No. 21-7794

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

REPLY TO BRIEF IN OPPOSITION

HEATHER E. WILLIAMS
Federal Defender
BRIAN ABBINGTON
Assistant Federal Defender
801 I Street, 3rd Floor
Sacramento, California 95814
Telephone: (916) 498-6666
Email: brian_abbington@fd.org

*ROBERT D. BACON
*Counsel of Record**
484 Lake Park Avenue, PMB 110
Oakland, California 94610
Telephone: (510) 834-6219
Email: bacon2254@aol.com

Counsel for Petitioner
PAUL C. BOLIN

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I. INTRODUCTION

Paul Bolin's certiorari petition[1] presents important issues concerning the prejudice to a client when counsel fail to adequately perform one of the most important responsibilities any lawyer is ever called upon to exercise: investigating and preparing the case for their client's life.

This case is not unique. The issues Mr. Bolin presents arise frequently, and state and federal habeas courts have repeatedly strayed from this Court's precedent and from the realities of capital trial litigation. The problem is widespread, and no authority other than this Court can direct lower courts to adhere to traditional Sixth Amendment prejudice standards. A grant of certiorari would not be a mere exercise in error correction, although the decision of the court below is erroneous on multiple levels.

The record in this case provides a firm foundation for the Court to address these general issues about the standard of prejudice. The 9th Circuit's assumption that the performance of Mr. Bolin's trial attorneys was deficient, was manifestly supported by the evidence before the state court. *Bolin v. Davis*, 13 F.4th 797, 810 (9th Cir. 2021), *reprinted at* 1App. 1; Petn. 2-3. The available mitigation was powerful, had Mr. Bolin's counsel put minimally adequate time and effort into looking for it prior to the guilty verdict. Unlike the small amount of mitigating evidence the jury actually heard, readily available evidence directly explained *why* Mr. Bolin killed

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[1] The petition names the warden of San Quentin State Prison as the respondent. Mr. Bolin has been transferred to the California Medical Facility, so Jennifer Benavidez, the acting warden of the latter institution, is now the appropriate respondent. *See* Rule 2(a), Rules Governing Section 2254 Cases.

two men, and explained it in a mitigating manner. Petn. 8-12, 28-30. As in *Porter v. McCollum*, 558 U.S. 30, 44 (2009), "there exists too much mitigating evidence that was not presented to now be ignored."

II. 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

This is one of a growing number of cases in which courts of appeals have held that a state habeas court could reasonably conclude that the mere facts of the crime of conviction, or the strength of the aggravating evidence more generally, rules out any substantial probability of a life verdict.[2] Petn. 16-18. This conclusion is, as a matter of both fact and law, *not* reasonable.

Respondent attempts to characterize this as a case-specific holding unworthy of this Court's attention, BIO 8, 13-14, 16, but the problem is much deeper and more common, so a grant of certiorari is called for. The 9th Circuit's language cannot reasonably bear the benign and case-specific interpretation respondent gives it at BIO 16. And while attempting to recast the 9th Circuit's holding, respondent acknowledges a circuit split. Respondent recognizes that *Clark v. Thaler*, 673 F.3d 410, 424 (5th Cir. 2012), holding that it is "virtually impossible" to show prejudice, imposes a strict standard that cannot similarly be softened. BIO 16 n.3. The circuit

[2] Respondent questions the phrase "rules out," BIO 8, but it means the same thing as the phrase respondent uses: that, because of the strength of the aggravating evidence, the petitioner "failed to show" prejudice. *Ibid.*

split exists, no matter how the 9th Circuit opinion in this case is interpreted. Petn. 16-18.[3]

Empirical analysis of hundreds of jury verdicts for life across decades shows that murders so aggravated that any amount of mitigation would be futile simply do not exist. Petn. 18-20. Yet the 9th Circuit, and other courts, repeatedly conclude that it would be reasonable to identify the single case before them—looked at in isolation—as a member of that empty set, the one exception that disproves the rule. Petn. 16-18. But other courts—including other panels of the 9th Circuit—recognize that *Williams v. Taylor*, 529 U.S. 362, 367-68, 397-98 (2000), holds that it is *not* reasonable for a habeas court to view *any* capital case in this manner. Petn. 16; *see also Andrus v. Texas*, 140 S. Ct. 1875, 1887 n.7 (2020) (*Andrus I*), where the majority faulted the dissenting justices for ruling out penalty phase prejudice based on the aggravating evidence.[4]

The 9th Circuit in this case superimposed a new standard that, as a practical matter, supplants the one set forth in this Court's precedent from *Strickland v. Washington*, 466 U.S. 668, 694 (1984), through *Andrus*. By this view, the weighing contemplated by *Strickland, id.* at 695, and *Wiggins v. Smith*, 539 U.S. 510, 534 (2003), becomes superfluous if the crime appears sufficiently aggravated in the subjective view of a habeas court.

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[3] More recently than the petition, the 3d Circuit held by a divided vote that a habeas court may reasonably find the strength of the aggravating evidence to be "fatal" to any showing of prejudice from deficient mitigation investigation. *Lesko v. Secretary*, 34 F.4th 211, 248 (3d Cir. 2022).

[4] The denial of certiorari when *Andrus* returned to this Court, *Andrus v. Texas*, 142 S. Ct. 1866 (2022), does not call into question the Court's holdings in *Andrus I*.

The violence of Mr. Bolin's crimes, like the erroneous reasoning of the 9th Circuit in this case, is not an outlier. Both occur with depressing frequency. Mr. Bolin's crimes cannot reasonably be perceived as the single most aggravated case in decades. This Court knows from its own experience that Mr. Bolin's crimes were not "'*uniquely* cruel and unjustified' … even by the standards of other capital cases," BIO 13, *quoting* 13 F.4th at 822 [emphasis added], and that it would be unreasonable for a state habeas court to so perceive them. Every murder that is charged capitally is "cruel and unjustified" and evokes outrage. Few result in judgments of death, even fewer when defense trial counsel adequately perform their duty of investigation.

Respondent asserts that the difference between death verdicts and life verdicts is "the strategic decisions of trial counsel." BIO 17. Respondent puts the cart before the horse. The issue of prejudice arises here only because Mr. Bolin's counsel did not know enough about their client to make strategic decisions worthy of deference. Petn. 2-12. The death verdict against Mr. Bolin was not based on the jury's weighing of the available mitigation against the aggravation. Because of the deficient performance, there were figuratively just a few light feathers on Mr. Bolin's side of the scale, and the prosecutor told the jury so. 3ER 754-55.[5] The jury heard for two weeks about Mr. Bolin the killer and for two hours about Mr. Bolin the family man, with nothing to connect the two. The jury did not know that available mitigating evidence *explained* the murders. Petn. 8-12.

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[5] The reference is 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.

The 9th Circuit's reasoning leads to a Catch-22. Explanatory mitigating evidence makes a murder look *less* aggravated, by placing it in context. But the 9th Circuit appears content to view the crime in the light most favorable to the prosecution, 13 F.4th at 801-02, 822; BIO 1-2, and through that lens conclude that any mitigation would not matter to a reasonable factfinder.

This is not hypothetical. The downward spiral of Mr. Bolin's life that led to the homicides is outlined at Petn. 10-12. The homicides can be understood in the context of the life history the jury did not know about because counsel did not know about it. Even someone who perceived the homicides as the 9th Circuit did, when viewing them only in isolation, would be unreasonable to maintain the same impression after learning the mitigation case proffered on habeas. A reasonable prejudice inquiry takes the circumstances of the crime into account, but does so by "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534.

More generally, respondent focuses on the *presentation* of evidence to the jury. BIO 14, 17. Respondent overlooks one of the most fundamental principles of the mitigation enterprise: it requires a level of *investigation* commensurate with what is at stake.

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."

Strickland, 466 U.S. at 690-91. The presentation of evidence in this case fell short because counsel's investigation was abysmally inadequate.

The Court recently denied certiorari in *Canales v. Lumpkin*, No. 20-7065, 2022 WL 2347581 (June 30, 2022), cited at Petn. 19, 25, 28. *Canales* may have been a weak candidate for certiorari review after *Shinn v. Martinez Ramirez*, 142 S. Ct. 1718 (2022), because in *Canales* the mitigating evidence was never presented in state court. *See* 2022 WL 2347581 at 4 n.2 (Sotomayor, J., dissenting). By contrast, Mr. Bolin's petition squarely presents the issue. The available mitigating evidence was presented on state habeas, and the state court unreasonably concluded that it did not establish even a prima facie case of prejudicial ineffective assistance.

Certiorari should be granted.

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

1. The 9th Circuit Stated and Applied A Standard Inconsistent With This Court's Precedent

Like the 9th Circuit, respondent demands too much of Mr. Bolin in order to demonstrate prejudice, more than this Court's precedent demands. There is simply no warrant in the "reasonable probability" standard of *Strickland*, 466 U.S. at 694, and its progeny, for the 9th Circuit—or any habeas court—to demand "compelling" mitigation, evidence that does not merely make a more favorable result reasonably probable, but *compels* it. The 9th Circuit's multiple references to "compelling," even "inevitably compelling," evidence are cited at Petn. 21. The 9th Circuit's opinion simply will not bear the benign reading respondent gives it at BIO 18. Respondent

has no basis for deciding that a correct statement of the *Strickland* standard is the 9th Circuit's "core holding," *ibid.*, but the court's multiple statements of an erroneous standard are not. And respondent's own demand for "highly persuasive mitigation evidence," *ibid.,* and "powerful" evidence, *id.* at 20, is itself an unreasonable application of *Strickland*.

Respondent argues there was no prejudice because there are factual differences between this case and *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins*, and *Williams*. BIO 14-15. This Court has "never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice." *Andrus I*, 140 S. Ct. at 1886 n.6. Decontextualized elements of the aggravating or mitigating facts in other cases do not establish a safe harbor in which a state habeas court's assessment of the evidence before it, and the probable effect of that evidence on a jury, is necessarily reasonable. This is because capital sentencing must be "individualized." *Eddings v. Oklahoma*, 455 U.S. 104, 105 (1982). The task is to insure that a jury has an opportunity to make a "reasoned moral response to the *defendant's* background, character, and crime." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 252 (2007) (emphasis added). Courts regularly assess the factual similarity of precedent when deciding questions of *law*, but that analysis is wholly inappropriate to review of prejudice at an individual capital sentencing.

Respondent errs by stating that review of prejudice must be "doubly deferential." BIO 9. On the question of prejudice, there is at most one level of deference: to the state habeas court. There is no second level of deference because

there is no other decisionmaker to defer to. "Double deference" refers to review of the state court's assessment of counsel's strategic choices. *E.g., Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). That issue is not presented here because counsel's inadequate investigation left them in no position to make strategic choices entitled to deference.

While using the language of deference, respondent—like the 9th Circuit—is insufficiently deferential to the decisionmaker who really matters, a *jury*. Neither a state habeas court's assessment of the evidence, or a federal habeas court's assessment of the evidence, ultimately matters. The assessment of prejudice on habeas demands a greater level of judicial humility than the 9th Circuit was willing to undertake. "[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. Respondent refers to the "relative weakness" of the mitigation evidence proffered on habeas, BIO 14 ("relative" to what?), but the decision whether it was strong or weak belonged to a jury that actually heard it, not to a habeas court, either state or federal. *Porter*, 558 U.S. at 43. A habeas court that arrogates that decision to itself is not reasonably applying *Rompilla*. *See* 28 U.S.C. § 2254(d)(1).

The references to reasonableness in 28 U.S.C. § 2254(d) have substantive content. Deference is not abdication. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). A "reasonable" habeas court is one that understands the dynamics of mitigation discussed by the Court in cases such as *Rompilla* and *Porter*. Conversely, a habeas court that is blinded by the details of how the murder was committed and so cannot

clearly see "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), is not reasonably applying this Court's precedent and is undeserving of deference.

Respondent never identifies the nature of the state court decision being reviewed here. Mr. Bolin's state habeas petition was denied under California's prima facie case standard by which a state habeas court resolves factual questions in the petitioner's favor. Petn. 12-13, 24 n.8. Under § 2254(d), a federal habeas court looks to state law requirements in reviewing denial of a claim without a hearing. *Brumfield v. Cain*, 576 U.S. 305, 320-21 (2015). It cannot deny the petition on the ground that the state court might reasonably have resolved questions of fact against the petitioner, because the California Supreme Court has indicated that is not what it does. *Reis-Campos v. Biter*, 832 F.3d 968, 973 (9th Cir. 2016); *Nunes v. Mueller*, 350 F.3d 1045, 1054-56 (9th Cir. 2003). The state court decided that Mr. Bolin did not present even a prima facie case that his claims had merit; that is the decision a federal court must test for reasonableness. The state court did not allow full fact development, so it would be impossible and erroneous for a federal court to decide whether, if the state court had done so, whatever decision the state court might have made on a full record would have been reasonable. *See Wellons v. Hall,* 558 U.S. 220, 223 (2010).

Contrary to this principle, the 9th Circuit hypothesized adverse inferences and rebuttal, nowhere in the record, that might have followed from the presentation of an adequate case in mitigation. 13 F.4th at 814-21. Not only are those hypotheses

inconsistent with *Strickland*'s focus on the likelihood of a *different* result, not the same result, they are also inconsistent with the standard the state court used to deny Mr. Bolin's habeas petition, a standard that focuses on his allegations alone without entertaining the possibility of contradiction not already in the record.

In a related error, the 9th Circuit overlooked this Court's recognition in cases such as *Williams*, 529 U.S. at 396-97, and *Sears v. Upton*, 561 U.S. 945, 951 (2010), that mitigation evidence may persuade a factfinder although it is not uniformly favorable to the defendant. When evidence is "double-edged," a reasonable habeas court recognizes that the jury may find *either* "edge" to be more persuasive, so there is a reasonable probability of a different result. Petn. 24; *see also Abdul-Kabir, supra,* 550 U.S. at 255, 260 a jury must have an opportunity "to give … meaningful, mitigating effect" to "double-edged" evidence). A court that treats "double-edged" as a synonym for "unpersuasive," as respondent does at BIO 19, is not reasonably applying this Court's precedent.

The aggravating inferences the 9th Circuit speculated that the jury might draw from the mitigating evidence, 13 F.4th 814-21 & BIO 11-13, add little if anything to the facts of the capital crime that the 9th Circuit found to have such extraordinary aggravating power. By contrast, the jury was given nothing from which to suspect the existence of the mitigating and explanatory inferences from the evidence proffered on habeas. A reasonable habeas court could not conclude that both "edges" of the supposedly double-edged evidence weigh equally in the prejudice balance.

The 9th Circuit instead relied on the vastly different *Wong v. Belmontes*, 558 U.S. 15 (2009), where the problem was that mitigation might open the door to evidence of *another murder* the jury didn't know about. 13 F.4th 819, 820, 821; *see* BIO 12. There was no comparable negative lurking in the wings in this case, and a habeas court would be unreasonable to equate this case to *Belmontes*. Petn. 22.

2. One Example: Mr. Bolin's Honorable, Effective, But Disabling Service in The Navy

Mr. Bolin's daughter testified before the jury:

> Q: Before that was your dad not in the house all the time?
>
> A: No. He was working – either working or in Vietnam.
>
> Q: Was he in the Navy while you were a young child?
>
> A: Yes.
>
> Q: At about the time that you were seven years old, did something happen between yourself and your mother?
>
> A: She had abandoned us. …
>
> Q: Your dad was in the Navy at the time?
>
> A: Yes. (3ER 694.)
>
> His younger sister testified:
>
> Q: When Paul was about 16 or 17, he joined the Navy; is that right?
>
> A: Yes.
>
> …
>
> Q: And after joining the Navy, some years later Paul went to Vietnam?
>
> A: Yes. (3ER 721-22.)

That is *everything* that the jury knew about Mr. Bolin's service in the Navy. They did not know—because Mr. Bolin's trial counsel did not know—about 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 service after nine years 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, working below decks as an engineman. 2App. 382-83, 399, 426. *See generally* Petn. 6-7, 27-28. Of particular importance, the jury did not know the web of connections between his combat experience, his neurotoxin exposure, and his back injury—all of which occurred in the Navy—and the crimes for which the jury had convicted him. Petn. 10-12.

Without citing the most relevant precedent of this Court, *Porter v. McCollum, supra*, the 9th Circuit said that a state habeas court could reasonably see no difference between what the jury heard and what they should have heard about his military service, so Mr. Bolin was not prejudiced. 13 F.4th 819-20; BIO 12. The 9th Circuit held that it would be reasonable for the state court to analyze this evidence in the same way that the Court said was unreasonable in *Porter*, 558 U.S. at 40-44.

The fact of service in the Navy in Vietnam, without any explanation, was not inherently mitigating to a jury in 1990 that had just found Mr. Bolin guilty of two murders. Indeed, the 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 superficially compare Mr. Bolin negatively to veterans who live productive, crime-free lives after discharge.

The mitigation case must be "viewed as a whole." *Williams*, 529 U.S. at 399; Petn. 29. Mr. Bolin was also similarly prejudiced by the jury's lack of knowledge of the details of other mitigating aspects of his life history, even if they had some superficial awareness of a few general themes. *Cf.* Petn. 27-30 *with* BIO 3-4.

3. All The Prejudice Must Be Considered

Prejudice from counsel's deficient performance, in this case and others, is not limited to available evidence the jury never heard. Two examples:

Respondent fails to mention an additional form of prejudice that harmed Mr. Bolin because his counsel's investigation was too *late*, as well as being too *little*. His counsel made decisions about how to question prospective jurors, and about which jurors to accept or challenge, with no plan for a penalty-phase defense theory. 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, even if counsel wanted to. When counsel began investigating potential penalty-phase evidence, the chosen jurors had already found Mr. Bolin guilty. It was too late to reconsider decisions made during voir dire. Petn. 13 n.6.

The fact that Mr. Bolin did not receive adequate mental health evaluation until ten years after the offenses, BIO 5, 12, is a direct and prejudicial artifact of his trial counsel's deficient performance, but respondent holds it against Mr. Bolin and cites it as a reason that he cannot demonstrate prejudice. *See also* Petn. 23.

A reasonable habeas court applying this Court's precedent would take all this prejudice into account. The 9th Circuit did not, and concluded that the state habeas court need not do so, either. Certiorari should be granted.

* * * * *

CONCLUSION

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

DATED: July 12, 2022.

Respectfully submitted,

HEATHER E. WILLIAMS
Federal Defender
BRIAN ABBINGTON
Assistant Federal Defender
801 I Street, 3rd Floor
Sacramento, California 95814
Telephone: (916) 498-6666
Email: brian_abbington@fd.org

*ROBERT D. BACON
*Counsel of Record**
484 Lake Park Avenue, PMB 110
Oakland, California 94610
Telephone: (510) 834-6219
Email: bacon2254@aol.com

Counsel for Petitioner
PAUL C. BOLIN