No. 21-7061

# In the Supreme Court of the United States

JOHN LEZELL BALENTINE, 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

John Balentine shot three teenagers as they slept. So determined was Balentine that, when his gun jammed, he walked out of their house, cleared the jam, and returned to commit the murders. Balentine was equally determined to avoid a life sentence in general population, where he faced the constant threat of jailhouse reprisals. Balentine was convicted after turning down a mid-trial offer to plead guilty for a life sentence. Balentine then instructed punishment-phase counsel not to present mitigation witnesses. Counsel complied.

Balentine's state-habeas counsel attacked this punishment-phase performance under *Strickland v. Washington*, 466 U.S. 668 (1984). The Texas Court of Criminal Appeals (CCA) rejected Balentine's ineffective assistance of trial counsel (IATC) claim on the merits. In federal-habeas proceedings, Balentine's new counsel attacked trial counsel's punishment-phase performance with new mitigation evidence. The district court rejected this claim as procedurally defaulted. After this Court decided *Martinez v. Ryan*, 566 U.S. 1 (2012), Balentine sought to reopen the judgment denying habeas relief under Rule 60(b)(6), citing state-habeas counsel's ineffectiveness as cause to overcome the default. After an evidentiary hearing, the district court denied relief because Balentine's IATC claim was insubstantial. The Fifth Circuit affirmed. The question presented is:

> Did the Fifth Circuit correctly affirm the district court's exercise of discretion in finding that no exceptional circumstances justify Rule 60(b)(6) relief because Balentine lacks a substantial IATC claim, either because Balentine forfeited his claim by instructing trial counsel not to present mitigation evidence, or because trial counsel's performance was neither deficient nor prejudicial?

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## INTRODUCTION

The Court should reject Balentine's attempt to reopen a judgment denying habeas relief with new evidence of a meritless IATC claim. There is no split worthy of review, no error to correct, and no way to avoid numerous vehicle problems.

## STATEMENT

**1.** In the early morning of January 21, 1998, Balentine armed himself with a pistol and walked several miles to the Amarillo home he used to share with his ex-girlfriend, Misty Caylor. Once inside, Balentine killed three sleeping teenagers—Misty's 17-year-old brother, Mark Caylor (who had previously threatened Balentine because of his treatment of Misty), and two 15-year-old boys, Kai Geyer and Steven Brady Watson. R.14519-525.[1]

[1] *R.*_ represents the Fifth Circuit record on appeal.

Balentine shot each victim in the head. R.13777, 13972-75, 14465, 14525. Balentine fled Amarillo and was later arrested in Houston where he confessed to the murders. R.14472, 14490.

At trial, the State played the tape-recording of Balentine's confession. R.14511-42. In it, Balentine recounted walking five or six miles from his residence to Misty's house. R.14519-21. Upon entering, "the gun jammed, so [Balentine] had to go back outside and shoot it in the alley." R.14523-24. Balentine then reentered the house, where he "shot Mark [Caylor] in the head and shot the other two in the head." R.14524-25. Balentine did not know the two other boys. R.14541-42.

The jury convicted Balentine of capital murder. R.9401.

**2.** In light of the cold, calculated triple murder, Balentine's counsel faced a daunting task at sentencing. Yet these crimes reflected only a fraction of Balentine's violent criminal behavior. Rosa Miller provided particularly compelling testimony about a night in November 1996, when Balentine broke into her home and kidnaped her. R.15009-37. As Miller tried to leave, a man grabbed her by the throat and threatened to cut her. R.15017-19. When the man forced her into her car, she recognized her attacker as Balentine, who had worked at her workplace. R.15010-11, 15020-21. Balentine drove off with Miller. R.15020-26. Miller saw that Balentine had a box cutter, and when he told her he would cut her, she believed him. R.15026. Balentine told her he was going to put her in the trunk or tie her up. R.15030. Miller escaped when Balentine stopped for cigarettes. R.15034-37. Throughout the ordeal, Miller thought Balentine was going to tie her up, rape her, and kill her. R.15037.

The State also showed that Balentine was found delinquent by a juvenile court in 1985 for having burglarized a high school JROTC building and stolen several rifles. R.14985-86; R.15087. The jury learned that Balentine was also arrested at a Wal-Mart in December

1986 after attempting to steal a large quantity of firearms. R.15000-03. Balentine was sentenced to five years' imprisonment for burglary and attempted theft. R.15099. Balentine was also convicted of robbery in November 1989 and received a five-year sentence. R.15098.

Finally, while awaiting transfer on the capital-murder charge, Balentine struck one sheriff's deputy and knocked another into a wall with enough force to require medical attention. R.15043-48. Several deputies were needed to restrain Balentine, who kept resisting, kicking, and throwing punches. R.15047.

At the close of the State's case, the defense informed the court they had "about four or five, maybe six" witnesses they planned to call; however, after a recess, the defense rested after presenting no witnesses. R.15049-52. The jury sentenced Balentine to death. R.9836.

**3.** Balentine challenged his conviction and sentence in state court. The CCA affirmed Balentine's conviction and sentence on direct appeal. *Balentine v. State*, 71 S.W.3d 763, 774 (Tex. Crim. App. 2002). Balentine's state-habeas application raised twenty-one grounds for relief, including that his attorney provided ineffective assistance of counsel for failing adequately to investigate and present mitigation evidence. R.11774-877. Adopting the trial court's findings and conclusions, the CCA rejected the merits and denied relief. *Ex parte Balentine*, No. WR-54,071-01 (Tex. Crim. App. Dec. 4, 2002).

**4.** Balentine, represented by new counsel, sought habeas relief in federal court. Balentine again challenged his trial counsel's preparation for sentencing but identified additional avenues he claimed his trial counsel should have explored. Balentine argued that trial counsel should have done more to investigate mitigating evidence and to have Balentine evaluated by mental-health experts based on a history of head injuries. R.256-429, 430-593.

The district court denied habeas relief, rejecting Balentine's punishment-phase IATC claim as procedurally defaulted. *Balentine v. Quarterman*, No. 2:03-CV-00039, 2008 WL 862992, at *22 (N.D. Tex. Mar. 31, 2008). The Fifth Circuit affirmed the denial of relief. *Balentine v. Quarterman*, 324 F. App'x 304, 305-07 (5th Cir. 2009) (per curiam).

In 2012, Balentine filed a Rule 60(b) motion in district court, urging that *Martinez* excused the default of his IATC claim. ROA.1468, 1473. The district court denied that motion. *Balentine v. Thaler*, No. 2:03-CV-039-J, 2012 WL 3263908, at *4 (N.D. Tex. Aug. 10, 2012). Again, the Fifth Circuit affirmed that ruling on appeal. *Balentine v. Thaler*, No. 12-70023, Slip op. at 6 (5th Cir. Aug. 17, 2012) (per curiam). This Court, however, granted Balentine's petition for writ of certiorari and remanded the case for further consideration in light of *Trevino v. Thaler*, 569 U.S. 413 (2013), which made *Martinez* applicable in Texas. *Balentine v. Thaler*, 569 U.S. 1014 (2013). The Fifth Circuit then remanded the case to the district court to "conduct further proceedings consistent with the Supreme Court's ruling in *Trevino*." *Balentine v. Stephens*, 553 F. App'x 424, 425 (5th Cir. 2014) (per curiam).

The district court, acting through a magistrate judge, held an evidentiary hearing "for the purpose of examining the exception to procedural bar," which included evidence relating to the merits of Balentine's underlying IATC claim. *Balentine v. Stephens*, No. 2:03-CV-00039, 2016 WL 1322435, at *4 (N.D. Tex. Apr. 1, 2016). In addition to calling witnesses to establish what additional mitigation evidence Balentine contended could have been developed, Balentine presented testimony from his second-chair trial counsel, his trial mitigation investigator, and his state-habeas lawyer. Balentine, however, did not testify. After the hearing, the magistrate recommended that Rule 60(b) relief be denied, and the district

court adopted that recommendation. *Balentine v. Davis*, No. 2:03-CV-00039, 2018 WL 2298987, at *1 (N.D. Tex. May 21, 2018).

**5.** Balentine appealed, and, after granting a COA, a Fifth Circuit panel affirmed the denial of Rule 60(b) relief. Pet. App. 2a.

## REASONS FOR DENYING THE PETITION

### I. No Conflict of Authority Warrants Review.

The court below held that "[i]f a defendant instructs his attorney not to present mitigation evidence, the failure to present this evidence does not give rise to a *Strickland* claim." *Id*. at 11a (quoting *Shore v. Davis*, 845 F.3d 627, 633 (5th Cir. 2017) (per curiam)). *Shore* explained that *Schriro v. Landrigan*, 550 U.S. 465 (2007), "bars the defendant from raising a *Strickland* claim based on failure to investigate mitigation evidence" when he instructs counsel not to investigate or present mitigation evidence. *Shore*, 845 F.3d at 633. *Shore* also explained that this Court "has never imposed" a requirement that such instructions be knowingly and intelligently made. *Id.* at 632. And per *Teague v. Lane*, 489 U.S. 288 (1989), such a novel rule cannot disturb a state conviction on collateral review. *Id.*

Balentine misunderstands *Landrigan* and his attempt to cast the decision below as an outlier falls short. Moreover, there is no need to clarify *Landrigan* and, in any event, no conflict that could help Balentine.

#### A. Balentine misunderstands *Schriro v. Landrigan*.

Balentine's argument reflects a misunderstanding of *Landrigan*. In that case, the state court of appeals had confronted the fact that Landrigan "instructed his counsel not to offer any mitigating evidence." 550 U.S. at 475. As this Court explained, "[i]f Landrigan issued such an instruction, counsel's failure to investigate further could not have been prejudicial

under *Strickland*." *Id.* Because the record "plainly indicate[d] that Landrigan informed his counsel not to present any mitigating evidence," the state court "reasonably determined that Landrigan instructed his attorney not to bring any mitigation to the attention of the sentencing court." *Id.* at 476-77 (cleaned up). Landrigan's "established recalcitrance" meant that Landrigan could not show prejudice. *Id.* at 477.

The thrust of Balentine's argument is that his record "established" no such "recalcitrance" and therefore raises the question of whether his instructions must be knowing and informed. *Id.* But he misunderstands the issue. Balentine wanted a death sentence, not the life sentence that a hypothetical mitigation case might have yielded. *See* Pet. App. 16a. Balentine's trial attorneys testified in federal court that their strategy was to make the guilt phase of the trial so difficult for the State that they could secure a plea offer for life imprisonment. *Id.* at 11a. The State made such an offer. *Id.* But Balentine rejected it, explaining to his attorney that he feared the constant threat of reprisals and did not wish to "spend [his] life until [he was] fifty or sixty years old in the penitentiary." *Id.* He told his lawyer he wanted the death penalty and that counsel should not call mitigation witnesses; counsel recalled telling co-counsel that he would do "the same thing" in Balentine's shoes. *Id.* at 11a-12a. Balentine reiterated his wishes to his counsel at the end of the State's punishment case. *Id.* at 12a. Necessarily, any evidence counsel could have found through further investigation would not have changed Balentine's mind. *See Landrigan*, 550 U.S. at 475.

Balentine argued below that his decision to forego mitigation was, in fact, based on counsel's "fatalistic judgment" that the existing mitigation case "would not be enough to obtain a life sentence" and on his counsel's "lack of preparation." Pet. App. 12a-13a. But the district court found that there was no evidence of such hope; the evidence supported the

conclusion that Balentine preferred the death penalty. *Id.* at 13a-14a. Once Balentine's confession was admitted, he effectively faced two outcomes—life imprisonment or a death sentence. *Id.* Balentine cannot show clear error in finding that he instructed counsel not to present mitigation evidence because he preferred the death penalty. *Id.* at 14a-15a. Balentine's actions thus yield the same result as in *Landrigan*.

### B. The alleged circuit split does not warrant review.

Balentine argues that the decision below departs from the decisions of other courts of appeals concerning whether a mitigation instruction must be knowing and informed. In a general sense, some courts have said that such instructions must be knowing and informed. But this Court has consistently held that constitutional rights must not be viewed at a "high [a] level of generality." *Nevada v. Jackson*, 569 U.S. 505, 512 (2013) (per curiam). At the level of specificity relevant to this case, no split warrants review because courts would agree that waiving mitigation like Balentine did forfeits an IATC claim. *Contra* Pet. 16-22.

**Ninth Circuit**. Balentine cites (at 18-19) two Ninth Circuit cases: *Douglas v. Woodford*, 316 F.3d 1079 (9th Cir. 2003), and *Sanders v. Davis*, 23 F.4th 966 (9th Cir. 2022). But neither supports Balentine's argument.

*Douglas*, which predates *Landrigan*, is distinguishable. In *Douglas*, the Ninth Circuit granted habeas relief where the petitioner refused to cooperate in a mitigation investigation. 316 F.3d at 1087-88. The Ninth Circuit noted that it required, under *pre-Landrigan* cases, an "informed and knowing" decision to waive mitigation. *Id.* at 1089. But unlike here, counsel in *Douglas* presented mitigation evidence *against* his client's wishes. *Id.* "[I]t was not the client's desires which impeded [counsel's] efforts, but rather, [counsel's] failure to uncover the additional evidence that creates the problem." *Id*. The court suggested that the

petitioner might have changed his mind if presented with a more thorough investigation because the record did not prove otherwise. *Id.* Here, however, Balentine's opposition to mitigation evidence was based on his concerns about lengthy imprisonment in the general prison population, Pet. App. 49a, not lack of faith in mitigation evidence. *Id.* at 11a-15a.

*Sanders* merely echoes *Douglas*: absent proof that a fuller investigation would not have changed the defendant's mind, a reviewing court asked whether it could have. The *Sanders* court found no clear error in the district court's holding that the petitioner had threatened to obstruct the penalty phase. 23 F.4th at 981. But the court explained that it would "look to whether '[the p]etitioner would have changed his directions to counsel' had counsel adequately fulfilled his duties in connection with the penalty phase." *Id.* at 982-83. Relief was deemed appropriate because the record did not reflect that the petitioner fully understood the penalty phase (for example, he wished for neither a death sentence nor a life sentence), let alone the mitigation evidence his counsel failed to uncover. *Id.* at 988 & n.20, 991.

This case poses no such scenario. Indeed, the district court found trial counsel's testimony that "Balentine fully understood the situation at trial and was capable of making [the waiver]," was "credible, was not impeached . . . , and was largely confirmed by [the] investigator." Pet. App. 50a. Balentine never expressed anything casting his understanding of the punishment phase into doubt. So Balentine shows no conflict with Ninth Circuit precedent.

**Eleventh Circuit.** Equally unpersuasive is Balentine's reliance (at 18-19) on Eleventh Circuit precedent cited favorably in *Sanders*, 23 F.4th at 981 (citing *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1360 (11th Cir. 2009)). In *Cummings*, the petitioner had consistently refused to allow his trial counsel to investigate mitigation evidence because he maintained his innocence, refused to "beg" for his life, and preferred death to life in prison.

588 F.3d at 1336-38, 1343, 1361. The trial court explained mitigation, provided a psychological examination to ensure the petitioner's decision was competent, and decided it would instruct counsel to call two of the petitioner's sisters—a decision the petitioner begrudgingly accepted. *Id.* at 1336-39, 1361, 1366. The state courts found neither deficiency nor prejudice. *Id.* at 1350, 1352-54. The Eleventh Circuit upheld that decision as reasonable under AEDPA, particularly in the light of the petitioner's unwillingness to permit mitigation investigation or presentation. *Id.* at 1360-61, 1365-69. Because Balentine wanted a death sentence, he likewise cannot base a complaint on the availability of mitigation evidence. *See* Pet. App. 11a-15a.

**Third Circuit**. Balentine's reliance (at 18-20) on *Blystone v. Horn*, 664 F.3d 397 (3d Cir. 2011), likewise fails. In *Blystone*, the court of appeals conducted an AEDPA-deferential review of the state record and merely reviewed the state court's judgment for reasonableness under AEDPA. *Id.* at 416-17. The trial record demonstrated that the petitioner waived only *certain* mitigating evidence, specifically the petitioner's own testimony and the testimony of his parents. *Id.* at 425. Although his counsel told the state post-conviction court that the petitioner preferred the death penalty, there was nothing to corroborate that statement. *Id.* at 405, 426. Thus, the Third Circuit concluded that "the state court's determination that [the petitioner] waived the presentation of *all* mitigating evidence, regardless of form, was objectively unreasonable in light of the evidence before it." *Id.*

In contrast, Balentine's federal evidentiary hearing forecloses comparison to *Blystone*. Here, the Fifth Circuit was bound to analyze *Strickland* in light of unrebutted findings that

Balentine preferred the death penalty for sound reasons independent of mitigating evidence and with a full understanding of the penalty phase. In short, Balentine's case reflects a different waiver than *Blystone* on findings Balentine cannot show were clearly erroneous.

**Tenth Circuit**. Balentine's Tenth Circuit precedent (at 19) reveals no conflict either. *See Young v. Sirmons*, 551 F.3d 942 (10th Cir. 2008); *Battenfield v. Gibson*, 236 F.3d 1215 (10th Cir. 2001). *Battenfield*, which pre-dates *Landrigan*, merely applied ADEPA deference to a record that bore indicia that the petitioner was not aware of the importance of mitigation. 236 F.3d at 1229-30 (noting affidavit that counsel "never explained to him the 'importance of mitigation or what mitigation actually was'" (cleaned up)). The record also suggested the waiver extended only to his own testimony and that of his parents. *Id.* at 1230-31. These limitations were confirmed by the petitioner's colloquy with the trial judge. *Id.* The petitioner's waiver was thus insufficient because he did not understand "the nature or purpose of mitigating evidence." *Id.* at 1226. Balentine, on the other hand, "fully understood the situation at trial and was capable of making [the waiver]," Pet. App. 50a, and the reasoning for his choice confirms that his waiver extended to all possible mitigation evidence, *see id.* at 48a-50a. Balentine disputes the outcome, not the framework.

*Young* post-dates *Landrigan* but is likewise distinguishable. There, the court reviewed the petitioner's claim de novo, but without a federal evidentiary hearing. *Young*, 551 F.3d at 948-49, 955-96. Reviewing the sparse state court record and applying AEDPA deference, the Tenth Circuit explained that the evidence before it proscribed a conclusion that the petitioner would have waived the right to present *any* mitigation evidence had his counsel conducted a more thorough investigation. *Id.* at 959. Indeed, the petitioner did not "offer any explanation for his decision to forego mitigation testimony." *Id.* at 947. Moreover, the

state court had found that the petitioner did not waive presentation of mitigation *at all*. *Id.* at 953. Rather, the petitioner opted to present his mitigation evidence by a stipulation he entered with the prosecution. *Id.* at 947. The Tenth Circuit agreed that the petitioner made no waiver. *Id.* at 959.

Thus, the Tenth Circuit's conclusion rested not only on the deficiency of any purported waiver, but on the fact that the petitioner opted to put forth *some* mitigation evidence and that it was impossible to know whether he would have agreed to put on *further* evidence had his counsel performed to the *Strickland* standard. *Id.* There is no such deficiency here: Balentine did not assent to put on any mitigation evidence, by stipulation or otherwise.

**Sixth Circuit**. *Owens v. Guida*, 549 F.3d 399 (6th Cir. 2008), is likewise inapposite. In *Owens*, the defense put on *some* mitigation evidence. *Id.* at 403. But the petitioner "[h]amstrung" counsel as to the "best" evidence. *Id.* at 406. Specifically, she refused to (1) testify, (2) cooperate in mental health evaluations, or (3) permit her counsel to interview her family members or call them as witnesses. *Id.* at 406-07. The petitioner could not "claim that her attorneys were 'ineffective' for taking her advice." *Id.* at 407. The court excluded those categories of evidence in its prejudice analysis and, in evaluating the remaining mitigation evidence, concluded that the petitioner suffered no prejudice. *Id.* at 413. *Owens* can thus be squared with the foregoing authority.

Even if there were some tension among applications of *Landrigan*, this Court's review is unwarranted. Balentine relies on numerous, distinguishable pre-*Landrigan* cases to which AEDPA deference almost universally applied. Those courts were tasked only with deciding whether the state court's understanding of this Court's precedent was *reasonable*.

*See* 28 U.S.C. § 2254(d)(1). The state courts' leeway to interpret this Court's precedent undercuts Balentine's argument. At a minimum, further percolation would be appropriate.

### C. The decision below does not conflict with this Court's precedent.

Balentine also urges this Court to grant certiorari to "decide whether a defendant's waiver of mitigation must be knowing and informed." Pet. 23. Specifically, Balentine points to a supposed "dichotomy" between *Strickland* and *Landrigan*. *Id.* But two observations foreclose the asserted conflict. *Cf.* S. Ct. R. 10.

*First*, *Strickland* and *Landrigan* pose no tension. *Contra* Pet. 23. *Strickland* explained that "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant." 466 U.S. at 691. The "informed strategic choices" language tracks *Landrigan*'s statement that the Court has "never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence." 550 U.S. at 479. When no further investigation could persuade a defendant to permit mitigation—for example, when his reasons are not tethered to the strength or weakness of the evidence—there is necessarily a "*Strickland*-informed" choice. *Landrigan* said nothing to upset *Strickland*—indeed, this understanding is borne out in the cases Balentine cites. The lower courts are not confused about how *Landrigan* and *Strickland* interact.

*Second*, even if Balentine were correct (and he is not), a desire not to introduce mitigation evidence need not be informed and knowing. The Constitution permits a capital defendant to waive presentation of mitigation evidence at sentencing. *E.g.*, *Blystone v. Pennsylvania*, 494 U.S. 299, 306 n.4 (1990). There is no constitutional requirement to present mitigating evidence in every capital case. *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). "Trial management is the lawyer's province." *McCoy v. Louisiana*, 138 S. Ct. 1500, 1508 (2018).

Trial counsel makes choices in developing and presenting evidence. *See Harrington v. Richter*, 562 U.S. 86, 110 (2011). This Court has not included those choices among the small set of decisions "reserved for the client." *McCoy*, 138 S. Ct. at 1508. Unlike the "waiver of the right to counsel," which "must be knowing and intelligent," this Court has "never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence." *Landrigan*, 550 U.S. at 479 (citing *Iowa v. Tovar*, 541 U.S. 77, 88 (2004)). It follows that an expression of waiver forecloses a constitutional complaint.

### D. No conflict of authority could help Balentine.

#### 1. The conflict alleged is not fairly presented.

Balentine's argument is not fairly presented. Balentine states (at 21) that his "actions were nothing like those of the defendant in *Landrigan*." At a minimum, Balentine's position makes this case an exceedingly poor vehicle to consider "the way in which the lower courts are applying *Landrigan*." Pet. 22. The "factual distinctions between this case and *Landrigan*" indicate that even if resolving a difference of authority might provide "guidance" in some instances of waiver, it would not do so here. *Id.* The Fifth Circuit correctly rejected Balentine's attempts to limit his instruction. Pet. App. 11a-15a. Balentine "instructed counsel to not call the available punishment witnesses because he did not want a life sentence." *Id.* at 14a. This finding aligned with the testimony presented at the evidentiary hearing and the record. *Id.* Despite Balentine's competing view of this evidence, finding "that Balentine preferred a death sentence over a sentence of life in prison was not clearly erroneous." *Id.* (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400-01 (1990)).

Indeed, the record forecloses Balentine's attempt to sidestep clear-error review and recast his waiver as limited. Balentine states that he "deferred to counsel's judgment and

agreed that the available witnesses would not be called." Pet. 20. According to Balentine, his "decision was guided by the information counsel gave him and limited to the available witnesses." *Id.* Balentine states that the district court "found" that he "had instructed counsel not to call the *available* witnesses at punishment phase," and his "instructions to counsel were confined to the limited residual doubt witnesses that counsel was prepared to present at punishment phase." *Id.* Not so.

Based on Balentine's lawyer's testimony at the federal evidentiary hearing, the district court found that "although defense counsel had trial witnesses available to testify at the punishment stage, Balentine told them not to call *any* punishment witnesses because he did not want a life sentence." Pet. App. 12a (emphasis added). The evidence did not support Balentine's supposed "acquiescence to the fatalistic judgment of his counsel" concerning the punishment witnesses. *Id.* The only realistic trial outcomes were "life in prison or the death penalty," there was no evidence that Balentine actually believed he might be acquitted, and Balentine had no other plausible reason for rejecting the plea deal. *Id.* at 13a-14a; R.3011. Indeed, when asked if Balentine was merely declining to "take the life sentence and give up [his] right to finish the trial," trial counsel responded, "No, ma'am. He said, 'I want the death penalty; I don't want a life sentence.'" R.6716. Balentine was undisputedly competent to make that decision. R.6700-01.

Moreover, Balentine's waiver *was* informed and knowingly made. *Contra* Pet. 23. Even after being found guilty, Balentine reiterated he did not want his lawyer to present mitigation witnesses: "[d]efense counsel had trial witnesses available to testify at the punishment stage, but Balentine told them to not call any punishment witnesses." R.3003. Trial counsel testified that Balentine "wanted the death penalty." R.6697. Balentine was "not necessarily

expressing a desire to be immediately executed" but rather making the reasonable comparison of a death sentence to "the anticipated quality of life he would have in prison with a life sentence" in general population, where Balentine faced "constant fear of reprisals." Pet. App. 14a. Balentine's expressed preference for death row over life imprisonment and his corresponding instructions to counsel similarly demonstrate that he knew forgoing mitigation witnesses would likely yield a death sentence.

Balentine suggests (at 23-24) he waived mitigation only because he did not understand what evidence was available. But his instruction was not "a result of his counsel's pessimism and lack of preparation with respect to mitigation witnesses." Pet. App. 13a. Counsel "talked to [Balentine] from the very first, that with his record and everything else, there's a very good chance he would get the death penalty, if [they] couldn't get him off at the guilt or innocence" phase. R.6647. Counsel advised Balentine that his only hope was to take the State's life offer. R.6730-31. Counsel stated that when the State offered a life sentence, he could not convince Balentine to accept. ROA.6610, 6697-98. Per trial counsel, Balentine said,

> "With my background and the fact that I killed three Aryan Nation kids, they're going to try to stick a shiv in me every day." And he basically told me that he would rather be on death row where he wouldn't have to worry about that, and he said something to the effect of, "Who in the hell wants to spend their life until they're fifty or sixty years old in the penitentiary?" And he said, "I want the death penalty."

R.6698-99. During this same conversation, Balentine instructed counsel not to call any punishment witnesses. R.6696-97. Counsel again approached the subject of mitigation with Balentine after the conclusion of the State's punishment case to see whether Balentine changed his mind. R.6696-97, 6713-14. Balentine stated that he did not want to put on any more witnesses. Pet. App. 12a. Balentine cannot argue that he was misinformed.

Balentine argued that his lawyer's testimony was not credible because (1) counsel argued for a life sentence despite Balentine's instruction, (2) counsel failed to make a record of the instruction, (3) counsel did not discuss the instruction with any other attorney or investigator who could corroborate it, and (4) counsel made no notes of the instruction. *Id.* But the Fifth Circuit rejected these arguments, concluding that the district court's factual findings, which credited counsel's testimony, were not clearly erroneous. *Id.* at 13a-14a.

First, counsel's actions were not inconsistent with Balentine's waiver. Balentine's counsel was personally opposed to the death penalty and believed that he could make an argument of his own without consulting Balentine or violating his instructions. *Id.* at 13a.[2]

Second, it made no difference whether Balentine's instruction was stated on the record. The district court found that counsel had immediately reported Balentine's preference for the death penalty to co-counsel, and the investigator working on the case similarly testified that Balentine had instructed counsel not to call available witnesses at the punishment stage. Pet. App. 13a. The lack of confirmatory notes "does not prove that no such instructions were given." *Id.* Rather, the evidence confirmed that "such instructions were made and followed," and Balentine "has not shown the absence of notes disproves [his attorney's] testimony." *Id.* Moreover, since a record of such waiver has never been required, the absence of a more detailed colloquy is unremarkable. R.3007-08.

[2] That trial counsel gave Balentine an opportunity to change his mind about mitigation witnesses proves nothing because Balentine did not change his mind. R.3004-05. Likewise, after the testimony of a state punishment witness, Balentine seemed "upset" that counsel was not cross-examining the witness. R.15038. But this reaction does not contradict waiver: as Balentine stated on the record, he did not want questions asked of this witness. R.15040.

Balentine's post-hoc justifications of his instructions to counsel were "simply not supported by the evidence." Pet. App. 16a. Whether "additional mitigation evidence would have made it more likely that he would receive a life sentence" was "irrelevant to the reasoning he expressed to his counsel. He said that he wanted a death sentence." *Id.* Balentine's "reasoning was based on his expectations of quality of life in prison for a life sentence versus a death sentence, not on what he perceived as his likelihood of receiving a life sentence." *Id.* Balentine identifies no split on these fact-bound issues.

**2. A change in the law cannot benefit a federal habeas petitioner seeking to reopen a final judgment denying habeas relief.**

Balentine cannot benefit from the rule he seeks. The court below explained—and Balentine does not contest—that a "change in decisional law after entry of judgment does not constitute [extraordinary] circumstances and is not alone grounds for relief from a final judgment." *Id.* at 8a (citation omitted). Balentine identifies no split on Rule 60(b).

Moreover, rules against retroactivity preclude Balentine's argument. *Id.* at 15a. Under *Teague*, "the imposition of an informed and knowing requirement would impermissibly create and apply a new rule of constitutional law to upset a state conviction on collateral review." *Id.* Balentine requires this Court to hold, for the first time, that mitigation waivers must be knowing and informed. But this Court has "never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence" in mitigation of a death sentence. *Id.* at 16a. This independently bars relief, *see Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam), because it was not "compelled by existing precedent" when Balentine's conviction became final, *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997).

Similarly, this Court has never imposed a requirement that the waiver of the right to present mitigation evidence be made knowingly and on the record. *Landrigan*, 550 U.S. at 479. Imposing any such rule here would likewise violate *Teague*. These new rules cannot apply retroactively. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021).

## II. The Fifth Circuit Correctly Affirmed the Denial of Rule 60(b) Relief.

The court below properly affirmed the denial of Rule 60(b) relief because no exceptional circumstances justify reopening the habeas judgment. The court below held that Balentine's IATC claim was procedurally defaulted unless he could show cause and prejudice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Accordingly, Balentine had to show that his IATC claim has some merit (prejudice) and that state habeas counsel performed ineffectively (cause). *Buck v. Davis*, 137 S. Ct. 759, 779-80 (2017). Here, the lower courts correctly determined that Balentine's IATC claim lacks merit.

### A. The Fifth Circuit properly followed this Court's Rule 60(b) precedent.

The Fifth Circuit correctly explained that the "extraordinary circumstances" that might justify reopening a judgment "will rarely occur in the habeas context." Pet. App. 8a (quoting *Gonzales v. Crosby*, 545 U.S. 524, 535 (2005)). The court reviewed the denial of rule 60(b) relief for abuse of discretion. *Id.* The court affirmed the denial of Balentine's Rule 60(b)(6) motion because his IATC claim "has no merit and thus does not come within the *Martinez* exception to procedural bar." *Id.* at 10a.

The Fifth Circuit thus properly followed this Court's precedent concerning whether it was appropriate to reopen a final judgment. In general, circumstances justifying Rule 60(b)(6) relief encompass "a wide range of factors." *Buck*, 137 S. Ct. at 777-78. But a "a good claim or defense" is a precondition of Rule 60(b)(6) relief. *Id.* at 780. Because Balentine's

punishment-phase claim is meritless, it is necessarily insubstantial under *Martinez*. Because Balentine's claim remains "unreviewable," the Fifth Circuit correctly recognized that "Rule 60(b)(6) relief would be inappropriate." *Id.*

### B. The court rightly held that Balentine has no substantial IATC claim.

The court below correctly determined that Balentine cannot use *Martinez* to establish cause and prejudice. *Martinez* requires proof that state-habeas counsel was ineffective under *Strickland* and an underlying IATC claim that is "substantial." 566 U.S. at 14. Because Balentine's IATC claim lacks merit, *Martinez* could not excuse procedural default.

#### 1. Balentine forfeited his IATC claim.

The Fifth Circuit correctly determined that Balentine could not blame trial counsel for following his instructions. "Balentine instructed counsel to not call the available punishment witnesses because he did not want a life sentence, and this forecloses his complaint against trial counsel failing to present mitigation witnesses at the punishment stage of his trial." R.3012. Balentine's IATC claim thus "has no merit and does not come within the *Martinez* exception to procedural bar." R.3021. The Fifth Circuit affirmed because Balentine "himself instructed his attorneys *not* to present mitigation evidence," as he "did not want a life sentence." Pet. App. 11a, 14a. This finding foreclosed Balentine's complaint against trial counsel for "failing to adequately investigate mitigation evidence" under this Court's precedent. *Id.* at 14a-15a (citing *Landrigan*, 550 U.S. at 475-76). A defendant cannot block his lawyer's efforts and call the resulting performance unconstitutional. *Landrigan*, 550 U.S. at 475-76.

As the district court explained, the "major difference" between the investigations "was the expert witnesses and mental health experts." R.3018. But Balentine's instruction "effectively prevented this Court from knowing what that evidence would have been at trial,

and how any additional investigation or witnesses may have improved the defense." R.3017. Balentine can only speculate that new witnesses would have fared better than the witnesses he prohibited from testifying, but such speculation cannot prevail under *Strickland*. *See Richter*, 562 U.S. at 112.

**2. Alternatively, Balentine's IATC claim is meritless.**

The Fifth Circuit also correctly determined, in the alternative, that Balentine's new evidence does not yield a reasonable probability of a different sentencing result. Balentine had to prove that (1) counsel performed deficiently at the punishment phase, and (2) the deficiency prejudiced the petitioner's defense. *Wiggins*, 539 U.S. at 521 (citing *Strickland*, 466 U.S. at 687). To determine prejudice, a court must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Id.* at 534. Once reweighed, the court must determine whether the petitioner has shown that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694). Even if Balentine had not forfeited his IATC complaint, Balentine established neither the deficiency nor prejudice necessary to prevail under *Strickland*. Pet. App. 16a-21a.

**Deficiency**. To prove deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, at 466 U.S. at 688. The "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Id.* at 691. Applying that standard, the court of appeals correctly explained that Balentine fell short of satisfying *Strickland*'s deficiency prong. Pet. App. 18a. "*Strickland* requires that '[j]udicial scrutiny of counsel's performance must be highly deferential.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). And the

Fifth Circuit confirmed that Balentine's argument "relies upon precisely the sort of judicial second-guessing that *Strickland* was intended to avoid." *Id.*

Balentine does not dispute that there was a mitigation investigation. The court below detailed the pretrial mitigation investigation efforts, which the district court found reasonable. *Id.* at 17a. Indeed, of the available punishment-phase witnesses, "three or four of them" could have testified about Balentine's family history but Balentine did not let them. R.3017 nn.7-8, 7276-87. "Balentine's arguments—that trial counsel did not begin the investigation soon enough, that they did not try hard enough to gather records or get his mother to testify, that they did not find enough witnesses—come down to a matter of degrees." Pet. App. 18a. Because "[j]udicial scrutiny of counsel's performance must be highly deferential," *Strickland* foreclosed Balentine's reliance on judicial second-guessing. *Id.*

Moreover, trial counsel recounted reasonable strategic concerns (R.6689-95, 6722-28) in explaining "the *scope* of counsel's investigation into petitioner's background." *Wiggins*, 539 U.S. at 528. The trial investigator had developed "what is generally considered to be mitigation evidence, such as Balentine's poverty, racial discrimination, disadvantaged adolescence, unstable family, lack of parental stability, and juvenile issues with the criminal justice system." R.3018. Counsel knew Balentine had a difficult upbringing but concluded that "[n]one of it seemed like anything that [he] could . . . actually use to persuade a jury, considering his background and the violence and the three deaths in this case." R.6690. Balentine contends incorrectly (at 6) that counsel "took no steps" to investigate alleged brain damage. Counsel's trial investigator "tried but could not identify any doctor in the area willing to administer an MRI to Balentine." R.3014.

Finally, Balentine concedes that trial counsel chose to focus on obtaining a life-sentence offer from the State. *See* Pet. 6. This strategy was *successful*; it failed to avoid a death sentence only because Balentine rejected the offer. At sentencing, trial counsel made a reasonable jury argument consistent with Balentine's instruction not to present mitigation witnesses. *See* R.6715-16, 15065-69. The argument focused on residual doubt, which courts have described as "the most powerful 'mitigating fact.'" *E.g.*, *Williams v. Woodford*, 384 F.3d 567, 624 (9th Cir. 2004) (citation omitted). Even if there was some hypothetical alternative path to a life sentence, counsel's performance was not objectively unreasonable.

Contrary to Balentine's assertion (at 27-28), the Fifth Circuit's decision comports with this Court's precedent, including *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (per curiam). Counsel has a duty to investigate a capital defendant's background. *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam). But counsel may make "reasonable decision[s] that make[] particular investigations unnecessary." *Andrus*, 140 S. Ct. at 1881 (quoting *Wiggins*, 539 U.S. at 521)). Such decisions must be "assessed for reasonableness . . . applying a heavy measure of deference to counsel's judgments." *Id.* (quoting *Wiggins*, 539 U.S. at 521-22). In *Andrus*, the Court concluded that counsel performed deficiently under the unique facts of that case. *See id.* at 1882-85. Not only did counsel conduct a paltry investigation, his mitigation evidence also backfired based on counsel's failure to investigate the State's case. *Id.*

This case is no such extreme example. *Contra* Pet. 28. Balentine complains that the Fifth Circuit's analysis of his counsel's alleged failings as "directly contrary to" *Andrus*. *Id.* 27. But *Andrus* did not reference, let alone reject, an analysis of the "matter of degree" to which counsel performed reasonably. *Id.* Because the Constitution requires "reasonable

competence, not perfect advocacy," *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam), *Strickland* is necessarily a matter of the degree of counsel's choices and actions.

**Prejudice**. The Fifth Circuit also correctly evaluated prejudice. The new evidence, weighed against the entirety of the aggravating evidence, created no "substantial" "likelihood of a different result." *Richter*, 562 U.S. at 111-12. In assessing prejudice, courts must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. The "likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. Balentine's mitigation evidence does not outweigh the aggravating evidence. *See id.*; *Wiggins*, 539 U.S. at 534. Balentine's evidence is not so compelling that it would tip the balance and establish a "substantial" likelihood of a different result. *Richter*, 562 U.S. at 112.

*First*, the Fifth Circuit followed the analysis that Balentine advances. *Contra* Pet. 28-31. The decision below echoes the familiar prejudice inquiry—"whether there is a reasonable probability that at least one juror would have struck a different balance." *Andrus*, 140 S. Ct. at 1886. The Fifth Circuit "reweigh[ed] the evidence in aggravation against the totality of available mitigating evidence." Pet. App. 19a (quoting *Wiggins*, 539 U.S. at 534). Then, the court explained that there is no "'reasonable probability' that, had the jury heard the mitigation evidence, 'it would not have imposed the death penalty.'" *Id.* at 20a. The Fifth Circuit stated that "Balentine could not show the requisite prejudice under *Strickland*." *Id.* at 19a. "[I]n assessing prejudice, [courts] reweigh the evidence in aggravation against the totality of available mitigating evidence." *Id.* (quoting *Wiggins*, 539 U.S. at 534). There was "no 'reasonable probability' that, had the jury heard [Balentine's] mitigation evidence, 'it

would not have imposed the death penalty.'" *Id.* at 20a (citation omitted). Moreover, Balentine "failed to show prejudice because his 'weak evidence of mental illness' paled in comparison to the State's 'strong evidence of future dangerousness.'" *Id.* at 21a (quoting *Smith v. Davis*, 927 F.3d 313, 338-39 (5th Cir. 2019)). *Smith*, in turn, stated that, under such circumstances, there is no "'reasonable probability that at least one juror would have struck a different balance' among mitigating and aggravating factors that would have resulted in a sentence of life instead of death." 927 F.3d at 338-39 (quoting *Wiggins*, 539 U.S. at 537).

Balentine's chief complaint was that subsequent investigation produced testimony of expert witnesses and mental health experts that could have been presented in mitigation. Pet. App. 18a. But the aggravating evidence against Balentine was so overwhelming that it was virtually impossible to establish prejudice when weighing the "totality of available mitigating evidence." *Id.* (quoting *Wiggins*, 539 U.S. at 534). The jury heard Balentine's chilling tape-recorded confession to murdering three teenage boys, "including the calm and calculated way that he prepared for the crime." *Id.* at 19a. Balentine walked five or six miles to the home where the boys slept, entered, and got a drink from the kitchen. *Id.* at 19a-20a. Realizing his gun was jammed, Balentine left, fired a test shot in the alley, and returned to shoot each sleeping boy in the head. *Id.* at 20a. The jury also heard evidence of Balentine's earlier criminal behavior that began when he was a teenager, including particularly compelling testimony from a woman who Balentine had violently kidnapped and threatened to cut unless she stopped screaming. *Id.* And Balentine had already committed violence while incarcerated: he struck two deputies, injuring one badly enough to require medical attention. R.15043-48. Given this "overwhelming aggravating evidence," there was no reasonable probability of avoiding the death penalty. Pet. App. 20a.

*Second*, Balentine's new evidence "could have hurt Balentine as much as it would have helped him." *Id.* at 18a. Although such evidence might indicate that a defendant is not as morally culpable for his behavior, it also might suggest that the defendant, "as a product of his environment, is likely to continue to be dangerous in the future." *Id.* at 19a (citation omitted); *see also* Tex. Code Crim. Proc. art. 37.071 § 2(b)(1) (permitting a jury to impose the death penalty only if it finds unanimously and beyond a reasonable doubt "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"). Balentine could not show any likelihood this evidence would have had the necessary mitigating effect. Pet. App. 19a.

This Court has recognized that evidence can have both aggravating and mitigating effect. *Penry v. Lynaugh*, 492 U.S. 302, 323-24 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). Evidence of mental deficiency and a history of abuse is "a two-edged sword" in that "it may diminish [Balentine's] blameworthiness for [the] crime even as it indicates that there is a probability that he will be dangerous in the future." *Id.* at 324; *accord Abdul-Kabir v. Quarterman*, 550 U.S. 233, 255 (2007). It is not enough that Balentine has developed additional evidence; the question is whether Balentine was "prejudiced because it was not used." R.3015. This Court has expressly noted that the weight of proffered mitigation evidence is reduced if it may "undercut" the petitioner's case. *Cullen v. Pinholster*, 563 U.S. 170, 202 (2011); *id.* at 201 (citing *Atkins*, 536 U.S. at 321 as "recognizing that mitigating evidence can be a 'two-edged sword' that juries might find to show future dangerousness").

Balentine's new mitigation evidence falls into two basic categories: evidence of a traumatic childhood and evidence of mental disorder. But each of these categories can be double-edged. And his history, though tragic, also underscores his propensity for criminal violence. Balentine's own experts make the link between circumstances arguably reducing moral blameworthiness while amplifying future dangerousness. For example, Balentine's psychologist, Dr. Kessner, stated in her affidavit that "[c]hildren exposed to partner violence have an increased likelihood of engaging in violence" and are at "risk for future problems and criminal activity." R.7438-40. Balentine's neuropsychologist, Dr. Martell, noted the "significant risk for neurodevelopmental and behavioral abnormalities" present from Balentine's background. R.7484. And forensic psychologist Dr. Lisak stated that the abuse Balentine experienced "fueled in [him] a longstanding anger." R.8982. The evidence, including Balentine's newly introduced evidence, confirms future dangerousness.

Consider the evidence of Balentine's upbringing. Even though such evidence is typically considered mitigating, this Court recognizes that it can cut both ways. *See Pinholster*, 563 U.S. at 201 ("The new evidence relating to Pinholster's family—their more serious substance abuse, mental illness, and criminal problems—is also by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation." (internal citation omitted)); *Abdul-Kabir*, 550 U.S. at 255 (recognizing that evidence of "mental retardation and childhood abuse" can function as a "two-edged sword," because it "may diminish [a petitioner's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." (quoting *Penry*, 492 U.S. at 324)). In this case, delving into Balentine's background would have highlighted petitioner's criminal

activity, but rather than suggesting an ability to change, Balentine cites no evidence of remorse. *Cf. Williams v. Taylor*, 529 U.S. 362, 398 (2000).

Evidence of mental dysfunction poses similar challenges. *See Penry*, 492 U.S. at 324. The Fifth Circuit has correctly recognized that such evidence is double-edged. *E.g.*, *Druery v. Thaler*, 647 F.3d 535, 541-42 (5th Cir. 2011); *Martinez v. Quarterman*, 481 F.3d 249, 258 (5th Cir. 2007). A rational jury would be justified in finding that any reduction in Balentine's moral culpability was offset or outweighed by the attendant risk of future dangerousness. Balentine cannot demonstrate that evidence of a mental condition would have made the jury substantially likely to return a life sentence. Because Balentine's new mitigating evidence could have just as easily hurt him in the eyes of the jury, his argument is without merit.

The "double-edged" sword analogy is not an "exception" to *Strickland*. *Contra* Pet. 30. Courts must not "unreasonably discount[] the mitigation evidence." *Porter*, 558 U.S. at 42. But considering all possible effects of the totality of evidence is precisely what *Strickland* demands. *See id.* at 41. Consider *Porter*. There, courts gave no weight to evidence of the petitioner's abusive upbringing simply because he was 54 years old at the time of his trial and reduced the value of his traumatic Korean-war service to "inconsequential proportions" because he had been absent without leave on more than one occasion. *Id.* at 37, 43-44. Moreover, the state courts entirely discounted evidence of the petitioner's mental health and brain injuries simply because it did not establish a *statutory* mitigation factor. *Id.* at 42-43. But sentencers must be permitted to and may consider "any relevant mitigating factor," whether or not it rises to the level of establishing a statutory factor. *Id.* at 42. The state courts' analysis thus unreasonably discounted mitigation evidence. In this case, however,

the lower courts did not unreasonably discount evidence. Rather, they evaluated and reweighed all the mitigating evidence and simply found it insufficient to overcome the aggravating evidence.

Balentine's other cases are unavailing. *Rompilla v. Beard* does not help Balentine because this Court did not fault any lower court's prejudice analysis as none had conducted one. 545 U.S. 374, 390 (2005). In *Williams*, the lower court's errors were unrelated to Balentine's complaint about double-edged evidence. 529 U.S. at 396-98. Rather, a state supreme court incorrectly applied *Lockhart v. Fretwell*, 506 U.S. 364 (1993), as modifying *Strickland*, and it erroneously failed to include the mitigation evidence that *was* introduced at trial in its reweighing. *Williams*, 529 U.S. at 397-98. Indeed, this Court noted that "not all of the additional evidence was favorable to [the petitioner]," implicitly recognizing the need for prejudice analysis to account for evidence that cuts both ways. *Id.* at 396.

Contrary to Balentine's contention (at 30), the Fifth Circuit did not "assume[]" that there was "no reasonable probability that even a single juror would credit the mitigating aspects of such evidence." *Strickland* states that the "assessment of prejudice" must *not* "depend on the idiosyncrasies of the particular decisionmaker." 466 U.S. at 695. *Richter* likewise requires more than a the "conceivable" prospect of a favorable juror. 562 U.S. at 112. As the Fifth Circuit held, Balentine's evidence fell short. Pet. App. 20a-21a. And insofar as Balentine relies (at 32) on prejudice cases decided by *state* courts, they establish no principle of *federal* law. *Cf. Johnson v. Williams*, 568 U.S. 289, 305 (2013).

*Third*, contrary to Balentine's suggestion (at 31), the Fifth Circuit did not hold that the nature of the crime precluded a finding of prejudice. Rather, tracking *Strickland*, it reviewed all the evidence, weighing the mitigation evidence against the evidence of the crime

and of aggravating factors. Pet. App. 19a-21a. Notably, the State adduced compelling testimony from Balentine's kidnapping victim, and the Fifth Circuit properly considered the profound impact of that evidence in addition to the brutal, premeditated triple murder. *Id.* at 20a. That reality contrasts with cases that either lacked a comparable criminal history, *e.g.*, *Porter*, 558 U.S. at 31-36, or prejudice analysis, *e.g.*, *Rompilla*, 545 U.S. at 390-93.

Moreover, Balentine's cases largely pre-date *Richter*'s articulation of prejudice. There, the Court explained that "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Richter*, 562 U.S. at 112 (emphasis added). The Fifth Circuit analyzed the competing bodies of evidence and concluded that the aggravating evidence was not overcome by Balentine's proffered mitigation evidence. The court did not hold that the "nature of the crime" would make it "impossible" to establish prejudice. Pet. 31.

Nor does *Buck* bolster the argument. *Buck* involved the effect of a court-appointed psychologist's race-based statements in the context of granting a COA, not a claim on the merits like Balentine's. 137 S. Ct. at 768-69, 776-77. This Court focused on the "powerful racial stereotype" the expert offered on future dangerousness. *Id.* at 776. The Court rejected the idea that the expert's mention of race was de minimis. *Id.* at 777. *Buck* is thus best understood as rejecting "a particularly noxious strain of racial prejudice" from expert assessment of future dangerousness, which is absent here. *Id.* at 776.

**III. Multiple Vehicle Problems Complicate Review.**

Even if Balentine's IATC claim had merit (and it does not), the judgment may be affirmed on independent grounds. Although Balentine cast his claim as "new" to invoke *Martinez*'s path to overcoming procedural default, his claim is really a merits-adjudicated claim barred by 28 U.S.C. § 2254(d). And even if section 2254(d) did not apply, section 2254(e)(2)

still bars the new evidence on which Balentine relies. Even if AEDPA did not bar relief, Balentine still would not have been able to proceed under *Martinez* because state-habeas counsel was not ineffective. Plus, reaching those questions poses additional obstacles concerning the scope of Rule 60(b) and *Martinez*.

### A. Independent grounds preclude relief.

#### 1. Because Balentine merely presents new evidence to bolster an adjudicated claim, AEDPA precludes relief.

By rejecting Balentine's claim as meritless, the panel found it unnecessary to reach the alternative argument that AEDPA's relitigation bar, 28 U.S.C. § 2254(d)(1), stopped Balentine from reviving a stale IATC claim with new evidence. Pet. App. 10a n.9. But courts "shall not" grant habeas on "any claim that was adjudicated on the merits in State court" unless the claim satisfies section 2254(d). When AEDPA refers to the "claim" adjudicated in state court, it means "an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez*, 545 U.S. at 530. When the state court rejected "an asserted federal basis for relief," it adjudicated Balentine's claim. *Id.* Balentine's grounds for challenging counsel's mitigation performance support a single claim—"identical grounds may often be proved by different factual allegations." *Sanders v. United States*, 373 U.S. 1, 16 (1963).

Balentine's IATC claim is barred by AEDPA. Grounds 20 and 21 of Balentine's state-habeas petition complained of trial counsel's unreasonable failure under *Strickland* to develop and present a mitigation case. ROA.11875-77. Balentine specifically challenged trial counsel's mitigation investigation as incompetent. ROA.11877. When it adjudicated Balentine's punishment-phase IATC claim, the state-habeas trial court noted that strategic reasons could be discerned for not presenting mitigation witnesses. R.11679. The CCA also

noted that Balentine failed to identify what mitigating evidence should have been available. R.11679. Based on these findings and its own review, the CCA denied relief. R.11915-16.

Balentine thus built his federal IATC claim around the evidence he contends the jury should have heard and trial counsel's purported failure to develop it. R.408-22. But AEDPA precludes the use of *all* new facts and evidence to attack a state court's adjudication of a claim. *Pinholster*, 563 U.S. at 182-85. AEDPA prevents federal courts from relying on new facts or legal arguments in evaluating a merits adjudication. *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam); *Pinholster*, 563 U.S. at 181-82. To revive a merits adjudication by using new facts and evidence would eviscerate "comity, finality, and federalism." *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017).

*Martinez* does not change this result. *Martinez* created a "narrow exception" to procedural default of IATC claims that cannot be raised on direct appeal. 566 U.S. at 9. It created no loophole to AEDPA for IATC claims that *were* raised in state-habeas review. In light of *Pinholster*, *all* new evidence is prohibited. *See* 563 U.S. at 181-82.

**2. Section 2254(e)(2) independently bars Balentine's new evidence.**

AEDPA independently bars Balentine from supporting his claim with new evidence. Section 2254(e)(2) "restricts the discretion of federal habeas courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Pinholster*, 563 U.S. at 186. Section 2254(e)(2)'s bar on new evidence is triggered if the habeas petitioner "has failed to develop the factual basis of a claim in State court proceedings." That clause is met if the petitioner "was at fault for failing to develop the factual bases for his claims in state court." *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005) (per curiam).

To overcome procedural default, Balentine asserts that state-habeas counsel was ineffective in failing to develop his IATC claim. That position, if accepted, means state-habeas counsel was not diligent. "[F]ailed to develop," 28 U.S.C. § 2254(e)(2), means a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 432. The allegation of negligence against state-habeas counsel "triggers the opening clause of § 2254(e)(2)." *Id.* at 439-40; *accord Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam). Thus, Balentine could not rely on new evidence to support his claim.

In *Shinn v. Ramirez*, No. 20-1009, this Court is considering the Ninth Circuit's refusal to apply section 2254(e)(2) under *Martinez*. The Ninth Circuit erred, as Texas has explained. *See* Brief for the States of Texas et al. as Amici Curiae 3-11, *Shinn v. Ramirez*, No. 20-1009 (U.S. Feb. 26, 2021). It would likewise be error to rely on Balentine's newly developed evidence. *Martinez* created a "narrow exception" to *court-created* rules for procedural default. 566 U.S. at 9. But that exception should not affect "statutory exhaustion provision[s]" for factual development. *Ross v. Blake*, 136 S. Ct. 1850, 1857 (2016).

### 3. *Martinez* cannot aid Balentine because state-habeas counsel was not ineffective.

Even if Balentine's claim were new, his claim would still fall outside *Martinez* because "state habeas counsel was not ineffective in failing to present it." Pet. App. 21a n.11. The court below reached this conclusion because petitioner's "ineffective assistance of trial counsel claim has no merit." *Id.* But state-habeas counsel's performance was independently reasonable. *Martinez*, 566 U.S. at 14. A "fair assessment of attorney performance requires that every effort be made" to "reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466

U.S. at 689. Those circumstances include the "state of the law" at the time, which informs what claims are "worth pursuing." *Smith v. Murray*, 477 U.S. 527, 536 (1986). Courts must "affirmatively entertain the range of possible 'reasons . . . counsel may have had for proceeding as they did.'" *Pinholster*, 563 U.S. at 196.

In light of Balentine's instruction, there was little reason to believe state-habeas counsel could have uncovered a fruitful claim. "[C]ounsel reasonably could have determined" Balentine's claim "would have failed." *Sexton*, 138 S. Ct. at 2559. The "state of the law" was not conducive to Balentine's attempt to overcome his mitigation waiver. *See supra* Part I. And lawyers may not "be faulted for a reasonable miscalculation." *Richter*, 562 U.S. at 110. "Viewed in light of" the facts and the "law at the time," "the decision not to pursue" Balentine's current version of his IATC claim "fell well within the 'wide range of professionally competent assistance.'" *Smith*, 477 U.S. at 536 (quoting *Strickland*, 466 U.S. at 690). Further investigation would not raise a "substantial" "likelihood of a different result." *Richter*, 562 U.S. at 112. The aggravating evidence against Balentine was overwhelming; there is no "'nothing to lose' standard for evaluating *Strickland* claims." *Knowles v. Mirzayance,* 556 U.S. 111, 122 (2009). State-habeas counsel interviewed Balentine about his background and reasons for rejecting a life sentence. R.6761-63. Reasonable counsel could find that he could not overcome deference to trial counsel's performance. *See Richter*, 562 U.S. at 108 ("An attorney need not pursue an investigation that would be fruitless[.]"). And it would have been impossible for state-habeas counsel to prove that different witnesses would have fared better than the witnesses Balentine precluded from testifying.

Finally, further investigation would not have put Balentine's claim in a materially stronger posture. This was a calculated triple murder from which Balentine had multiple,

clear chances to walk away. Reasonable state-habeas counsel could conclude that "further investigation would be a waste," *Rompilla*, 545 U.S. at 383, because, no matter what he found, he likely would be unable to show a "substantial" "likelihood of a different result" had trial counsel's alleged ineffectiveness not occurred, *Richter*, 562 U.S. at 112.

### B. Collateral attacks raise additional vehicle problems.

**1.** Furthermore, to grant relief, this Court would first have to decide that the change in law following *Martinez*, as framed by Balentine, constitutes an exceptional circumstance under Rule 60(b). *See, e.g.*, *Diaz v. Stephens*, 731 F.3d 370, 375-77 (5th Cir. 2013); *Adams v. Thaler*, 679 F.3d 312, 319-20 (5th Cir. 2012); *see also In re Paredes*, 587 F. App'x 805, 813 (5th Cir. 2014) (per curiam); *Cox v. Horn*, 757 F.3d 113, 124 n.8 (3d Cir. 2014). In *Buck*, this Court declined to reach a related question when retroactivity was not raised prior to merits briefing. *Buck*, 137 S. Ct. at 780. But such preservation concerns are absent here, and *Martinez* never established the rule Balentine seeks—allowing unlimited opportunity to relitigate IATC claims with different evidence developed in federal habeas.

**2.** Additionally, following *Martinez* and *Trevino*, several CCA justices have expressed openness to recognizing a *Martinez* exception for otherwise-barred successive state-habeas applications. *E.g.*, *Ex parte Alvarez*, 468 S.W.3d 543, 551 (Tex. Crim. App. 2015) (Yeary, J., concurring). Applying procedural default as Balentine envisions forecloses Texas courts from considering such arguments in the first instance. *See Coleman*, 501 U.S. at 735 n.1. A defendant who argues that *federal* procedural default can be excused due to ineffective assistance by state habeas counsel should not be permitted deprive Texas courts the opportunity to consider the argument afresh. *See generally Rhines v. Weber*, 544 U.S. 269 (2005).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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