direct appeal. MOCPCC also assists in the procurement of outside counsel when our office is representing a co-defendant or otherwise conflicted from providing representation.

The Promise of Justice Initiative is a Louisiana based non-profit law office that provides capital representation in federal habeas corpus litigation.

Counsel for amici curiae, Alexis Hoag, is a research scholar and lecturer at Columbia Law School where her teaching and scholarship include capital post-conviction defense and right to counsel. Prior to academia, counsel spent over a decade representing death sentenced individuals in federal capital habeas proceedings. Counsel Heather Fraley has spent nearly fifteen years representing death sentenced individuals in state and federal habeas proceedings.

Together, amici write to explain why granting certiorari is necessary to preserve the integrity of the Sixth Amendment right to counsel in capital cases.[1]

---

[1] Pursuant to this Court's Rule 37, amici state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice of the filing of this brief was given to both parties, and both parties have consented in writing to its filing.

SUMMARY OF ARGUMENT

This Court should grant certiorari because the Fifth Circuit's decision marks a significant departure from this Court's precedents defining and applying the standard of review for claims of ineffective assistance of counsel. State and federal habeas proceedings serve an important role in preserving the Sixth Amendment right to counsel, as petitioners often cannot raise or adequately develop claims of ineffective assistance of counsel on direct appeal. To succeed on a claim of ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), a petitioner must prove there is a reasonable probability of a more favorable outcome if trial counsel had performed effectively. In *Wiggins v. Smith*, 539 U.S. 510, 537 (2003), this Court applied the *Strickland* standard to a claim of ineffective assistance at the penalty phase of a capital trial, holding that a lawyer's deficient performance is prejudicial if there is "a reasonable probability that at least one juror" that voted for death at trial "would have struck a different balance."

In the decision below, the Fifth Circuit redefined this standard in a way that threatens to eviscerate the right to effective assistance of counsel in capital cases. Instead of applying *Wiggins*, the Fifth Circuit concluded that *Harrington v. Richter*, 562 U.S. 86 (2011)—a non-capital case decided under deferential AEDPA[2] review—narrowed *Strickland*'s prejudice prong by requiring all petitioners, even those entitled to de novo review, to prove their facts closely mapped onto one of this

[2] AEDPA refers to the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254.

Court's cases granting relief.

This distorted interpretation of *Richter* establishes an almost impossible standard for proving prejudice. The Fifth Circuit's rule both deprives capital petitioners of the individualized sentencing that the constitution guarantees and prevents reviewing courts from correcting egregious instances of constitutional error. This Court should grant the Petition to reaffirm that the standard announced in *Wiggins* remains the standard for assessing prejudice on all claims of penalty phase ineffective assistance, and that *Richter* did nothing to heighten or alter this standard.

ARGUMENT

I. The Fifth Circuit announced a new, heightened standard for assessing prejudice on claims of penalty phase ineffective assistance of counsel.

It is axiomatic that the writ of habeas corpus plays an essential role in protecting constitutional rights. *See Slack v. McDaniel*, 529 U.S. 473, 483 (2000). And few constitutional rights are more frequently asserted in habeas than the right to effective assistance of counsel. Every habeas lawyer knows they can establish a Sixth Amendment violation if they can prove both that counsel's performance at some critical stage of the proceeding was deficient because it fell below objective standards of reasonableness, and that their client was prejudiced because there is a reasonable probability of a more favorable outcome if counsel had performed effectively. *Strickland*, 466 U.S. at 694.

For *capital* habeas lawyers, it is equally well known that to establish error in

the penalty phase of a capital trial, one must prove "there is a reasonable probability that at least one juror would have struck a different balance" if counsel had performed effectively. *Wiggins*, 539 U.S. at 537. Satisfying this standard is not easy (as the hundreds of petitioners who have lost such claims can attest), but it is even more difficult when a court reviews the claim under the deferential lens of the AEDPA. As this Court explained in *Harrington v. Richter*, where a state court reviews a claim of ineffective assistance on the merits, the federal court may only grant relief if fair-minded jurists could not disagree that the state court's adjudication was unreasonably wrong. 562 U.S. at 101.

After clarifying the standard for reviewing claims of ineffectiveness under the AEDPA, this Court in *Richter* explained that proving a reasonable probability of a more favorable outcome under *Strickland* means the "likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. As discussed in detail in Mr. Canales's Petition, in the ten years since *Richter*, every other circuit court that routinely applies *Wiggins* has interpreted the "substantial likelihood" language as a mere restatement of the prejudice standard established in *Strickland* and refined in the capital penalty phase context in *Wiggins*. According to the Fifth Circuit, however, *Richter* established a new standard for proving prejudice on ineffectiveness claims, even those claims subject to a de novo standard of review.

In the decision below, the Fifth Circuit held that the *Strickland* prejudice standard is no longer satisfied "when the new mitigating evidence 'might have' influenced one juror," because *Richter* "established" a *new, heightened* standard for

proving prejudice from penalty phase ineffectiveness in a capital case, which it calls the "substantial likelihood standard." Pet. App. 5a.[3] The Fifth Circuit held *Richter* "made no distinction between cases that were reviewed de novo and those that received deference under the [AEDPA]." *Id.*

The Fifth Circuit applied its heightened prejudice standard to Mr. Canales when it identified minor differences between his case and those where this Court had found prejudice from penalty phase ineffectiveness, concluding that because Mr. Canales's mitigation case was not identical to those cases, he was not entitled to relief. Pet. App. 6a-7a. The court discounted to irrelevance substantial new evidence of Mr. Canales's childhood trauma, physical and sexual abuse, neglect, abandonment, post-traumatic stress disorder, and coercion from prison gangs, because it did not identically match the evidence this Court found prejudicial in other cases. Pet. App. 6a. Judge Higginbotham's dissent makes clear that a court applying the proper standard of review under *Wiggins* would easily have found prejudice on the facts of Mr. Canales's case. Pet. App. 9a-13a.

This Court should grant review to expressly reject the heightened prejudice standard that the Fifth Circuit adopted, and reaffirm the applicability of the *Wiggins* standard, because (1) the Fifth Circuit's heightened prejudice standard is

[3] This interpretation of *Richter* as announcing new law is inconsistent with this Court's retroactivity jurisprudence, which holds that new substantive law will not be made in cases on collateral review. *See Wiggins*, 539 U.S. at 522 ("Williams' case was before us on habeas review. Contrary to the dissent's contention, we therefore made no new law in resolving Williams' ineffectiveness claim.").

inconsistent with this Court's commitment to ensuring substantial claims of ineffective assistance of counsel receive meaningful review by at least one court; (2) the heightened prejudice standard will deprive capital petitioners of individualized sentencing; and (3) the heightened standard will eviscerate the right to effective assistance of counsel at the penalty phase of capital trials.

II. The heightened prejudice standard should be rejected because it is inconsistent with this Court's commitment to ensuring all substantial claims of ineffective assistance of counsel receive meaningful review by at least one court.

This Court's decision in *Martinez v. Ryan*, 566 U.S. 1, 12 (2012), was acutely focused on the importance of habeas proceedings in preserving "the foundation for our adversary system"—the Sixth Amendment right to effective assistance of counsel. There, the Court explained that although rules of finality and federalism guide federal habeas courts, those rules must give way where they jeopardize the ability of courts to correct substantial claims of ineffective assistance of counsel. *Id.* Weighing the risk "that no state court at any level will hear the prisoner's" Sixth Amendment claim against the interests of finality and federalism, this Court concluded that federal habeas petitioners who could prove their initial-review counsel were ineffective were entitled to a de novo merits review of their claims of trial counsel ineffectiveness. *Id.* at 10-11.

This Court's acknowledgement in *Martinez* that "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system," *id.* at 12, highlights the importance of providing a meaningful forum for individuals to

vindicate that right. "A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel" because "[d]efense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged." *Id.* Whether a petitioner raises a substantial claim of ineffective assistance of counsel for the first time on direct appeal, in an initial review-collateral proceeding, or in federal habeas, the reviewing court must give it "proper consideration." *Id.* at 14. But ensuring Sixth Amendment claims receive proper consideration means preventing lower courts from applying unduly burdensome standards of review. As explained in detail in Sections III and IV below, the Fifth Circuit has created an unduly burdensome standard of review.

Martinez reflects this Court's commitment to ensuring all colorable claims of constitutional error under the Sixth Amendment's right to counsel receive meaningful review. The Fifth Circuit's imposition of a heightened prejudice standard to any petitioner, but particularly one whose claim it was reviewing under *Martinez*, undermines this goal. This Court has recognized the importance of habeas in preserving the constitutional rights of those accused of crimes, especially those who may pay the ultimate price. *See Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) ("[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."). The only way to preserve habeas as a meaningful forum for

vindicating the right to effective assistance of counsel is to reject the Fifth Circuit's heightened prejudice standard and reaffirm that *Wiggins* remains the proper standard for assessing penalty phase ineffectiveness claims.

III. Applying the heightened prejudice standard would deprive petitioners of individualized sentencing.

Central to this Court's death penalty jurisprudence is an acknowledgement of the importance of individualized sentencing. "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment, requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). And while anchored in the Eight Amendment, the right to individualized sentencing also plays a role in assessing prejudice under the Sixth Amendment right to counsel. Pursuant to *Strickland*, a court must decide what impact new mitigating evidence may have had on a jury's individualized assessment of the appropriate sentence.

Rather than focus on how a jury might conduct an individualized assessment of the facts at hand, the Fifth Circuit's heightened prejudice standard focuses on whether a capital petitioner's newly presented mitigating evidence differs in any way from the facts of this Court's cases finding prejudice from penalty phase ineffectiveness. Mr. Canales could not demonstrate prejudice, the Court of Appeals held, because unlike the petitioner in *Wiggins*, he did not suffer from diminished capacity nor did he lack a record of violent conduct, Pet. App. 7a; unlike the petitioner

in *Williams v. Taylor*, 529 U.S. 362 (2000), Mr. Canales was not borderline intellectually disabled and had not expressed remorse, Pet. App. 7a; unlike the petitioner in *Rompilla v. Beard*, 545 U.S. 374, 377 (2005), there was no evidence presented at trial that Mr. Canales had a benign childhood, Pet. App. 6a n.2; and unlike the petitioner in *Porter v. McCollum*, 558 U.S. 30, 30 (2009), Mr. Canales failed to show a nexus between his mitigating evidence and his offense, Pet. App. 6a n.2. Mr. Canales's inability to prove prejudice, therefore, stemmed from the factual dissimilarities between his case and this Court's cases granting relief.

Assessing prejudice based on a checklist of factors found persuasive in prior cases is precisely the approach this Court rejected in *Shinn v. Kayer*, 141 S. Ct. 517, 525 (2020). In that case, petitioner argued that the Arizona Supreme Court was unreasonable for failing to find prejudice on his penalty phase ineffective assistance of counsel claim because the facts of his case were so similar to the facts of other cases where the Arizona Supreme Court granted relief. *Id.* This Court rejected that approach, explaining that "capital sentencing requires an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Id.* at 526 (emphasis in original) (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)). "[B]ecause the facts in each capital sentencing case are unique, the weighing of aggravating and mitigating evidence in a prior published decision is unlikely to provide clear guidance about how a state court would weigh the evidence in a later case." *Id.*

So, too, here, where the Fifth Circuit was acting as the initial review court for Mr. Canales's *Wiggins* claim, the prior published decisions of this Court were unlikely to provide clear guidance on how a jury might weigh the aggravating evidence against Mr. Canales's new mitigating evidence. Of course, it is incumbent upon courts of appeals to look to this Court's decisions for guidance, but as this Court held in *Shinn*, each capital sentencing case is unique. That a petitioner's facts do not identically align with the facts of *Wiggins*, *Porter*, *Williams*, or *Rompilla* does not mean relief is foreclosed. Even the "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before" finding a constitutional violation. *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007). But particularly in cases (like this one) where the unreasonableness of a prior state court decision is not at issue, courts must move beyond caselaw comparisons and conduct an individualized determination, based on the facts presented, to determine if there is a reasonable probability of a different outcome. The Fifth Circuit did not conduct such an individualized determination here, and will not conduct an individualized determination in the future if its heightened prejudice standard is left unchecked.

This Court has "consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the [Fifth Circuit] failed to undertake below." *Sears v. Upton*, 561 U.S. 945, 955 (2010). By focusing on the facts of *other* cases, rather than on whether the new mitigating facts in *this* case might have convinced at least one juror to vote for a sentence less than death, the Fifth Circuit deprived Mr. Canales of the individualized sentencing determination to

which he was entitled. This Court should grant certiorari and hold that such an erosion of the right to individualized sentencing is unacceptable under our Constitution.

IV. Applying the heightened prejudice standard ensures that egregious instances of ineffective assistance of counsel will go uncorrected.

How this Court defines the prejudice standard for ineffectiveness claims determines how weak or robust the Sixth Amendment right to counsel will be. Requiring petitioners to prove a reasonable probability that at least one juror would have voted for a sentence less than death filters out the weak Sixth Amendment violations while capturing the egregious ones. But requiring petitioners to prove that the facts of their case identically match the facts of a previous case granting relief ensures that reviewing courts will overlook valid claims of error.

It was likely for this reason that the Court, in *Andrus v. Texas*, rejected the argument that "the prejudice inquiry here turns principally on how the facts of this case compare to the facts in *Wiggins*." 140 S. Ct. 1875, 1887 n.6 (2020). Though the Fifth Circuit below claimed to find support for its heightened prejudice standard in *Andrus*, in truth, the Court's holding that "we have never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice" directly contradicts the Fifth Circuit's approach to Mr. Canales's case. *See id.* By applying its heightened prejudice standard, the Fifth Circuit "unreasonably discounted to irrelevance" evidence of trauma and abuse that had a reasonable probability of convincing at least one juror to vote for a sentence less than death. *Porter*, 558 U.S.

at 43.

This case presents a quintessential example of prejudicially ineffective assistance of counsel. At trial, the jury heard simply that "[Mr.] Canales did not cause trouble, had an aptitude for art, and received few visits from family, and that he had tried to stop inmates from fighting." Pet App. 6a. The new mitigating evidence "bears no relation" to this meager presentation. *Rompilla*, 545 U.S. at 393.

The new evidence paints a picture of a man who grew up in poverty, often without a home and hungry, giving food to his sister so she could eat. A man who "both suffered and witnessed horrific violence and sexual assault" throughout his childhood. Pet. App. 9a. From age six to twelve, his stepfather "regularly beat Mr. Canales, stripping him naked, dragging him by the ears, and then whipping him with a belt . . . until he had welts and bruises all over his body." *Id.* The stepfather also tried to rape Mr. Canales, and raped and beat Mr. Canales's sister in front of him. *Id.* Mr. Canales began shining shoes and selling newspapers on the streets at age eight, and was forced to join a gang. *Id.* He bounced between his mother's home and father's home, experiencing bouts of housing insecurity. At age thirteen, Mr. Canales's father abandoned him in Houston. *Id.* As a result, Mr. Canales became an alcoholic by age fourteen, and later became addicted to heroin. At the time of the offense, Mr. Canales suffered from post-traumatic stress disorder and a heart condition that caused uncontrollable bleeding, rendering him vulnerable to prison gang violence.

This evidence is precisely the type of evidence this Court has repeatedly

acknowledged may render a defendant less culpable in the eyes of a jury. *See Penry v. Lynaugh*, 492 U.S. 302, 316 (1989). This is also the type of evidence this Court has found mitigating in cases far more aggravated than this one. *Compare* Pet. App. 22a (Mr. Canales held the single adult male victim, a prison inmate, while another inmate strangled him to death) *with Andrus*, 140 S. Ct. at 1878 (double murder); *Porter*, 558 U.S. at 31 (double murder); *Rompilla*, 545 U.S. at 377-78 (defendant beat victim with a blunt object, stabbed him sixteen times in the neck and head, and set his body on fire); *Wiggins*, 539 U.S. at 514 (defendant drowned a 77-year-old woman); *Williams*, 529 U.S. at 367-68 (defendant beat victim to death with a mattock). And it is the type of evidence this Court has found sufficient to satisfy the *Strickland* prejudice standard even under the deferential lens of the AEDPA. *See Porter*, 558 U.S. at 42; *Williams*, 529 U.S. at 367-68.

A comparison of this Court's other seminal penalty phase ineffectiveness cases reveals how few of those cases would have been decided the same way if the Fifth Circuit's heightened prejudice standard had been applied. For example, according to the Fifth Circuit, the petitioner in *Williams* was able to demonstrate prejudice (even under deferential AEDPA review), in part, because he had expressed remorse at his sentencing hearing. 529 U.S. at 398. If expressing remorse was required to prove prejudice, then neither Wiggins, Rompilla, Porter, nor Sears would have been able to demonstrate prejudice. The petitioner in *Wiggins* was able to demonstrate prejudice, in part, because he lacked a violent record. 539 U.S. at 513. If lacking a violent record was required to prove prejudice, then Williams,

Rompilla, Porter and Andrus would have been unable to prove prejudice. The petitioner in *Rompilla* was able to demonstrate prejudice, in part, because the evidence at trial created a "benign conception of Rompilla's upbringing" which the new mitigating evidence would have counteracted. 545 U.S. at 378. If counteracting a benign conception of one's childhood was required to prove prejudice, then Wiggins and Porter would not have been able to prove prejudice. *Porter* involved prior military service, unlike any of the other cases, indicating that if prior military service were required to prove prejudice, only Porter would have been able to demonstrate prejudice.

If this Court finds the above exercise ridiculous, it should. But this is precisely the exercise the Fifth Circuit held was required under *Richter*, and it is precisely the exercise the court will continue to undertake in the future if this Court does not grant certiorari and correct the error below. Requiring apples-to-apples comparisons of mitigating evidence in capital cases is not only difficult, it threatens to eviscerate the right to effective representation in the penalty phase of a capital trial.

Mr. Canales's case is exactly the type of case that should be reversed for prejudicial Sixth Amendment error: a severely damaged and traumatized man was sentenced to death without a jury of his peers ever hearing about the horrific life experiences that shaped him. Because the new mitigating evidence might have convinced at least one juror to vote for a sentence less than death, a new jury ought to have the opportunity to weigh the evidence and asses the appropriate sentence.

But under the Fifth Circuit's interpretation of *Strickland*, the facts of Mr. Canales's case were not enough. If Mr. Canales's case does not satisfy the heightened prejudice standard that the Fifth Circuit announced, then no case ever will. This Court must not allow the error in Mr. Canales's case, or other cases like it, to stand. This Court should take this opportunity to clarify what it said in *Andrus* and insist that the prejudice determination in each case turns on its own unique facts, not on whether the facts here align with the facts in *Wiggins*.

CONCLUSION

The Court should grant certiorari and hold that *Wiggins* remains the controlling law of the land.

Dated March 8, 2021

Respectfully submitted,

/s/ Alexis J. Hoag
ALEXIS J. HOAG

/s/ Heather Fraley
HEATHER FRALEY