CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

JOE MICHAEL LUNA,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Under 28 U.S.C. § 2254(d)(1) and *Wilson v. Sellers,* 138 S. Ct. 1188 (2018), is a habeas court's review of a state court decision limited to an analysis of the reasons actually given by the state court to support its ruling, as the Second, Third, Fourth, Sixth, Seventh, and Ninth Circuits have held, or can the habeas court consider other reasons not discussed by the state court in determining whether the state court's ruling was contrary to, or an unreasonable application of, clearly established federal law, as the Fifth and Eleventh Circuits have held and as the Court of Appeals did in this case?

STATEMENT OF RELATED PROCEEDINGS

Luna v. Lumpkin, No. 19-70002 (United States Court of Appeals for the Fifth Circuit) (order denying rehearing filed on March 17, 2021).

Luna v. Davis, No. 19-70002 (United States Court of Appeals for the Fifth Circuit) (order granting certificate of appealability on one claim filed October 24, 2019).

Luna v. Davis, No. SA-15-CA-451-XR (United States District Court for the Western District of Texas) (judgment dismissing petition for writ of habeas corpus and denying certificate of appealability filed September 24, 2018).

Ex parte Joe Luna, No. WR-70,511-01 (Texas Court of Criminal Appeals) (order adopting in part and rejecting in part the trial judge's findings and conclusions and denying application for writ of habeas corpus filed April 22, 2015).

Ex parte Joe Luna, No. 2006-CR-0033-W1 (District Court of Bexar County, Texas) (opinion recommending denial of application for writ of habeas corpus filed September 25, 2014).

Luna v. Texas, No. 08-10144 (United States Supreme Court) (order denying petition for writ of certiorari filed October 5, 2009).

Luna v. State, No. AP-75,358 (Texas Court of Criminal Appeals) (opinion affirming conviction and sentence on direct appeal filed October 29, 2008).

State v. Luna, No. 2006-CR-0033 (District Court of Bexar County, Texas) (judgment of guilt and sentence entered March 8, 2006).

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The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished. It appears in the appendix and is reported as *Luna v. Lumpkin*, 832 F. App'x 849 (5th Cir. 2020). A timely petition for panel rehearing was denied by order on March 17, 2021, is not reported, and appears in the appendix.

The opinion of the United States District Court for the Western District of Texas denying the petition for habeas corpus, *Luna v. Davis*, No. SA-15-CA-451, 2018 WL 4568667 (W.D. Tex. Sept. 24, 2018), is unreported and appears in the appendix.

The opinion of the Texas Court of Criminal Appeals adopting the findings, conclusions, and recommendations of the state post-conviction court, *Ex Parte Luna*, No. WR-70,511-01, 2015 WL 1870305 (Tex. Crim. App. Apr. 22, 2015), is unreported and appears in the Appendix. The findings of fact and conclusions of law for the 379th District Court for Bexar County, Texas, *Ex Parte Luna*, No. 2006-CR-0033-W1 (Tex. Dist. Ct. Sept. 25, 2014), is unreported and appears in the appendix.

JURISDICTION

The Court of Appeals, after granting a Certificate of Appealability, affirmed the denial of habeas relief on October 22, 2020, and denied a petition for rehearing on March 17, 2021. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Title 28 U.S.C. § 2254 provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

Petitioner Joe Michael Luna was convicted of the murder of Michael Andrade. The State alleged that Mr. Luna had crawled through an attic from his girlfriend's apartment to an adjoining apartment in the same building. During the course of that burglary, Mr. Luna encountered and strangled Mr. Andrade, who lived in that apartment.

Mr. Luna's childhood was marked by severe and persistent trauma. When he was three years old, Mr. Luna was sexually assaulted by his uncle. Later, he was virtually abandoned by his family. ROA.572–76.[1] Even though he was still a child, he was often homeless, forced to live alone on the streets. ROA.578.

Mr. Luna suffered through physical abuse, sexual abuse, neglect, and poverty. He was surrounded by abusive adults with criminal records, untreated

[1] ROA refers to the electronic record on appeal that was filed in the Fifth Circuit.

mental health problems, and drug addictions. The homes he lived in were places in which physical violence was the norm and he could never feel safe. The one constant in his life was the complete absence of an adult caretaker with the resources and desire to care for him. ROA.572–83.

The traumas and abuse he suffered throughout childhood resulted in debilitating mental health deficits. Mr. Luna suffers from significant brain damage, schizophrenia, complex posttraumatic stress disorder, and major depressive disorder. ROA.583–88. But the jury heard little of this evidence because trial counsel had failed to conduct a reasonable investigation and, as described below, actually presented testimony at the penalty phase of the trial that made Mr. Luna seem dangerous, even in prison.

A. Trial Proceedings

Joe Luna was arrested and charged with capital murder, burglary, arson, and related offenses for the February 17, 2005, murder of Michael Andrade. ROA.2358. The 379th District Court of Bexar County, Texas, appointed attorneys Mario Trevino and Michael Granados to represent Mr. Luna at trial.

From February 3, 2006, through February 22, 2006, Mr. Luna assisted his attorneys in selecting a jury. ROA.3077-3411. On February 27, 2006, after the jury was sworn, Mr. Luna entered a guilty plea to the charge of capital murder. ROA.3439. Following the plea, the State presented both its guilt-innocence phase and penalty-phase witnesses—approximately fifty-eight witnesses total—including many who testified about collateral offenses and unadjudicated conduct. ROA.3442–3663.

In the defense case, Mr. Luna and two defense witnesses testified. ROA.3664–79, 3713–25. In rambling testimony, Mr. Luna asked the jury to give him the death penalty because he "kind of wanted to die," stated that God had allowed Satan to fully control him during the murder of Michael Andrade in order to get his attention, and compared his trial to God's judgment upon Sodom and Gomorrah. ROA.3665. On direct and cross-examination, he detailed his extensive criminal history as a juvenile and adult. ROA.3666–72.

Nevertheless, Mr. Luna did not waive the presentation of mitigation evidence or seek to preclude his lawyer from arguing in favor of a life sentence. In light of the potential impact of his testimony, it was of paramount importance for defense counsel to educate the jurors about his horrific upbringing and to explain the impact of his upbringing on his mental health and in causing brain damage. Yet, counsel called no witnesses who had first-hand knowledge of Mr. Luna's childhood and upbringing even though members of his family and others who knew him were ready and willing to testify on Mr. Luna's behalf. Nor did counsel present evidence of the impact that the traumatic events of his childhood had on his development. Instead, counsel limited his presentation to a brief hearsay summary of Mr. Luna's life from the mitigation investigator. ROA.3713–17.

Counsel also presented testimony from psychiatrist Dr. Brian Skop whose testimony was, at best, only marginally helpful. Dr. Skop did not provide the jury with any information about Mr. Luna's childhood and upbringing, other than some reference to his juvenile record. ROA.3722. At best, Dr. Skop only told the jury

that Mr. Luna would be a high risk for violence out of prison, but a lesser risk in prison. ROA.3721.

The scant testimony from Dr. Skop that counsel offered to the jury opened the door to a devastating cross-examination. The prosecution brought out Dr. Skop's belief that Mr. Luna suffered from antisocial personality disorder. Dr. Skop explained that people with anti-social personality disorder have a lifelong condition that causes them to not follow laws, to commit crimes, and to have little empathy for or understanding of other people. ROA.3725.

Still on cross-examination, Dr. Skop further explained that his examination of Mr. Luna was limited to the question counsel asked concerning future dangerousness. He testified that Mr. Luna had a number of risk factors "that increase his overall long term risk of committing a violent act." ROA.3723. And he admitted that even in prison there was "some probability" that Mr. Luna would commit future acts of violence. ROA.3724.

The prosecutor seized upon Dr. Skop's testimony in his summation:

> You also know that he is a danger when he is in prison. Because you learned yesterday from Doctor Skop, their own witness, that . . . [h]e has antisocial personality disorder. He doesn't feel empathy for other people. And he has a narcissistic personality disorder. He thinks very highly of himself. That's basically what that means.
>
> And what else those three disorders mean, that he will have for life, is that not only are the wires crossed up in here, but he is missing something right here. He's missing something in his heart.
>
> He is missing that thing that we all have that makes us feel bad when somebody else feels bad. He's missing that thing that makes us not want to hurt other people. And he's missing that thing inside of him that when he does hurt somebody, he feels bad about it.

ROA.3742.

Dr. Skop became the prosecutor's best witness. He provided expert testimony that Mr. Luna was a sociopath who had some probability of committing future acts of violence. Moreover, he provided almost no mitigating testimony. He provided no evidence of the traumatic events of Mr. Luna's childhood, or of the impact that trauma may have had on his psychological, social, and emotional development. Defense counsel's decision to put on testimony that could not help, and that opened the door to the devastating cross-examination and admissions, was utterly unreasonable and caused great prejudice.

On March 8, 2006, the trial court instructed the jury to find Mr. Luna guilty, which it did. ROA.3735. That same day, the trial court gave a penalty charge, counsel delivered closing arguments (with the defense urging a life sentence), and the jury returned a sentence of death. ROA.3735–43.

B. Direct Appeal and Initial State Habeas Proceedings

The Texas Court of Criminal Appeals affirmed Mr. Luna's conviction and sentence on direct appeal. *Luna v. State*, 268 S.W.3d 594, 597 (Tex. Crim. App. 2008), ROA.2309–37. This Court denied certiorari review. *Luna v. Texas*, 558 U.S. 833 (2009).

Mr. Luna, represented by attorney Michael Gross, sought a writ of habeas corpus under state law. ROA.4866–5160. At the state writ hearing, Mr. Luna presented testimony from a number of witnesses, including trial counsel, to support his claims, inter alia, that trial counsel was ineffective for failing to investigate and properly present mitigation testimony. ROA.5648–58. Counsel also introduced

affidavits from some of those witnesses, which were admitted as substantive evidence after being adopted by the witness and subject to cross-examination and potential hearsay objections. *E.g.*, ROA.5775–76.

Josie Luna, Mr. Luna's mother, testified that she reviewed her affidavit and the information in Dr. Ferrell's report and that it was accurate (with the exception of her address). ROA.5765–66. She was never given an opportunity to tell trial counsel about the facts in her affidavit. Ms. Luna testified that, when she had asked trial counsel to be allowed to testify on her son's behalf during the trial penalty phase, counsel refused, stating that it would not do any good. ROA.5770–71.

In her affidavit, she explained that she had an on-again, off-again relationship with Mr. Luna's father, but they never married. She recalled one incident when she took her son to the hospital for a high fever and another in which he fell and hit his head. Young Joe was very active and, although a doctor prescribed Ritalin, she never gave it to him because she had read negative things about the drug. ROA.5212.

She described her mother's house, where they lived for a while, as a terrible place to raise her children. All of her brothers were involved with drugs and were in trouble with the law. Her brother Ralph died of an overdose in the house with the syringe still in his arm. There was constant violence and fights, often in front of the children. Her brothers grew and sold marijuana and other drugs from the

house. Drug use was open and constant. The police frequently entered and searched the house. ROA.5212–13.

Ms. Luna described an incident when she found her brother Ralph with his pants pulled down and his penis erect. He was making Joe touch him and he was touching Joe. Joe was three at the time. Her mother ordered her not to call the police and told her she and her children would be kicked out of the house if she did. ROA.5213.

Joe had difficulty with school and teachers reported that his comprehension was behind. Yet no teacher took an interest in Joe or was willing to help him. Ms. Luna lived with a man named Eric Elizondo for three years. He was violent and abusive with her and her children. He would discipline Joe by beating him with a strap until she made him stop. She would find Joe curled up in the corner, crying, and trying to hide. ROA.5213–14.

Brandy Moyer, Mr. Luna's sister, testified in the state writ hearing that everything contained in her affidavit was true.[2] In her affidavit, Ms. Moyer explained that she and Joe were very close growing up as they felt that no one else was looking out for them. Their mother, Josie Luna, was young and wild and would just leave them with whomever was around the house. Josie Luna's uncles sold drugs openly from the house. Brandy and Joe were totally unsupervised.

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[2] She also had reviewed the facts alleged in Dr. Jack Ferrell's report and in George Tristan's (Mr. Luna's father's) affidavit and opined that they were true. ROA.5785–86. As with Ms. Luna's, Ms. Moyer's affidavit was admitted into evidence. ROA.5787. She was subpoenaed to court for Mr. Luna's trial and would have testified consistently with her affidavit if called. ROA.5788.

ROA.5217–18. There were frequent arguments and fights in the household. Brandy and Joe would just wander off by themselves to get away. *Id.*

She likewise reported that, when Joe was three years old, her mother caught her Uncle Ralph sexually molesting Joe. This led to a big fight between her mother, who wanted to call the police, and her grandmother, who threatened to kick Ms. Luna and the kids out of the house if she did. ROA.5218. The assault was never reported.

Nevertheless, when Brandy was in first grade and Joe was in kindergarten, her grandmother kicked them out of the house. They spent the next few years moving from place to place and attending many different elementary schools. Her mother worked all the time and was rarely home. For a while, they lived with Eric Elizondo, their mother's abusive boyfriend. Elizondo would frequently beat them with a belt. Brandy was afraid of him. Elizondo and her mother fought frequently, and the police were called on multiple occasions.

By high school, Brandy knew that Joe had developed a drug problem. His room smelled of gasoline and she found him passed out. Joe was secretive about his life and would often be gone for days at a time. ROA.5219.

Mr. Luna's aunt, Rose Ramirez, likewise testified to the accuracy of her affidavit in the state writ hearing. ROA.5827. Her affidavit explained that Mr. Luna's mother was often absent, and he was left with whomever was home to watch him. By the time Joe was a teenager, he was already lost. No one really took an interest in him. Her brother Ralph, who had molested Joe, had also molested her

and her sisters. ROA.5221. That abuse was never reported to the authorities. ROA.5828.

Dr. Jack Ferrell, a psychologist, conducted an evaluation of Mr. Luna. Dr. Ferrell reviewed court records, family affidavits, the reports of mitigation investigators, and various records, including treatment records from psychiatric facilities that trial counsel did not make available to the defense expert at trial. ROA.5803–04. Dr. Ferrell interviewed Mr. Luna and conducted a battery of psychological tests before preparing an affidavit/report documenting his findings.

Dr. Ferrell described the chaotic, unstable, and traumatic events that characterized Mr. Luna's upbringing. ROA.5806–08. He reported that Mr. Luna has cognitive difficulties. He remarked that Mr. Luna suffered from a chaotic environment and neglectful parenting and was subjected to physical and sexual abuse. ROA.5810–11.

Psychological testing showed that Mr. Luna suffered from schizophrenia, a significant thought disorder. He also suffered from depression and had a significant anxiety disorder. He was a disturbed, confused youth who suffered from psychotic episodes and exhibited features of post-traumatic stress disorder (PTSD) from depression and abandonment. ROA.5812–13. Dr. Ferrell testified that he would have been available to testify to his findings at trial, where he would have opined that his findings were important mitigation that helped tell Mr. Luna's story, and that such testimony would have humanized him, without any significant downside. ROA.5821–23.

Dr. Ferrell's affidavit indicates that his testing showed moderately severe mental disorders that include dysthymic disorder and schizoid personality disorder with antisocial traits and depressive features. His scores were elevated on scales for schizophrenia, depression, and paranoia, among others. ROA.5226. Of most importance, however, was the effect of his traumatic upbringing. In addition to PTSD, children who have suffered the types of trauma that Joe suffered, including sexual abuse, have significant problems with relationships and social interactions that affect their day-to-day functioning. Joe exhibits those patterns; his traumatic upbringing was the starting point of Joe's life trajectory that culminated in Mr. Andrade's murder. This was crucial evidence that should have been presented to the jury. ROA.5226. As Dr. Ferrell's affidavit explained:

> Joe may at times have suffered from features of confusion, disorganization, marked mood instability, internalized anxiety and tension, and difficulty perceiving reality. These findings reflect that Joe had a compromised mental status. It was vital that the jury would have had the above information at trial especially in a death penalty case.

ROA.5227.

The state habeas court rejected the claim that counsel was ineffective for failing to adequately investigate and present readily available mitigation and mental health evidence. The court held that trial counsel had conducted a "very thorough mitigation investigation" that included the use of a mitigation investigator (Margaret Drake) and a psychiatrist (Dr. Skop). A154–55.

The court further held that Mr. Luna had not shown that he was prejudiced by any deficiency in counsel's performance:

> Most importantly, as to all of Applicant's claims of ineffective assistance of counsel, this court finds that even if Applicant's trial attorneys performed deficiently as to certain aspects of Applicant's trial, in light of Applicant's testimony acknowledging guilt and asking to be sentenced to death, Applicant has not satisfied the second prong of *Strickland.* Applicant has not shown that there is a reasonable probability that the results of the trial would have been different but for counsel's deficient performance. *Id.* Therefore, this court recommends that all of Applicant's claims of ineffective assistance of trial counsel be denied.

A155 (internal citation omitted).

On April 22, 2015, the Texas Court of Criminal Appeals adopted the trial court's findings and conclusions, as well as its recommendation that relief be denied.[3] *See* ROA.8307–08.

C. Federal Habeas Proceedings

Petitioner filed a timely habeas petition, an amended petition, and a supporting memorandum of law. ROA.62–166; 549–732. The district court denied subsequent motions to stay proceedings to allow him to attempt to exhaust unexhausted claims in state court, for discovery, and for an evidentiary hearing. ROA.1817; 1905.

Without hearing argument from the parties or conducting an evidentiary hearing, the district court denied the petition for habeas corpus relief. ROA.1911–86. The court also held that no COA would be issued. *Id.* Mr. Luna filed a timely motion to alter or amend the judgment which was denied on December 3, 2018. ROA.2032–36.

[3] The Court of Criminal Appeals rejected some findings on issues not relevant to this petition.

Mr. Luna filed a timely notice of appeal on December 31, 2018. He subsequently filed an application and supporting brief seeking COA on four claims. He also filed a motion seeking to set a briefing schedule for two claims for which he contended that no COA was necessary.

On October 24, 2019, the Fifth Circuit granted a certificate of appealability concerning whether defense counsel rendered ineffective assistance in their investigation and presentation of mitigating evidence for the punishment phase of the trial. After additional briefing by the parties, the Court affirmed in an unpublished opinion, with one judge concurring in judgment only.

Assuming that counsel had performed deficiently, the Court focused on the reasonableness of the state court's finding that that there was no reasonable probability that additional evidence of Luna's sexual abuse and mental illness would have caused a juror to vote differently. The Court recognized that "a state court judge could have found prejudice in Luna's case," noting that this Court has found "prejudice when counsel failed to present childhood abuse and mental health problems as mitigating evidence." A7 (citations omitted). The Court wrote:

> Luna points to significant mitigating evidence that could have been presented, including his mother's potential testimony that Luna was a victim of childhood sexual abuse, and that he suffered from schizophrenia and other mental illness. Luna also has direct evidence that concerns about his mental health were on the jury's mind: during deliberations the jury asked for the "psychiatric report of Dr. Skop," though the judge could not give it to them because that report had not been admitted.

A8.

Nevertheless, the Court held that Mr. Luna could not get past AEDPA's barriers to relief. In doing so, the appellate court relied on reasons that went beyond the state court's reliance on only the impact of Mr. Luna's testimony:

> But there is more. Luna's asking the jury to give him the death penalty should not obscure the other strong aggravating evidence that existed. He committed a cold-blooded murder. He had an extensive and violent criminal history, including multiple home invasions. In some of those he pressed a gun against victims' heads. In one, he blindfolded family members and tied their wrists and feet with duct tape. In yet another, he wrapped residents up in bedsheets and left them underneath a Christmas tree. Then there is Luna's postarrest scheme for a jail break in which he would use the judge as a human shield if the escape did not go as planned. . . .
>
> To sum up, a state court may have been able to conclude that the failure to present mitigating evidence of sexual abuse and mental health conditions prejudiced the outcome of Luna's trial. But for the reasons we have explained, at best for Luna, prejudice was debatable under *de novo* state court review. That means the state court did not have to find prejudice. As a result, its "no prejudice" ruling was not unreasonable, and we lack authority to grant federal habeas relief.

A9–10.

Mr. Luna timely sought panel rehearing, arguing, inter alia, that the panel had applied deference to reasons that were not a part of the state court adjudication, in contravention of *Wilson v. Sellers*, 138 S. Ct. 1188 (2018). He noted that the Fifth Circuit had perceived a potential conflict between *Wilson* and its practice of applying deference to reasons that were not part of the state court analysis. *See Sheppard v. Davis*, 967 F.3d 458, 466–67 (5th Cir. 2020) (holding that there was no need to resolve the issue because the petitioner would lose even if review was limited only to the state court's actual rationale); *but see Smith v. Davis*, 927 F.3d 313, 321 (5th Cir. 2019) (habeas court should turn its focus to the

particular reasons used by the state court). Although Mr. Luna asked the Court to resolve those conflicts, the Court declined to do so and denied rehearing in an order without explanation.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve a Circuit Split Concerning the Proper Application of 28 U.S.C. § 2254(d).

28 U.S.C. § 2254(d)(1) requires a habeas court to give deference to a state court's ruling unless the state court decision is contrary to, or an unreasonable application of, clearly established federal law. But in making this determination, what reasons may the habeas court consider? Is the court limited to the reasons actually provided by the state court? Or can the court look beyond those reasons, and defer to the state court because other reasons, not given by the state court, could lead to the same result?

This Court provided some answers to these questions in *Wilson*, 138 S. Ct. 1188, but the courts of appeals remain divided on how *Wilson* is to be applied. In *Wilson*, this Court held that a federal court should "train its attention on the *particular reasons*—both legal and factual—why state courts rejected a state prisoner's federal claims and . . . give appropriate deference to that decision." *Wilson*, 138 S. Ct. at 1191–92 (emphasis added). This Court explained that a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable. *Id.* at 1192. "We have affirmed this approach time and again." *Id.* *Wilson* appears to limit a federal court's deference only to the actual reasoning and rationale provided by the state court.

But the courts of appeals are divided about whether *Wilson* actually means what it appears to say. As explained below, the Fifth and Eleventh Circuits have declined to find that *Wilson* limits federal courts to analysis of the state courts' provided reasons, whereas the Second, Third, Fourth, Sixth, Seventh, and Ninth Circuits have adopted this interpretation of *Wilson* either explicitly or by application. This split has not gone unnoticed. *See Thompson v. Skipper*, 981 F.3d 476, 480 n.1 (6th Cir. 2020) ("In the wake of *Wilson*, courts have grappled with whether AEDPA deference extends only to the reasons given by a state court (when they exist), or instead applies to other reasons that support a state court's decision.").

The opinion by the Court of Appeals in this case provides a well-defined example of the issue and why it matters. The Texas Court of Criminal Appeals specifically adopted the findings and conclusions of the state habeas court. In that opinion, the state court, in a conclusory and truncated analysis, held only that Mr. Luna had failed to prove prejudice "in light of Applicant's testimony acknowledging guilt and asking to be sentenced to death." ROA.5665. The state court gave no other rationale for its decision. Significantly, the state court did not weigh the totality of the mitigating evidence that could have been presented against the evidence in aggravation as required by this Court's precedents. *See infra*.

The Fifth Circuit did not determine the reasonableness of the state court decision. Instead, although noting that such reasoning might be reasonable, the Court went beyond the state court's rationale and provided other reasons that the

state court could have used – but did not – to justify its decision. The Court held that "[s]everal factors allow a judge to reasonably distinguish this case from others in which there was prejudice from counsel's failure to present mitigating evidence of mental illness and childhood trauma." A8. Although Mr. Luna's testimony was one possible factor, the Court also considered the strength of the aggravating evidence, and the supposed cumulative nature of the evidence proffered in state habeas proceedings. A8–9.

The Court recognized that there was "significant mitigating evidence that could have been presented" and that a reasonable jurist could conclude that Mr. Luna had been prejudiced by counsel's errors. A8, 10. But based upon its consideration of the totality of the evidence, a test that had not been applied by the state court, the Court held that the state court decision, though debatable, was a reasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. A10.

Had the Court limited its analysis to the "particular reasons" why the state court rejected the claim, its analysis would have been different. It would have first determined whether those particular reasons were contrary to, or an unreasonable application of, clearly established federal law. And if they were—as the Court would have likely found since the state court did not apply the totality of the evidence test required by *Sears v. Upton*, 561 U.S. 945, 955–56 (2010)—the Court would then have conducted a de novo analysis of prejudice. That analysis would have likely landed in Mr. Luna's favor, given the Court's views:

> Luna points to significant mitigating evidence that could have been presented, including his mother's potential testimony that Luna was a victim of childhood sexual abuse, and that he suffered from schizophrenia and other mental illness. Luna also has direct evidence that concerns about his mental health were on the jury's mind: during deliberations the jury asked for the "psychiatric report of Dr. Skop," though the judge could not give it to them because that report had not been admitted.

A8.

In short, the proper application of *Wilson* and § 2254(d)(1) makes a difference in this case. Thus, this case is an appropriate vehicle to resolve the continuing conflicts among the Courts of Appeals and assure uniformity in the application of habeas review.

A. The Circuit Courts Are Squarely and Openly Split on the Correct Interpretation of § 2254(d) and *Wilson v. Sellers*.

The courts of appeals are in an entrenched six-two split over the exact extent and nature of deference due, requiring resolution by this Court to ensure a uniform standard of review across circuits.

In the Second, Third, Fourth, Sixth, Seventh, and Ninth Circuits, federal courts defer to the actual reasoning provided in state court opinions, thus conforming their analyses to this Court's instructions in *Wilson*. These circuits look to *Wilson*'s "particular or specific reasons" language and conclude that this language restricts federal courts from looking beyond the state court opinion for additional grounds on which to assess the decision's reasonableness.

For example, the Sixth Circuit held, "AEDPA requires this court to review the actual grounds on which the state court relied." *Coleman v. Bradshaw*, 974 F.3d 710, 719 (6th Cir. 2020) (citing *Wilson*, 138 S. Ct. at 1192), *cert. denied*, No. 20-

7536, 2021 WL 2302021 (U.S. June 7, 2021). Similarly, the Ninth Circuit will not consider reasons to deny relief beyond those specified by the state court, stating that under *Wilson* it "may look only to the reasoning of the [state court below.]" *Kipp v. Davis*, 971 F.3d 939, 952 n.10 (9th Cir. 2020) (citing *Wilson*, 138 S. Ct. at 1193–94).

The Second and Seventh Circuits have consistently applied *Wilson* in the same way. *See Winfield v. Dorethy*, 956 F.3d 442, 454 (7th Cir. 2020) ("Having found the state court's 'specific reasons' for denying relief, the next question is whether that explanation was reasonable thereby requiring our deference." (quoting *Wilson*, 138 S. Ct. at 1192)); *Scrimo v. Lee*, 935 F.3d 103, 111–12, 116–18 (2d Cir. 2019) (considering the actual "rulings and explanations of the trial judge" and distinguishing them from other possible reasons that could have supported the state court's ruling); *see also Hodkiewicz v. Buesgen*, 998 F.3d 321, 326–29 (7th Cir. 2021) (quoting *Wilson*'s "specific reasons" language in setting out the applicable standard of review and then adhering to those reasons).

Longstanding precedents in the Third and Fourth Circuits also align with this interpretation of *Wilson*. Two years before *Wilson* was decided, both circuits considered the deference due to the reasoning of state court decisions in § 2254(d) proceedings and held that federal courts should evaluate only those reasons that the state court provided. *See Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 283 (3d. Cir. 2016) (en banc) ("[W]hen the state court pens a clear, reasoned opinion, federal habeas courts may not speculate as to theories that 'could have supported'

the state court's decision."); *Grueninger v. Dir., Va. Dep't of Corr.*, 813 F.3d 517, 525–26 (4th Cir. 2016) (holding that the court should evaluate the given reasoning of the state court's denial, not "any reasonable basis" that could have supported that denial). The Third and Fourth Circuits have yet to publish decisions interpreting or applying *Wilson*, but there is no reason to suspect *Wilson* would disturb their pre-*Wilson* precedents. Together with the Second, Sixth, Seventh, and Ninth Circuits, these circuits comprise a distinct majority that adhere to the letter of *Wilson*.

In clear contrast, the Fifth and Eleventh Circuits have declined to take up *Wilson*'s "specific reasons" instruction. They rely instead on contrary circuit practices that predate *Wilson*. In the Eleventh Circuit, review is not limited to the reasons the state court provided. *Whatley v. Warden, Ga. Diagnostic & Classification Ctr.*, 927 F.3d 1150, 1182 (11th Cir. 2019). Rather, that circuit consistently looks to "any reasonable argument" that could support a state court's ruling, regardless of the reasons actually provided in that ruling. *Id.*; *see also Jenkins v. Comm'r, Ala. Dep't of Corr.*, 963 F.3d 1248, 1265 (11th Cir. 2020), *cert. denied sub nom. Jenkins v. Dunn*, No. 20-6972, 2021 WL 1951891 (U.S. May 17, 2021); *Presnell v. Warden*, 975 F.3d 1199, 1227–32 (11th Cir. 2020), *petition for cert. filed*, No. 20-7932 (U.S. Apr. 30, 2021).

The Fifth Circuit also interprets *Wilson* to hold only that "the state court's reasoning *can* matter," not that the court was prohibited "from considering . . . cases not cited when evaluating the reasonableness of the state court's reasoning." *Langley v. Prince*, 926 F.3d 145, 163, 169 (5th Cir. 2019) (en banc) (emphasis

added); *compare id.* at 180 (Higginson, J., joined by four other judges, dissenting) (where state court gives reasons for its decision, habeas review should look to whether those specific reasons are reasonable). The circuit has continued to apply this analysis even as it has openly remarked upon the practice's tension with *Wilson*'s holding. *See Sheppard*, 967 F.3d at 467 n.5 (acknowledging the possibility "that *Wilson* overruled *sub silentio* the position . . . that a habeas court must defer to a state court's ultimate *ruling* rather than to its specific *reasoning*" but declining to adopt that position), *cert. denied sub nom. Sheppard v. Lumpkin*, No. 20-6786, 2021 WL 2044588 (U.S. May 24, 2021); *Thomas v. Vannoy*, 898 F.3d 561, 568 (5th Cir. 2018) ("The continued viability of [the circuit's] approach after the Supreme Court's decision in *Wilson v. Sellers* is uncertain . . . ."). In this case the Fifth Circuit again looked outside the state court's specific reasons to deny Mr. Luna relief.

The Tenth Circuit's approach is less clear. Its prior practice considered "what arguments or theories supported *or could have supported* the state court's decision" when conducting habeas review. *Bonney v. Wilson*, 754 F.3d 872, 879, 886 (10th Cir. 2014) (emphasis added) (noting that "the district court jumped beyond the state court's analysis," and doing the same – "Now let us take a look at what arguments or theories supported or could have supported the state court's decision"). In *Wood v. Carpenter*, 907 F.3d 1279, 1295–96 (10th Cir. 2018), the Tenth Circuit appeared to continue to follow that practice, and, while citing *Wilson* in a footnote, *id.* at 1294

n.12, did not discuss whether its prior practice is in tension with this Court's holding.

The circuit courts' conflicting interpretations of the scope of review under § 2254(d) as explained in *Wilson* cannot be reconciled without further guidance from this Court. The circuit courts show no indication they will move toward consensus. Absent clarification of *Wilson*'s reach by this Court, this split will grow only more intractable.

B. The Question of *Wilson*'s Interpretation Is Recurring and Important.

The question relating to the proper application of § 2254 in light of *Wilson*'s holding has important implications for both federal and state courts that will persist. The issue arises in every case in which a federal court is asked to review a reasoned opinion by a state court under § 2254(d). These cases number in the hundreds if not thousands every year, implicating every circuit in which a person might be sentenced to death, as well as in non-capital habeas cases. In each of these cases, a federal court must know the extent to which *Wilson* conscribes its review of the state court's reasoning. Should a state court offer unreasonable reasons for its decision, whether a federal court can look beyond that reasoning to bolster the state court's ultimate conclusion frequently determines whether a petitioner obtains relief. (This is true in the case at hand, as explained further in Part C.) The standard of review in capital cases should not turn on mere geography, a principle this Court has recognized by granting review on related questions in the past. *E.g.*, *Wilson*, 138 S. Ct. 1188; *Harrington v. Richter*, 562 U.S. 86 (2011).

In recognition of the importance of *Wilson*'s interpretation, scholars have weighed in on the issue, largely in line with the majority side of the circuit split. *See* Brian R. Means, *Federal Habeas Manual* § 3:70 (2021) (concluding that *Wilson* has "apparently settled the matter" by instructing courts to refrain from "considering grounds that *could have* supported the state court's decision," while noting the Eleventh Circuit's skepticism of this conclusion); *Leading Case, Antiterrorism and Effective Death Penalty Act—Habeas Corpus—Scope of Review of State Proceedings*—Wilson v. Sellers, 132 Harv. L. Rev. 407, 412–13 (2018) (concluding that "the *Wilson* Court limited . . . the practice of courts imagining all possible bases for denying relief . . . to [the] specific procedural posture" of cases with no available reasoned state court decision, "thus sparing habeas petitioners from a burden that AEDPA need never have imposed on them").

The fact that multiple circuits have adopted an understanding of *Wilson* contrary to this consensus evidences the necessity of further clarification by this Court. The extent to which *Wilson* requires federal courts to examine the specific reasons on which a state court relied has important consequences both for principles of federalism and for judicial review of habeas corpus cases as Congress prescribed in the AEDPA.

C. This Case Is the Proper Vehicle to Resolve the *Wilson* Split.

Mr. Luna's case is well situated as a vehicle for the Court to consider the question presented because the issue is squarely implicated here and is likely to make a difference in the outcome of the case.

In affirming the denial of Mr. Luna's habeas petition, the Fifth Circuit panel below relied on reasons it acknowledged were outside of the state court's rationale. A9. As a result of this weighing of additional reasons, the panel concluded that the state court's ruling was not unreasonable. A10. The Fifth Circuit's reasoning represents a straightforward example of the minority approach to *Wilson*.

This application of the minority approach was determinative as to the denial of relief. Had the Fifth Circuit below followed the majority approach and limited its analysis to the confines of the state court opinion as required by *Wilson*, it likely would have found that the state court decision was contrary to, and an unreasonable application of, this Court's precedent.

The state court did not properly apply the prejudice analysis required by this Court. This Court has consistently required a prejudice analysis to "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000); *accord Sears*, 561 U.S. at 955–56; *Porter v. McCollum*, 558 U.S. 30, 41 (2009); *Wiggins v. Smith*, 539 U.S. 510, 536 (2003). The focus must be on whether the "available mitigating evidence, taken as a whole, 'might well have influenced the *jury's appraisal*' of [Mr. Luna's] moral culpability." *Wiggins*, 539 U.S. at 538 (quoting *Williams*, 529 U.S. at 398) (emphasis added); *accord Rompilla v. Beard*, 545 U.S. 374, 393 (2005). In *Williams,* this Court held that a state court unreasonably applied clearly

established law when it failed to "evaluate the totality of evidence." 529 U.S. at 397–98.

Here, the state court did not apply a totality of the circumstances test, but instead focused almost exclusively on Mr. Luna's testimony requesting a death sentence. A155. Such a narrow, truncated analysis is the antithesis of the "probing and fact-specific analysis" that considers the totality of the evidence. *Sears*, 561 U.S. at 955–56 (quoting *Porter*, 558 U.S. at 41). Here, the state court did not engage in any such probing inquiry to assess *Strickland* prejudice. It failed to weigh all of the aggravating and mitigating evidence and failed to determine whether a single juror might have been swayed differently had evidence of childhood sexual abuse and severe mental health impairments been presented.

Such brief engagement with the record falls far short of what *Sears* and its forebearers mandate. *See Andrus v. Texas*, 140 S. Ct. 1875, 1887 (2020) (remanding to ensure that the state court perform a "weighty and record-intensive analysis" to assess prejudice under *Sears*). The state court "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing," impermissibly truncating its analysis. *See Porter*, 558 U.S. at 42. Because *Sears* requires a probing and fact-specific analysis of the *totality* of available mitigation evidence to determine prejudice, the state court's conclusion was unreasonable and contrary to clearly established law.

Had the Fifth Circuit recognized the state court's conclusion as unreasonable, it would have been required to review Mr. Luna's claims of ineffective assistance of

counsel de novo. *See Panetti v. Quarterman*, 551 U.S. 930, 932 (2007) (citing *Wiggins*, 539 U.S. at 534 (2003)) ("If the state court's adjudication is dependent on an antecedent unreasonable application of federal law, . . . the federal court must then resolve the claim without the deference AEDPA otherwise requires."). Under de novo review, the Fifth Circuit could have given proper weight to the "significant mitigating evidence" it acknowledged was available, including evidence of Mr. Luna's past sexual abuse[4] and of his severe mental illnesses. A8. Indeed, the Court recognized that reasonable judges could find that Mr. Luna had demonstrated prejudice. A10.

Indeed, the prejudice to Mr. Luna was heightened by counsel's presentation of expert testimony that was actually helpful to the State and harmful to the defense – prejudice that was not addressed by either the state or the federal courts. Dr. Skop became the prosecutor's best witness. He provided expert testimony that Mr. Luna was a sociopath who had some probability of committing future acts of violence in prison. Moreover, he provided almost no mitigating evidence. He provided no evidence of the traumatic events of Mr. Luna's childhood, or of the impact that trauma may have had on his psychological, social, and emotional development. Defense counsel's decision to put on testimony that could not help, and that opened the door to devastating cross-examination and admissions, was objectively unreasonable and caused great prejudice. *See Hooks v. Workman*, 689

[4] This Court has recognized that evidence that a defendant had been the victim of sexual abuse is "powerful" and is the type of evidence relevant to any assessment of moral culpability. *Wiggins*, 539 U.S. at 533–34.

F.3d 1148, 1207 (10th Cir. 2012) (prejudice found where expert testimony presented by the defense was actually harmful and portrayed defendant as violent, and was coupled with limited mitigation presentation); *Johnson v. Bagley*, 544 F.3d 592, 605–06 (6th Cir. 2008) (counsel's presentation of damaging expert testimony contributed to the finding of prejudice).

Yet the Court below never evaluated whether the state court opinion was contrary to, or an unreasonable application of *Williams*, *Rompilla*, *Porter*, *Sears* or *Wiggins.* Nor did it conduct a de novo review of prejudice. Instead, the Court considered additional grounds to bolster the state court's otherwise unreasonable decision, gave that bolstered decision deference, and then denied relief on that basis. The Fifth Circuit's rejection of *Wilson*'s "specific reasons" instruction directly shaped the outcome of Mr. Luna's case.

Mr. Luna's case is well positioned for this Court's consideration. Here, the question of *Wilson*'s holding was determinative of his denial of relief and is not complicated by an underlying factual dispute. Further, Mr. Luna is sentenced to death, meaning the stakes of this decision are substantial and merit the Court's attention. All told, Petitioner's case squarely and cleanly allows the Court to resolve this critical issue that impacts all habeas review and has divided the Circuits.

CONCLUSION

For these reasons, this Court should grant this petition for a writ of certiorari.[5]

Respectfully submitted,

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[5] Counsel gratefully acknowledge the invaluable assistance received in drafting this Petition from Marnie Lowe, a third year law student at Yale Law School.