CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

JOHN LEZELL BALENTINE,
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

Stuart Brian Lev*
Peter Walker
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

QUESTIONS PRESENTED

CAPITAL CASE

Under *Schriro v. Landrigan*, 550 U.S. 465 (2007), does a capital defendant necessarily forfeit his right to allege trial counsel's ineffectiveness for failing to adequately investigate and prepare for sentencing by purportedly instructing counsel not to present mitigation evidence, as the Fifth and Sixth Circuits have held and as applied below, or does *Landrigan* allow a capital defendant to pursue that claim when the instruction is limited or it is not knowing and informed, as the Third, Ninth, Tenth, and Eleventh Circuits have held?

Was trial counsel deficient for failing to adequately investigate and prepare for sentencing and was Mr. Balentine prejudiced by counsel's failure to investigate and present readily available mitigation evidence of his mental health impairments, brain damage, and childhood sexual abuse?

STATEMENT OF RELATED PROCEEDINGS

Balentine v. Lumpkin, No. 18-70035 (United States Court of Appeals for the Fifth Circuit) (order denying petition for rehearing filed August 31, 2021)

Balentine v. Lumpkin, No. 18-70035 (United States Court of Appeals for the Fifth Circuit) (opinion affirming the district court's judgment filed August 3, 2021)

Balentine v. Davis, No. 18-70035 (United States Court of Appeals for the Fifth Circuit) (order granting a certificate of appealability on the district court's denial of the Rule 60(b)(6) motion filed February 26, 2020)

Balentine v. Davis, No. 2:03-CV-039-D (United States District Court for the Northern District of Texas, Amarillo Division) (order adopting the magistrate judge's report and recommendation and denying motion for relief from judgment filed May 21, 2018)

Balentine v. Davis, No. 2:03-CV-39-J-BB (United States District Court for the Northern District of Texas, Amarillo Division) (report and recommendation denying relief from judgment pursuant to Rule 60(b)(6) filed September 29, 2017)

Balentine v. Stephens, No. 2:03-CV-00039 (United States District Court for the Northern District of Texas, Amarillo Division) (Opinion and Order for evidentiary hearing in the District Court, Northern District of Texas filed April 1, 2016)

Balentine v. Stephens, No. 12-70023 (United States Court of Appeals for the Fifth Circuit) (Opinion remanding to the District Court to conduct further proceedings filed January 30, 2014)

Balentine v. Thaler, No. 12-5906 (United States Supreme Court) (order granting petition for writ of certiorari and remanding to the United States Court of Appeals for the Fifth Circuit filed June 3, 2013)

Balentine v. Thaler, No. 12-70023 (United States Court of Appeals for the Fifth Circuit) (order denying motion for rehearing en banc filed August 21, 2012)

Balentine v. Thaler, No. 12-70023 (United States Court of Appeals for the Fifth Circuit) (order denying motion for stay of execution and affirming district court's denial of Rule 60(b) motion filed August 17, 2012)

Balentine v. Thaler, No. 2:03-CV-039-J (United States District Court for the Northern District of Texas, Amarillo Division) (order accepting and adopting report and recommendation of the United States Magistrate Judge, denying motion for relief from judgment under Rule 60(b), denying stay of execution, and granting request for a certificate of appealability filed August 10, 2012)

Balentine v. Thaler, No. 2:03-CV-00039 (United States District Court for the Northern District of Texas, Amarillo Division) (report and recommendation to deny motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) filed July 30, 2012)

Balentine v. Texas, No. 10-11036 (United States Supreme Court) (order denying petition for writ of certiorari filed March 26, 2012)

Balentine v. Texas, No. 10-11036 (United States Supreme Court) (Order granting stay of execution pending disposition of petition for writ of certiorari filed June 15, 2011)

Balentine v. Texas, No. 09-5128 (United States Supreme Court) (order denying stay of execution filed June 15, 2011)

Ex Parte Balentine, No. WR-54,071-03 (Texas Court of Criminal Appeals) (order denying relief on third state habeas application filed June 14, 2011)

Balentine v. Thaler, No. 10-9758, (United States Supreme Court) (order denying the petition for writ of certiorari filed June 13, 2011)

Balentine v. Thaler, No. 09-70026 (United States Court of Appeals for the Fifth Circuit) (order denying rehearing en banc filed December 29, 2010)

Balentine v. Thaler, No. 09-70026 (United States Court of Appeals for the Fifth Circuit) (Judgment on rehearing that the panel opinion of June 18, 2010 is withdrawn and affirming judgment of the district court filed on November 17, 2010)

Balentine v. Thaler, No. 09-70026 (United States Court of Appeals for the Fifth Circuit) (Opinion reversing denial of habeas corpus relief and remanding filed on June 18, 2010)

Balentine v. Texas, No. 09-6704 (United States Supreme Court) (order denying petition for writ of certiorari filed November 2, 2009)

Balentine v. Thaler, No. 09-5128 (United States Supreme Court) (order denying petition for writ of certiorari filed October 20, 2009)

Balentine v. Thaler, No. 09-70026 (United States Court of Appeals for the Fifth Circuit) (Order granting stay of execution scheduled September 30, 2009, filed September 29, 2009)

Balentine v. Thaler, No. 09-70026 (United States District Court for the Northern District of Texas, Amarillo Division) (Order denying motion for relief pursuant to Federal Rule of Civil Procedure 60(b) but granting a certificate of appealability filed on September 28, 2009)

Ex Parte Balentine, Nos. WR-54,071-01 and WR-54,071-02 (Texas Court of Criminal Appeals) (Order denying first subsequent application for writ of habeas corpus and denying request to consider initial application filed September 22, 2009)

Balentine v. Quarterman, No. 08-70014 (United States Court of Appeals for the Fifth Circuit) (Opinion denying the motion to expand the certificate of appealability and affirming the district court's denial of habeas petition filed April 13, 2009)

Balentine v. Quarterman, No. 2:03-CV-00039 (United States District Court for the Northern District of Texas, Amarillo Division) (order overruling objections and adopting report and recommendation of the magistrate judge on the motion for certificate of appealability filed May 30, 2008)

Balentine v. Quarterman, No. 2:03-CV-00039 (United States District Court for the Northern District of Texas, Amarillo Division) (Opinion granting certificate of appealability on grounds one and two and denying certificate of appealability on the remaining claims filed May 2, 2008)

Balentine v. Quarterman, No. 2:03-CV-00039 (United States District Court for the Northern District of Texas, Amarillo Division) (order overruling objections and adopting recommendations of magistrate judge filed March 31, 2008)

Balentine v. Quarterman, No. 2:03-CV-00039 (United States District Court for the Northern District of Texas, Amarillo Division) (report and recommendation to deny petition for a writ of habeas corpus filed September 27, 2007)

Ex Parte John Lezell Balentine, No. 54, 071-01 (Texas Court of Criminal Appeals) (order adopting the trial judge's findings and conclusions and denying application for writ of habeas corpus filed December 4, 2002)

State v. Balentine, No. 39,532-D (District Court of Potter County, Texas) (findings of fact and conclusions of law recommending denial of application for writ of habeas corpus filed October 18, 2002)

Balentine v. State, No. 73,490 (Texas Court of Criminal Appeals) (opinion affirming conviction and sentence on direct appeal filed April 3, 2002)

State v. Balentine, No. 39,532-D (District Court of Potter County, Texas) (judgment of guilt and sentence entered April 21, 1999)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished. It appears in the appendix and is reported as *Balentine v. Lumpkin*, 2021 WL 3376528 (5th Cir. 2021). A timely petition for panel rehearing was denied by order on August 31, 2021, is not reported, and appears in the appendix.

The order of the United States District Court for the Northern District of Texas adopting the Report and Recommendation of the Magistrate Judge and denying the petition for relief from judgement, *Balentine v. Davis*, No. 2:03-CV-039-D (United States District Court for the Northern District of Texas, Amarillo Division, filed May 21, 2018), is unreported and appears in the appendix. The Report and Recommendation of the Magistrate Judge, *Balentine v. Davis*, No. 2:03-CV-039-D (United States District Court for the Northern District of Texas, Amarillo Division, filed September 29, 2017), is unreported and appears in the appendix.

JURISDICTION

The Court of Appeals, after granting a Certificate of Appealability, affirmed the denial of a Petition for Relief from Judgement Pursuant to Fed. R. Civ. P. 60(b) on August 3, 2021, and denied a petition for rehearing on August 31, 2021. On December 1, 2021, Justice Alito extended the time for filing a petition for certiorari until January 28, 2022. 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.

STATEMENT

A. Introduction

For the first seven months after appointment, and until immediately before the start of trial, trial counsel did nothing to investigate and prepare a case for mitigation. No one, including trial counsel, disputes this. This failure was remarkable given the substantial evidence of Mr. Balentine's guilt; any reasonably competent counsel would have known the importance of developing mitigation evidence to try to save his client's life. But Mr. Balentine's counsel did not.

Indeed, counsel presented no witnesses and no evidence at Mr. Balentine's sentencing trial. No explanation was given for those omissions. Without any evidentiary support, counsel simply urged the jury to sentence Mr. Balentine to life. At a federal evidentiary hearing held fifteen years after trial, trial counsel accepted no responsibility for their deficient investigation and presentation. Instead, for the first time, counsel blamed Mr. Balentine. Counsel explained that after he advised Mr. Balentine that there was no helpful testimony to present, Mr. Balentine purportedly stated that he preferred a death sentence and agreed that no witnesses should be presented.

Such blame-shifting was consistent with counsel's attitude towards Mr. Balentine at the time of trial. Mr. Balentine's trial lawyers treated him with disdain and showed their own racial animus towards him. For example, during the testimony of one of the state's penalty witnesses who had testified about a prior unadjudicated incident where she claimed that Mr. Balentine assaulted her and kidnapped her from her home,[1] ROA.15016-37, trial counsel wrote a note that said, "**Can you spell justifiable lynching?**" ROA.8414 (emphasis added). This racially inflammatory comment raises significant concerns about counsel's relationship with Mr. Balentine.

Nor was this the first time that counsel expressed disdain for Mr. Balentine, and spoke about him in degrading terms. As explained by co-counsel, when Mr. Balentine rejected the states late-trial offer of a plea to a life sentence – an offer seemingly born out of the state's concern about the strength of its case – lead trial counsel Durham erupted in fury, calling Mr. Balentine "a dumb son of a bitch," and stormed out of the room. ROA.6698.

Counsel's attitude towards Mr. Balentine was particularly disturbing in light of the racial dynamics of the case. Prior to the murders, Mr. Balentine, a black man, had been involved in a dispute with Mark Caylor, one of the three white teenagers who were killed. Mr. Caylor had threatened to kill Mr. Balentine and went with others looking for him on more than one occasion. The dispute grew ugly, with Caylor resorting to racial epithets and taunts. ROA 13811-15. Someone

[1] Mr. Balentine was never tried or convicted for this offense.

attached a note referencing the KKK to the front door of a house where Mr. Balentine was staying. Chris Caylor, Mark's brother, testified that he placed the note on Mr. Balentine's door as a threat to Mr. Balentine. ROA 13862-63; 13888-90.

Although this case has a long procedural history, and comes to this Court from the affirmance of a denial for relief pursuant to Rule 60(b)(6), the crux of the lower court rulings focused on the question of whether Petitioner's claim of ineffective assistance of trial counsel was substantial, i.e., did it have some merit. The Court of Appeals and the District Court allowed counsel to shift the blame, even though there was nothing on the trial record to indicate that Mr. Balentine opposed mitigation, interfered with counsel's investigation, or had any objection to counsel's argument urging the jury to impose a life sentence.

B. Relevant Procedural Background

The long and complex history of this case is detailed in the Fifth Circuit opinion. A2-7. In 2013, this Court granted a stay of execution and remanded the denial of the Rule 60 motion to the Fifth Circuit Court of Appeals, which later remanded to the District Court. *See Balentine v. Stephens*, 553 Fed. App'x 424 (5th Cir. 2014).

In 2016 and 2017, the Magistrate Judge held an evidentiary hearing on the Rule 60 issues, including the merits of the trial counsel ineffectiveness claim. The Magistrate Judge subsequently issued a Report and Recommendation that trial counsel was not ineffective and that, as a result, the Rule 60 motion should be denied and no COA should issue. Mr. Balentine filed timely objections that were overruled by the District Court. A27.

On appeal, the Fifth Circuit granted a COA, but then affirmed the District Court's ruling that counsel was not ineffective and that, for that reason, Rule 60b relief should be denied. A2, 21-22. Petitioner now seeks review of that ruling.

C. Relevant Factual Background

1. The crime

Mr. Balentine was accused, and ultimately convicted, of shooting and killing three teenagers as they slept on January 21, 1998. Prior to the murders, Mr. Balentine, a black man, had been involved in a dispute with one of the victims, all of whom were white, who had threatened to kill him and went with others looking for him on more than one occasion. The dispute grew ugly, with one of the victims resorting to racial epithets and taunts. Shortly after his arrest, Mr. Balentine confessed to the murders.

2. Appointment of counsel and the absence of pre-trial investigation

On August 6, 1998, the trial court appointed James Durham to represent Mr. Balentine. *See* ROA.8380. Mr. Durham had not represented a capital defendant in twenty-two years. On August 25, 1998, the court appointed Paul Herrmann as co-counsel with Mr. Durham. ROA.8381. The appointment of Mr. Herrmann was troubling since *he had been the lead prosecutor against Mr. Balentine* until the day before he was appointed as defense counsel. ROA.6599. Nonetheless, Mr. Herrmann remained as one of Mr. Balentine's attorneys until he was removed on or about March 8, 1999. *See* ROA.8385.

On September 10, 1998, the court authorized counsel to hire an investigator. ROA.8381. Counsel retained Darrell Dewey. As Mr. Herrmann noted, they ultimately had to remove Dewey "because he wouldn't do any work." ROA.6606. However, Mr. Herrmann acknowledged that during his nearly seven months on the case, he too, did no work on preparing for the penalty phase. ROA.6597. Mr. Durham interviewed Mr. Balentine within a few days of his arrest, on August 8, 1998. In that interview, Mr. Balentine told Mr. Durham that he had sustained a head injury at the age of seven, and had lost consciousness for some period of time. ROA.8404. Mr. Herrmann was also aware that Mr. Balentine had suffered a head injury. ROA.6601.

Yet, despite counsel's knowledge of Mr. Balentine's background, they took no steps to explore whether Mr. Balentine suffered from organic brain damage. They hired no mental health experts; none were even consulted. Counsel never had Mr. Balentine tested for organic brain damage. Rather than investigate, Mr. Herrmann simply hoped, that at some point, the state would offer a plea to a life sentence. ROA.6602.

Thirteen days before the scheduled start of trial, and two days before the start of pre-trial hearings, Mr. Herrmann withdrew from the case and former district attorney Randall Sherrod was appointed in his stead. *See* ROA.8385. Mr. Sherrod indicated that the defense team had no real strategy for the punishment phase of trial, explaining that "[w]e were up a creek." ROA.6646. Like his predecessor, he did nothing to develop mitigating evidence. Mr. Sherrod's records

reveal no work on mitigation issues until *after the jury convicted Mr. Balentine*. Then, in the two days that followed, he spent a total of 6 ½ hours preparing for the penalty phase hearing. *See* ROA.8422.

When Mr. Sherrod joined the defense team his efforts were focused on the guilt phase. ROA.6635. Challenging the confession was one of his top priorities. ROA.6660. Mr. Sherrod acknowledged that he did not speak with any of the potential mitigation witnesses before the penalty phase. ROA.6674. This was his first and last capital case as a defense attorney. ROA.6628.

3. The last minute appointment of a new investigator

Kathy Garrison was hired as the defense team investigator on or about March 8, 1999. ROA.7199. She was tasked with investigating both the guilt and sentencing phases at the same time and was starting from scratch. ROA.7201. She testified that she was not provided with any interview notes, records or signed release forms upon entering the case. *Id.* Indeed, jury selection began thirteen days after her appointment. ROA.7200-01. She was responsible for all of the field work as the attorneys were in court litigating pre-trial motions and selecting a jury during the great majority of that time. ROA.7203.

Pressed for time, Ms. Garrison was unable to devote any time to considering mitigating evidence until her interview with Mr. Balentine on March 25, 1999, after the start of jury selection. Ms. Garrison testified that she "got along well with John" and had a good relationship with him. ROA.7204. In her opinion, he was a cooperative client and answered all of her questions to the best of his ability. ROA.7203. He provided her with pertinent information related to the mitigation

investigation, including the names and contact information of his family members; his medical history, including information about a head injury he suffered as a child where he lost consciousness; his prior juvenile placements and adult criminal record; and the names of the various schools he attended. ROA.7205-09; ROA.8657-64 (Kathy Garrison handwritten interview notes).

On April 5, 1999, Ms. Garrison telephoned Mr. Balentine's mother, Clara Smith. On this same date, she made a call to Mr. C.L. Borden, one of Mr. Balentine's former employers. ROA.7247. Both calls were for purposes of developing mitigation and were the only mitigation interviews she conducted. Ms. Garrison acknowledged that it was not best investigative practice to wait until jury selection to make first contact with Mr. Balentine's mother. ROA.7257.

Ms. Garrison testified that she did not have time to travel to Arkansas, where Mr. Balentine had been raised, to interview witnesses and, in fact, never left the Amarillo area in search of witnesses. ROA.7257-58. In her 2001 affidavit provided to state habeas counsel, she stated that "It was a severe disadvantage to be given essentially thirty days (March 11th to April 12th) to investigate the witnesses, investigate any potentially mitigating evidence and confer with counsel and Applicant." ROA.7401.

On April 8, 1999, seventeen days after the start of jury selection, Ms. Garrison tried unsuccessfully to retain Dr. Jeffrey Cone, M.D., a neurologist, to conduct an MRI scan of Mr. Balentine. He was the only mental health professional she contacted. Despite her notes documenting "Brain injuries in the past. Psych to

examine him," no such experts were hired. *See* ROA.8646. Ms. Garrison testified that she shared what information she learned with both Mr. Durham and Mr. Sherrod. ROA.7211.

4. Rejection of the plea offer

After the state rested and the jury had been taken to the crime scene where a demonstration of the loudness of gunshots was conducted, the state offered Mr. Balentine the opportunity to plead guilty to a life sentence. Mr. Sherrod explained that he and Mr. Durham went to convey the offer to Mr. Balentine on the morning of April 15, 1999, and on the elevator ride to the cell room the following occurred:

> When we went down to talk with him, Jim was excited because we got the offer of life and he was high-fiving – trying to high-five with me in the elevator, and I told him, I said "John's not going to take it." And he asked me "why?" And I explained to him that Jim – at least in my opinion had given him some false hope about some of the search issues that were in the case. And I said, "He's just not going to take it."

ROA.6697-98. Mr. Sherrod feared that "false hope" would lead Mr. Balentine to reject a plea deal for a life sentence.

And that's what happened. When they met with Mr. Balentine,

> [J]im walked in, and he said, "We got you a life sentence." He explained very briefly, and I don't remember all the details on that, about the life sentence. He was telling him that he needed to take it. John just said "I'm not going to take it." And Jim said, "*Well, you talk to the dumb son-of-a-bitch. I'm going back upstairs.*

ROA.6698. Mr. Sherrod then spent another "fifteen or twenty minutes" with Mr. Balentine. *Id.*

After Mr. Balentine rejected the state's offer, the defense alerted the court that Mr. Balentine had made this decision, but said nothing about any instruction

concerning mitigation witnesses or any purported desire for the death penalty. ROA.14707.

Trial resumed and the defense called several witnesses to testify to events leading up to and on the night of the murder. The jury convicted on all charges.

5. The penalty phase hearing

The jury convicted Mr. Balentine of capital murder on Friday, April 16, 1999, and the court scheduled the penalty phase to begin on Monday, April 19. Counsel informed the court that "[W]e've got about four or five, maybe six [witnesses], depending on what I talk to them about at 1:30. It's going to go very quickly." ROA.15049 (emphasis added). The witnesses that the defense had cobbled together over the weekend were individuals who had seen one or more of the victims make threats to Mr. Balentine, or "residual doubt witnesses."

At sentencing the State presented several witnesses to describe Mr. Balentine's prior record. The defense called no witnesses, introduced no exhibits, and rested. Mr. Sherrod asked the jury to spare Mr. Balentine's life because: (1) the confession was suspect; (2) the victims had threatened Mr. Balentine's life; and (3) a life sentence was sufficient punishment. ROA.6666-70. Presented with detailed evidence of Mr. Balentine's criminal history from the state, and no mitigation evidence from the defense, the jury returned a death sentence.

6. State habeas

State habeas counsel had no experience with capital writs and conducted no investigation of trial counsel's ineffectiveness. He did not investigate Mr. Balentine's mental health background or seek to retain an expert to conduct a

thorough evaluation. He stated that he did not do any independent fact investigation. He had no strategic or tactical reason for failing to conduct either a fact or mental health investigation. ROA.6751; ROA.6770.

7. Federal habeas evidentiary hearing

i. Trial counsel advised Mr. Balentine that none of the mitigation witnesses present would make a difference.

At a federal evidentiary hearing in 2016, Mr. Sherrod defended against the claim that he had been ineffective. For the first time in the seventeen years since Mr. Balentine's conviction, he alleged that the failure to present any evidence or call any witnesses at the penalty hearing was motivated by Mr. Balentine's desire to be sentenced to death. Mr. Sherrod did not make a record of this at trial.

Mr. Sherrod testified that the only evidence they had available for sentencing were the witnesses who would testify about the threats made to Mr. Balentine by the victims, "[A]nd that's all [Mr. Balentine] was aware of." ROA.6730. *See also* ROA.6646-47; "[W]hen I looked at the witnesses and the statements on what they could and could not testify to . . . *there wasn't anything there that would have made a difference*, and I informed my client that.") (emphasis added); ROA.6699 (same). Mr. Balentine accepted that judgment, and no witnesses were called.

ii. Mental health, sex abuse, and other mitigation testimony

Mr. Balentine presented the evidence that effective counsel could have presented had they conducted a reasonable investigation. Dr. Gilda Kessner, a psychologist, found that Mr. Balentine had exposure to domestic violence; early life

instability; unstable attachments; negative male role models; negative supervision; poor school performance; and that he observed community violence. ROA.6807. Dr. Kessner identified a family history of alcoholism and sexual abuse. ROA.6816. Her notes reflect that Mr. Balentine told her "I don't have any pleasant memories" and "I just remember pain." ROA.6820.

Dr. Daniel Martell, Ph.D., conducted a full neuropsychological work-up of Mr. Balentine. ROA.6950. He administered a comprehensive battery of neuropsychological tests. ROA.6969. He described Mr. Balentine as very cooperative and that the malingering tests he administered were all valid and demonstrated he gave good effort and was not malingering. ROA.6955.

Mr. Balentine scored in the impaired or below range in 25% of the tests he was administered, which Dr. Martell described as unusual. ROA.6972. Dr. Martell emphasized that "these are not isolated scores here or there. He concluded that these impairments were present at the time of the offense and a reasonably competent neuropsychologist in 1998-1999 would have been able to reach these diagnoses. ROA.6990.

The state's expert, Dr. Randall Price, Ph.D., agreed that Dr. Martell's clinical observations are consistent with the test results. ROA.7123. He agreed that Dr. Martell conducted a comprehensive neuropsychological exam and that his scoring was accurate. ROA.7119. He agreed that there is a cluster of impaired scores in auditory memory and that there is convergence. ROA.7134-35. He ultimately

disagreed with Dr. Martell's conclusions about the potential impact of these impairments.

Dr. David Lisak, Ph.D., a clinical psychologist who specializes in forensic matters mostly pertaining to sexual assaults, concluded that Mr. Balentine had been sexually and physically abused. ROA.7051. Mr. Balentine told Dr. Lisak about the physical abuse he endured at the hands of his uncles and his mother. ROA.7059. Mr. Balentine remembers that his mother and his stepfather would beat him with a household extension cord but as he got older, his stepfather switched to contractor extension cords because they were heavier and hurt more. ROA.7062.

Dr. Lisak determined that Mr. Balentine experienced sexual abuse at the hands of his sister when he was five years old and reported that his uncle tried to molest him at his grandmother's house. ROA.7062-63. The attempted rape had a pronounced impact on him because it violated the safety of the grandmother's home. ROA.7062. He was also sexually abused by older women when he was young teenager. ROA.7063. These experiences had a deleterious impact on Mr. Balentine's development.

Ms. Jane Bye, a mitigation specialist, identified many areas of mitigation including: "very chaotic childhood with abuse, neglect, poverty, violence, bullying in the neighborhood, living in a terrible neighborhood, medical issues, mental health issues, learning disabilities, developmental delays." ROA.6885. Mr. Balentine's father was abusive toward his mother and would beat her regularly. ROA.6887.

Ms. Bye learned that Mr. Balentine's paternal uncle tried to sexually molest him but was interrupted by his grandmother. ROA.6892. His teachers reported that Mr. Balentine had difficulty retaining information and writing, and he had hard time writing a full sentence. ROA.6900. These teachers also noted he was often upset about what was happening at home and he reported he did not get along with his stepfather. ROA.6900-91. Ms. Bye also learned that Mr. Balentine had suffered a head injury as a child that resulted in a period of unconsciousness. ROA.6903.

D. The Relevant Decisions Below

1. The District Court decision

After conducting an evidentiary hearing, the Magistrate Judge concluded that trial counsel was not ineffective in the investigation and development of mitigating evidence. For this reason, state post-conviction counsel was not ineffective under *Martinez v. Ryan*, 566 U.S. 1 (2012), for failing to raise that claim. On that basis, the magistrate recommended that the Rule 60 motion be denied.

The Magistrate Judge based his recommendations on two lines of reasoning: 1) that Petitioner had waived the presentation of mitigating evidence and, for that reason, was precluded from challenging his lawyer's effectiveness; and 2) that regardless of any waiver, Petitioner failed to show that his counsel was ineffective. The District Court adopted that Report.

The Magistrate Judge recognized that, through habeas counsel, Petitioner presented a great deal of mitigation evidence, none of which was presented at trial. A55-56. The Court was troubled by the failure of trial counsel to present any

witnesses at sentencing. A56. Mr. Balentine's challenge to the adequacy of trial counsel's investigation of mitigating evidence made "a reasonable point," particularly in light of the fact that the initial investigator appointed to the case did no work for 8 months after his appointment, before being replaced a few weeks before the start of trial. A52. Federal habeas counsel, the Court wrote, "developed considerable mitigation evidence particularly regarding Balentine's mental health and child development." A55.

2. The Fifth Circuit Opinion

The Fifth Circuit affirmed, based upon the district court's reasoning. A10. The Court relied upon its prior caselaw that held that where a defendant instructs his lawyer not to present mitigation evidence, counsel cannot be ineffective for failing to present any evidence. A10-11; 14-15. The Court rejected Petitioner's effort to distinguish a defendant who objects to any mitigation from one who limits his instruction to the witnesses that were available at the time of trial. A14-15. In addition, the Court rejected Petitioner's argument that any waiver of mitigation had to be knowing and informed, and that his was not because of counsel's unreasonably limited investigation. A16.

The Court also affirmed the district court's alternative holding that the IATC claim lacked merit. The Court held that Balentine's challenge to counsel's limited, belated, and rushed investigation was merely a matter of degree that did not result in any prejudice in light of the strength of the aggravating evidence. A18-20.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE A CIRCUIT SPLIT ON WHETHER A CAPITAL DEFENDANT'S LIMITED WAIVER OF THE SCANT MITIGATION EVIDENCE THAT COUNSEL WAS PREPARED TO PRESENT SHOULD PRECLUDE HIM FROM RAISING AN INEFFECTIVE ASSISTANCE CLAIM BASED ON COUNSEL'S DEFICIENT INVESTIGATIONAND DETERMINE WHETHER A WAIVER OF MITIGATION EVIDENCE MUST BE KNOWING AND INFORMED.

This case presents two vexing and recurring issues that arise when a defendant instructs his attorney to forego the presentation of mitigation evidence. The first issue concerns the scope and application of this Court's opinion in *Schriro v. Landrigan*, 550 U.S. 465 (2007), and asks whether this Court created a rule that necessarily precludes a defendant who foregoes the presentation of the admittedly unhelpful mitigation evidence his lawyer was prepared to present from raising a claim of ineffective assistance of counsel. The Court of Appeals are split on *Landrigan's* proper meaning and application.

The second question is whether the decision to forego mitigation must be knowing and informed. This Court left that question open in *Landrigan* and that has led to differences and confusion in the lower courts.

This case squarely presents both of these questions and provides this Court with the opportunity to resolve the differences among the Courts of Appeals and provide much needed guidance explaining what is required when a defendant asks to forego his constitutional right to present mitigation evidence at a capital sentencing proceeding.

A. The Courts of Appeals are Divided on the Meaning and Application of *Schriro v. Landrigan.*

In *Landrigan*, defendant consistently interfered with counsel's efforts to present mitigating evidence and repeatedly told the court that he wanted the death penalty. This Court, without deciding whether a knowing and informed waiver was constitutionally required,[2] stated that "[e]ven assuming . . . that an 'informed and knowing' requirement exists . . . , Landrigan cannot benefit from it." *Id.* at 479. This Court pointed to the "careful" explanation of mitigating evidence that counsel gave in the case and the record evidence in concluding that the waiver was knowing and intelligent. *Id.* at 479-80.

Some Courts of Appeals have expanded this ruling far beyond the circumstances presented in *Landrigan.* The Fifth Circuit has held, in this case and others, that a defendant's waiver of mitigation necessarily precludes him from raising a claim that trial counsel was ineffective for failing to adequately investigate and present mitigation evidence. *See Shore v. Davis,* 845 F.3d 627 (5th Cir. 2017); *Loden v. McCarty*, 778 F.3d 484, 499 (5th Cir. 2015). The Sixth Circuit has adopted a similar approach. *See Owens v. Guida*, 549 F.3d 399, 406 (6th Cir. 2008) ("*Schriro* mirrors cases from our own circuit that have held that a client who interferes with her attorney's attempts to present mitigating evidence cannot then claim prejudice based on the attorney's failure to present that evidence.").

[2] The four justice dissent would have found a knowing and intelligent requirement for the waiver of mitigation based upon a simple application of prior law. *Landrigan,* 550 U.S. at 484 (Stevens, J., dissenting).

In this case, the Fifth Circuit applied a *Landrigan* preclusion rule even though, as a result of a deficient investigation, counsel had only a few witnesses available to testify, counsel had advised Mr. Balentine that these witnesses, all of whom would offer residual doubt evidence similar to that which the jury had already rejected at the guilt phase, would not be helpful to him, and the district court had found that Mr. Balentine's instruction to counsel was limited to those available witnesses.

The Fifth (and Sixth) Circuit's approach to mitigation waivers is at odds other Courts of Appeals. In *Sanders v. Davis*, 2022 WL 121398 (9th Cir., filed January 13, 2022), a divided panel found counsel ineffective and granted habeas relief to a defendant who had told counsel prior to trial that he was opposed to a life sentence and had repeatedly told counsel and the court that he did not want to present mitigation evidence to the jury. *Id.* at *4-6. Applying *de novo* review, which is also applicable here, the Court found that this Court's ruling in *Landrigan* did not apply where the defendant did not threaten to obstruct the investigation and presentation of mitigation evidence. *Id.* at *12. The Court cited approvingly to Third Circuit cases, such as *Blystone v. Horn*, 664 F.2d 397, 426 (3d Cir., 2011), where it was held that counsel was ineffective in failing to investigate and present mitigation evidence because defendant's mitigation waiver was limited to certain witnesses. *Id.* And the Court noted, and eventually adopted, the line of Eleventh Circuit cases that have recognized that counsel can be ineffective, in some instances, even where the defendant has obstructed the presentation of mitigation

evidence. *Id.* at *13 (citations omitted). The Court explicitly rejected the argument that, under *Landrigan,* a defendant who instructs his lawyer not to present mitigation can never establish the prejudice prong of an ineffectiveness claim. *Id.* at n.13.

In *Blystone,* the defendant told the Court at his penalty hearing that he did not wish to have his parents testify or offer any other evidence in the case. Despite the trial court's acceptance of this after an on-the-record colloquy, a colloquy entirely absent here, *Blystone* concluded that the colloquy was limited to the evidence counsel was prepared to present – and did not extend to all the evidence counsel could have reasonably found if he had conducted a competent investigation. *Id.,* 664 F.3d at425-26. *See also Young v. Sirmons*, 551 F.3d 942, 959 (10th Cir. 2008); *Battenfield v. Gibson*, 236 F.3d 1215, 1229-33 (10th Cir. 2001) (holding counsel ineffective and defendant's waiver invalid where there was "no indication [counsel] explained . . . what specific mitigation evidence was available"); *Douglas v. Woodford*, 316 F.3d 1079, 1089 (9th Cir. 2003) (finding counsel ineffective because instruction not to present evidence was uninformed by reasonable mitigation investigation).

Mr. Balentine's case provides an appropriate vehicle to resolve this split. Here, trial counsel testified that the only mitigation evidence they had available were the testimony of witnesses who would describe the threats made to Mr.

Balentine by one of the victims, "[A]nd that's all [Mr. Balentine] was aware of."[3] ROA6730. The jury had already rejected similar testimony that had been presented during the guilt phase of the trial. Counsel told Mr. Balentine that those witnesses would not make a difference and that a death sentence would result. ROA6699. Mr. Balentine deferred to counsel's judgement and agreed that the available witnesses would not be called.

Mr. Balentine's decision was guided by the information counsel gave him and limited to the available witnesses. And that is what the district court found – that Mr. Balentine had instructed counsel not to call the *available* witnesses at punishment phase. A43, 50.

Thus, the Magistrate Judge explicitly found that Mr. Balentine's instructions to counsel were confined to the limited residual doubt witnesses that counsel was prepared to present at punishment phase – witnesses that counsel had told Mr. Balentine would make no difference. Under cases such as *Sanders* and *Blystone*, such instructions would not have precluded an ineffective assistance claim. Yet the Fifth Circuit paid scant attention to the limited scope of any waiver.

Instead, the Fifth Circuit rejected the views of its sister Circuits and adopted an overly broad interpretation of *Landrigan*, concluding that a defendant who instructs counsel not to call mitigation witnesses is foreclosed from pursuing an ineffectiveness claim. A14-15. This application of a broad prohibition is

[3] Mr. Sherrod testified that he had some information about the potential penalty phase witnesses, but that he had not talked to them before the punishment phase. ROA6673-74.

particularly worthy of review because the rule applied by the Fifth Circuit goes far beyond the factual circumstances underlying this Court's ruling in *Landrigan*.

Mr. Balentine's actions were nothing like those of the defendant in *Landrigan.* There was no indication prior to trial that Mr. Balentine had any intention or desire to seek the death penalty. He pled not guilty and insisted upon his right to a jury trial. Moreover, he cooperated in the investigation of potential mitigation evidence. Investigator Garrison testified that she "got along well with John" and had a good relationship with him. ROA.7204. He was a cooperative client and answered all of her questions to the best of his ability. ROA.7203. His cooperation continued throughout the representation. ROA 7209.

Ms. Garrison interviewed him about his background in the courthouse during jury selection. ROA.7205. He provided her with pertinent information related to the mitigation investigation, including the names and contact information of his family members; his medical history, including information about a head injury he suffered as a child where he lost consciousness; his prior juvenile placements and adult criminal record; and the names of the various schools he attended. ROA.7205-09; ROA.8657-64 (Kathy Garrison handwritten interview notes). Mr. Balentine also signed release forms to assist her in gathering records. ROA.7233-37. These are not the actions of a man who desires a death sentence.

Mr. Balentine's behavior during trial likewise provides no indication that he wanted the death penalty. Mr. Balentine made no statements indicating such a desire. As reported by counsel, he actively participated in defense decision making.

For example, counsel registered Petitioner's waiver of a challenge to venue on the record. *Id.* at 69. When Petitioner changed his mind twice about the venue waiver (to retract the waiver, then to waive once again), counsel again had the decisions placed on the record. ROA.10170; ROA.10285.

Even during the penalty phase testimony, counsel registered a disagreement with Petitioner over the vigor of the defense. ROA.15038-40. He told the trial court that Mr. Balentine was upset at counsel's failure to question one of the state witnesses. Counsel explained his reasons for not asking questions, but indicated that Mr. Balentine was upset at that decision. Mr. Balentine agreed with counsel's description of the situation *Id.* Mr. Balentine's concerns are not the actions of a defendant seeking a death sentence.

Moreover, unlike *Landrigan*, the trial record here was completely silent concerning any mitigation waiver. There was no careful explanation of the mitigating evidence that might be available, and nothing on the record to indicate that Mr. Balentine did not want to present mitigation evidence. Indeed, Mr. Balentine made no objection when counsel argued to the jury that a life sentence should be imposed.

This Court has not had the occasion to examine the way in which the lower courts are applying *Landrigan.* Given the various splits among the Circuits and the factual distinctions between this case and *Landrigan*, this case is an appropriate vehicle for this Court to resolve the split and provide further guidance on these important issues.

B. Must a Defendant's Waiver of Mitigating Evidence Be Knowing and Informed?

This case also presents the opportunity to decide whether a defendant's waiver of mitigation must be knowing and informed. In *Strickland v. Washington*, 466 U.S. 668, 691 (1984), this Court held that "[c]ounsel's actions are usually based, quite properly, on *informed* strategic choices made by the defendant….". Despite *Strickland's* insistence that a defendant's strategic choices be informed, the majority in *Landrigan* suggested that this Court had not yet decided this issue in the context of a waiver of mitigation. *Id.* at 479.

The dichotomy between *Strickland* and *Landrigan* has caused confusion among the lower court that this Court should resolve. For example, in *Sanders,* the Court applied a knowing and informed standard despite its acknowledgement of *Landrigan's* assertion that this Court had never mandated that standard. *Sanders* at *13, n.14. The majority then proceeded to find that defendant's decision to forego a penalty phase defense was not knowing and informed and that counsel was ineffective. *Id.* at *18-19. In dissent, Judge Miller indicated his belief that the majority had misunderstood and misapplied *Landrigan.* Although he believed that counsel was ineffective, he thought that *Landrigan* precluded a finding that defendant's actions were not knowing and informed. *Id.* at *25-26.

Mr. Balentine's instructions to counsel cannot be severed from the information provided by counsel. He made his decision based on what counsel told him about the available witnesses. And because counsel had not conducted a

competent investigation, he had very little information to provide. His decision was not knowing and informed.

This case gives this Court the opportunity to define the standards required for a valid waiver of mitigation evidence.

II. THE FIFTH CIRCUIT'S ALTERNATIVE DETERMINATION THAT COUNSEL WAS NOT INEFFECTIVE IN THE INVESTIGATION AND PRESENTATION OF MITIGATION EVIDENCE IS IN CONFLICT THIS COURT'S PRECEDENT.

The Fifth Circuit also affirmed the district court's alternative holding that Mr. Balentine failed to meet either prong of the *Strickland* test. Although recognizing that Mr. Balentine had developed additional mitigation evidence that had not been developed by trial counsel – including evidence that he had been sexually abused as a child, was brain damaged, and suffered multiple mental health impairments – the Court held that his complaints about the timing and extent of counsel's investigation came down to just a "matter of degrees." Op at 18. And the Court rejected the mitigating value of the evidence as "double edged," concluding the Mr. Balentine's crime was such that it was "virtually impossible to establish prejudice." Op. at 19

Such reasoning rejects the core principles this Court has laid down in its ineffective assistance cases. It is contrary to this Court's holdings and dilutes the constitutional standard demanded of counsel in a capital case that this Court has sought to maintain. This Court's review is urgently needed before the Fifth Circuit further undermines this Court's case law.

A. Counsel's Investigative Failure

This is a case in which trial counsel, although recognizing the likelihood of a guilty verdict, conducted no investigation into Mr. Balentine's background and mental health until just days before the start of trial. As a result, the jury sentenced Mr. Balentine to death without hearing the readily available, uncontested mitigating evidence of Mr. Balentine's childhood, which was marked by severe poverty, neglect, and physical and sexual abuse. Moreover, the jury never learned how this traumatic childhood impacted Mr. Balentine psychologically, as was explained by mental health experts during the evidentiary hearing, or that Mr. Balentine suffers from brain dysfunction.

It is undisputed that no investigation was even started until just two weeks before trial. For seven months after counsel and an investigator were appointed, nothing was done. The investigator did no investigation. Counsel took no steps to either oversee the appointed investigator or conduct their own investigation in preparation for penalty. Even after the appointment of a new investigator shortly before trial, counsel showed little interest in the penalty phase preparation. Mr. Sherrod conceded that he was not guiding Ms. Garrison's investigative efforts regarding the development of mitigating evidence. *See* ROA.6634 (testifying he did not provide instructions to Garrison). Indeed, Mr. Sherrod's billing records show he met with Ms. Garrison for one hour and spoke with her on the phone one time prior to trial. *See* ROA.8419-20.

B. Counsel's Performance Was Deficient

Counsel's inactions fell far short of prevailing professional norms at the time of Mr. Balentine's trial. In *Porter v. McCollum*, 558 U.S. 30 (2009), addressing a 1988 trial, this Court noted that "[i]t is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" *Id.* at 39 (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). In *Wiggins v. Smith*, 539 U.S. 510 (2003), addressing a 1989 trial, this Court found that trial counsel's performance was deficient because counsel unreasonably narrowed the scope of their sentencing investigation, causing them to fail to present a plethora of mitigating evidence that was available at the time of trial. *Id.* at 534. Reasonable counsel do not ignore their duty to investigate, as Mr. Balentine's lawyers did.

Perhaps most significantly, trial counsel failure to follow up on known information necessitating an investigation into Mr. Balentine's mental health contradicted this Court's precedents. "In assessing the reasonableness of an attorney's investigation… a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527; *see also Neal v. Puckett*, 286 F.3d 230, 237 (5th Cir. 2002) ("In assessing counsel's performance, we look to such factors as . . . what additional 'leads' he had, and what results he might reasonably have expected from these leads.").

Even trial counsel's scant investigation yielded evidence indicating the need to have a mental health professional evaluate Mr. Balentine. Just a few days after

he was appointed, Mr. Durham learned that Mr. Balentine had suffered loss of consciousness due to head trauma as a child and had been treated by a psychiatrist. *See* ROA.8404. Ms. Garrison's notes referenced "brain injuries" and the need to have Mr. Balentine evaluated by a mental health expert. ROA.7814. And during her one brief interview with Mr. Balentine's mother, Ms. Garrison learned that he had received mental health treatment as a child. ROA.7257-58; ROA.7856 (Garrison interview notes of Clara Smith). Indeed, trial counsel filed a motion for expert assistance, stating that Mr. Balentine "may suffer from serious mental disorders, including organic brain damage—which constitutes mitigating evidence." ROA.3338. Yet even after this motion was granted, counsel made no effort to retain an expert or have Mr. Balentine evaluated.

This Court has repeatedly found investigations deficient when trial counsel failed to uncover mitigating mental health evidence. *See Rompilla v. Beard*, 545 U.S. 374, 391 (2005) (adequate investigation would have disclosed mental health mitigation); *Wiggins*, 539 U.S. at 535 (adequate investigation would have uncovered petitioner's "diminished mental capacities"); *Williams*, 529 U.S. at 396 (constitutionally adequate investigation would have disclosed that petitioner was "borderline mentally retarded"). Here, faced with overwhelming indicia that investigation into Mr. Balentine's mental health was necessary, trial counsel failed to conduct such an investigation, and was therefore deficient.

The Fifth Circuit found that counsel's lapses were merely a matter of degree. Such reasoning flaunts this Court's precedent and is directly contrary to its recent

holding in *Andrus v. Texas*, 140 S. Ct. 1875 (2020). *Andrus* reiterates that capital counsel have an obligation to conduct a thorough investigation of defendant's background. *Id.* at 1881. Although counsel in *Andrus* presented some mitigation, including expert testimony, this Court concluded that counsel's investigation was an "empty exercise." *Id.* Like Mr. Balentine's counsel, counsel in *Andrus* learned little about his client's background, had little if any contact with potential mitigation witnesses, uncovered none of the evidence of his client's dysfunctional background, and failed to follow up on evidence indicative of mental health issues. "In short, counsel performed virtually no investigation, either of the few witnesses he called during the case in mitigation, or of the many circumstances in Andrus' life that could have served as powerful mitigating evidence." *Id.* at 1883.

Counsel's lapses in *Andrus* were not just a matter of degree but rendered his performance constitutionally deficient. And Mr. Balentine's counsel did even less than in *Andrus*. Yet the Fifth Circuit used a matter of degree standard to avoid its duty to apply *Andrus*.

C. Mr. Balentine Suffered Prejudice

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 Andrus*, 140 S. Ct. at 1886; *Porter v. McCollum*, 558 U.S. 30, 41 (2009); *Wiggins v. Smith*, 539 U.S. 510, 536 (2003). The ultimate question is whether, in light of the evidence, there is a reasonable probability that a single juror would have struck a different

balance regarding Mr. Balentine's moral culpability and voted for life. *Id.* Here, Mr. Balentine presented mitigation evidence of sexual abuse, trauma. brain damage, and other mental health problems that counsel could have presented had he investigated. Any single juror could have relied upon that evidence to mitigate his moral culpability and vote for life.

This Court has found error when a 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. That is exactly what the Fifth Circuit did in this case.

The district court discounted the mitigating effect of the mental health evidence by concluding that these "mental health witnesses" are "double edged swords", i.e., their testimony could have "caused the jury to determine that [Mr. Balentine] was a significant threat of future dangerousness," and therefore Mr. Balentine had failed to establish prejudice under *Strickland*. The Fifth Circuit approved that reasoning, finding that it was consistent with its precedent. A19

This Court has repeatedly recognized the value of mental health mitigation as evidence of reduced moral culpability; and does not allow such evidence to be discounted in the prejudice calculus based on its purportedly "aggravating aspects." In *Williams*, the Court found the state court's no-prejudice finding objectively unreasonable even where future dangerousness was at issue. 529 U.S. at 398 (defendant's mitigating evidence "may not have overcome a finding of future dangerousness, [but] the graphic description of [the defendant's] childhood, filled

with abuse and privation, or the reality that he was borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability" (citation omitted)). *See also Rompilla*, 545 U.S. at 377-78; *Porter*, 558 U.S. at 42. There is no "double-edged" evidence exception to *Strickland* prejudice.

The court's conclusion is particularly flawed regarding the evidence that Mr. Balentine was sexually abused as a child and the psychological impact this abuse had on him. *See* ROA.7062-72 (Testimony of Dr. David Lisak). The court cites no cases to support its characterization of this evidence as "double-edged." Indeed, there is no caselaw supporting the proposition that a jury is likely to conclude that a person will commit future acts of violence because he was sexually assaulted as a child. Nor is there any support in the record supporting such a conclusion.

Even assuming that some jurors might consider mental health evidence aggravating, the Supreme Court cases cited above recognize that some jurors might be persuaded by the mitigating aspects of the evidence. And because Mr. Balentine need only show a reasonable probability that one or more jurors might conclude that the mitigating aspects of the evidence were enough to exercise mercy and vote for life, prejudiced is established. The Fifth Circuit's contrary conclusion erroneously assumes that there is no reasonable probability that even a single juror would credit the mitigating aspects of such evidence. Such reasoning flies in the face of *Porter's* admonition that mitigation evidence should not be "unreasonably discounted."

The Fifth Circuit further discounted the mitigation evidence by suggesting that the nature of the crime made it impossible to prove prejudice. Again, the Fifth Circuit's reasoning flies in the face of 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*, 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*, 545 U.S. at 377-78 (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, research shows that thorough investigation and presentation of mitigating evidence can make a difference even in highly aggravated cases. *See* Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 Hofstra L. Rev. 1161, appendices at 1229-1256 (2018) (cataloguing nearly *200 aggravated capital trials* that resulted in life sentences, including *80 cases with multiple victims*).

Texas juries have sentenced defendants to life even where the facts of the crime were heinous. For instance, in *Garcia v. State*, No. 03-08-00586-CR, 2010 WL 4053640, at *3-4 (Tex. Ct. Crim. App. Oct. 12, 2010), the jury returned a life sentence when the defendant killed two taxi drivers on separate days by shooting them in the head. Similarly, in *Saenz v. State*, 421 S.W.3d 725, 733 (2014), the jury returned a life sentence when, over the course of a month, the defendant killed five dialysis patients by injecting their intravenous dialysis lines with bleach and poisoned three additional patients in the same manner. *See also State v. Gabriel* (Texas, 2015) (Life verdict) (Murder by strangulation of two infant sons; sent photo of youngest son's hanged body to estranged wife) (http://www.startelegram.com/news/local/crime/article13853561.html); *State v. Crawford*, (Texas, 2013) (Murder of girlfriend's 10 month old daughter by beating her in the head) (Life verdict) (http://dfw.cbslocal.com/2013/08/15/arlington-man-

murdered-baby-when-she-wouldnt-stop-crying). Juries elsewhere have likewise rejected the death penalty even where the defendant was found guilty of killing multiple victims.

In sum, there might be highly aggravated cases. But many difficult cases may still result in a life sentence when mitigation is thoroughly investigated and presented to the jury. *See Douglas v. Woodford*, 316 F.3d 1079, 1091 (9th Cir. 2003) (noting that "[t]he gruesome nature of the killing did not necessarily mean the death penalty was unavoidable" notwithstanding the gruesome killing of two teenage girls and extensive record of other crimes of violence). The Fifth Circuit's unreasonable efforts to discount the substantial mitigation evidence presented at the federal evidentiary hearing deserves this Court's review.

CONCLUSION

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

Respectfully submitted,

/s/ Stuart Brian Lev
Stuart Brian Lev*
Peter Walker
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, John Lezell Balentine

Dated: January 28, 2022