CASE NO. 21-5460 (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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Stuart Brian Lev*
Loren Stewart
Andrew Childers
Assistant Federal Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928-0520
Stuart_Lev@fd.org

* *Counsel of Record*
Member of the Bar of the Supreme Court

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1. There is a clear split on an important federal question.

Under AEDPA, does a habeas court review the reasonableness of a state court's reasoning, or of its result? In other words, does it matter whether the state court reasonably applied clearly established federal law in reaching its result, or is it only the reasonableness of the result that counts?

Respondent acknowledges that the Courts of Appeals are split on these questions. BIO at 28. However, he urges this Court to ignore this disparate application of an important federal statute, because, in his view, the split is not fully developed. *Id.* Respondent is wrong. As set forth in the Petition, there is a demonstrable split among the Courts of Appeals. Petition at 18–21. Six Circuits examine the reasonableness of the state court reasoning. Two Circuits take a different approach. The Fifth Circuit, as illustrated by its treatment of this case, and the Eleventh Circuit, pay scant attention to the state court's reasoning and, instead, look only to the reasonableness of is result, regardless of how unreasonable the path the court took to get there.

This is a well-defined split on an important question of law that affects the way the majority of habeas petitions should be reviewed. Even if every circuit has not yet weighed in, the split has been recognized by the judiciary and is ripe for resolution.

This Court should resolve that split. Congress enacted 28 U.S.C. § 2254(d) with the intent that it be applied uniformly throughout the nation. *See Mississippi Board of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (federal statutes are generally intended to have uniform nationwide application); *Lyeth v. Hoey*, 305 U.S.

188, 194 (1938) (in the absence of language to the contrary, statutes should be interpreted to provide a uniform application to a nationwide scheme). When uniform application is lacking, as it is here, it is appropriate for this Court to review and resolve the differences among the Courts of Appeals. And even though this Court seemed to address the question in *Wilson v. Sellers,* 138 S. Ct. 1188 (2018), the split has continued. This Court's guidance is needed.

2. Respondent's speculative arguments about how Petitioner would have fared if the Fifth Circuit had applied the standard of review required by *Wilson* and § 2254(d) do not reduce the need for this Court to resolve the existing Circuit split.

The thrust of Respondent's argument is that this Court should deny certiorari because, even if the Fifth Circuit was wrong in its approach to *Wilson* and § 2254(d), Petitioner would still be denied habeas relief. In support of this argument, Respondent asserts that the state court's reasoning was reasonable and that, even if it was not, Petitioner's ineffective assistance of trial counsel claim would fail even under *de novo* review. BIO at 16–28.

The problem with this argument is that none of these issues were addressed by the court below because the court focused only on the reasonableness of the result reached by the state court. The Fifth Circuit did not examine whether the state court reasoning was contrary to, or an unreasonable application of, clearly established federal law – which it was, *see* Petition at 24–25. Nor did it conduct a *de novo* review of Petitioner's ineffectiveness claim. Indeed, without reaching that question, the Fifth Circuit recognized that a "court may have been able to conclude" that Mr. Luna was prejudiced by counsel's failure to present mitigation evidence of

"sexual abuse and mental health conditions" and that a court, applying *de novo* review, could conclude that Petitioner was entitled to relief. A8, 10. Thus the state's arguments against certiorari are largely speculative and depend upon arguments that were not addressed below.

The decision below was grounded in the court's belief that deference was due to the state court because it reached a reasonable result. If that approach was wrong, as it would have been in the majority of circuits, then the proper remedy is not to deny certiorari, but to resolve the question presented and remand the matter to the Fifth Circuit to review in the first instance the arguments raised in the BIO.

For these reasons, Respondent's fact specific arguments are of little relevance at this stage of the proceedings.

3. In any event, Respondent's fact specific arguments lack merit.

Although the state post-conviction court's opinion summarized the evidence before it in some detail, its analysis of the legal issue was scant. This truncated analysis conflicts with the type of analysis required by this Court's precedents. This Court has recognized that the prejudice prong of an ineffectiveness claim requires a "weighty and record-intensive analysis." *Andrus v. Texas*, 140 S. Ct. 1875, 1887 (2020); *accord Sears v. Upton*, 561 U.S. 945, 955–56 (2010) (prejudice requires a "probing and fact-specific analysis" that considers the totality of the evidence) (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009)).

The state court did not comply with these requirements. In a section of its opinion entitled "Application of Law to Appellant's Ineffective Assistance of Counsel Claim," the state court 's only analysis of prejudice was this:

> 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.*

A155 (internal citation omitted).[1]

This analysis does not engage in the weighty and probing analysis required by *Sears*, *Porter*, and *Andrus.* Respondent argues that the court's summary of the testimony and facts was sufficient to show that it conducted a proper prejudice determination. BIO at 17–18. But, because the Fifth Circuit only looked at the result reached in state court, and not its application of law, the court never addressed whether the state court's truncated prejudice analysis satisfied this Court's clearly established case law. Far from being a reason to deny certiorari, the Fifth Circuit's omission of the steps required by § 2254(d) underscores the

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[1] The state court's analysis of deficient performance was similarly brief. Without engaging in any of the facts, the court simply stated that counsel had conducted a thorough investigation. The Fifth Circuit did not address this prong, focusing instead solely on the question of prejudice. In fact, the state court's deficient performance conclusion was objectively unreasonable.

Mr. Luna's trial attorneys did not conduct the thorough investigation of his background required in a capital case. *See* Petitioner's Fifth Circuit Brief at 30. Trial counsel's first substantive meeting with their mitigation investigator occurred nearly a year after they were appointed and after jury selection had begun. Without adequate supervision and input from counsel, this investigator failed to interview a number of witnesses with first-hand knowledge of the abuse and trauma Mr. Luna suffered as a child.

Although their mitigation specialist's report reflected rampant sexual abuse in the household, including that Mr. Luna was sexually assaulted by an uncle when he was three years old, trial counsel failed to present this evidence or investigate further. *See id.* at 38. And despite numerous indications of mental health problems, trial counsel failed to have an expert conduct a full assessment of Mr. Luna's mental health. *Id.* at 41. Indeed, to make matters worse, counsel put on an underprepared mental health expert and opened the door to testimony on cross examination concerning antisocial personality disorder.

importance of the question raised and demonstrates the need to resolve the circuit split.

Respondent argues that the state court thoroughly discussed the aggravating and mitigating evidence "in its analysis of prejudice" and relies on *Dunn v. Reeves*, 141 S. Ct. 2405 (2021), to argue that Petitioner has mischaracterized the state court opinion. BIO at 1, 18. This argument is legally and factually wrong.

First, as set forth above, while the state court summarized the evidence presented at trial and in support of the state habeas, its analysis of prejudice was one sentence long and relied exclusively on Mr. Luna's testimony. Petitioner has not mischaracterized that opinion.

Second, *Reeves* addressed a very different question. In *Reeves*, the Court of Appeals had held that the state court was unreasonable because it applied a *per se* rule that, without testimony from trial counsel explaining his or her actions, an ineffectiveness claim necessarily fails. This Court held that the state court had not applied such a *per se* rule and reversed. 141 S. Ct. at 2412. Moreover, this Court noted that, unlike here, *Reeves* was not a case where defense counsel failed to investigate and uncover mitigating evidence of mental impairment and family background. *Id.* at 2411. *Reeves* has no relevance to the questions concerning the proper application of § 2254(d) or this Court's ruling in *Wilson*.

Citing to *Schriro v. Landrigan*, 550 U.S. 465 (2007), Respondent argues that Petitioner's testimony asking the jury to sentence him to death precludes any finding of prejudice. BIO at 21–23. Mr. Luna's case, however, presents a different

factual scenario. In *Landrigan*, the defendant instructed his lawyer not to present any type of mitigating evidence and undermined his lawyer's efforts to explain the potential mitigation to the sentencing judge. *Id.* at 476–77. Mr. Luna did no such thing. He did not object to, or interfere with, counsel's presentation of mitigating evidence. He did not object to, or interfere with, counsel's argument to the jury in favor of a life sentence. Although Mr. Luna asked the jury to sentence him to death, he left it to the jury to consider both options and decide upon the appropriate sentence. Unlike *Landrigan*, Mr. Luna accepted his lawyer's efforts to present mitigation and obtain a life sentence. Because Mr. Luna did not instruct counsel to forego the presentation of mitigation, and because there is no reason to think that Mr. Luna would have objected to the type of evidence of childhood trauma, sexual abuse, and severe mental health problems such as schizophrenia that counsel could have presented if he had conducted an adequate investigation, *Landrigan* is inapplicable.

Respondent also argues that Mr. Luna cannot prove prejudice because the mitigation evidence uncovered in post-conviction proceedings was cumulative of that presented at trial. *See* BIO at 27. This is wrong. The new evidence differs greatly in both strength and subject matter from what was presented at trial.

The mental health testimony presented by the defense in mitigation at trial was nothing like the evidence proffered in state habeas. Trial psychiatrist Dr. Brian Skop's testimony was limited to issues relating to future dangerousness. In only eight pages of direct testimony, Dr. Skop provided the jury with no information

about Mr. Luna's childhood and upbringing, other than noting that he had been expelled from a treatment program at Laurel Ridge for fighting with another resident and that he supposedly showed some progress while in the Texas Youth Commission. ROA.3722. Dr. Skop testified that he reviewed few records. ROA.3721. The only testing he conducted was a brief screen for intelligence. *Id.* When asked about Mr. Luna's risk to society, Dr. Skop explained that he would be a high risk for violence out of prison, but a lesser risk in prison. *Id.* Dr. Skop explained that Mr. Luna had a personality that was "predisposed to impulsive difficulties," but thought prison might help with that. *Id.*

On cross-examination, Dr. Skop 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. Most devastatingly, Dr. Skop told the jury that Mr. Luna had antisocial personality disorder. *Id.*

In contrast, the mental health evidence proffer in state habeas sought to humanize Mr. Luna by explaining the effects of his traumatic and abandoned upbringing and the serious mental health impairments he suffered throughout his life. Psychologist Jack G. Ferrell, Jr., conducted a battery of tests and explained that Mr. Luna had schizophrenia, a significant anxiety disorder, and some sociopathy. ROA.5809; *see also* ROA.5226. Mr. Luna also showed some depression and tested as "schizoid, another term for a type of ongoing behavior that is confused, withdrawn, not being part of the standard community." ROA.5812–13.

Dr. Ferrell also addressed the further impact of Mr. Luna's traumatic upbringing. ROA.5227.

These stark differences between the testimony presented and the testimony that could have been presented belie Respondent's argument that the testimony proffered was cumulative of the testimony presented. The record clearly and convincingly establishes that it was not.

The same is true of testimony about Mr. Luna's childhood and upbringing. The jury never learned that Mr. Luna was sexually abused when he was just three years old by his uncle, or that Mr. Luna often lived alone on the streets as a child for weeks at a time to escape the violence of his home. ROA.572–76. And the jury never learned of the physical abuse he suffered from his mother and her long-term boyfriend James Eric Elizondo. *See* ROA.5213. Likewise, the jury heard nothing about the sexual abuse, nearly-daily domestic violence, and open and rampant drug use Mr. Luna was exposed to while living in his maternal grandmother's house. *See* ROA.580–93.

Had the Fifth Circuit properly applied §2254(d) in a manner consistent with *Wilson*, it might have reached the merits of these arguments. But it did not. The essential question remains: whether *Wilson* should be applied to the state court's reasoning, or just its results.

Respondent also suggests that even under *de novo* review, Mr. Luna cannot establish prejudice because the jury heard extensive evidence of his culpability and future dangerousness. *See* BIO at 27. This argument is in conflict with this Court's

precedent, which holds that a petitioner may establish prejudice when powerful or even seemingly overwhelming future dangerousness or aggravation evidence has been introduced. In *Williams v. Taylor*, 529 U.S. 362 (2000), for example, this Court found *Strickland* prejudice where the capital murder was "just one act in a crime spree that lasted most of Williams's life." 529 U.S. at 418 (Rehnquist, C.J., dissenting). At Williams's sentencing hearing the prosecution introduced evidence that he had been previously convicted of armed robbery, burglary, and grand larceny. *Id.* at 368 (majority opinion). The jury also learned that, in the months after the capital offense, Williams stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, confessed to having strong urges to choke other inmates and to break a prisoner's jaw, and brutally assaulted an elderly neighbor, leaving her in a vegetative state. *Id.* at 418 (dissent). Notwithstanding these facts, the Court found prejudice. *Id.* at 398; *see also Porter*, 558 U.S. at 42 (finding prejudice where petitioner repeatedly told his ex-girlfriend's family he would kill her, then broke into her home, shot and killed his ex-girlfriend and her new boyfriend, and pointed a gun at her daughter's head); *Rompilla v. Beard*, 545 U.S. 374, 377–78 (2005) (finding prejudice where defendant stabbed victim repeatedly and set body on fire and defendant had significant history of violent felonies); *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (rejecting Texas's "brutality trumps" argument and finding prejudice where defendant shot and killed his former girlfriend while her children begged for her life, shot and killed his former girlfriend's friend, and shot his stepsister).

Indeed, the type of mitigation evidence proffered in state habeas is exactly the type of evidence that this Court has held could cause a reasonable juror to decide to exercise mercy and vote for a life sentence. *See Williams*, 529 U.S. at 418; *Rompilla*, 545 U.S. at 377–78; *Porter*, 558 U.S. at 42. Here, regardless of the strength of the aggravating and future dangerous evidence, there is a reasonable probability that the evidence of childhood sexual assault, traumatic and dysfunctional upbringing, and significant mental health impairments including schizophrenia and organic brain damage could have led one or more jurors to exercise mercy and vote for life.

In any event, because it failed to address the state court's reasoning, the Fifth Circuit never applied a *de novo* standard and should have the opportunity to do so in the first instance.

In sum, none of the Respondent's fact specific arguments undermine the importance of the question presented or make this case an inappropriate vehicle to resolve the split among the Circuit Courts of Appeals.

CONCLUSION

For these reasons, as well as those set forth in the Petition, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

/s/ Stuart Brian Lev
Stuart Brian Lev*
Loren Stewart
Andrew Childers
Assistant Federal Defenders
Federal Community Defender Office for
the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
215-928-0520
Stuart_Lev@fd.og

* *Counsel of Record*
Member of the Bar of the Supreme Court

Counsel for Petitioner, Joe Michael Luna

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