No. _____

CAPITAL CASE

In the
Supreme Court of the United States

PAUL C. BOLIN,

Petitioner,

v.

RON BROOMFIELD,
Warden of San Quentin State Prison,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

This capital case, in which defense counsel's investigation and preparation for the penalty phase was grossly deficient, presents two questions concerning what is and is not a reasonable application of the prejudice standard of *Strickland v. Washington*, 466 U.S. 668 (1984). On both questions, there are mutually inconsistent lines of authority in the Courts of Appeals, and review is called for under Supreme Court Rule 10(a):

1. Whether a state or federal habeas court may reasonably conclude that a crime is so aggravated that no mitigation could persuade even one juror to vote for a life verdict, so that ineffective assistance of counsel or other error at the penalty phase cannot be prejudicial, notwithstanding that juries regularly return life verdicts in highly aggravated cases?

2. Whether, consistent with *Strickland* and *Rompilla v. Beard*, 545 U.S. 374, 393 (2005), a habeas court may require a petitioner to make a "compelling" showing of prejudice from ineffective assistance of counsel, and may find an absence of prejudice based on a reasonable likelihood that the result of the trial could have been the *same* even in the absence of the ineffective assistance?

* * * * *

PARTIES TO THE CASE

All parties are listed in the caption.

LIST OF ALL PROCEEDINGS

People v. Bolin,
No. 41477-A, Kern County (California) Superior Court, judgment entered February 25, 1991.

People v. Bolin,
No. S019786, California Supreme Court, opinion issued June 18, 1998.

Bolin v. California,
No. 98-7182, this Court, certiorari denied March 8, 1999.

In re Bolin on Habeas Corpus,
No. S090684, California Supreme Court, order issued January 19, 2005.

Bolin v. Warden of San Quentin State Prison,
No. 1:99-cv-05279-LJO-SAB, United States District Court for the Eastern District of California, judgment entered June 9, 2016.

Bolin v. Davis,
No. 16-99009, United States Court of Appeals for the Ninth Circuit, opinion issued September 15, 2021.

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Petitioner Paul C. Bolin respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the 9th Circuit, affirming the denial of his petition for writ of habeas corpus.

OPINIONS BELOW

The opinion of the 9th Circuit Court of Appeals is published at 13 F.4th 797 and reprinted at 1App. 1. The opinion of the district court is available at 2016 WL 3213551 and 2016 U.S. Dist. LEXIS 75493 and reprinted at 1App. 32. The summary order of the California Supreme Court denying state habeas corpus is unreported and is reprinted at 2App. 370. The opinion of the California Supreme Court affirming the judgment on direct appeal is published at 18 Cal.4th 297, 956 P.2d 374, and 75 Cal.Rptr.2d 412, and is reprinted at 2App. 337.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The 9th Circuit Court of Appeals filed its opinion on September 15, 2021. 1App. 1. Mr. Bolin's timely petition for rehearing was denied on December 6, 2021. 1App. 31. On February 24, 2022, Justice Kagan extended the due date for this petition until May 5, 2022.

The district court had jurisdiction based on 28 U.S.C. § 2241. The court of appeals had jurisdiction based on 28 U.S.C. § 1291.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

* * * * *

INTRODUCTION AND STATEMENT OF THE CASE

1. As The Ninth Circuit Recognized, Defense Counsel's Preparation for The Penalty Phase Was Deficient

Paul Bolin was tried in Superior Court in Kern County (Bakersfield), California, in 1991 and 1992 for the murder of his marijuana-growing partner Vance Huffstuttler and Steve Mincy, who Huffstuttler brought to see the marijuana crop, in a remote area deep in the foothills. Another visitor was wounded but survived and testified for the prosecution. The multiple-murder special circumstance allegation made Mr. Bolin death-eligible. Cal. Penal Code, § 190.2(a)(3).

After the jury found him guilty, Mr. Bolin asked the judge to dismiss appointed lead counsel Charles Soria. The judge agreed, designating second-chair counsel William Cater as sole counsel for the penalty phase. In violation of his duty to Mr. Bolin, Mr. Cater was unaware of what Mr. Soria had and had not done to prepare for the penalty phase. 2ER 447-48, 450, 452, 455; 3ER 643, 661, 676-77.[1] In even greater violation of *his* duty, Mr. Soria had done almost no preparation. 2ER 466-70, 472-73; 3ER 678-81, 787-91, 835-37.

[1] Portions of the record not reprinted in the appendix to this petition are cited to the excerpts of record submitted to the 9th Circuit. The excerpt page numbers are printed in the lower right corner of the excerpt pages.

Mr. Soria had obtained a patently inadequate evaluation of guilt-phase mental health issues from Dr. Ronald Markman. 4ER 875-77. This evaluation was never endorsed by any of Mr. Bolin's counsel and never presented to the jury. Dr. Markman's opinions were adverse to Mr. Bolin precisely *because*—due to counsel's deficient performance—they were not informed by life history investigation. Apparently, the only records he received and reviewed were police, probation, and court records concerning the charged offenses and Mr. Bolin's prior offenses. 4ER 875. Beyond this, he was dependent on Mr. Bolin personally for life history information. A capital client is often an unreliable and incomplete source for his own life history, so history must be obtained from other independent sources in addition to the client. *See Rompilla*, 545 U.S. at 381; American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 11.4.1.C (1989) (hereafter "ABA Guidelines"; published shortly before Mr. Bolin's trial)[2]; 2App. 441-43.

With the jury waiting, the judge granted Mr. Cater five weeks for penalty-phase investigation "starting from scratch," 2ER 475, over the Christmas and New Year holidays. Mr. Cater prepared limited testimony from a few family witnesses, but he had no time to—among other things—obtain military and prison records or consult any expert. He presented two hours of mostly "good person" evidence.

[2] The Court described the Guidelines as the "well-defined norms" for assessing the performance of capital counsel. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). They are not "inexorable commands"; they are "guides" to what reasonable performance means. *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009). *Strickland* and *Wiggins* both direct reviewing courts to refer to standards set by organizations such as the ABA for guidance as to what is required of counsel, as does *Padilla v. Kentucky*, 559 U.S. 356, 366-67 (2010).

By contrast, the prosecution had presented two weeks of evidence of the crime at the guilt phase. They bolstered it at penalty phase with aggravation evidence of multiple occasions when Mr. Bolin attacked or threatened men who were apparently being aggressive toward his daughters or toward young women for whom he assumed a parental role.

In argument, the prosecutor exploited the weaknesses of the mitigation case: the many unanswered questions, and the reliance on family members who had been out of touch with Mr. Bolin for most of his adult life. 3ER 752-55. Unsurprisingly, since the jury knew almost nothing about Mr. Bolin other than his crimes, and nothing about *why* the crimes happened, they sentenced him to death. The judgment was affirmed on appeal. *People v. Bolin*, 18 Cal.4th 297 (1998).

2. The Available Mitigation Was Powerful, Had Mr. Bolin's Counsel Looked for It

On state habeas, new counsel presented a unified life-history narrative through lay and expert witnesses, offering a mitigating explanation of Mr. Bolin's crimes, briefly outlined here. A longer summary is in the declaration of Zakee Matthews, M.D., 1App. 384-444.

A. A "Living Hell" Between an Abusive Home and Unsupervised Life on the Streets

Paul Bolin was born in Chicago in 1947. His adverse childhood experiences began when he was a toddler. His father, William Bolin, abused him physically and emotionally. William frequently had uncontrollable rages and beat Paul[3] until he

[3] In this section, discussing his childhood, he is referred to as "Paul," rather than the more customary "Mr. Bolin" used elsewhere.

was too tired to continue. Paul tried to hide or escape, but he couldn't. Although the beatings continued until Paul was older, he didn't strike back. At least once, Paul's father threw him down the stairs and knocked him unconscious. Paul bears scars on his head consistent with injuries from William's beatings. Paul also witnessed William emotionally and physically abuse his mother and sisters. He saw his father try to kill his mother at least twice. He tried to intervene to help his mother and sisters, and as a consequence was further abused. 2App. 388-92.

Paul's home life with his abusive father was such a "living hell," 4ER 943 [sister], that Paul frequently ran away from home and lived with friends or on the streets of 1950s Chicago without adult supervision or assistance, beginning as young as **nine** years old. 2App. 422-23; 4ER 945.

Paul's parents divorced in 1957 when he was 10 years old. Both remarried. Paul thereafter lived in both his mother's and father's homes and was abused in both. 2App. 394. Paul changed schools often, so he had limited opportunity to learn social and interpersonal skills through interaction with other children and lacked outside influences that might have mitigated some of the abuse. 2App. 436. No one ever intervened to prevent Paul from being abused. 2App. 393.

B. Effective and Honorable, But Disabling, Navy Service, And Neurotoxin Exposure

When Mr. Bolin was 17, he enlisted in the Navy. He was trained as an engineman and served aboard an admiral's barge as well as combat vessels. In turn, Mr. Bolin's Navy career was good for him. 2App. 398-407. He served honorably and effectively for nine years, and received generally glowing performance reports,

including one from an admiral. He was steadily promoted and reached the rank of Engineman First Class (E-6). 2App. 398-99, 401-03.

As an engineman, working below decks, Mr. Bolin was exposed daily to dangerous neurotoxins such as cleaning fluids, paint thinners, petroleum-based fuels, degreasers and lead. 2App. 382-83.

Like the soldier in *Porter v. McCollum*, 558 U.S. 30 (2009), Mr. Bolin brought his trauma history with him into the service, and its effects show up periodically in his service record, as do ongoing marital problems. He developed psychiatric symptoms, and was seen several times by a Navy psychiatrist who diagnosed an anxiety reaction. He was hospitalized and prescribed Thorazine. He was disciplined for being intoxicated on duty. 2App. 399-400, 403-04.

In 1972, Mr. Bolin spent several months as an adviser to South Vietnamese naval units. He performed this assignment well. He participated in daily small craft patrols, and was stationed at Cam Ranh Bay which came under frequent and unpredictable guerrilla attacks. The dangers inherent in this duty are suggested by some of the training he received before embarking for Vietnam: survival, evasion, resistance to interrogation and escape. 2App. 404-06.

Shortly after Mr. Bolin left Vietnam, his rising Navy career and the stability it provided ended abruptly through no fault of his own when he suffered a disabling back injury in a fall aboard ship. 2App. 407.

After the back injury, Mr. Bolin was no longer physically fit to serve, and was honorably discharged after nine years. Despite several operations to repair the

injury, he had severe chronic back pain and headaches for years afterward, on top of the effects of exposure to neurotoxins and the experience of combat. 2App. 407-408; 3ER 832, 847-48, 868-69.

After his discharge, Mr. Bolin used the skills he learned in the Navy as a pipefitter in civilian shipyards. He continued to be exposed to neurotoxins on a daily basis: bilge waste, fuel, welding, grinding, sandblasting. He suffered constant, painful, serious physical symptoms from this exposure, including breathing problems and headaches, in addition to his ongoing back pain. 2App. 382, 409-11, 426; 4ER 867-68. He self-medicated with alcohol. 2App. 382, 387, 410; 3ER 848.

C. A Positive and Protective Parent Despite His Disabilities

While in the Navy, Mr. Bolin married and had two daughters. After the couple divorced, his ex-wife abandoned the children. He took custody of his daughters and was deeply devoted to their care. 2App. 399, 403-04. Beyond his own daughters, Mr. Bolin was a generous man who shared his home and food with many young people who had no place else to go. Some neighborhood boys considered him a second father. 2App. 413-14; 3ER 842-43.

Mr. Bolin exhibited symptoms of trauma-related stress disorder. 2App. 387, 423, 425. He began to protect his daughters from dangers that existed only in his mind. Loud noises, especially helicopters or fireworks, alarmed Mr. Bolin, and sent him searching for possible danger. On occasion, he believed he was being followed or watched and "patrolled" his house in a camouflage uniform. When he spoke about his service in Vietnam, he got a glassy, far-away look in his eyes, and seemed as though he was somewhere else. 2App. 411-13; 3ER 832-34, 845-47, 869-70.

The aggravation evidence the prosecution presented to the jury all fit a pattern: Mr. Bolin responded disproportionately while protecting young women in his charge, threatening or assaulting men who were treating them inappropriately. 2App. 415, 417; 3ER 688.

D. Positive Performance in Prison

Mr. Bolin's prison records, which his trial counsel failed to obtain, revealed that he performed well while serving a sentence for one of these assaults. He consistently worked while in prison, as a welder, mechanic, and dorm janitor. Staff supervisors thought that his attitude and cooperation were excellent and that his work was outstanding. He was commended for wanting to "do[] the job right the first time." Mr. Bolin had a discipline-free prison record. 2App. 415-16.[4] This record suggests that he would adapt well as a life prisoner and would not pose a danger to staff. The marked contrast between his chaotic life in the community and his favorable performance in prison, as in the Navy, demonstrates that Mr. Bolin functions well in a structured, secure setting.[5]

E. A Downward Spiral That Could Have Been Explained, and In Turn Helps to Explain the Capital Crime

After Mr. Bolin left prison, his life spiraled downhill rather directly to the capital crime. He found it difficult to find work to support his family. This was a

[4] At the penalty phase, a prison guard testified briefly from her own personal experience about his good performance in prison. 3ER 714-17. Neither counsel nor the jury knew that her personal recollections could have been corroborated by his prison records.

[5] While in jail awaiting trial in the present case, he wrote a threatening letter to his daughter's abusive boyfriend. 2App. 417; 4ER 954-55. As with the prior assaults, he wanted to protect his daughters but could not limit himself to doing so in appropriate ways.

source of great disappointment to him. 2App. 416-18. After his fiancée was killed in an auto accident, he was devastated and went on a drinking spree. He went to live by himself in a cabin in a remote mountainous area. He had very little contact with his family. 2App. 418-19; 3ER 834, 850-51.

Mr. Bolin began growing marijuana. 2App. 419; 4ER 873. In mid-1989, he met Vance Huffstuttler at a bar. Mr. Bolin invited Huffstuttler to live with him at the cabin and to help him grow marijuana. 2App. 419. In late summer 1989, Mr. Bolin and Huffstuttler got into a fight. Mr. Bolin believed that because of the fight, Huffstuttler was out to get him and that he was not safe with Huffstuttler around. Mr. Bolin became very nervous and agitated. 2App. 420-21. Sometime immediately before Huffstuttler and Steve Mincy were killed, Mr. Bolin ingested large quantities of alcohol and cocaine. 4ER 876. On Labor Day weekend 1989, Huffstuttler brought Mincy and Jim Wilson to the cabin. Enraged apparently because the marijuana operation had been exposed to strangers, Mr. Bolin shot them all. Only Wilson survived.

F. Significant Organic Brain Deficits Are Consistent With His History and Help Explain the Capital Crime

Neuropsychological testing—which trial counsel should have obtained but did not—points to organic brain damage which is consistent with Mr. Bolin's history and helps to explain the capital crime and the prior incidents presented in aggravation. *See* the declaration of Natasha Khazanov, Ph.D., 2App. 371 *et seq*.

Mr. Bolin's neurological impairments are severe and are localized to his frontal lobes. The frontal lobes of the brain are primarily responsible for initiation,

organization, planning, execution, and regulation of complex motor movements and actions. They enable integration of the highest levels of behavior and damage to them can result in extreme derangement and disorganization. 2App. 375-76. Because his frontal lobes have been damaged, Mr. Bolin has profound impairments in flexibility (the ability to shift or adapt thinking or behavior to changed circumstances) and in his ability to inhibit unwanted responses. He cannot adequately plan complex actions or learn from his mistakes. 2App. 377-78.

The causes of these impairments may be uncertain, *see* 13 F.4th at 815-16, but their existence and their consistency with his history is clear. 2App. 374, 383. In turn, Mr. Bolin's neuropsychological impairments contributed significantly to his behavior, functioning and personality throughout his life. Frontal lobe deficits placed him at a significantly higher risk for trauma and depressive disorders. He is largely unaware of these deficits, which are completely out of his control. Even when they are pointed out to him, he lacks the capacity to adapt adequately. 2App. 383. As discussed in the next section, these impairments contributed directly to the capital crime and to the prior violence the prosecution offered in aggravation.

G. Adequate Mental Health Evaluation Would Have Synthesized the Life History Evidence in A Significantly Mitigating Way

A qualified mental health expert could have synthesized this evidence and put it in context, had trial counsel consulted one. This would have provided the jury with an understanding of the course of Mr. Bolin's life, not limited to the crimes of which they had convicted him, that would have significant mitigating value and created a

reasonable likelihood of a more favorable result. *See* the declaration of Zakee Matthews, M.D., 2App. 384 *et seq*.

Mr. Bolin's history includes known risk factors that help explain his psychological disorders: severe physical and psychological mistreatment during his childhood and adolescence; neurotoxin exposure; head trauma; exposure to military combat; and his chronically painful back injury. 2App. 426-27, 429-39.

Mr. Bolin's impairments are cumulative and synergistic. For example, his organic brain damage exacerbates the effect of child abuse. The detrimental effects of experiencing wartime violence are increased by Mr. Bolin's previous experiences of violence, his neuropsychological deficits, and his substance abuse. His ability to cope with his chronic pain was impaired by the organic brain damage, substance abuse, and lingering effects of childhood and wartime violence. 2App. 381, 439-40. His trauma history predisposed him to substance abuse, and substance abuse helped to numb his physical and emotional pain. 2App. 433.

Many of his behavioral symptoms are consistent with his trauma history, and in turn help to explain his crime and the prior incidents offered in aggravation. These include, among others, hypervigilance, impulsiveness, tendency to paranoia, inflexibility, tendency to dissociation, and poor problem-solving skills. 2App. 377-79, 429-31.

Mr. Bolin has a strong desire to be a caretaker to other abused, neglected and victimized people, unsurprising in light of his inability to protect his mother and sisters from his father's violence when he was young. This background contributed

to his exaggerated need to protect the people he loves and protect his personal space. 2App. 434. This, in turn, helps to explain both the crimes for which he was on trial, and the incidents that the prosecution offered in aggravation. The penalty phase testimony of his daughter Mary supports this inference, 3ER 688-89, 691-93, but her recollections of events when she was 12 or 13 years old, 3ER 686, 699, cannot reasonably be considered an adequate substitute for the expert testimony proffered on habeas.

At the time of the capital crime, Mr. Bolin was exposed to additional stressors that impaired his functioning: he could not find employment because he was on parole, his fiancée died following an auto accident, and he was afraid for his life because of Vance Huffstuttler's threats. 2App. 417-20, 425.

It is reasonably probable that, due to the effects of his organic brain damage, his history of child abuse, and his exposure to combat, Mr. Bolin became frightened and suddenly perceived great danger to himself from Vance Huffstuttler, and instantly felt the need to defend himself against that danger. Mr. Bolin's ingestion of alcohol and cocaine before the crime, along with the many stressors in his life, exacerbated the effects of his deficits and made it even more likely that he would act impulsively in response to perceived danger. 2App. 441.

Despite this extensive proffer, the state habeas petition was summarily denied. 2App. 370. The state court accepted Mr. Bolin's factual allegations as true but nonetheless concluded that he had not established even a prima facie case of

ineffective assistance of counsel. *See Cullen v. Pinholster*, 563 U.S. 170, 188 n.12 (2011).

3. The Federal Habeas Courts Did Not Cure the Constitutional Violations

On federal habeas, the district court held a limited evidentiary hearing on a portion of the ineffective assistance claim that is not addressed in this petition, concerning failure to renew a motion for change of venue after voir dire.[6] The district court denied the remaining claims, including those now at issue, on the papers, applying the deferential standard of 28 U.S.C. § 2254(d). 1App. 32-227, 2App. 228-336.

The district court granted a narrow certificate of appealability, limited as relevant here to a claim that Mr. Cater was ineffective for failing to request a longer continuance than five weeks. 2App. 334-35. Mr. Bolin briefed a broader ineffectiveness claim, for inadequate penalty-phase investigation and preparation beginning long before those five weeks. The 9th Circuit expanded the certificate of appealability, correctly assumed deficient performance, but denied the ineffective assistance claims in their entirety for want of prejudice. *Bolin v. Davis*, 13 F.4th 797 (9th Cir. 2021). Rehearing en banc was denied.

* * * * *

[6] The evidence taken in district court concerning jury selection demonstrates additional prejudice to Mr. Bolin from counsel's deficient performance. His counsel made decisions about how to question prospective jurors, and about which jurors to accept or challenge, with no idea what the defense penalty-phase theory was going to be. *See* 2ER 412, 434-37, 474. Not having done the investigation necessary to identify themes for the penalty phase, they were unable to select jurors with an eye toward their potential receptiveness to the intended case in mitigation. When Mr. Cater began to develop a penalty-phase strategy, after the chosen jurors found Mr. Bolin guilty, it was too late to reconsider decisions made during voir dire.

REASONS FOR GRANTING THE WRIT

I. IT WOULD BE UNREASONABLE FOR A HABEAS COURT TO CONCLUDE THAT A CRIME IS SO AGGRAVATED THAT NO MITIGATION COULD RESULT IN A LIFE VERDICT

Without acknowledging a clear split of authority on the question, the 9th Circuit concluded that the circumstances of Mr. Bolin's crime were so "highly aggravated" that a reasonable jurist could rule out the possibility that any mitigation could result in a life sentence, so there was no prejudice from counsel's deficient performance. 13 F.4th at 822. It would not be reasonable for either a state or federal habeas court to find an absence of prejudice on this basis. The decisions rejecting this reasoning are, as an empirical factual matter, the correct ones.

1. This Court Has Recognized That Penalty Phase Error May Be Prejudicial In Highly Aggravated Cases

This Court's decisions make clear that a habeas court unreasonably applies *Strickland* when it concludes that the aggravated nature of the crime rules out the possibility of prejudice from ineffective assistance at the penalty phase. For example, this Court found prejudice in *Williams v. Taylor,* 529 U.S. 362, 367-68, 397-98 (2000) (hereafter simply *Williams*). Williams was convicted of killing his victim with a mattock when the victim refused to lend Williams a few dollars. In addition to the senseless and violent nature of the crime, at trial the prosecution presented considerable evidence of other offenses: Williams "brutally assaulted" an elderly woman and left her in a vegetative state, stole cars, set fire to a home, stabbed a man during a robbery, set a fire in the jail while awaiting trial for capital murder, and confessed to strong urges to choke other inmates and to break a fellow prisoner's jaw.

Id. at 368, 418. But this Court found that the IAC claim merited relief *despite* the highly aggravated crime and the "simply overwhelming" evidence of future dangerousness. *Id.* at 374.

Other decisions of this Court are to the same effect. *See Wiggins v. Smith*, 539 U.S. 510 (2003) (granting IAC relief to petitioner who killed 77-year-old woman found drowned in her bathtub, missing her underwear, and sprayed with insecticide); *Rompilla,* 545 U.S. at 391 (granting IAC relief after finding "beyond any doubt that counsel's lapse was prejudicial" although victim had been stabbed 16 times, beaten with a blunt object, gashed in the face with beer bottle shards, and set on fire); *Sears v. Upton*, 561 U.S. 945 (2010) (summarily reversing a no-prejudice finding where defendant kidnapped, raped, and murdered 59-year-old victim after punching her in the face with brass knuckles and handcuffing her to the backseat of a car). Likewise, in *Porter*, *supra*, 558 U.S. at 42, the state court's failure to find penalty phase prejudice was unreasonable even though the state court found the murder "premeditated to a heightened degree." In *Andrus v. Texas*, 140 S. Ct. 1875, 1887 n.7 (2020), the majority faulted the dissenting justices for ruling out penalty phase prejudice based on the aggravating evidence.

The 9th Circuit's holding is also difficult to square with another line of this Court's authority. In finding no prejudice, the 9th Circuit described Mr. Bolin's "uniquely cruel and unjustified conduct that reflected an appreciable indifference to human life." 13 F.4th at 822. Since death-eligibility requires, at a minimum, "reckless indifference to human life," *Tison v. Arizona*, 481 U.S. 137, 158 (1987), a

case that did not fit that description would not be death-eligible and would never have a penalty phase. Ergo, *every* murder case in which a jury returns a *life* verdict would fit the 9th Circuit's description.

2. The Lower Courts Are Split on This Issue

Despite the decisions of this Court just cited, the 9th Circuit concluded that the aggravated nature of Mr. Bolin's offense was sufficient to rule out prejudice. 13 F.4th at 822. But the 9th Circuit has recognized in other cases that, both as an empirical factual matter and in reference to this Court's precedent, such a rule should not be applied.

"[I]t would be difficult to find a capital case at the sentencing phase that does not have strong aggravating circumstances." *Avena v. Chappell*, 932 F.3d 1237, 1252 (9th Cir. 2019) (double murder; subsequent homicide in jail; state court was unreasonable to find no prejudice; citing *Williams*); *accord*, *Noguera v. Davis*, 5 F.4th 1020, 1044-45 (9th Cir. 2021) (state court was unreasonable to find no prejudice; premeditated murder for insurance money; citing *Williams*); *but cf. Apelt v. Ryan*, 878 F.3d 800, 833-34 (2017), *reh'g denied,* 906 F.3d 834, 837-39 (9th Cir. 2018) (premeditated murder of defendant's wife for insurance money; premeditation distinguishes *Williams* and rules out prejudice).

In 2019 the 9th Circuit went en banc and concluded that a state habeas court was unreasonable to rule out prejudice in a case with "undeniably severe" aggravating facts. *Andrews v. Davis,* 944 F.3d 1092, 1118 (9th Cir. 2019) (en banc) (three murders during an apparently prolonged home invasion robbery). But the present decision is one of several after *Andrews* to erroneously rely on the aggravated

nature of the crime to rule out prejudice. *E.g., Jurado v. Davis*, 12 F.4th 1084, 1101 (9th Cir. 2021); *Benson v. Chappell*, 958 F.3d 801, 833-34 (9th Cir. 2020).

The split is not merely internal to the 9th Circuit, so it cannot be resolved by the en banc process. Similar splits exist in other circuits.

The 5th Circuit explained why the aggravated nature of the offense (assuming, contrary to reality, that there could be a capital murder that is *not* aggravated) does not rule out prejudice:

> The State's stereotypical fallback argument that the heinous and egregious nature of the crime would have ensured assessment of the death penalty even absent the [error] cannot carry the day here. … [I]n this particular case, the details of the crime, as horrific as they are on an absolute scale, are not significantly more egregious than those in [other cases where similar error was found prejudicial]. Finally, our decades of experience with scores of § 2254 habeas cases from the death row of Texas teach an obvious lesson that is frequently overlooked: Almost without exception, the cases we see in which conviction of a capital crime has produced a death sentence arise from extremely egregious, heinous, and shocking facts. But, if that were all that is required to offset prejudicial legal error and convert it to harmless error, habeas relief based on evidentiary error in the punishment phase would virtually never be available, so testing for it would amount to a hollow judicial act.

Gardner v. Johnson, 247 F.3d 551, 563 (5th Cir. 2001) (5th Amendment); *see Walbey v. Quarterman*, 309 F. Appx. 795, 803 (5th Cir. 2009) (*Gardner* applies to ineffective assistance of counsel claims).

But on other occasions, the 5th Circuit has held that "it is virtually impossible to establish prejudice" despite significant mitigating evidence if "the evidence of …

future dangerousness is overwhelming." *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002); *accord, e.g., Clark v. Thaler*, 673 F.3d 410, 424 (5th Cir. 2012).[7]

In *Foust v. Houk*, 655 F.3d 524, 544 (6th Cir. 2011), it was unreasonable for the state court to deny relief based on the "view that the aggravating factors were too extreme for any mitigators to overpower them," even accepting the state court's view of the aggravating circumstances as "overwhelming." *Id.* at 545. But in *Hodge v. Jordan*, 12 F.4th 640, 644 (6th Cir. 2021), the 6th Circuit deferred to the state court's view that "'the particularly depraved and brutal nature of [the] crimes' meant a sentencing jury would not have spared Hodge's life."

Decisions of other circuits are also at odds with the 9th Circuit's view of Mr. Bolin's case. For example, *Griffin v. Pierce*, 622 F.3d 831 (7th Cir. 2010), and *Marshall v. Cathel*, 428 F.3d 452 (3d Cir. 2005), both concluded that deficient investigation and presentation of mitigating evidence was prejudicial—and state courts were unreasonable to conclude otherwise—even where the murder was committed for hire.

3. The 9th Circuit Decision Is Inconsistent With Empirical Evidence Concerning the Behavior of Capital Sentencers and The Duties of Capital Counsel

Perhaps even more importantly, juries—not just habeas courts—do not rule out mitigation and a life verdict even in highly aggravated cases. The worst crimes do not invariably yield death sentences when effective trial lawyers find and present

[7] "Overwhelming" is a term of comparison. While it could properly be applied following the weighing of aggravation and mitigation, it is not appropriately used to refer to the aggravating evidence alone, in support of an argument that weighing or comparison would be unnecessary or futile.

persuasive mitigating evidence. No habeas court reviews these cases. When a habeas court evaluates prejudice in the case before it without acknowledging this universe of cases, there is an "extreme malfunction[]" of the capital litigation process calling for federal habeas corpus relief, *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

Russell Stetler, who has taught, studied, and practiced mitigation for decades, has thoroughly documented the conclusion that "the overwhelming majority of post-*Furman* death-eligible cases have *always* avoided death sentences, regardless of the brutality of the crime." In support, he cited hundreds "of highly aggravated cases (child victims, killing of police officers, and multiple victim cases)" in which juries returned life verdicts. Russell Stetler, *The Past, Present and Future of the Mitigation Profession*, 46 HOFSTRA L. REV. 1161, 1186 n.142 (2018) (emphasis original) (cited by Mr. Bolin's counsel in the 9th Circuit, but not referred to in the opinion). His list includes 13 California jury verdicts of life for defendants convicted of three or more homicides (whereas Mr. Bolin was convicted of two). Seven of these cases were tried before Mr. Bolin's, and six were tried later. Russell Stetler *et al.*, *Mitigation Works: Empirical Evidence of Highly Aggravated Cases Where the Death Penalty was Rejected at Sentencing* 49-85 (Dec. 24, 2021), https://ssrn.com/abstract=4084060. The empirical research of the Capital Jury Project similarly documents the ability and willingness of juries to return life verdicts in highly aggravated cases. *See* Brief of Legal Academics as Amici Curiae, *Canales v. Lumpkin*, No. 20-7065 (March 8, 2021) (hereafter "*Canales* Brief").

The point is not to compare murders against one another and identify which is worse. Doing so would be inherently subjective, futile, and disrespectful to homicide victims. Rather, the point is that doing so is inconsistent with the empirical data about capital trials, so it is unreasonable for a habeas court—state or federal—to rely on such reasoning. The courts have spoken inconsistently—and inconsistently with this Court—on this point, so a grant of certiorari is called for.

The 9th Circuit's conclusion that some capital cases, including this one, are so aggravated that an adequate mitigation presentation could not make a difference, is also inconsistent with another empirical principle. The ABA Guidelines for capital defense counsel—which are likewise empirically based in actual practice—emphasize the importance of developing, well in advance of trial, an integrated defense theory that is consistent between the guilt and penalty phases of trial. ABA Guidelines § 11.7.1. Counsel have a duty to devise a strategy for the penalty phase that takes into account the prosecution's guilt phase evidence. If the enterprise were likely to be futile, as the 9th Circuit assumed, there would be no such duty. But Mr. Bolin's counsel did not have a penalty-phase theory, nor the information from which to distill one, until after the guilt phase was over.

The 9th Circuit's conclusion that Mr. Bolin could suffer no prejudice from such a serious dereliction, is inconsistent with well-established principles of law and fact. A grant of certiorari is called for.

II. THE *STRICKLAND* PREJUDICE STANDARD REQUIRES ONLY A REASONABLE LIKELIHOOD OF A DIFFERENT RESULT, NOT A CERTAINTY OR NEAR-CERTAINTY

1. The 9th Circuit Focused on The Likelihood of The Same Result

The *Strickland* prejudice standard requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been *different*." 466 U.S. at 694 (emphasis added). "[A]lthough we suppose it is possible that a jury could have heard [the mitigation proffered on habeas] and still have decided on the death penalty, that is not the test." *Rompilla, supra,* 545 U.S. at 393.

The 9th Circuit held that a state habeas court could demand far more from a petitioner and still reasonably apply *Strickland*. Six times, the 9th Circuit demanded "compelling" mitigating evidence on habeas—*i.e.,* evidence that would *compel* a different result and not merely make it reasonably probable—in order to satisfy the *Strickland* prejudice standard. 13 F.4th at 810, 814, 819, 820, 821. On one of these occasions, it also faulted the habeas evidence as "inconclusive." *Id.* at 810. On another occasion, it demanded "inevitably compelling" mitigation. *Id.* at 821.

The 9th Circuit has elsewhere recognized that a state court unreasonably applies *Strickland* when it similarly asks "whether the jury 'might have' reached the *same* result," *Weeden v. Johnson*, 854 F.3d 1063, 1072 (9th Cir. 2017) (emphasis added), or when it asks if the new evidence "could support" the verdict at trial, *Hardy v. Chappell*, 849 F.3d 803, 823 (9th Cir. 2016). Similarly, in *Cauthern v. Colson*, 736 F.3d 465, 486-87 (6th Cir. 2013), the 6th Circuit held that the state court engaged in unreasonable factfinding when it speculated that the jury might have decided that foregone mitigating evidence of the defendant's childhood was not mitigating. What

matters under *Strickland* is whether there is a reasonable likelihood that jurors would decide that it *was* mitigating. The 9th Circuit's decision against Mr. Bolin is inconsistent with these holdings, and is not the only recent 9th Circuit decision to erroneously focus on the likelihood of the *same* result. *See Ochoa v. Davis*, 16 F.4th 1314, 1335 (9th Cir. 2021); *Hooper v. Shinn*, 985 F.3d 594, 630-31 (9th Cir. 2021).

The 9th Circuit en banc in *Andrews* disapproved a prejudice standard that hypothesized rebuttal that the prosecution never proffered and drew inferences against the petitioner. 866 F.3d at 1021-23. The 9th Circuit here did what the en banc court disapproved in *Andrews*. It cited Mr. Bolin's arrests the jury never heard about, 13 F.4th at 819, relying on hearsay in a probation report about arrests that did not result in convictions, for offenses that were trivial compared to the ones the jury heard about. 2SER 270. It would be unreasonable to conclude that hypothetical rebuttal about these incidents would add any meaningful weight to the aggravation side of the balance.

The 9th Circuit linked its concern about potential rebuttal to a vastly different case, *Wong v. Belmontes*, 558 U.S. 15, 17 (2009), where more robust mitigation would have opened the door to "potentially devastating" evidence that Belmontes had committed another murder the jury didn't know about. 13 F.4th at 819, 820, 821; *cf. Stankewitz v. Wong*, 698 F.3d 1163, 1174 (9th Cir. 2012) (distinguishing *Belmontes*). There is no such rebuttal lurking in the wings here. A state habeas court that extended *Belmontes* to this very different case would be unreasonably applying this Court's precedent.

The 9th Circuit said a reasonable sentencer could write off the detailed and thoughtful analysis by Drs. Matthews and Khazanov in favor of a hypothetical rebuttal evaluation like the one Dr. Markman gave defense counsel before trial. 13 F.4th at 821. But compared to the documented narrative offered by Drs. Matthews and Khazanov, Dr. Markman's untethered opinions would be unpersuasive to a reasonable sentencer. *Rowland v. Chappell*, 876 F.3d 1174, 1185 (9th Cir. 2017), and cases there cited. The 9th Circuit erred by treating Dr. Markman's opinions as ground truth. Insofar as the 9th Circuit concluded that counsel's failure to provide background information to Dr. Markman poisoned the well and made a showing of prejudice impossible even after competent habeas counsel adequately represented Mr. Bolin, that conclusion is itself additional prejudice from counsel's deficient performance. *See Sochor v. Secretary,* 685 F.3d 1016, 1028-29 (11th Cir. 2012) (state court acted unreasonably by viewing prejudice analysis as a credibility contest between the trial expert and post-conviction experts and then discounting entirely the post-conviction experts).

Also inconsistent with *Strickland*'s focus on the probability of a *different* result, the 9th Circuit said: "Although that [habeas] evidence presents Bolin in a more sympathetic light in some respects, it also suffers from a variety of shortcomings. At times, it is variously speculative, double-edged, ambiguous, or otherwise unpersuasive. In other instances, it is cumulative of evidence and mitigation themes that [trial attorney] Cater had presented." 13 F.4th at 814. On point after point, the 9th Circuit identified ways that a sentencer could "discount" or "fail[] to engage with"

or "identif[y] perceived problems with" the lay and expert evidence proffered on habeas. These quotations are from *Porter*, 558 U.S. at 43-44, describing how the state habeas court there unreasonably ruled out prejudice.[8] In particular, the 9th Circuit's reference to "more negative aspects" of Mr. Bolin's military record echoes the state-court reasoning this Court found unreasonable in *Porter*. *Cf.* 13 F.4th at 820 *with* 558 U.S. at 43-44.

If evidence is "double-edged," 13 F.4th at 814, by definition a reasonable factfinder could conclude that it is favorable to the defendant. Except in the extreme *Belmontes* situation, the fact that some adverse evidence may come along with the new mitigation evidence does not rule out prejudice. *Sears, supra,* 561 U.S. at 951; *Williams, supra*, 529 U.S. at 396-97; *cf. Pinholster, supra*, 563 U.S. at 201 (case-specific holding of no prejudice because new evidence of "questionable mitigating value" was likely outweighed by the aggravating evidence that came along with it).

Penry v. Lynaugh, 492 U.S. 302 (1989), and its progeny hold that a jury must have an opportunity "to give … meaningful, mitigating effect" to "double-edged" evidence. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 255, 260 (2007). The 9th Circuit said no jury needed to consider the mitigating value of Mr. Bolin's evidence precisely because it was, in the 9th Circuit's view, "double-edged." That holding cannot be reconciled with *Penry* and its progeny such as *Abdul-Kabir*.

[8] The 9th Circuit's reasoning is particularly dubious because the court was testing the reasonableness of a state-court decision that accepted Mr. Bolin's factual allegations as true. *See Pinholster, supra*, 563 U.S. at 188 n.12.

The 9th Circuit similarly erred by rejecting the mitigating strength of Mr. Bolin's organic brain damage due to uncertainty about its *etiology*, 13 F.4th at 815-16, when what would matter to a reasonable sentencer is the *certainty* that this impairment exists, 2App. 374, 383. The neuropsychological test results are consistent with Mr. Bolin's history, even though exact causal links cannot be proven with certainty. His head injuries, alcohol abuse, and exposure to neurotoxins on a daily basis for fifteen years, including solvents, petroleum products and lead particles, put Mr. Bolin at risk for the brain damage that testing revealed. 2App. 380-83.

In sum, the 9th Circuit allowed the state court to belittle Mr. Bolin's mitigating evidence in the same ways as the state court in *Porter*. As in *Porter*, a grant of certiorari and a reversal is called for.

2. Weighing By an Adequately Informed Sentencer, Not A Habeas Court, Ultimately Matters

As a corollary of *Strickland*'s emphasis on the probability of a *different* result, a habeas court—state or federal—is not the ultimate factfinder, and a state habeas court that interprets *Strickland* in that manner applies it unreasonably.

Evidence that is "unpersuasive" to a habeas court, 13 F.4th at 814, may move a sentencer, especially a jury. *See Canales v. Davis*, 966 F.3d 409, 427-28 (5th Cir. 2020) (Higginbotham, J., dissenting), *pet'n for cert. pending*, No. 20-7065. The court below asserted with certainty that the aggravating evidence outweighed the mitigating evidence as though stating the product of a carefully calibrated weighing that reached a definitive result. However, this Court has understood the futility of such a calculus, emphasizing jurors make individualized sentencing decisions

reflecting their own reasoned moral response to the mitigating evidence. In California, a death sentence must reflect the unanimous decision of twelve jurors, but nothing requires all the jurors to consider mitigating circumstances in the same way. *See Mills v. Maryland*, 486 U.S. 367 (1988). Reasonable jurors may disagree about the weight to assign various mitigating circumstances and about the ultimate decision. By accepting as a virtual certainty the overwhelming weight of the aggravating evidence, the 9th Circuit erroneously failed to consider whether even a single juror could reasonably have weighed the evidence differently than they did, which is all that is required to establish prejudice. *Wiggins*, 539 U.S. at 537.

Under *Strickland*, Mr. Bolin is entitled to have that evidence presented to and weighed by a sentencer, not just a habeas court. *See, e.g., Porter*, 558 U.S. at 43; *Rompilla*, 545 U.S. at 392-93; *White v. Ryan*, 895 F.3d 641, 670-71 (9th Cir. 2018). In *United States v. Barrett*, 985 F.3d 1203, 1223-32 (10th Cir. 2021), the government vigorously challenged the defendant's post-conviction experts, but the 10th Circuit found prejudice because the mitigating inferences from their testimony were "plausible," a word the court used 11 times.

On these issues also, the 9th Circuit decision is inconsistent with decisions of this Court.

III. THIS IS AN APPROPRIATE CASE IN WHICH TO DECIDE THESE ISSUES

This is an appropriate case in which to decide these issues. The breadth and the depth of the mitigation evidence proffered for the first time on state habeas is substantial. The 9th Circuit sold it short.

On habeas, Mr. Bolin proffered what is called "classic mitigation." *See Summerlin v. Schriro*, 427 F.3d 623, 635 (9th Cir. 2005) (en banc) ("there was an abundance of available classic mitigation evidence concerning family history, abuse, physical impairments, and mental disorders"). Experts tied the life history evidence into a coherent narrative, a narrative that included a mitigating explanation of the circumstances of the capital crime and the prior offenses presented in aggravation.

The 9th Circuit called much of the mitigation proffered on habeas "cumulative." 13 F.4th at 814, 820. It was not. Two examples:

The jury heard a few sentences about Mr. Bolin's appallingly traumatic childhood from his *younger* sister, 3ER 719-21, but did not hear the habeas evidence that the 9th Circuit itself described as "disturbing," 13 F.4th at 817; *see generally* 2App. 388-96. The jury did not hear the details about how his home life with his abusive father was such a "living hell," 4ER 943 [sister], that at the age of **nine** he was a throwaway child, driven to living on the streets of 1950s Chicago. 2App. 422-23; 4ER 945.

The jury heard vague references to Mr. Bolin having served in the Navy in Vietnam. 3ER 694, 721-22. They did not hear about his productive nine-year career in the Navy, or his glowing evaluations from his commanding officers and his promotion to E-6. 2App. 398-406. They did not hear about his combat experience and ensuing post-traumatic stress disorder. 2App. 404-06, 411-13, 430-31; 3ER 832-34, 845-47; 4ER 870-71, 947, 952. They did not hear about his shipboard back injury, which abruptly ended his naval career and left him with a lifetime of pain. 2App.

407; 3ER 832, 847, 4ER 868-69. They heard nothing about his occupational exposure to neurotoxins, in the Navy and in civilian shipyards afterward. 2App. 382-83, 409-11; 3ER 848, 4ER 867-68. Brief mention of his service, without details, invited jurors to speculate inaccurately that something adverse in his service record was being hidden from them, or else to compare Mr. Bolin negatively to veterans who live productive, crime-free lives after discharge.

As in *Porter*, the jury "heard *almost* nothing that would humanize [Mr. Bolin] or allow them to *accurately* gauge his moral culpability." 558 U.S. at 41 (emphasis added). Presentation of "*some* mitigation evidence" at trial does not "foreclose" the prejudice inquiry. *Sears, supra,* 561 U.S. at 955 (emphasis original). To the contrary, *Strickland* allows a finding of no prejudice when the habeas proffer "would barely have altered the sentencing profile." 466 U.S. at 700. That is not this case.

"[T]he effectiveness of mitigating evidence is in the 'details' and when only a general overview is set forth, without providing those 'details,' the attorney does not give the jury a proper vehicle for giving effect to the mitigating evidence." Mark E. Olive, *Narrative Works*, 77 U.M.K.C. L. REV. 989, 1002 (2009), quoting the magistrate judge whose grant of relief was affirmed by the 5th Circuit in *Walbey*, *supra*, 309 F. Appx. 795. Mitigation is an exercise in persuasion through storytelling, not a list of topics to be checked off. *See Canales* Brief at 4-6 and authorities there cited; Sean D. O'Brien, *Death Penalty Stories: Lessons in Life-Saving Narratives*, 77 U.M.K.C. L. REV. 831 (2009).

Not just in this case but in others, the 9th Circuit has failed to grasp this point. Both *Berryman v. Wong*, 954 F.3d 1222, 1227-28 (9th Cir. 2020), and *Livaditis v. Davis*, 933 F.3d 1036, 1048 (9th Cir. 2019), treat detailed mitigation as cumulative because the same subject had been touched, however lightly, in the trial evidence. But in *Williams v. Filson*, 908 F.3d 546, 569 (9th Cir. 2018), the court held that the district court erred by failing to understand and apply this principle. *See also Jells v. Mitchell*, 538 F.3d 478, 501 (6th Cir. 2008) (evidence that "provides a more nuanced understanding of [defendant's] psychological background" is not cumulative).

Besides details, minimally adequate mitigation requires those details to be presented as part of a coherent life story. Mitigation is synergistic. The whole is greater than the sum of its parts, so the mitigation case must be "viewed as a whole" by a reasonable habeas court. *Williams*, 529 U.S. at 399; *see also Andrus*, 140 S. Ct. at 1887; *Spreitz v. Ryan*, 916 F.3d 1262, 1279-81 (9th Cir. 2019). Mental health experts, such as those Mr. Bolin proffered on habeas, Drs. Matthews and Khazanov, can provide that coherence. 2App. 380-83, 386-441. The jury figuratively saw a handful of unconnected snapshots, but the state habeas proffer was comparable to a feature-length motion picture of Mr. Bolin's life.

In violation of this principle, the 9th Circuit broke the habeas mitigation proffer into six parts and found each one wanting, looked at alone. 13 F.4th at 815-21. They did not address the connections among them. As one example, the 9th Circuit understandably downplayed Mr. Bolin's self-report of "[s]ubstance abuse at time of murders." 13 F.4th at 816-17. By contrast, a reasonable habeas court would

recognize that the factual proffer was more complex, explaining that his substance abuse is part of a much larger synergistic web. He had much to self-medicate for, including childhood trauma, military combat, a back injury, and neurotoxin exposure. Neuropsychological deficits reduced his ability to cope in less self-destructive ways. 2App. 381-83, 387, 410; 4ER 869, 927; *see* section 2.G of the Introduction, *supra.* In context, a reasonable sentencer—or a reasonable habeas court—would not write off Mr. Bolin's substance abuse as volitional, recreational, or lacking in mitigation value, as did the 9th Circuit. 13 F.4th at 816-17. And a reasonable sentencer would recognize that his constellation of lifelong impairments helps explain the murders and the crimes offered in aggravation, 2App. 424-41, even if the 9th Circuit is right that substance abuse on those specific occasions does not persuasively do so.

Similarly, the 9th Circuit erred as a matter of both fact and law, *see Tennard v. Dretke*, 542 U.S. 274, 287 (2004), when it wrote off the expert testimony because of a supposedly inadequate nexus to the circumstances of the capital crime. 13 F.4th at 816.

If the state court viewed the mitigation as the 9th Circuit did, it unreasonably applied *Wiggins,* 539 U.S. at 534, which requires a habeas court to "reweigh the evidence in aggravation against the *totality* of available mitigating evidence." [Emphasis added.]

The evidence in this case provides a firm basis on which to undertake review and resolve the conflicts among the lower courts in the interpretation of this Court's precedent.

* * * * *

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the 9th Circuit Court of Appeals should be reversed.

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Respectfully submitted,

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