No. 21-5460

In the Supreme Court of the United States

JOE MICHAEL LUNA, PETITIONER

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Joe Michael Luna asked the jury to impose the death penalty and explained in detail that he was a future danger, that no mitigating evidence about his childhood justified a life sentence, and that he preferred death to life in prison. Nevertheless, he now argues that his trial attorneys provided ineffective assistance in failing to investigate and present further evidence about his childhood and mental health. The questions presented are:

1. Whether the Fifth Circuit correctly affirmed the district court's denial of habeas relief because Luna cannot overcome the relitigation bar Congress enacted in the Antiterrorism and Effective Death Penalty Act ("AEDPA").

2. Whether *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), implicitly overturned the position taken by the majority of lower courts that a federal court considering a habeas petition is to defer to a state court's judgment regarding the applicability of federal law, not just its reasoning.

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INTRODUCTION

After strangling a young man to death and pleading guilty to capital murder, Luna himself testified at length as to why the jury should impose the death penalty. Yet Luna now contends that the Constitution required his trial counsel to investigate and present further mitigation evidence—notwithstanding that the State presented overwhelming aggravating evidence, the mitigation evidence Luna now relies on is largely cumulative of what the jury heard, and the jury's decision was based on Luna's own testimony against life imprisonment. The district court correctly rejected Luna's claim of ineffective assistance of trial counsel ("IATC"), and the Fifth Circuit correctly affirmed.

Faced with such a damning record and a claim that has been rejected by every court to consider it, Luna relies on a "mischaracterization of the state-court opinion." *Dunn v. Reeves*, 141 S. Ct. 2405, 2412 (2021) (per curiam). Although the state habeas court thoroughly discussed the aggravating and mitigating evidence in its analysis of prejudice, Luna argues (at 16) that the state court's no-prejudice determination rested only on the fact that Luna asked the jury to give him the death penalty. Luna then argues (at 16-17) that the Fifth Circuit erred in considering all the evidence in evaluating whether the state court's prejudice determination was contrary to or an unreasonable application of clearly established federal law as determined by this Court. And he claims (at 18-22) that the Fifth Circuit's decision deepens a circuit split concerning whether *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), requires a federal court to focus solely on the reasons the state court gave for its decision even if the record and briefing show that other reasons would have supported the state court's ruling.

But any circuit split around *Wilson* is too ill-formed to warrant this Court's intervention, and Luna's interpretation of *Wilson* is incorrect. Moreover, the state court's decision rested on its analysis of all the aggravating and mitigating evidence, including Luna's testimony. And, in any event, Luna cannot obtain federal habeas relief under either AEDPA's deferential standard or de novo review. Accordingly, the Court should deny the petition for a writ of certiorari.

STATEMENT

1. In 2006, Luna pleaded guilty to strangling Michael Paul Andrade to death before setting fire to his home. Fifth Circuit Record ("R.") 2627-28, 3442-43. The court admonished him, confirmed with Luna's counsel that he was competent to waive his rights, and accepted his plea. R.3439-42. With Luna's agreement, the trial court conducted a unified hearing in which the jury heard evidence pertaining to both his guilt and his sentence. R.3441. The jury would be instructed to find Luna guilty and then answer special issues that would determine whether Luna would be sentenced to life in prison or death. *Id.*

2. Although Luna pleaded guilty, the State presented ample evidence that he strangled Andrade to death, *e.g.*, R.3476-77, 3487; set fire to the apartment, R.3457-58; and ultimately bragged about his exploits to his cell mate, R.3626-27.

The State also presented evidence from Andrade's girlfriend, sister, and mother about the profound impact his death had on them, *see, e.g.*, R.3445, 3654-57, as well as Luna's long history of crime and violence, demonstrating the extreme threat he posed to those around him.

This history stretched back to the 7th grade, when other students informed Luna's middle-school principal that Luna was carrying a gun. R.3513. When questioned, Luna drew

the gun and said, "Back off motherfuckers," R.3514, and had to be wrestled to the floor, *id.* Another witness, Johnny A. Rodriguez, Jr., testified about a time in 1997 when Luna (then 17 years old) fought him in a pawn shop, hit a police officer, and tried to flee before being handcuffed. R.3526-27.

The State also presented evidence that Luna had committed multiple home invasions that terrorized the inhabitants and posed a grave risk of harm.* In 1998, Luna broke into the apartment of Phillip Settles while he and his 13-year-old daughter were at home. R.3537-38. Brooke Envick testified that she was awakened in the early morning on June 9, 2004, when she heard the door from the home to the garage slamming shut, R.3567, and watched as Luna's vehicle "just took off very quickly and peeled out," R.3568. Jennifer Weise testified that, in August 2004, she awoke to discover someone was in her home. R.3614. Luna looked into her bedroom and then went to the back of the home, where her 10-year-old son would have been if he had not happened to be staying with her parents. *Id.* Weise was "too scared to move" and waited until Luna left with her before she called the police. *Id.*

Michael McGloughlin also testified about the early morning hours of June 9, 2004. R.3571. McGloughlin was home with his wife and daughter, who was about two-and-a-half years old, when he heard a "very loud like banging noise" and became aware "that someone was in the house." R.3572. The intruder "charged at [McGloughlin] down the stairs," *id.*, and kicked the door in as McGloughlin tried to hide in his bedroom, R.3572-73. McGloughlin

* The witnesses did not always know Luna's identity at the time of the offense. But, after being linked to these crimes through finger-print examination, *see* R.3539, or DNA evidence, *see* R.3600-01, 3611-13, Luna admitted that he was the perpetrator. R.3665-66.

described his terror because "at that point there's a man standing there holding a gun pointed at [him]." *Id.* After ordering McGloughlin to lie down on the bed, *id.*, Luna or one of his accomplices "pressed the gun to [McGloughlin's] head very hard asking if [he] had called the cops," *id.*, and threatened to shoot McGloughlin in front of his family if he lied, R.3574. When Luna and his accomplices found the couple's vehicles, they began loading the McGloughlins' possessions into them. R.3575. McGloughlin then believed that the intruders were going to shoot one of them. *Id.* Instead, Luna and his accomplices bound McGloughlin and his wife together and drove off. R.3575-76. When McGloughlin and his wife eventually managed to untie themselves and call the police, the bindings left "cuts and bruises on [their] wrists and ankles." R.3576.

Ruy D'Amico testified, that in June 2004, he was at home with his wife and two sons, R.3587-88, when he too was held at gun point, R.3588. Luna and his accomplices gathered the family together in one bedroom, made them all lie face down, blindfolded them, and tied their hands and feet with duct tape or strips from one of the children's bedclothes. *Id.* The family members were carried into the living room and placed on the floor next to each other "like sardines." R.3588-89. The family remained on the floor for over an hour before the intruders finally left with the family's vehicle and possessions. *Id.*

Vicky Calsada testified that, in January 2005, she was living with a roommate and her roommate's 16-year-old son. R.3619. When she and her roommate returned home from work in the early morning, two intruders "popped up from in the house" with black masks, shotguns, and gloves. *Id.* Luna and his accomplice ordered the two women and the boy to lie face down on the floor. R.3620. The intruders asked for jewelry, and, when Calsada could not remove her necklace quickly enough because she was nervous, an intruder "yanked it

off." *Id.* When Luna and his accomplice realized she still had more jewelry on, they told her, "Bitch, you want to die . . . ." *Id.* The intruders ripped up sheets from a bedroom and tied the residents up underneath the Christmas tree. *Id.* Calsada estimated that the intruders had been in the house with her roommate's son for about 40 minutes before she and her roommate arrived, "terrorizing this child." *Id.* She testified that the intruders had struck her roommate's son "because he would not say where the safe was," when, in fact, Calsada had no safe. *Id.* Luna and his accomplice took the residents' dog, and Calsada "heard the puppy scream" as they threw it into a bag. R.3621. After about 15 minutes, the intruders left. R.3620. Luna and his accomplice also stole a handgun from Calsada. R.3621.

Luna was guilty of other crimes besides home invasions. In 2004, when Luna was 24, he had a sexual relationship with a child whom he knew was 14. R.3657-58, ROA.3658. He also carjacked Candido Tovar at gun point, R.3561-62, before leaving him in "wooded area" with his ankles and wrists together with duct tape, R.3563-66. As Luna later recounted to his cellmate, Luna also broke into a police officer's home and stole a "bulletproof vest," "guns," and other "equipment." R.3628. Luna waited for the officer to return home so that Luna could shoot him, but the officer did not arrive, so Luna left. *Id.*

3. Luna's lengthy series of violent crimes culminated in the capital murder of Michael Andrade. Raymond Valero, who shared a jail cell with Luna, testified that Luna described the murder to him. R.3625-27. According to Valero, Luna told him that Andrade begged for his life as Luna tied him up but that Luna choked him to death anyway. *Id.* Valero further testified how Luna boasted that he would get out of the charges against him. R.3628. Luna planned "to marry [] his girlfriend so she wouldn't testify against him." *Id.* Luna also

planned to "escape from the court" by using the judge "for a human shield." *Id.* And Luna showed Valero that he kept a handcuff key hidden in a bar of soap. R.3629.

4. After the State rested, Luna decided to testify against the advice of counsel. R.3663. Luna's counsel and the trial court questioned Luna to ensure he understood the rights he was waiving, and his counsel confirmed that Luna was competent to waive those rights. R.3663-64. After being admonished, Luna explained to the jury that he chose to testify "to set the record straight" and he was not there "to try and plead for [his] life"—in fact, he was "going to do the opposite." R.3664-65. Luna testified that he did not blame the circumstances of his childhood for the way he turned out, stating, "I am who I am for the decisions I made in life." R.3665.

Luna also testified that he had "lived a life of crime" and stated, "Most of the stuff they brought, the DA and the prosecutor have brought up, is not even half of everything that I've done in my life." *Id.* Luna admitted that he was guilty of every past crime the State had brought up during the trial, stating, "I don't want to get into it all, but everything they've brought up, I am guilty of plus—plus some." R.3666. And Luna explained to the jury that he "was addicted to the adrenalin[e] rush that [he] got from doing the crimes [he] did." R.3665. Luna stated that he "got a rush out of going into a house when somebody was there and taking everything they owned." R.3669. According to Luna, his criminal behavior was "just a little sickness that [he] had." R.3665. Luna testified that he killed Andrade to prevent the police from tracing him back to his girlfriend's apartment, which was connected to Andrade's through an attic. R.3666.

Luna also specifically told the jury that there were no mitigating facts justifying a lesser sentence for his crime: "And I don't want nobody to think that I have a mitigating

circumstance in my case from my childhood to lessen this sentence. I've thought about this case . . . . I deserve to get punished to the full extent of the law." *Id.* Luna further explained, "All my life I lived in sin. I've hurt people. I've destroyed their lives. And the only hope I got now is God." *Id.* And Luna also testified:

> My family is just as much a victim . . . as this family. I kept my—my lifestyle a secret to them. They didn't know about the stuff I was doing. My mom, every time I got in trouble she turned me in . . . . She always tried to better me. I was just hard-headed.

Id. Luna later stated, "I've embarrassed [my family]. I've put them through shame. Put them through a lot." R.3667.

Luna went on to explain to the jury in detail why he preferred a death sentence to life in prison:

> One reason why I think the death sentence would be good for someone like me is because when I went and I did the five years in prison [for a previous offense], I remember a saying somebody told me which was, Go to prison an animal, come out a beast. And I believe that to the fullest. I don't believe there's no rehabilitation about prison whatsoever. To get a life sentence and to go to prison for 40-something years I don't think it would make me any better than I am now. I think it would make me worse than I am now . . . .
>
> I'm not afraid of death. As a matter of fact, I kind of want it. Has to do with everything I've been through. I'm kind of tired of this life. Tired of hurting people because of this addiction that I had.

Id.

Luna explained that he had hidden the handcuff key because, at the time, he planned to escape. *Id.* But Luna testified that he had given up on the "false sense of hope" that he would "beat this case." *Id.* Instead, Luna testified, he now wanted "to give the victim's family . . . justice for what [he] did." *Id.* Luna concluded his direct examination by stating, "I'm

pretty sure justice will be served to its fullest" and apologizing for "all the homes that [he] destroyed." *Id.*

On cross-examination, Luna confirmed that he was going to use the handcuff key to escape if "the opportunity ever presented itself." R.3668. And Luna agreed with the prosecutor that he was asking the jury for the death penalty, that he was a future danger, and that there were no mitigating circumstances to decrease his culpability:

> Q. Beyond a reasonable doubt you're a future danger?
>
> A. Beyond a reasonable doubt.
>
> Q. And there's no mitigating evidence—
>
> A. No.
>
> Q. —by which this jury should spare your life?
>
> A. No.
>
> Q. None whatsoever?
>
> A. None whatsoever.

Id.

When the prosecutor questioned him, Luna admitted to numerous offenses. As a young man, he escaped from a "Zero Tolerance Facility." *Id.* He was guilty of every crime that the State had "brought up" during trial. R.3669. He was also guilty of "[m]any crimes" that the State had not brought up. *Id.* Luna testified that his "addiction" "started off with cat burglaries." *Id.* Luna "started doing a bunch of cat burglaries where [he] would sneak into people's home while they were asleep" and "take basically everything they had" and then leave. *Id.* According to Luna, his burglaries "escalate[d]" when he began carrying a weapon. *Id.* Luna stated, "There's many crimes that I committed that you all are not aware of." *Id.*

When the prosecutor asked Luna to estimate the number of crimes, Luna responded, "Cat burglaries and aggravated robbery, I say between 25 and 30." *Id.* In addition to "aggravated home invasions," Luna committed "auto thefts" and sold cocaine. *Id.* Luna testified that he used to have a job but quit working there after about two months because he wanted to commit home invasions, R.3669-70, which were "more fun" and gave him an "adrenaline rush," R.3670. Luna further confirmed that his "modus operandi" was to tie his victims up with sheets. R.3671.

When questioned about the capital murder of Andrade, Luna testified that he had been "plotting" to burglarize a police officer and "a lady who . . . had two kids" who lived near his girlfriend. *Id.* Luna explained that he "knew everybody's schedule in that whole apartment complex." *Id.* But Luna discovered that his girlfriend's attic connected only to Andrade's, so he "went into that one and he was there." *Id.* Luna "could tell [Andrade] was scared." *Id.* Luna was carrying "that little handgun that [the State] got." R.3672. Luna tied Andrade up with a sheet and loaded Andrade's possessions into backpacks. *Id.* Luna took "his stuff" to a vehicle and then went back into Andrade's apartment. *Id.* Luna strangled Andrade when he became concerned that Andrade would "call the cops." *Id.*

Luna testified that Andrade's murder "didn't affect [him]." *Id.* Luna tried to destroy evidence of his crime by vacuuming the apartment and wiping his fingerprints. *Id.* Eventually, Luna concluded that the "best way to make sure [he got] rid of all the evidence is if [he] set the house on fire." *Id.* So he lit the bed and a sheet on fire and left. *Id.* Luna planned to use Andrade's computer as payment for a shotgun he received from a man who lived in a "crack house." R.3672-73.

Luna further confirmed that, while he was in pretrial custody, he "managed to get in quite a few little scrapes with the guards" and that his "attitude towards the guards was hostile and aggressive." R.3673. He also tried to work out a plan with his girlfriend and his sister "to help benefit [his] case." R.3675. But Luna admitted that he was "really just using" his girlfriend and "didn't have no feelings for her whatsoever." *Id.* In fact, while Luna was staying with his girlfriend, he was "plotting on robbing a bank," which had "always been a fantasy of [his]." *Id.*

Luna also confirmed that he "had all the opportunities in the world to turn [his] life around back when [he was] a very young man." R.3668. For example, when Luna left the Texas Youth Commission, the commission offered to pay for his first semester of college. *Id.*

At the conclusion of his cross-examination, Luna again explained why he wanted a death sentence:

> I don't see myself spending the rest of my life in prison. I get out I'll be 70 years old. What am I going to have? Everybody I know, my mom, my dad, chances are, they're going to be passed away. I ain't going to have nothing .... So what would I have to lose. Given the death sentence I would be able to focus my attention on getting strengthened spiritually and not be sidetracked.
>
> This is not no scheme. This is the truth. I'm not afraid of getting the lethal injection. I'm not afraid of death.

R.3678.

Luna confirmed that the jury should answer the special issues in a way that would lead to the death penalty:

> Q. Let me make sure we have all this straight, Mr. Luna. You want this jury to answer the special issue number one, yes; that you are a future danger?

A. Because I am.

Q. And you want this jury to answer special issue number two, no; because there is no sufficient mitigating reason to spare your life. That's what you want. Correct?

A. Correct.

Q. No question about it?

A. No question about it.

Q. Are you going to give up all your appeals?

A. I'm not going to try to appeal to nothing.

Q. Okay. So you're done.

A. Yep.

Q. And that's what you want.

A. That's exactly what I want.

R.3679.

5. Although Luna asked the jury to find that there were no mitigating circumstances that would justify a life sentence, his attorneys called two mitigation witnesses. First, Margaret Drake, a clinical social worker, testified that she interviewed Luna, interviewed his family members, and reviewed various records. R.3713-14. Drake met with Luna's mother three or four times and also interviewed two of Luna's aunts, his former stepmother, and his sister. R.3714-15.

Drake testified that Luna's sister "was hostile and angry about her childhood experience." R.3715. There was "friction" in the family because of Luna's mother's "lack of supervision and frequently leaving the children in the care of the other relatives." *Id.* In addition, "[t]here was very little involvement of Joe's father in his life." *Id.* "[T]here were a number

of relatives that were involved in substance abuse," including "[a]lcohol, various drugs, inhal[a]nts, [and] cocaine." *Id.* Luna's mother had "a fraud conviction on her record." *Id.* Moreover, Drake testified that "there is an unusual number of family members on both sides that have a history of criminal activity." *Id.*

Drake testified that, at one point, Luna lived with "a Mr. Elizondo," who was "quite violent." R.3716. Luna and his mother were "very much afraid of him and would hide in the house . . . to protect themselves from him." *Id.* Luna "quit his formal schooling" in the 7th grade. *Id.* Drake further testified that there was evidence in Luna's family of "differences in mental processing" and that Luna "had many, many models, adult models of behavior that included criminal activity and drug use and mental differences." R.3717. She concluded that Luna had "been through an extremely difficult life." R.3718.

On cross-examination, Drake confirmed that her testimony about Luna's family history relied on Luna's truthfulness and the truthfulness of his family members. *Id.* She also agreed with the prosecutor that "there are many, many people who have grown up in homes much worse than [Luna's] and they have not gone on to commit capital murder or home invasions." R.3720.

Luna's counsel also called Dr. Brian Perry Skop. *Id.* Dr. Skop stated that the court appointed him to evaluate Luna. R.3721. He testified that, if Luna were released from confinement, "his risk would be moderately high of committing further violent acts" but that "[w]ithin the context of the prison system . . . . the risk is less." *Id.* Dr. Skop explained that "going to prison reduces [Luna's] access to substances," and "substance dependency is a large risk factor for the commission of violent acts." *Id.* Dr. Skop further opined that Luna would do better in a prison setting because he "has a personality style that's predisposed to

impulsive difficulties." *Id.* According to Dr. Skop, he would expect the risk that Luna would commit another violent crime to decrease as Luna aged. R.3722. Finally, Dr. Skop stated that Luna's request for the death penalty did not appear to be the result of "a major depression" or because Luna was suicidal but was instead the result of "a decision that he's made that he would rather receive the death penalty than be in prison for the rest of his life, or the majority of his life." *Id.*

On cross-examination, Dr. Skop confirmed that he was aware that Luna "had 19 disciplinary actions taken against him" while in prison, including assaulting other inmates and guards. R.3723. He also testified that Luna had "antisocial personality disorder"—a tendency "to fail to follow normal societal rules." R.3725.

6. As Luna requested, the jury found beyond a reasonable doubt that Luna "would commit criminal acts of violence that would constitute a continuing threat to society." R.2772. It also found that there were no sufficient mitigating circumstances to warrant a sentence of life imprisonment rather than a death sentence. R.2773. In accordance with the jury's findings, the trial court sentenced Luna to death. R.2779-80.

7. The Texas Court of Criminal Appeals ("CCA") affirmed Luna's conviction. *Luna v. State*, 268 S.W.3d 594 (Tex. Crim. App. 2008). This Court denied certiorari. *Luna v. Texas*, 558 U.S. 833 (2009).

Luna filed an application for habeas corpus in state court. R.4866-5160. Among other claims, Luna argued that he received ineffective assistance of counsel because his trial attorneys failed to sufficiently investigate and present mitigating evidence. R.5141-52. Luna's state habeas counsel presented additional evidence at the hearing, including evidence from Luna's family members that he suffered physical, emotional, and sexual abuse as a child.

See generally R.5208-27, 5751-931. Luna also called Dr. Jack Gordon Ferrell, Jr. R.5800. Dr. Ferrell testified that Luna suffered from several mental-health issues, including depression, sociopathy, anxiety disorder, and schizophrenia. *See, e.g.*, R.5812-13. On cross-examination, he agreed that not all children who have the same risk factors as Luna commit capital murder. R.5850-51.

The trial court recommended that habeas relief be denied and issued findings of fact and conclusions of law. R.5613-69. In rejecting Luna's claim that his trial counsel were ineffective for failing to present additional mitigation evidence, the court concluded that Luna's "trial lawyers conducted a very thorough mitigation investigation." R.5664. The court noted that counsel "retained the assistance of two experts, Marg[a]ret Drake and Dr. Skop." *Id.* The court then explained that, even if trial counsel performed deficiently, "in light of [Luna's] testimony acknowledging guilt and asking to be sentenced to death," Luna had failed to demonstrate a reasonable probability that the results of his trial would have been different but for the deficient performance. R.5665.

The CCA adopted the trial court's findings and conclusions in relevant part and denied habeas relief. *Ex Parte Luna*, No. WR-70,511-01, 2015 WL 1870305 (Tex. Crim. App. Apr. 22, 2015) (per curiam) (unpublished); Pet. App'x ("A.") 104.

8. Luna next filed a federal habeas petition. R.549-732. Luna raised 15 claims for relief, including a claim that his trial counsel were ineffective for failing to investigate and present mitigation evidence concerning Luna's childhood and mental illness. R.551-55, 572-605. The district court dismissed Luna's habeas petition with prejudice and denied him a certificate of appealability ("COA"). R.1987.

The district court also found that Luna had failed to demonstrate that the state court's rejection of his IATC claim was contrary to, or an unreasonable application of, this Court's precedent. R.1945-46. The court explained that "[t]he record in this case supports the state court's conclusion that [Luna's] trial counsel conducted a very thorough mitigation investigation into [Luna's] background and childhood." R.1950. As the court noted,

> Ms. Drake testified about Petitioner's difficult upbringing and exposure to substance abuse, violence, instability, criminal behavior, neglect, rejection by his father, and family members with mental health issues. Although no *further* evidence was presented on these issues, any additional testimony regarding Petitioner's chaotic childhood would only have been cumulative of evidence already presented at trial.

Id. (citation omitted).

9. Luna sought a COA from the Fifth Circuit on four issues. *Luna v. Davis*, 793 F. App'x 229, 231 (5th Cir. 2019) (per curiam); A.12-24. The court granted Luna a COA only on his IATC claim based on failure to investigate and present additional mitigating evidence concerning childhood sexual and physical abuse and Luna's alleged mental-health issues. A.15-16, 24.

The Fifth Circuit later affirmed the district court's judgment. *Luna v. Lumpkin*, 832 F. App'x 849, 854 (5th Cir. 2020); A.3-11. The court "assume[d], without deciding, that Luna's counsel fell below the constitutional minimum in failing to investigate and present all mitigating evidence." A.7. The court concluded that the state court could have "reasonably distinguish[ed] this case from others in which there was prejudice from counsel's failure to present mitigating evidence of mental illness and childhood trauma." A.8. According to the court, "[t]he most obvious [distinguishing feature] is Luna's own testimony," wherein "[h]e told the jury he could not rehabilitate, that the death penalty was appropriate, and

that no mitigating evidence existed to compel a contrary conclusion." *Id.* While the court observed that this "unusual feature of this case alone is likely enough to require us to defer to the state court's 'no prejudice' determination," it also noted that there was "other strong aggravating evidence." A.9. Luna filed a petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. This Is a Poor Vehicle to Address Any Questions About the Application of *Wilson v. Sellers* Because Luna Would Still Not Be Entitled to Habeas Relief.

Luna's sole ground to ask for this Court's intercession is that following *Wilson*, there is confusion about whether a federal habeas court is to defer to a state habeas court's exact reasoning for denying relief, or its overall judgment. Cert. Pet. 16-18. But no matter how the Court might answer Luna's question about the proper interpretation of *Wilson*, he could not obtain federal habeas relief. Contrary to Luna's reading of the state habeas court's decision, the state court considered all the evidence, not just Luna's testimony. Even if it did not, Luna's testimony alone precludes habeas relief. Luna cannot overcome AEDPA's relitigation bar and, even if he could, he cannot show deficient performance or prejudice even under de novo review. The Court should therefore deny Luna's petition.

A. The state court's prejudice determination did not rely solely on Luna's testimony.

Luna's request for certiorari review rests entirely on his argument that the Fifth Circuit went beyond the state habeas court's rationale when evaluating the reasonableness of the state court's prejudice determination. Cert. Pet. 16-18. Luna argues that the state court's prejudice analysis relied solely on his testimony and that the Fifth Circuit therefore erred in weighing additional aggravating evidence against the mitigating evidence. *Id.* at

17. But Luna's foundational premise—that the state court relied solely on Luna's testimony in rejecting his *Strickland* claim—is incorrect. Accordingly, his entire argument fails.

The CCA adopted the trial court's findings and conclusions in relevant part. A.102. Recognizing that "a review of a claim of ineffective assistance will involve an assessment of harm," the trial court expressly stated its belief that "it is necessary to summarize certain testimony from Luna's trial" as part of its prejudice determination. *See* R.5627 n.5. The court then spent more than 30 pages of its order detailing the evidence—both aggravating and mitigating—presented at trial and at the writ hearing. R.5627-58. Of those 30 pages, less than three were devoted to Luna's testimony. R.5639-41. In comparison, the court spent about 12 pages recounting additional aggravating evidence, including testimony about Luna's multiple home invasions. *See* R.5627-39. The state court's order shows that it considered all the evidence in its prejudice determination.

In arguing otherwise, Luna homes in on one statement from the court:

> Most importantly, as to all of [Luna's] claims of ineffective assistance of counsel, this court finds that even if [Luna's] trial attorneys performed deficiently as to certain aspects of [Luna's] trial, in light of [Luna's] testimony acknowledging guilt and asking to be sentenced to death . . . [Luna] has not satisfied the second prong of *Strickland* [*v. Washington*, 466 U.S. 668 (1984)].

R.5665. Luna insists (at 16) that this statement proves that the state court "did not weigh the totality of the mitigating evidence that could have been presented against the evidence in aggravation." But the phrases "[m]ost importantly" and "in light of," when viewed in the context of the court's entire order, show only that the court considered Luna's testimony to be the most damning evidence against him and the most difficult for any mitigating evidence to counter. The court was right to focus on Luna's request to receive the death penalty,

because that factor alone defeats Luna's attempts to show prejudice. *See* A.9 ("[t]hat unusual feature of this case alone is likely enough to require us to defer to the state court's 'no prejudice' determination"); *see also infra* Part I.B.1. But if the court were relying *only* on Luna's testimony, there was no need for it to spill so much ink on the additional aggravating evidence. The trial court's lengthy recitation of the aggravating and mitigating evidence "would have been a curious choice for a busy state cour[t]" if recounting Luna's request for the death penalty "could have sufficed." *Reeves*, 141 S. Ct. at 2412 (cleaned up, alteration in original).

The state court weighed all the evidence and determined that Luna had failed to show that any deficient performance prejudiced the defense. The Fifth Circuit rightly concluded that the state court's determination was not an unreasonable application of *Strickland*. A.10. This Court's review is unwarranted.

B. Even if the Fifth Circuit erred, Luna is not entitled to habeas relief.

Even if the Fifth Circuit improperly looked beyond the state court's rationale for its prejudice determination, at least two insurmountable barriers would preclude habeas relief: the AEDPA relitigation bar and the lack of any actual evidence that Luna was prejudiced by any putative inadequacies of his counsel.

1. Luna cannot overcome AEDPA's relitigation bar.

a. Luna cannot show that the state court's deficient-performance determination was an unreasonable application of clearly established federal law as determined by this Court. AEDPA therefore bars habeas relief. 28 U.S.C. § 2254(d)(1). Luna bears the burden of proving both of *Strickland*'s prongs. *See Strickland*, 466 U.S. at 687. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. Courts "must indulge a

strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* And AEDPA makes the review "doubly deferential." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011).

Luna has argued through direct appeal and both his state and federal habeas proceedings that his trial counsel provided deficient performance in failing to investigate and present mitigating evidence concerning the sexual abuse and other trauma Luna experienced as a child and his mental illness. R.572. But Luna's counsel did present mitigating evidence that is very similar to the evidence his state habeas counsel later uncovered. The CCA found "that the record reveals that [Luna's] trial lawyers conducted a very thorough mitigation investigation." R.5664. Even if Luna's federal habeas counsel can now imagine additional avenues of investigation, Luna was entitled to "reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam). This is especially true under the strictures of AEDPA.

Moreover, the evidence concerning Luna's mental health is double-edged because it would provide further proof that Luna posed a severe risk of future danger. Indeed, Luna now complains about the mental-health testimony that his counsel *did* present at trial because it indicated that Luna "was a sociopath who had some probability of committing future acts of violence in prison." Cert. Pet. 26; *see also id.* at 5-6.

At the state habeas hearing, Luna's lead trial counsel testified that he and Dr. Skop, after reviewing the results of Luna's psychological testing, decided not to further investigate areas of Luna's mental health that they did not want presented at trial:

> And so we started looking through there and he did give, I think, Mr. Luna a couple of psychologicals . . . And I mean, [Luna] tested kind of high on the—what's the name of that scale? I forgot. The paranoid and the sociopath or

> something like that scale. And so when he and I were chatting, we were saying, you know, Where do we go with this? And he said, Well, we're just going to take a shot and we're going to present what we have and hopefully the State won't get into these little areas that we know about that we don't want being brought up. And that's the honest answer.

R.5911. Luna's trial attorneys were entitled to rely on their experts' investigation and advice. *See Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1263 (2019).

Luna's counsel did testify that—at least at the time of trial—Luna "essentially wanted the death penalty" and that Luna's wishes put him "in a difficult position when it comes to presenting mitigation evidence." R.5923. But counsel also testified that he spoke with both of his experts about the mitigation evidence, that he spoke with them about their investigations, that neither of his experts ever told him that Luna had been sexually assaulted, that neither Luna nor any of his family members ever told him that Luna had been sexually assaulted, and that had these experts told him of these issues, he would have "done something with the information." R.5921.

Given the fact that Luna's trial counsel investigated and presented mitigation evidence concerning his difficult childhood and mental-health issues, retained and listened to the advice of experts, and faced the challenging circumstances of having a client who pleaded guilty to capital murder and then asked the jury for a death sentence, the CCA did not unreasonably apply clearly established precedent from this Court when it determined that Luna's trial counsel did not render deficient performance under *Strickland*.

b. Even if Luna were correct that the state court's only rationale for its prejudice determination was that, "in light of [Luna's] testimony acknowledging guilt and asking to be

sentenced to death," R.5665, Luna could not show prejudice under *Strickland*, that determination was reasonable under section 2254(d)(1).

To be entitled to federal habeas relief, Luna must show that his trial counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. "In the capital sentencing context, the prejudice inquiry asks 'whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Shinn v. Kayer*, 141 S. Ct. 517, 522-23 (2020) (per curiam) (quoting *Strickland*, 466 U.S. at 695). "A reasonable probability means a 'substantial,' not just 'conceivable,' likelihood of a different result." *Id.* at 523 (quoting *Pinholster*, 563 U.S. at 189) (cleaned up).

Moreover, because Luna presents his IATC claim in a federal habeas petition, he "faces additional burdens" imposed by AEDPA. *Id.* To overcome AEDPA's relitigation bar under section 2254(d)(1), he must show that the state court's adjudication of his claim "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." 28 U.S.C. § 2254(d)(1). "This 'standard is difficult to meet.'" *Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021) (per curiam) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). "The term 'unreasonable' refers not to 'ordinary error' or even to circumstances where the petitioner offers 'a strong case for relief,' but rather to 'extreme malfunctions in the state criminal justice system.'" *Id.* (quoting *Richter*, 562 U.S. at 102) (cleaned up). Under this "doubly deferential" review, *Pinholster*, 563 U.S. at 202, Luna is not entitled to habeas relief.

Luna specifically told the jury that no mitigating evidence justified a sentence of life rather than death. R.3666, 3668. He refused to blame his crimes on his childhood or family.

R.3666. And he agreed that the jurors should "answer special issue number two, no," indicating that "there is no sufficient mitigating reason to spare [his] life." R.3679. Luna should not now be heard to argue that there *was* mitigating evidence, that his childhood *was* the cause of his crimes, and that the jury should *not* have answered the special issues as it did. And he should not be allowed to fault his trial counsel for failing to present additional mitigation evidence whose existence he himself repeatedly denied.

As the Fifth Circuit recognized, in *Schriro v. Landrigan*, 550 U.S. 465 (2007), this Court "found that trial counsel's failure to present mitigating evidence did not prejudice a defendant in analogous circumstances." A.8. In *Landrigan*, the capital defendant told the sentencing court that he had instructed his attorney not to present any mitigating evidence. 550 U.S. at 469. When the court asked him whether there were any mitigating circumstances, Landrigan replied, "Not as far as I'm concerned." *Id.* And Landrigan interrupted his attorney when the attorney tried to cast a mitigating light on the facts. *Id.* at 470. At the conclusion of the sentencing hearing, Landrigan stated, "I think if you want to give me the death penalty, just bring it right on. I'm ready for it." *Id.*

Landrigan later filed a federal habeas application under section 2254. *Id.* at 472. The district court refused to grant him an evidentiary hearing. *Id.* The en banc Ninth Circuit reversed but was itself reversed by this Court. *Id.* at 472-73. The Court concluded that, "regardless of what information counsel might have uncovered in his investigation," Landrigan "would have undermined the presentation of any mitigating evidence that his attorney might have uncovered." *Id.* at 477. And the Court emphasized that, by asking the sentencing court to give him the death penalty, Landrigan made it clear that he understood

the consequences of presenting no mitigating circumstances. *Id.* at 479-80. The Court further noted that Landrigan expressly stated his wishes and thereby put his counsel in a difficult position: "No other case could illuminate the state of the client's mind and the nature of counsel's dilemma quite as brightly as this one. No flashes of insight could be more fulgurous than those which this record supplies." *Id.* at 477.

But Luna's testimony was even more illuminating than Landrigan's. Although nothing in the record indicates that Luna specifically instructed his attorneys not to present mitigation evidence, he testified that he was asking the jury to give him the death penalty, that the jury should find that he is a future danger, and that the jury should find that there were no mitigating circumstances justifying a life sentence. R.3668, 3679. When asked whether there was any mitigating evidence, Luna replied, "[n]one whatsoever," R.3668, and later confirmed that there was "[n]o question about it," R.3679. He specifically denied that there were any mitigating circumstances from his childhood. R.3666. Luna explained that he "deserve[d] to get punished to the full extent of the law," *id.*, that he preferred to be on death row so that he could focus on God, R.3667, that he was not afraid of death, R.3678, and that he did not want to stay in prison until he was 70 years old and everyone he knew had passed away, *id.* Luna further testified that he would not try to appeal the court's decision. R.3679.

Luna decided in 2006 that he preferred a sentence of death to life in prison. He cannot argue some 15 years later that the CCA's decision not to overturn the death sentence determined by the jury at Luna's request constituted an "extreme malfunction[] in the state criminal justice system." *Hines*, 141 S. Ct. at 1149 (quoting *Richter*, 562 U.S. at 102) (cleaned up).

Moreover, the remainder of Luna's testimony provided ample aggravating evidence. Luna confirmed that he was guilty of every crime raised by the State. R.3666, 3669. Indeed, Luna told the jury that the crimes raised by the State were "not even half of everything that [he had] done in [his] life." R.3665; *see also* R.3669 (Luna testifying that he was guilty of "[m]any crimes" that the State had not brought up). Luna admitted to having committed "between 25 and 30" "[c]at burglaries and aggravated robber[ies]" in addition to "auto thefts" and "selling cocaine." R.3669.

Balanced against this aggravating evidence is evidence that Luna experienced a very difficult childhood which resulted in mental-health issues. *See, e.g.*, Cert. Pet. 6-11. But Luna's testimony undercut all the mitigating evidence his trial counsel developed—or could have developed. Luna explained that there was no mitigating evidence by which the jury could conclude that he should live. R.3668. And Luna specifically denied that there was any mitigating evidence of the kind that he now insists should have been presented: evidence of a traumatic childhood. R.3666 ("And I don't want nobody to think that I have a mitigating circumstance in my case from my childhood to lessen this sentence."); R.3666-67 (Luna explaining that his family was a victim of his actions). Instead of claiming that his crimes were the result of his childhood, Luna explained that his behavior was the result of his addiction to criminal activity. R.3665, 3667. Given Luna's testimony, there is no reasonable probability that a juror would have been persuaded to answer the special issues differently, especially because the jury *did* have evidence of Luna's childhood before it when it found that no mitigating evidence justified a life sentence. *See, e.g.*, R.3715-18.

In addition, although Luna argues that the jury should have heard more evidence of his mental illness, Cert. Pet. 4, that mental-illness evidence also suggested that Luna would be

a future danger. Dr. Skop testified that Luna had "antisocial personality disorder," and he explained that people with that disorder "tend to fail to follow normal societal rules," "tend to have legal problems, commit criminal acts," "tend to have drug problems," and "tend to have low empathy or understanding of other people." R.3725; *see also* Cert. Pet. 26. Moreover, additional mental-health evidence would not have nullified Luna's testimony, because his competence to testify is not at issue. The trial court questioned Luna and confirmed with this trial counsel that Luna was competent before Luna pleaded guilty. R.3440-41. The trial court again admonished Luna and confirmed his competence before Luna testified. R.3663-64; *see also* R.3722 (Dr. Skop testifying that Luna did not appear to be "suffering from a major depression" or "suicidal" and that Luna's request for the death penalty was "basically a decision that he's made that he would rather receive the death penalty than be in prison for the rest of his life, or the majority of his life"). Luna does not allege in this Court that he was incompetent to plead guilty or testify at trial.

Luna told the jury that he had carefully considered the matter and that he preferred death to a life sentence. He did not want to linger in prison. R.3667, 3678. And he wanted the victim's family to receive justice. R.3667. Although Luna has changed his mind, even the strongest possible mitigation evidence could only have resulted in a life sentence—the very result that Luna asked the jury *not* to give him after explaining why he was trying to avoid it. The state court got it right: "in light of [Luna's] testimony acknowledging guilt and asking to be sentenced to death," Luna cannot show that further evidence of his troubled childhood would have led the jury to do the opposite of what Luna himself requested. R.5665; *see also* A.8 (discussing the impact of Luna's testimony on a *Strickland* prejudice

determination). The state court's prejudice determination was not an unreasonable application of federal law as determined by this Court, and the Court should deny review.

2. Luna's claim would fail even de novo review.

Even if Luna could overcome AEDPA's relitigation bar, his claim would fail de novo review. He can meet neither *Strickland* prong.

a. First, Luna cannot show deficient performance. As explained above in Part I.B.1, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. And Luna had no constitutional right to "perfect advocacy." *Gentry*, 540 U.S. at 8.

At trial, Luna's counsel called Margaret Drake, a clinical social worker. R.3713. She testified that she had interviewed Luna five times, Luna's mother three or four times, two of Luna's aunts, and Luna's former stepmother. R.3714. Drake also reviewed several of Luna's records, including those from the Texas Youth Commission. *Id.* Drake testified about the results of her investigation and informed the jury of Luna's difficult childhood. R.3715-18. The defense also called Dr. Skop, who testified about Luna's mental-health issues and opined that Luna would pose less future danger if incarcerated. R.3721-22. And, after consulting with an expert, counsel decided that further mental-health evidence would be double-edged. *See* R.5911. Indeed, even Luna admits that Dr. Skop's mental-health testimony showed that Luna is a future danger. *See* Cert. Pet. 26.

Luna's counsel thus conducted an adequate investigation that supported their argument that Luna's troubled childhood was a mitigating factor. Counsel could not control the fact that Luna decided to testify against their advice, R.3663, or that his testimony undercut

all their mitigation efforts. Luna has not rebutted the strong presumption that his trial counsel provided reasonable professional assistance.

b. Second, Luna cannot show prejudice. In assessing prejudice, a court must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). As discussed above in Part I.B.1, Luna's testimony alone nullified any mitigating effect of evidence of Luna's childhood or mental-health issues. "But there is more." A.9. As the Fifth Circuit recognized, Luna's testimony was only one piece in the overwhelming aggravating evidence presented by the State:

> 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.

Id.

Meanwhile, "[o]n the mitigation side of the ledger, the evidence Luna argues his counsel should have presented was largely cumulative of what the jury did hear." *Id.* The jury heard evidence that Luna had experienced a difficult childhood and suffered from mental-health issues. Further similar evidence would not have swayed a reasonable juror presented with evidence of Luna's extensive criminal history, brutal capital murder, and specific denial of mitigating circumstances. Luna has not shown prejudice.

Because Luna can show neither deficient performance nor prejudice, he is not entitled to habeas relief, and this Court's review is unnecessary.

II. The Court Need Not Grant Review to Address the Proper Interpretation of *Wilson v. Sellers*.

Because Luna cannot obtain habeas relief regardless of how the question he presents in his certiorari petition concerning *Wilson v. Sellers* should be resolved, this Court should deny review. But, in any event, the Court need not address the question presented because the circuit split Luna identifies is not sufficiently developed and Luna's proffered interpretation of *Wilson* is incorrect.

A. Any circuit split is insufficiently developed to merit review.

Respondent does not dispute that, after *Wilson*, some courts have expressed uncertainty as to whether, under AEDPA, a federal "habeas court must defer to a state court's ultimate *ruling* rather than to its specific *reasoning*." *Sheppard v. Davis*, 967 F.3d 458, 467-68 & n.5 (5th Cir. 2020), *cert. denied sub nom. Sheppard v. Lumpkin*, 141 S. Ct. 2677 (May 24, 2021). Nevertheless, review at this time is premature as the issue is still percolating in the courts of appeals, and no well-defined circuit split yet exists. Contrary to petitioner's assertion, the Fifth Circuit has not decided the issue. *See id.* And Luna admits that "[t]he Third and Fourth Circuits have yet to publish decisions interpreting or applying *Wilson*," Cert. Pet. 20, and that the Tenth Circuit's approach is unclear, *id.* at 21. If there is a circuit split developing around *Wilson*, it is not yet ripe for this Court's review, especially in a case, like this one, in which the petitioner will not be entitled to habeas relief regardless of how the Court resolves the tension.

B. Luna's interpretation of *Wilson v. Sellers* is wrong.

Finally, review is unnecessary because Luna is incorrect to argue that *Wilson* requires federal courts to focus solely on the state habeas court's reasoning, even if the record supports the state court's determination. Cert. Pet. 27. *Wilson* imposes no such requirement.

In *Wilson*, the Court addressed whether a federal court should "look through" an unexplained state supreme court decision. 138 S. Ct. at 1192. That situation is not presented here, because the CCA expressly adopted the trial court's findings and conclusions in relevant part. A.102. And even if the state court's only rationale for its prejudice determination was Luna's testimony (which it was not, *see supra* Part I.A), and even if that rationale did not support denying habeas relief (which it does, *see supra* Part I.B.1), *Wilson* did not require the Fifth Circuit to ignore the wealth of additional aggravating evidence that outweighed any mitigating evidence and supported the state court's ruling. A state court need not even cite this Court's governing precedent to be entitled to AEDPA deference. *See Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (per curiam). Similarly, a state court need not "display[] all of its reasoning" to be entitled to deference. *Hanson v. Beth*, 738 F.3d 158, 164 (7th Cir. 2013). The federal habeas court should consider any additional supporting reasons evident from the record "where, as here, the state court gave some reasons for an outcome." *Id.*

To hold otherwise would be "inconsistent with the presumption that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). It would also create a perverse incentive for state habeas courts to avoid explaining their decisions. Under Luna's interpretation, if a state court explains why it is denying habeas relief, and its

reasons are insufficient, a federal court may grant habeas relief despite AEDPA's relitigation bar, even if the record, briefing, and argument show that the state court's judgment was reasonable. But if a state court does not give any reason for its decision, a federal habeas court "must determine what arguments or theories . . . could have supporte[d] the state court's decision" and evaluate those arguments and theories under section 2254(d). *Pinholster*, 563 U.S. at 188 (quoting *Richter*, 562 U.S. at 102). Luna offers no reason why this Court should encourage state courts to remain silent rather than explain their decisions.

Luna advances an incorrect interpretation of *Wilson v. Sellers* in a case in which answering the question presented would make no difference to the outcome. The Court should deny Luna's petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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