CAPITAL CASE
No. 18-8386

IN THE

Supreme Court of the United States

MICHAEL APELT,

Petitioner,

v.

CHARLES L. RYAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

I. THE DECISION BELOW CONTRADICTS THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

A. The Ninth Circuit Neglected *Strickland*'s Factual Analysis.

Respondent contends that Mr. Apelt presents a question that is too "factual" and "case-specific" to warrant this Court's review. Opp. 9-10. But the first question addresses the Ninth Circuit panel's failure to undertake *Strickland*'s required factual analysis at all. This Court has time and again reviewed matters where the lower courts misapplied *Strickland* and other precedents with similarly fact-intensive inquiries. See *e.g.*, *Wiggins* v. *Smith*, 539 U.S. 510 (2003); *Rompilla* v. *Beard*, 545 U.S. 374, 394 (2005) (O'Connor, J., concurring); *Sears* v. *Upton*, 561 U.S. 945 (2010) (per curiam); see also *e.g., Moore* v. *Texas*, 137 S. Ct. 1039, 1048 (2017) (reviewing application of *Atkins* v. *Virginia*, 536 U.S. 304 (2002)); *Banks* v. *Dretke*, 540 U.S. 668 (2004) (reviewing application of *Brady* v. *Maryland*, 373 U.S. 83 (1963)).

Respondent next contends that the panel correctly quoted the *Strickland* test. Opp. 11-12. However, citing or quoting the correct precedent is distinct from correctly applying it. See *Williams* v. *Taylor*, 529 U.S. 362, 407-08 (2000) ("A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involv[ing] an unreasonable application of . . . clearly established Federal law.'"). Here, the panel did not apply *Strickland*'s fact-intensive weighing analysis. Pet. 11-16.

Respondent counters that in "[c]onducting its reweighing, the court appropriately considered the facts and circumstances of the crime, including Apelt's careful planning and deliberation." Opp. 11 (citing Pet. App. 66a). But this argument merely highlights Mr. Apelt's point—while the panel considered the facts of the *crime* (including "planning and deliberation"), it failed to consider the mitigating evidence—the "other side of the ledger." *Porter* v. *McCollum*, 558 U.S. 30, 41 (2009) (per curiam); Pet. 11-16. *Strickland* requires that courts consider the totality of the evidence—both aggravating and mitigating—in reweighing. *Wiggins*, 539 U.S. at 534 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."). This Court has long required mitigating evidence be afforded "meaningful consideration" under the Eighth Amendment's individualized consideration requirement. *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233, 246-263 (2007) (discussing precedents). Mr. Apelt was wholly denied the opportunity to have his background considered at sentencing.

Similarly, Respondent points to the panel's citations to *Strickland* and *Andrews* v. *Davis*, 866 F.3d 994 (9th Cir. 2017), *vacated, reh'g en banc granted by* 888 F.3d 1020, in response to Mr. Apelt's argument that the panel inappropriately focused on whether there could be another death sentence instead of *Strickland*'s focus on the reasonable probability of a life sentence. Pet. 17; Opp. 13 ("The court in fact repeatedly cited the reasonable-probability standard"). Review of the panel opinion reveals its preoccupation with the likelihood of another death sentence and its lack of attention to the mitigation and reasonable probability of a life sentence. Compare Pet. App. 66a-67a (repeatedly framing the prejudice inquiry as whether the new evidence "did

not warrant death"), with *Rompilla*, 545 U.S. at 393 ("[A]lthough we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test.").

1. The Ninth Circuit Applied "Double Deference" to its Prejudice Analysis.

Respondent contends that an open question exists as to whether double deference applies to *Strickland*'s prejudice prong, pointing to a circuit split. Opp. 14 (citing *Waiters* v. *Lee*, 857 F.3d 466, 477-78 n.20 (2d Cir. 2017) (comparing *Hardy* v. *Chappell*, 849 F.3d 803, 825 n.10 (9th Cir. 2016) (explaining "a case considering only [the prejudice] prong is not subject to double deference"); *Evans* v. *Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1333 (11th Cir. 2013) ("[D]ouble deference does not apply to the prejudice inquiry."), with *Foust* v. *Houk*, 655 F.3d 524, 534 (6th Cir. 2011) ("We therefore afford double deference . . . on both prongs of the *Strickland* test.")); see also *Simpson* v. *Carpenter*, 912 F.3d 542, 599 (10th Cir. 2018) ("[W]e review the . . . prejudice determination under AEDPA's and *Strickland*'s doubly deferential standard of review."). Mr. Apelt agrees that the question is open and respectfully submits that it is fairly included in the question presented.[1]

Moreover, this case is an excellent vehicle. The panel did in fact apply the double deference standard to its *Strickland* prejudice analysis. Pet. 18.[2] And certainly,

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[1] Alternatively, this Court has the discretion to rewrite a question presented. See *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992).

[2] Respondent alleges that in the Petition, Mr. Apelt relied on the panel's application of double deference to an unrelated claim.

Mr. Apelt's case is compelling and stark in the volume of uncontested mitigating evidence that was developed post-trial, which makes the application of double deference a dispositive question. "The magnitude of the difference between the mitigating evidence that was presented at sentencing and the evidence that could have been presented through a competent investigation is sufficient to undermine confidence in the outcome. *No fairminded jurist could conclude otherwise*." *Apelt* v. *Ryan*, No. CV-98-00882-PHX-ROS, 2015 WL 5119670, at *12 (D. Ariz. Sept. 1, 2015) (emphasis added). Finally, Respondent's argument that Mr. Apelt's claim fails even under "a single layer of deference," Opp. 14, is nothing more than an argument on the merits belied by the District Court's ruling.

2. It Was Objectively Unreasonable for the State Court and Panel to Conclude that Apelt was not Prejudiced.

According to Respondent, "because the omitted mitigation does not explain the offense, the state court could reasonably have given it minimal weight, and could have reasonably concluded that the substantial aggravation would have offset it." *Id*. at 16 (citing *Mann* v. *Ryan*, 828 F.3d 1143, 1159 (9th Cir. 2016); *State* v. *Pandeli*, 161 P.3d 557, 575, ¶72 (Ariz. 2007)); see also *id*. at 13 (citing *McKinney* v. *Ryan*, 813 F.3d 798, 817-18 (9th Cir. 2015) (en banc)). In this vein, Respondent urges this Court to uphold the panel decision because "nothing in Apelt's background explains why he killed Cindy." Opp. 16.

Opp. 14 n.7. Mr. Apelt correctly quoted the double deference language from the panel's *Strickland* prejudice analysis, but unfortunately provided the incorrect cite. Pet. 18 (citing Pet. App. 86a-87a). Undersigned apologizes for this error. The correct citation should be Pet. App. 65a.

Fundamentally, the aggravating evidence is not as substantial as Respondent claims. Respondent argues there are "three weighty aggrava[tors]" that militate against a prejudice finding. Opp. 15. However, under Arizona law, the aggravating factors under A.R.S. §§ 13-751(F)(4) and (F)(5) are not each entitled to "full weight" because of their overlapping facts. Pet. App. 49a; *State* v. *Carlson*, 48 P.3d 1180, 1191 (Ariz. 2002).

Moreover, this Court has consistently rejected the tenet that mitigating evidence is required to explain the crime. *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982); *Tennard* v. *Dretke*, 542 U.S. 274 (2004). And while Respondent argues that courts should be permitted, as a rule, to give *de minimus* weight to non-causally connected mitigation so long as it is technically "considered," this is not the practice or spirit of this Court's capital sentencing jurisprudence, which requires that a sentencer "be able to give meaningful consideration and effect to all mitigating evidence . . . notwithstanding the severity of his crime." *Abdul-Kabir*, 550 U.S. at 246; see also *Porter*, 558 U.S. at 30, 42-43 (state court "unreasonably discounted" non-statutory mitigating evidence, including childhood abuse, cognitive defects, and military service); *Boyde* v. *California,* 494 U.S. 370, 382 (1990) (There is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse*."). Respondent's argument that this Court should embrace such a constitutionally suspect approach must be rejected.

At minimum, this Court should hold the current matter in abeyance in the event it grants review of

McKinney v. *Arizona*, 18-1109,[3] which concerns the Arizona Supreme Court's treatment of non-statutory mitigation after a defendant has obtained federal relief on an *Eddings* error.

B. The State Court Decision was Based on an Unreasonable Determination of the Facts.

Respondent argues Mr. Apelt's case is a poor vehicle to address the second question presented because the Ninth Circuit panel did not resolve it. Opp. 17. However, that is precisely why this Court should intervene—this is a capital case where the stakes could not be higher and one of Mr. Apelt's meritorious pleas for relief has gone unanswered. It is appropriate for this Court to grant review, vacate the judgment below, and remand for the Ninth Circuit to consider the § 2254(d)(2) argument in light of this Court's decision in *Brumfield* v. *Cain*, 135 S. Ct. 2269 (2015) (holding a state post-conviction court's failure to grant an evidentiary hearing on an *Atkins* claim rendered the state court decision unreasonable under (d)(2)).

Again, Respondent concedes that the question is at least one of importance (as well as recurring) by pointing out that there is a pending Petition for Writ of Certiorari that it sees as "offer[ing] a superior opportunity" to address it. Opp. 17 (citing *Brookhart* v. *Lee*, No. 18-1197; *Lee* v. *Kink*, 2019 WL 361813 (7th Cir.

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[3] Undersigned counsel Amy Armstrong and Emily Skinner of the Arizona Capital Representation Project contributed to an amicus brief in support of Petitioner McKinney. Brief Amici Curiae of the Arizona Capital Representation Project & Arizona Attorneys for Criminal Justice, *McKinney* v. *Arizona*, No. 18-1109 (Mar. 28, 2019).

2019)). The procedural facts of *Lee*, however, are not as strong as Mr. Apelt's.[4]

In *Lee*, the state post-conviction court "carefully consider[ed]" the materials presented in support of Lee's claim of ineffective assistance of trial counsel and explained in its opinion that there was no reasonable probability of a different outcome because the affidavits did not contradict the prosecution's case at trial and did contradict the defendant's testimony. Petitioner's Appendix at 64a-66a, *Brookhart* v. *Lee*, No. 18-1197 (Mar. 12, 2019). Here, the state court was presented with voluminous materials regarding Mr. Apelt's traumatic upbringing and yet disposed of the merits of the claim in a single sentence—finding Mr. Apelt did not "make a sufficient preliminary showing" on either *Strickland* prong. Opp. App. A-i(2). The state postconviction courts' treatment of the evidence in *Lee* and Mr. Apelt's case are starkly different, and Apelt's presents the better vehicle.[5]

Respondent contends Mr. Apelt's § 2254(d)(2) argument "fails on the merits" because the state court assumed the facts in his postconviction petition as true. Opp. 17. Mr. Apelt agrees with Respondent that, in finding the claim not colorable, the state court is presumed to have accepted Mr. Apelt's allegations as true. *Id*. However, this presumption does not render the

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[4] If this Court agrees that *Lee* presents a better vehicle to examine § 2254(d)(2), then this Court should hold Mr. Apelt's Petition for Writ of Certiorari pending the outcome of that case.

[5] The *Lee* case also concerns counsel's ineffectiveness at trial, not sentencing. Whether mitigation is sufficient to call for leniency is not as objective as a guilt/innocence query, but instead "reflect[s] a reasoned *moral* response to the defendant's background, character, and crime." *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

state court decision immune from review. As in *Brumfield*, 135 S. Ct. at 2281, the threshold to obtain an evidentiary hearing in post-conviction proceedings in Arizona is intended to be very low. *State* v. *Adamson*, 665 P.2d 972, 987 (Ariz. 1983) (a colorable claim has "the appearance of validity"). The factual determination that was unreasonable here was the state court's finding that Mr. Apelt failed to meet the low threshold showing for a reasonable claim, despite that he had offered significant new evidence of his traumatic history. Indeed, the Ninth Circuit panel found that, on the record before the state court, there was not only sufficient evidence to give rise to a colorable claim of counsel's deficiency, but sufficient evidence to prove that prong of *Strickland*. Pet. App. 63a.

Lastly, Respondent asserts Mr. Apelt's argument is inconsistent with the language of § 2254(d)(2) and with this Court's holding in *Cullen* v. *Pinholster*, 563 U.S. 170 (2011). Respondent is incorrect on both counts, as Mr. Apelt's argument is confined to the record before the state post-conviction court. *Pinholster* limits the federal court's ability to consider evidence outside the state court record when reviewing a claim pursuant to § 2254(d)(1). 563 U.S. at 185-86 ("the Court of Appeals erred in considering the District Court evidence in its review under § 2254(d)(1)"). Here, Mr. Apelt has not argued that the evidence presented in the district court demonstrates he has satisfied § (d)(2). Rather, Mr. Apelt argues that the record presented to the state court alone was sufficient to establish a colorable claim and entitle him to an evidentiary hearing. Of course, once § (d)(2) is satisfied, the federal courts review the claim *de novo* and may consider the additional mitigating evidence developed subsequent to the original state post-conviction court decision denying evidentiary development. Pet. 24.

C. The Eighth Amendment Precludes a Defendant with Severe Mental Impairments From Being Sentenced to Death Because His Crime Was Not Impulsive.

1. The Ninth Circuit's Decision Improperly Bars *Atkins* Claims for Defendants Convicted of Premeditated Crimes.

Respondent submits that the panel's ruling in Mr. Apelt's case forecloses a finding of intellectual disability where a murder is premeditated. Opp. 19. Respondent fails to recognize, however, that the ability to plan does not determine whether a person suffers intellectual disability; this Court has recently reaffirmed the medical community's similar position on this issue.

In *Moore* v. *Texas*, 137 S. Ct. 1039, 1046 n.6 (2017), this Court rejected Texas' use of factors including "has the person formulated plans and carried them through" and "did the commission of th[e] offense require forethought, planning, and complex execution of purpose" to preclude a finding of intellectual disability. See also *Moore* v. *Texas*, 139 S. Ct. 666, 671 (2019) (per curiam) (quoting *Ex parte Moore II*, 548 S.W.3d 552, 572, 603 (2018) (vacating the state court ruling that petitioner is not intellectually disabled where state court ruling was based, in part, on finding "that Moore's crime required 'a level of planning and forethought.'"). By looking to Mr. Apelt's post-18 behaviors that may, arguably, demonstrate areas of adaptive strengths, the panel resorted to stereotypes about people with intellectual disabilities. See Brief Amicus Curiae of the Federal Republic of Germany at 7-8, 18, *Apelt* v. *Ryan*, No. 18-8386 (Apr. 11, 2019); see also *Moore*, 137 S. Ct. at 1050 (state court "overemphasized Moore's perceived adaptive strengths . . . But the med-

ical community focuses the adaptive-functioning inquiry on adaptive *deficits*") (citing AAIDD-11, Intellectual Disability: Definition, Classification, and Systems of Support 47 (11th ed.)); *Brumfield*, 135 S. Ct. at 2281 (quoting AAMR, Mental Retardation: Definition, Classification, and Systems of Support 8 (10th ed. 2002)) ("intellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation'"). More than a decade ago, in *Atkins*, 536 U.S. at 308-09, 320, this Court recognized that individuals, like Mr. Apelt, with intellectual disability who may possess some areas of strengths, nevertheless suffer "cognitive and behavioral impairments" that place them within the class of people who do not act with sufficient moral culpability to be subject to the death penalty.

Respondent next argues that *Moore* v. *Texas* and *Hall* v. *Florida*, 572 U.S. 701 (2014) are not relevant to this claim because they were not clearly established federal law at the time of Mr. Apelt's intellectual disability hearing. Opp. 20. Mr. Apelt has argued from the district court onward that the state court decision was an unreasonable application of *Atkins* under § (d)(1), and was based on an unreasonable determination of the facts under § (d)(2). Pet. 27-31; Petitioner's Reply Brief, *Apelt* v. *Ryan*, No. 2:98-cv-00882-ROS (D. Ariz. Sept. 17, 2011), ECF No. 301 at 45-48; Cross-Appeal Reply Brief, *Apelt* v. *Ryan*, Nos. 15-99013, 15-99015 (9th Cir. July 7, 2017), ECF No. 35 at 14-16, 18-23. Mr. Apelt does not assert that the state court unreasonably applied *Moore* or *Hall*. Those cases *are* instructive, however, as they demonstrate this Court's commitment to applying the constitutional rule estab-

lished in *Atkins*—that states may not subject defendants who meet the clinical definition of intellectual disability to the death penalty. 536 U.S. at 311-21; *Hall*, 572 U.S. at 720 (the clinical definition of intellectual disability is "a fundamental premise of *Atkins*"). Indeed, after this Court rendered its opinion in *Moore*, it granted certiorari and remanded for further consideration several cases that were pending on federal habeas review—cases where *Atkins* was the clearly established federal law. *Weathers, III* v. *Davis*, 138 S. Ct. 315 (2017) (Mem.); *Long* v. *Davis*, 138 S. Ct. 72 (2017) (Mem.); *Martinez* v. *Davis*, 137 S. Ct. 1432 (2017) (Mem.); *Henderson* v. *Davis*, 137 S. Ct. 1450 (2017) (Mem.). If *Moore* was not relevant to cases on habeas review, this Court would not have needed to remand these cases for further consideration.

2. The State Court Ignored or Disregarded Important Evidence Demonstrating Severe Intellectual Disability.

Contrary to Respondent's argument, Mr. Apelt's § 2254(d)(2) argument does not "amount to insignificant quibbles." Opp. 21. This is not merely a matter of the state court evaluating the credibility of the evidence before it and ruling in favor of the state. Rather, the (d)(2) argument arises out of the state court's disparate treatment of Mr. Apelt and his brother Rudi. The state court decision, which concluded that the adaptive deficits evidence before it proved Rudi's claim of intellectual disability but undermined Mr. Apelt's claim, renders the death penalty arbitrary.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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