No. 21-7794

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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Whether a reasonable jurist could conclude that petitioner did not receive ineffective assistance of counsel during the penalty phase of his capital murder trial.

DIRECTLY RELATED PROCEEDINGS

Superior Court of the State of California, County of Kern:

People v. Bolin, No. 41477-A, (Feb. 25, 1991) (judgment of death).

California Supreme Court:

People v. Bolin, No. S019786 (June 18, 1998) (on automatic appeal, convictions and death sentence affirmed).

In re Bolin, No. S090684 (Jan. 19, 2005) (petition for writ of habeas corpus denied).

Supreme Court of the United States:

Bolin v. California, No. 98-7182 (Mar. 8, 1999) (certiorari denied).

United States District Court for the Eastern District of California:

Bolin v. Chappell, No. 1:99-CV-05279-LJO-SAB (June 9, 2016) (petition for writ of habeas corpus denied).

United States Court of Appeals for the Ninth Circuit:

Bolin v. Davis, No. 16-99009 (Sept. 15, 2021) (affirming denial of habeas corpus relief).

TABLE OF CONTENTS

Page

Statement 1
Argument 7
Conclusion..21

TABLE OF AUTHORITIES

Page

CASES

Andrews v. Davis
944 F.3d 1092 (9th Cir. 2019) (en banc) 16

Clark v. Thaler
673 F.3d 410 (5th Cir. 2012) 16

Cullen v. Pinholster
563 U.S. 170 (2011) 8, 9, 10, 13

Foust v. Houk
655 F.3d 524 (6th Cir. 2011) 16

Harrington v. Richter
562 U.S. 86 (2011) 9, 15

Ladd v. Cockrell
311 F.3d 349 (5th Cir. 2002) 16

Lockhart v. Fretwell
506 U.S. 364 (1993) 15

Rompilla v. Beard
545 U.S. 374 (2005) 14, 15

Shinn v. Kayer
141 S. Ct. 517 (2020) (per curiam) 9, 10, 11

Strickland v. Washington
466 U.S. 668 (1984) .... *passim*

Wiggins v. Smith
539 U.S. 510 (2003) 9, 14, 15

Williams v. Taylor
529 U.S. 362 (2000) 14, 15

Wong v. Belmontes
558 U.S. 15 (2009) 12, 19

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

28 U.S.C. § 2254 9

California Penal Code § 190.2(a)(3) 2

STATEMENT

1. In 1989, petitioner Paul Bolin "was living in a small cabin in a secluded mountainous area" in Kern County, California. Pet. App. 337. He cultivated marijuana there with Vance Huffstuttler, who "also lived on the property in a trailer." *Id.* at 338.

On Labor Day weekend, Huffstuttler met Steve Mincy and Jim Wilson at a bar in Twin Oaks, about 45 minutes away. Pet. App. 338. The three men drove together to the property in Wilson's truck. *Id.* When they arrived, Huffstuttler took Mincy and Wilson to see the marijuana plants, which prompted Bolin to angrily confront Huffstuttler. *Id.* While arguing, Huffstuttler and Bolin walked to Bolin's cabin where Eloy Ramirez, Bolin's friend who was visiting that weekend, saw Bolin retrieve a revolver and fire one shot at Huffstuttler at close range. *Id.* "Huffstuttler fell to the ground," motionless. *Id.* Bolin returned to Mincy and Wilson with the revolver, telling them that he had "nothing against" them. *Id.* At that moment, "Wilson turned and ran"; Bolin shot him in the shoulder, but Wilson continued running away. *Id.* Mincy begged Bolin not to shoot him, but Bolin ignored those pleas and shot him multiple times. *Id.*

Bolin returned to the cabin and shot Huffstuttler's body several more times with a rifle. Pet. App. 3, 338. Bolin searched for Wilson in the forest; when Bolin could not find Wilson, Bolin immobilized Wilson's truck and commented to Ramirez that Wilson "would bleed to death before he got off the hill." *Id.* at 3 (internal quotation marks omitted). Bolin arranged the scene to make

it "appear like the result of a drug deal gone bad" before leaving with Ramirez for Southern California. *Id.* at 338.

Wilson, wounded, hiked through the night in the wilderness and eventually found "a neighboring ranch, where the owner called the sheriff's office." Pet. App. 338. Deputies went to Bolin's cabin and discovered the bodies of Huffstuttler and Mincy. *Id.* Near Huffstuttler's body, deputies found a revolver that had been "wiped clean of fingerprints[.]" *Id.* "[B]lood spatters around Mincy's body" revealed that he had been shot while in the fetal position. *Id.* at 339. Bolin remained at large for several months until the story aired on the television show *America's Most Wanted*, resulting in Bolin's capture in Chicago. *Id.* at 339-340.

2. The prosecution charged Bolin with capital murder for killing Huffstuttler and Mincy, with the attempted first-degree murder of Wilson, and with cultivation of marijuana. Pet. App. 337; *see* Cal. Penal Code § 190.2(a)(3). Bolin moved for a change of venue based on the pretrial publicity the case had garnered, including the *America's Most Wanted* segment, but the trial court tentatively denied the motion before jury selection, and Bolin did not renew the motion afterward. Pet. App. 339-340. At the guilt phase of the trial, both Wilson and Ramirez testified, each providing eyewitness accounts of Bolin's crimes. *Id.* at 338-339. The defense presented no evidence. *Id.* at 339. The jury convicted Bolin on all counts. *Id.* at 337.

At the penalty phase, the prosecution introduced aggravating evidence of Bolin's additional prior violent acts, including testimony regarding the acts underlying a prior felony conviction. Pet. App. 339. The jury learned that Bolin had assaulted Matthew Spencer, resulting in great bodily injury, and had served time in prison for the attempted manslaughter of Kenneth Ross. *Id.* The jury also heard that Bolin had been "arrested in Oklahoma for stabbing Jack Baxter," acquitted after claiming self-defense, and returned to prison in California for a violation of parole. *Id.* at 3. And the prosecution presented evidence that Bolin, while awaiting trial, had sent a letter to Jerry Halfacre, threatening to have Halfacre "permanently removed from the face of this Earth" if Halfacre ever again saw Bolin's daughter Paula Halfacre, who was the mother of Halfacre's child. *Id.* at 339.

In mitigation, Bolin presented the testimony of eight witnesses regarding "Bolin's positive attributes and redeeming qualities." Pet. App. 17. Family members and friends—including Bolin's sister, daughters, stepdaughter, and Chicago relatives with whom Bolin stayed after the murders, *id.* at 17-18—testified that Bolin had "tried to get family members to spend time together, took the lead on home renovation projects, and served as a mentor figure to younger family members," *id.* at 18. His daughters, Paula Halfacre and Mary Bolin, testified that Bolin had raised and provided for them after their mother had abandoned them at young ages. *Id.* at 339. Bolin also raised his step-

daughter, Pamela Castillo, whose mother had divorced Bolin and left the country. *Id.*; *see id.* at 16. Both Mary and Bolin's sister, Fran Bolin, testified about Bolin's service to his country; he joined the Navy at 16 years old and fought in Vietnam. *Id.* at 17-18, 339. In addition, a correctional officer who had witnessed Bolin's prison behavior after the Ross shooting remembered Bolin as a "cooperative inmate" who did not cause problems. *Id.* at 18.

Through Mary's testimony, Bolin introduced mitigating evidence relating to the incidents with Spencer and Ross. Pet. App. 17. Mary testified that Bolin had been provoked by Spencer's attempts to touch Mary "inappropriately" and by Spencer's use of drugs in Bolin's home. *Id.* Mary also testified that Ross had been violent toward Bolin's goddaughter, Nyla Olson, *id.* at 16-17, and had been "carrying a stick as a weapon," *id.* at 17.

Bolin also presented evidence regarding the adversity he had faced during his life. Fran Bolin described Bolin's childhood as disturbing, testifying that Bolin had poor relationships with his father and stepfather, had ultimately been abandoned by his parents, and had become homeless, living on the streets at a young age. Pet. App. 17-18. Paula Halfacre testified that Bolin's fiancée, Rhonda, had died in a car accident, which prompted Bolin to move to the remote mountain cabin in Kern County. *Id.* at 17.

In his closing argument, Bolin's attorney argued for a sentence of life in prison. Pet. App. 18. He told the jury that Bolin was "not a man whose life is without redemption" considering Bolin's military service and his having raised

and provided for his daughters and stepdaughter. *Id.* Nevertheless, the jury returned a sentence of death. *Id.* at 337.

3. On direct appeal to the California Supreme Court, Bolin argued (among other things) that trial counsel had been ineffective for failing to renew a change of venue motion after jury selection and for allegedly failing to develop and present mitigating evidence at the penalty phase. Pet. App. 5-6, 8; *see id.* at 339-342, 367. The court rejected Bolin's claims and affirmed the conviction and sentence. *Id.* at 337-369. As relevant here, the court reasoned that Bolin's claim regarding penalty-phase mitigation evidence failed because none of the additional mitigation evidence Bolin faulted his trial counsel for failing to present was in the record. *Id.* at 367.

Bolin then filed a state habeas petition asserting the same ineffective assistance claim, among other grounds for relief. Pet. App. 5. He presented declarations from doctors who had examined Bolin more than ten years after his crimes, including Dr. Zakee Matthews and Dr. Natasha Khazanov. *Id.* Bolin also submitted a report of a forensic psychologist, Dr. Ronald Markman—who had evaluated Bolin before trial at the urging of defense counsel—as well as reports from Bolin's penalty-phase investigator and declarations from additional relatives and friends. *Id.* The California Supreme Court summarily denied the petition "on the merits." *Id.* at 370.

4. In 2000, Bolin filed a federal habeas petition, which was held in abeyance pending the resolution of his state habeas petition. Pet. App. 5. In 2016,

the district court denied relief on all of Bolin's claims. *Id.* at 335; *see id.* at 32-336. With respect to penalty-phase mitigation, the court noted that Bolin's trial counsel had thoroughly investigated Bolin's background and presented the testimony of many of Bolin's friends and family members and that the California Supreme Court could reasonably have concluded that Bolin had failed to establish either deficient performance or prejudice. *Id.* at 286. The district court granted a certificate of appealability on the claim. *Id.* at 335.

In 2021, the court of appeals affirmed the district court's denial of habeas relief. Pet. App. 1-30. The court "assume[d] without deciding" that Bolin's trial counsel had been constitutionally deficient at the penalty phase (and that no reasonable jurist could conclude otherwise), though the court "question[ed] whether Bolin" could, in fact, make such a showing. *Id.* at 12. But Bolin failed to show "prejudice under AEDPA's deferential standard of review" because "a fairminded jurist could reasonably conclude that further investigation and presentation of mitigating evidence Bolin claims should have occurred was not substantially likely to change the outcome." *Id.* The court emphasized that trial counsel had conducted an extensive investigation into Bolin's life history, including hiring an investigator who "traveled to Oklahoma, Chicago, Arizona, and several places in California to meet with potential witnesses." *Id.* at 14; *see id.* at 13-16. Bolin's trial counsel presented the testimony of eight witnesses, including family members and friends, who attested to Bolin's positive

qualities, military service, and difficult upbringing. *Id.* at 17-18. And the additional mitigating evidence Bolin faulted his trial counsel for not presenting—largely in the form of declarations from doctors who had examined Bolin roughly a decade after the murders, *id.* at 20—was "cumulative," "inconclusive," "insufficiently compelling," and would "not overcome the serious aggravating factors associated with Bolin's crimes and his history of violent criminal conduct" *id.* at 13.[1]

Bolin filed a petition for rehearing and rehearing en banc, which the court of appeals denied. Pet. App. 31.

ARGUMENT

Bolin argues that the court of appeals erred in two respects in denying his penalty-phase ineffective assistance claim: first, by ostensibly concluding that his crimes were "so aggravated that no mitigation could result in a life verdict," Pet. 14, and second, by ostensibly requiring a showing of "certainty or near-certainty" that the result of his trial would have been different but for his attorney's alleged deficient performance, *id.* at 21. But neither characterization of the decision below is accurate. The court of appeals correctly applied well-settled law in rejecting Bolin's claim. Its decision does not create any conflict of authority, and there is no other persuasive reason for further review.

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[1] The court of appeals, like the district court, also rejected Bolin's ineffective-assistance claim regarding the decision of his trial counsel not to pursue a motion for a change of venue based on pretrial publicity. Pet. App. 8-12; *see id.* at 49-74. Bolin does not press that claim in his petition here.

1. a. Bolin asserts that the court of appeals "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." Pet. 14; *see id.* at 14-20.

That argument both misstates the law and misreads the decision below. The relevant legal question is not whether a reasonable jurist "could rule out the possibility" of a different outcome at trial, Pet. 14, but whether a reasonable jurist could conclude that Bolin "had failed to show a 'substantial' likelihood of a different sentence.'" *Cullen v. Pinholster*, 563 U.S. 170, 202 (2011); *see Strickland v. Washington*, 466 U.S. 668, 694 (1984). Nor is Bolin's description of the decision below accurate. The court of appeals did not hold that *no* conceivable mitigation evidence could have changed the outcome in Bolin's case—only that "a reasonable jurist could conclude" that the "discovery and presentation of the additional mitigating evidence Bolin now identifies[] was not reasonably likely to have changed the result in Bolin's case." Pet. App. 18. In other words, the Ninth Circuit held that the California Supreme Court could reasonably have concluded that the *particular* evidence Bolin faults his trial counsel for not presenting to the jury was not reasonably likely to change the outcome.[2]

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[2] Bolin mischaracterizes the decision below in another respect as well, asserting that it "recognized" that "defense counsel's preparation for the penalty phase was deficient." Pet. 2 (capitalization omitted). In fact, the court of appeals observed, "Although we question whether Bolin could make the required

That approach reflects a faithful application of this Court's precedent, which instructs that a penalty-phase ineffective assistance claim like Bolin's requires a court to "'reweigh the evidence in aggravation against the totality of available mitigating evidence." *Pinholster*, 563 U.S. at 198 (quoting *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)). And when such a claim is raised in a federal habeas proceeding governed by 28 U.S.C. § 2254, the claimant must show that the state court's weighing of the mitigating and aggravating factors "is so obviously wrong that its error lies 'beyond any possibility for fairminded disagreement.'" *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam); *accord Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard."). This standard is "doubly deferential" to state courts, *Pinholster*, 563 U.S. at 202, and Congress intended for it to be "difficult to meet," *Kayer*, 141 S. Ct. at 523.

The court of appeals correctly determined that Bolin could not clear this high bar. In accordance with this Court's framework, to resolve Bolin's claim, the court of appeals reviewed: (1) the mitigation evidence Bolin's counsel ac-

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showing" of deficient performance given his trial counsel's "substantial efforts to develop mitigating evidence, we will assume without deciding that [counsel's] performance was constitutionally deficient (and that under AEDPA, no reasonable jurist could conclude otherwise)." Pet. App. 12.

tually presented at trial; (2) the additional mitigation evidence Bolin now asserts should have been presented; and (3) the State's aggravation evidence. Pet. App. 12-13; *see Kayer*, 141 S. Ct. at 524-526; *Pinholster*, 563 U.S. at 198-202.

Mitigation evidence presented at trial. As the court of appeals observed, this is not a case where trial counsel had failed to investigate and present mitigation evidence. Pet. App. 14-18. On the contrary, Bolin's attorney hired an investigator who "traveled to Oklahoma, Chicago, Arizona, and several places in California to meet with potential witnesses" and uncover mitigation evidence. *Id.* at 14. Defense counsel presented a robust mitigation case, ultimately putting on eight witnesses who testified to (1) "Bolin's positive attributes and redeeming qualities," (2) "how Bolin had helped his family," (3) his "difficult upbringing and military service," and (4) particular circumstances that counsel contended mitigated the aggravating violent acts evidence presented by the prosecution. *Id.* at 17. The mitigating evidence included testimony from Bolin's daughters that Bolin had raised them, as well as a stepdaughter and her friend, as a single parent. *Id.*; *see id.* at 339. Bolin's sister described the hardships of his childhood, which included abandonment by his parents and homelessness at an early age. *Id.* at 17-18, 339. Witnesses also discussed Bolin's enlistment in the Navy, his service in Vietnam, his previous positive prison behavior, the loss of his fiancée to a car accident, and his positive family contributions. *Id.* at 17-18. In his final plea to the jury, Bolin's

trial counsel tied this mitigation evidence together into the theme that Bolin's life was "not without redemption." *Id*. at 18.

Additional mitigation evidence now proffered. The court of appeals explained that "[t]he new mitigating evidence that Bolin has developed in connection with his habeas petition is 'hardly overwhelming.'" Pet. App. 18 (quoting *Kayer*, 141 S. Ct. at 525). "Although that evidence presents Bolin in a more sympathetic light in some respects, it also suffers from a variety of shortcomings"—including being at times "speculative, double-edged, and ambiguous" and "[i]n other instances, cumulative of evidence and mitigation themes" that Bolin's trial counsel *did* present to the jury. *Id.* at 18-19; *see id.* at 19-28 (examining Bolin's new evidence in detail).

For example, Bolin contends that his trial counsel failed to investigate or present evidence of Bolin's troubled childhood. Pet. 4-5; *see* Pet. App. 22. But a good deal of evidence regarding Bolin's upbringing *was* presented to the jury, primarily through the testimony of his sister Fran Bolin. *See* Pet. App. at 17-18, 22, *supra*, p. 4. As the court of appeals explained, a reasonable jurist could conclude that additional evidence of Bolin's troubled childhood was unlikely to sway the jury. Moreover, the abuse Bolin suffered, "while deplorable, was not so severe that it resulted in Bolin receiving medical attention," *id*. at 23; it did "not rise nearly to the level of Bolin's own depraved and lethal conduct," *id*.; it "risked opening the door to rebuttal evidence of Bolin's domestic abuse of his wife and children," *id*. at 24; and there was a "substantial gap in time between

Bolin's worst childhood experiences and his murders of Huffstuttler and Mincy" *id*.

Similarly, Bolin argues that his trial counsel should have presented additional details about Bolin's experience in the Navy. Pet. 5-7; *see* Pet. App. 25. But the jury heard evidence that Bolin had served with the Navy in Vietnam. Pet. App. 17. As the court of appeals reasoned, "it is not apparent" that additional information regarding Bolin's military service would have "create[d] a materially different portrait in mitigation." *Id.* at 25. And such evidence would have had to be "considered alongside other more negative aspects" of his military service that might have been admitted as rebuttal evidence, including regarding Bolin's "disciplinary problems," substance abuse, and "unauthorized absence." *Id.*; *see Wong v. Belmontes*, 558 U.S. 15, 26 (2009) (courts must consider evidence "that would have been presented had [the petitioner] submitted the additional mitigation evidence").

Bolin also faults his trial counsel for not presenting evidence of his "neurological impairments." Pet. 9; *see id.* at 9-12; Pet. App. 19-21. But a reasonable jurist could have concluded that there is no reasonable probability that this evidence would have resulted in a different outcome. This theory relies on the opinions of Drs. Khazanov and Matthews, but they "conducted their analyses approximately ten years after the murders," reducing their probative value. Pet. App. 20. In addition, "their assessment[s] of Bolin is largely at odds with the conclusions of Dr. Ronald Markman, who evaluated Bolin prior

to trial and whose report," which defense counsel received, "concluded that there was no evidence of a major mental disorder." *Id.* (alteration and internal quotation marks omitted). There are also "a number of significant shortcomings in Bolin's neurological deficits theory," *id.*, including its "speculative" nature, *id.*, and "uncertain relevance to the offenses for which he was convicted," *id.* at 21.

Aggravation evidence. The court of appeals reasoned that, even by the standards of other capital cases, Bolin's crimes "involve[d] uniquely cruel and unjustified conduct that reflected an appreciable indifference to human life." Pet. App. 28. "In an apparent effort to maintain the secrecy of his marijuana grow operation, Bolin shot two men four times each" and killed Mincy as he pleaded for his life. *Id.* Bolin then "elaborately dressed the scene" in an effort to make it appear to be "a drug deal gone bad," *id.* at 2, and "immobilized Wilson's vehicle" to leave Wilson "to perish in an unforgiving mountainous terrain," *id.* at 28. Given the strength of this "extensive aggravating evidence," *Pinholster*, 563 U.S. at 198, "[a] reasonable jurist could easily conclude that the additional mitigating evidence Bolin now proffers was unlikely to have led the jury to choose a different sentence," Pet. App. 28.

b. Bolin contends that the decision below is inconsistent with this Court's decisions, which he asserts "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." Pet. 14; *see id.* at 14-16. As just discussed, however, the court of appeals here did not hold that Bolin could *never* establish prejudice given the aggravated nature of his crimes. It held only that, when combined with the relative weakness of his additional mitigation evidence, the strength of the aggravation evidence would have permitted a reasonable jurist to conclude that Bolin had failed to show a substantial likelihood of a different outcome. Pet. App. 18-28; *supra*, p. 8.

The decisions that Bolin cites are readily distinguishable in that respect. Pet. 14-15. In *Williams v. Taylor*, 529 U.S. 362, 368 (2000), for instance, trial counsel's "sole argument in mitigation" was that Williams had turned himself in. Counsel failed to present extensive records graphically describing Williams's nightmarish and abusive childhood and mental illness. *Id.* at 370-371, 395. In *Wiggins v. Smith*, 539 U.S. 510, 535 (2003), counsel elected not to present mitigating life history evidence apart from Wiggins' lack of prior convictions, even though Wiggins had been the victim of "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care," had been homeless for portions of his life, and was deemed to have diminished mental capacities. And in *Rompilla v. Beard*, 545 U.S. 374, 391-392 (2005), trial counsel failed to present evidence showing that Rompilla's childhood included (1) beatings by his father with fists, straps, belts, and sticks, (2) imprisonment by his father in a dog pen filled with excrement, and (3) a lack of access to indoor plumbing and proper clothing.

These decisions do not suggest, much less establish, that a reasonable jurist would have been compelled to find prejudice here. The *Strickland* prejudice inquiry requires a "case-by-case" analysis depending on the particular circumstances and evidence of each conviction and sentence. *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993). A reasonable jurist could conclude that the mitigation evidence in cases like *Williams*, *Wiggins*, and *Rompilla* was more convincing than the "variously speculative, double edged, ambiguous[,] . . . otherwise unpersuasive," and "cumulative" evidence Bolin faults his counsel for not presenting. Pet. App. 18-19. A reasonable jurist could likewise conclude that the aggravation evidence was weightier in this case. Further, in both *Wiggins* and *Rompilla*, no state court had decided whether the defendant had been prejudiced by his counsel's failures; the federal court therefore decided the issue without the constraint of AEDPA deference. *Wiggins*, 539 U.S. at 534; *Rompilla*, 545 U.S. at 390. That distinction is significant, because "[t]he *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Richter*, 562 U.S. at 105.

c. Bolin next argues that the "lower courts are split" on the question of whether "the aggravated nature" of a defendant's crimes are "sufficient to rule out prejudice." Pet. 16 (capitalization omitted); *see id.* at 16-18. Bolin asserts that the Fifth, Sixth, and Ninth Circuits are each "internal[ly]" divided on that question, *id.* at 17; he also cites decisions of Third and Seventh Circuits, *id.* at 18. But no such conflict exists. The decisions Bolin cites recognize that the

aggravated nature of a crime does not *categorically* rule out the possibility that counsel's failure to introduce compelling mitigation evidence may be prejudicial; rather, the inquiry will depend on the weight of the mitigation and aggravation evidence in each individual case. *See, e.g.*, *Andrews v. Davis*, 944 F.3d 1092, 1118 (9th Cir. 2019) (en banc); *Clark v. Thaler*, 673 F.3d 410, 424 (5th Cir. 2012).[3]

That consensus is firmly rooted in this Court's precedent. As *Strickland* emphasized, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury," and "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." 466 U.S. at 695-696. Thus, for example, where "new evidence about [a petitioner's] family history is overwhelming," a habeas petitioner may be able to establish *Strickland* prejudice even in the face of significant aggravating evidence. *Foust v. Houk*, 655 F.3d 524, 546 (6th Cir. 2011). But here, as the court of appeals explained, Pet. App.

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[3] The Fifth Circuit has held that where "the aggravating evidence [is] overwhelming," it is "'virtually impossible to establish prejudice.'" *Clark*, 673 F.3d at 424 (quoting *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002)). That may be viewed as one formulation of the general principle that where aggravating evidence is very strong, extremely compelling new mitigating evidence would be needed to justify habeas relief under the deferential *Strickland* and AEDPA standards. In any event, because the Ninth Circuit did not rely on that "virtually impossible" standard here, there is no reason for this Court to grant review in this case to determine whether the Fifth Circuit's formulation is correct.

18-28, a reasonable jurist could have viewed Bolin's additional mitigation evidence as far from overwhelming, particularly as compared to the State's aggravation evidence. *Supra*, pp. 8-14.

d. Separately, Bolin argues that "empirical evidence" indicates that "even in highly aggravated cases," Pet. 18 (capitalization omitted), juries sometimes decline to impose the death penalty "when effective trial lawyers find and present persuasive mitigating evidence," *id*. at 18-19. That may well be true, but it does not suggest that review is warranted or that the decision below is wrong. On the contrary, the fact that many juries decline to impose death sentences even in highly aggravated cases underscores the importance of deference to the strategic decisions of trial counsel, who are best positioned to judge what mitigation evidence and themes are most likely to resonate with the jury in each case. As *Strickland* cautioned, because "[i]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689. Here, Bolin's trial counsel undertook a thorough investigation and presented extensive mitigation evidence while declining to introduce other evidence. That strategy

ultimately was unsuccessful, but Bolin has not shown that he received ineffective assistance of counsel in violation of the Sixth Amendment, much less that any reasonable jurist would be compelled to reach that conclusion.

2. Bolin also faults the court of appeals for supposedly requiring him to establish a "certainty or near-certainty" that he would have avoided a death sentence but for his attorney's alleged deficient performance, as opposed to merely "a reasonable likelihood of a different result." Pet. 21 (capitalization omitted); *see id.* at 21-26. The court did no such thing. Its core holding applied the same standard Bolin cites: "We hold that a reasonable jurist could conclude that a further continuance of the penalty phase, and [trial counsel's] discovery and presentation of the additional mitigating evidence Bolin now identifies, was *not reasonably likely* to have changed the result in Bolin's case." Pet. App. 18 (emphasis added).

Bolin argues that the court of appeals improperly "demanded 'compelling' mitigation evidence on habeas—*i.e.*, evidence that would *compel* a different result and not merely make it reasonably probable." Pet. 21. In context, however, the court used the term "compelling" not in the sense Bolin posits but rather as a description of the type of highly persuasive mitigation evidence that would be required to overcome the State's strong aggravation evidence, particularly under AEDPA's deferential standard. The court of appeals explained that fairminded jurists could decide that the new mitigating evidence was "inconclusive and insufficiently compelling" to "overcome the serious aggravating

factors associated with Bolin's crimes and his history of violent criminal conduct." Pet. App. 13.

Bolin also takes issue with the court of appeals' observation that some of the evidence he now cites could well have backfired had it been introduced. Pet. 22-24. For instance, the court noted that some of Bolin's additional evidence was "double-edged" in that it could have led the jury to perceive Bolin in a negative light, Pet. App. 18, that additional "evidence of Bolin's own childhood abuse" could have "open[ed] the door to rebuttal evidence of Bolin's domestic abuse of his wife and children," *id.* at 24, and that additional evidence of his military service could have led the prosecution to introduce evidence of his disciplinary record and substance abuse, *id.* at 25. In Bolin's view, this reasoning is mistaken because "[i]f evidence is 'double-edged,' by definition, a reasonable factfinder could conclude that it is favorable to the defendant," Pet. 24, and the additional evidence the prosecution might have introduced was not "potentially devastating," *id.* at 22 (citing *Belmontes*, 558 U.S. at 17). But the question is not whether the additional evidence might have been favorable to Bolin in certain respects. Rather, it is whether any reasonable jurist would be compelled to conclude that the new mitigation evidence—weighed against the existing aggravation evidence, the negative inferences the jury would likely have drawn from the new mitigation evidence, and the additional aggravation evidence that the prosecution would likely have introduced in response—would

have produced a substantial likelihood of a more favorable sentence. The court of appeals correctly concluded that Bolin had failed to make such a showing.

3. Finally, Bolin asserts that "[t]his is an appropriate case in which to decide these issues" because "[t]he breadth and the depth of the mitigation evidence proffered for the first time on state habeas is substantial." Pet. 26. For instance, he takes issue with the court of appeals' characterization of some of his additional mitigation evidence as "cumulative." *Id.* at 27-28. These fact-bound arguments regarding the record in this case do not provide a persuasive reason to grant review. The court of appeals properly applied this Court's settled framework for resolving penalty-phase ineffective assistance claims raised on federal habeas review. At the very least, a reasonable jurist could conclude that the additional mitigation evidence Bolin now proffers is not so powerful as to create a substantial likelihood of a different sentence in light of the extensive mitigation evidence Bolin's trial counsel presented during the penalty phase and the fact that Bolin shot and killed two men in cold blood to conceal his marijuana-growing operation and left a third man to slowly bleed to death in the mountains.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted

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