No. 22-982 - CAPITAL CASE

In the Supreme Court of the United States

RYAN THORNELL,

Petitioner,

v.

DANNY LEE JONES,

Respondent.

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

BRIEF FOR RESPONDENT

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COUNTERSTATEMENT OF THE CASE

The facts framing this appeal are not in dispute here, and the court of appeals' decision does not disturb the jury's findings of guilt. Nor will this appeal decide whether Jones must serve a sentence less than death. This appeal asks solely whether Jones should be resentenced so an Arizona court may evaluate for the first time the substantial mitigation evidence that was available when Jones was sentenced to death but, due to his counsel's concededly deficient performance, the state courts have never considered.

A. Trial Proceedings

As summarized by the courts below, after Jones and Robert Weaver spent the day drinking and using methamphetamine in Weaver's garage, Jones hit Weaver over the head multiple times with a baseball bat, killing him. Inside the house, Jones encountered Weaver's grandmother, whom he also hit on the head with the baseball bat. Jones then encountered Weaver's seven-year-old daughter (Tisha), whom he hit on the head with the baseball bat and either strangled or suffocated. Pet.App.8, 189-90, 242-45.

Following his arrest for the murders of Weaver and Tisha and the attempted murder of Weaver's grandmother,[1] Jones was appointed a public defender who had only three-and-a-half years' legal experience, none as lead capital counsel. Pet.App.9.

The prosecution's theory at trial was that Jones launched an unprovoked attack on Weaver motivated

[1] Weaver's grandmother eventually died from her injuries, but the prosecution never amended the indictment. Pet.App.246.

by a plan to steal Weaver's guns (R.T.8/31/93:64; R.T.9/9/93:38-40) and attacked Weaver's grandmother and killed Tisha to eliminate them as witnesses (R.T.9/9/93:42-44). The prosecution vigorously disputed Jones's evidence that his violence that night was due to drugs and alcohol (*e.g.*, R.T.9/9/93:44-46), arguing instead that his actions were those of a cold, calculated, and premeditated killer (R.T.8/31/93:64-65; R.T.9/9/93:54).

Well before the jury's guilty verdict, Jones's counsel learned from Jones's mother that Jones was deprived oxygen at birth, had a lithium deficiency—commonly associated with several serious psychiatric disorders—had been admitted to therapy six years before the murders, and was medicated for mood disorders. *See* Resp.C.A.ReplyBr.10, 15-16 (cataloguing evidence). Medical records in counsel's possession from approximately a year before trial established that Jones had attempted suicide five years before the murders, had explosive mood episodes, and was admitted to a mental health institution. Pet.App.28; *see also* Resp.C.A.ReplyBr.15.

Despite these red flags, and despite the prevailing standards calling for capital sentence-mitigation investigations to begin "expeditiously" and "immediately upon counsel's entry into the case,"[2] counsel did nothing to investigate Jones's mental health until counsel requested a mental health examination under Arizona Rule of Criminal

[2] ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.1(A), p. 13 (1989); *accord id.* at Guideline 11.8.3, p.23.

Procedure 26.5 *after* Jones's conviction. Pet.App.27-29.

At sentencing, counsel called three witnesses: (1) his guilt-phase investigator, who testified about an alleged accomplice; (2) Jones's second stepfather, Randy, who testified about Jones's complicated birth, multiple childhood head injuries, behavioral changes in his early teens, and substance abuse throughout his adolescence; and (3) Dr. Jack Potts, the Rule 26.5 examiner. C.A.E.R.2492-2628.

Dr. Potts conducted only a "short and cursory evaluation" of Jones and prepared a report with less than one page of analysis. Pet.App.29; *see* J.A.139-40 (report). Although Dr. Potts identified seven possible mitigating factors and three possible mental health, neurological, and neuropsychological disorders (an affective disorder, cyclothymia, and neurologic sequelae from head trauma) (J.A.140), he lacked the necessary time to conduct the kind of in-depth evaluation required to make any diagnoses (C.A.E.R.2566-67).

Dr. Potts nevertheless urged that such an evaluation be done. He testified that "it would be valuable to have had some neurologic evaluations . . . such as a CAT scan, possibly an MRI, possibly EEG, [and] possibly some sophisticated neurological testing because I think there's very strong evidence . . . of traumatic brain injury, and . . . we may have organic neurologic dysfunctions" that "might shed some additional light on . . . why Mr. Jones behave[d] in the

way he did" on the night of the murders.[3] C.A.E.R.2557-59.

The trial court, however, denied counsel's last-minute request for a continuance to obtain that testing, finding that "the evidence" that Jones "requires any kind of neurological examination," which included Dr. Potts's report and testimony, "is very slim, nonexistent in fact." C.A.E.R.2407.

Because Jones's sentencing occurred before this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), the trial judge—not a jury—weighed mitigating and aggravating circumstances and imposed two death sentences for the murders of Weaver and Tisha and twenty-five years for the attempted murder of Weaver's grandmother. C.A.E.R.2471-76 (sentencing minutes). The trial court found three aggravating circumstances for Weaver's murder: (1) the murder was for pecuniary gain, A.R.S. § 13-703(F)(5); (2) the murder was especially heinous, cruel, or depraved, § 13-703(F)(6); and (3) the murder involved multiple homicides, § 13-703(F)(8).[4] J.A.9-10. For Tisha's murder, the trial court again found these aggravating circumstances and the additional

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[3] At the subsequent federal evidentiary hearing, Dr. Potts testified that the reports submitted by Jones's experts in connection with those proceedings are the "documents . . . one would expect to see in mitigation . . . . I believe they're very, very helpful, and . . . I know I would have liked to have had the exhaustive nature of these reports." C.A.E.R.666-67.

[4] All Arizona statutory references are to the versions in effect at the time of Jones's sentencing.

aggravating circumstance that the victim was under 15 years of age, § 13-703(F)(9). J.A.2-3.

With respect to mitigating factors, the court found no statutory mitigating circumstances but did find that Jones (1) suffers from long-term substance abuse, (2) was under the influence of drugs and alcohol at the time of the murders, (3) had a chaotic and abusive childhood, and (4) may have genetic predispositions, aggravated by head trauma, that caused his substance abuse problem. J.A.3-7, 10-13. The court rejected the additional mitigating circumstances proffered by Dr. Potts that Jones (1) had the potential for rehabilitation, (2) likely suffers from cyclothymia (a manic-depressive illness), and (3) has a sense of remorse and responsibility for his actions. *Compare* J.A.6, 13 (court's special verdicts) *with* J.A.140 (Potts report). And because it had earlier rejected the suggestion that Jones "has anything that requires any kind of neurological examination" (C.A.E.R.2407), the court never considered Dr. Potts's identification of potential "neurologic sequelae"—*i.e.*, brain damage—as a potential mitigating factor. *Cf.* J.A.5, 12 (discussing "head trauma" only as potentially aggravating Jones's substance abuse problem).

Because Jones's sentencing occurred pre-*Ring*, the Arizona Supreme Court reviewed his sentence independently. *Compare State v. Watson,* 628 P.2d 943, 946 (Ariz. 1981) (articulating pre-*Ring* independent review standard) *with* § 13-756 (2002) (codifying abuse-of-discretion standard). The Arizona Supreme Court agreed with the trial court's analysis of the aggravators and mitigators, except as to Jones's chaotic and abusive childhood, which the Arizona

Supreme Court found not mitigating. Pet.App.266-84. The Arizona Supreme Court likewise failed to address Dr. Potts's identification of potential neurologic sequelae/brain damage as a mitigating factor. *Cf.* Pet.App.281-83 (discussing "head injuries" in the contexts of (1) childhood head trauma being entitled to "some mitigating weight" but "not sufficient to call for leniency" and (2) the denial of counsel's belated request for a continuance).

B. State Post-Conviction Review

Jones sought state post-conviction relief ("PCR"), asserting various claims, including two ineffective-assistance-of-counsel claims under the familiar framework of *Strickland v. Washington*, 466 U.S. 668 (1984). C.A.E.R.1977-2069. As relevant here, Jones asserted (in what the district court later called "Claim 20(O)" and the court of appeals called "Claim 1") that his trial counsel was constitutionally ineffective by failing to request a mental health expert in advance of the sentencing hearing and (in what the district court later called "Claim 20(P)" and the court of appeals called "Claim 2") that counsel was constitutionally ineffective by failing to seek neurological and/or neuropsychological testing before sentencing. C.A.E.R.2059-65.

Now sitting as the PCR court, the same judge who presided over Jones's trial and sentenced him to death predictably denied Claim 20(O)/1 at a preliminary status conference based on his *recollection* of counsel's performance: "Dr. Potts was a very good expert. . . . I can remember . . . . I don't think counsel was ineffective as far as Dr. Potts." J.A.63-64.

With respect to Claim 20(P)/(2), the PCR court denied PCR counsel's request for expert funding—similarly based on "my" (the trial judge's) "recollection" (C.A.E.R.2202-05, 2210)—and then, after an evidentiary hearing at which Jones's counsel was accordingly hamstrung, denied the claim on the deficient-performance prong with a single conclusory sentence: "The report and testimony of Dr. Potts who was appointed by the Court, adequately addressed defendant's mental health issues" (J.A.88).

C. District Court Proceedings

Following the PCR court's denial of his claims, Jones filed the 28 U.S.C. § 2254 petition underlying this appeal, reasserting, among other claims not relevant here, his mental-health-expert and neurological/neuropsychological-testing claims. C.A.E.R.1646-48. Jones also sought and obtained evidentiary development after the district court found that he "diligently attempted to develop" his claims in state court, rendering section 2254(e)(2) no bar to record expansion and a hearing. C.A.E.R.109, 148-51.

At an evidentiary hearing, Jones presented testimony from, among other witnesses, two defense experts (Dr. Pablo Stewart, a psychiatrist and Dr. Alan Goldberg, a neuropsychologist) who together diagnosed Jones with: (1) cognitive dysfunction (organic brain damage and a history of numerous closed-head injuries); (2) poly-substance abuse; (3) post-traumatic stress disorder ("PTSD"); (4) attention deficit/hyperactivity disorder ("AD/HD"); (5) mood disorder; (6) bipolar depressive disorder; and (7) a learning disorder. Pet.App.40.

To support these diagnoses, Jones introduced new evidence of multiple head injuries that he suffered from birth through adulthood; his mother's chronic malnutrition during her pregnancy with him; his chronic in-utero nicotine and chrome exposure; his fetal trauma from domestic violence and traumatic delivery; and his alcohol and drug abuse that started during childhood and continued through the developmental period. C.A.E.R.855-57, 869, 871-72, 873-76, 942-44, 950, 952, 978. Jones also introduced new evidence of his horrific childhood, including severe physical, sexual, and emotional abuse at the hands of male family members during his formative years, as well as his abuse of drugs and alcohol to cope with the resulting post-traumatic stress. C.A.E.R.868-69, 871-73, 876-80, 925, 930-31, 933-34, 942-43, 948-50, 952, 969, 979. And he introduced new evidence of a lifelong battle with mental illness, including medical records of self-harm, uncontrolled anger, and suicidal ideation from five years before the murders. C.A.E.R.1039-42, 1050.

The district court dismissed both claims for lack of prejudice. With respect to Claim 20(O)/1, the court found that "Dr. Potts served as a de facto defense expert at sentencing and . . . the results of subsequent examinations performed by the parties' mental health experts have not established a more-persuasive case in mitigation than that presented through the testimony and report of Dr. Potts." Pet.App.230. The court dismissed Claim 20(P)/2 after discounting most of the experts' diagnoses, disregarding nearly all the new evidence supporting them, and finding that Jones could prove only that he suffered from AD/HD and possibly a low-level mood disorder, to which, the

district court opined, an Arizona sentencing court "would have assigned minimal significance." Pet.App.222-23, 234.

D. Court of Appeals Proceedings

A unanimous panel of the Ninth Circuit reversed, finding that Jones satisfied the deficient-performance and prejudice prongs of *Strickland* for both claims. As to deficient performance, the panel held that the PCR court unreasonably applied *Strickland* under 28 U.S.C. § 2254(d)(1) and that its decision was premised on unreasonable factual determinations under section 2254(d)(2).[5]

Although the State had primarily urged the court of appeals to review the prejudice component of Jones's ineffective-assistance claims under section 2254(d) (Pet.C.A.Ans.Br.21-33), the panel held that, because the PCR court did not reach prejudice as to either claim, and because Jones diligently attempted to develop his claims in state court,[6] *de novo* review was appropriate under the framework of *Wiggins v. Smith*, 539 U.S. 510, 534 (2003), and *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).[7] Pet.App.38-39, 68.

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[5] The State has not sought this Court's review of these holdings.

[6] The State did not dispute Jones's diligence before the panel (*see* Pet.App.38-39, 68), and later conceded that section 2254(e)(2) and *Shinn v. Ramirez*, 596 U.S. 366 (2022), do not affect this appeal (Pet.C.A.Supp.Br.7), which directly refutes the State's jab (at 2) that the evidence relied on by the court of appeals panel was "developed . . . in contravention of" AEDPA.

[7] The State expressly disclaims (at 20 n.8) any challenge to the panel's decision to review the prejudice prong *de novo*.

Under that review and reviewing the district court's order denying relief for clear error, the panel concluded that Jones had demonstrated at least a "reasonable probability" that presentation of mental health expert testimony (Claim 1) or neurological and/or neuropsychological testing evidence (Claim 2) would have changed Jones's sentence.[8] Pet.App.39-62, 69-70 (quoting *Strickland*, 466 U.S. at 694).

Specifically, the panel held that "had counsel secured a defense mental health expert, that expert would have uncovered (and presented at sentencing) a wealth of available mitigating mental health evidence." Pet.App.39-40. "[T]hat expert," the panel continued, "could have provided substantial evidence—through neuropsychological testing or otherwise—that Jones suffered from mental illness, including evidence supporting any of the diagnoses made by experts in federal district court." Pet.App.40.

The panel based these conclusions first on the fact that Dr. Stewart, who had spent 130 hours working on Jones's case (Dr. Potts spent only 6 hours with Jones before sentencing), generated a 33-page report diagnosing Jones with four of his conditions, elaborating on Jones's social and developmental history, and "conclud[ing] that '[t]he circumstances surrounding Mr. Weaver's death are a direct consequence of [Jones's] abused and unfortunate past'" and "cognitive dysfunction."[9] Pet.App.41

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[8] The panel did not address Jones's appeal of other aspects of the district court's order dismissing his petition. Pet.App.70.

[9] As the panel observed, Dr. Goldberg, who gave Jones approximately 25 tests, made the remaining three diagnoses, and

(quoting J.A.127). Dr. Stewart's findings, the panel explained, identified "a number of factors that may have contributed to Jones's cognitive dysfunction . . . before Jones was even born," "went into much greater detail than [Jones's second stepfather] Randy had provided [the state courts] regarding Jones's head injuries," catalogued "numerous traumatic experiences [Jones suffered] early in his life," and detailed the extent and likely etiology of Jones's substance abuse since age eight or nine. Pet.App.41-44.

The panel acknowledged that "the expert testimony was not wholly one sided" because "[t]he State's experts disputed some of the diagnoses" (Pet.App.54), that the district court had found "the State's experts were more credible," and that, consequently, Jones had not presented sufficient "evidence *confirming* that [he] suffers from neurological damage caused by head trauma or other factors" (Pet.App.51). But after explaining that this Court's precedent requires the consideration of "'any relevant mitigating evidence' offered by the defendant" and that *Strickland* focuses on whether "new evidence was 'sufficient to undermine confidence in the outcome'"—not on whether one side's evidence preponderates—the panel held that "[i]t was improper for the district court to weigh the testimony of the experts against each other in order to determine who was the most credible and . . . . try to find a definitive diagnosis." Pet.App.51-52 (citations omitted). Indeed,

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Dr. David Foy (a psychology professor) corroborated by declaration five of the seven total diagnoses. Pet.App.45-46.

the panel held, "a conclusive diagnosis was not necessary for a sentencer to consider the wealth of evidence that Jones suffered from some form of mental illness and how that illness contributed to his commission of the crimes." Pet.App.54.

Unlike "neutral" and time-strapped Dr. Potts, whom the panel found the district court had clearly erred in declaring a "de facto defense expert at sentencing" (Pet.App.49 (quoting Pet.App.230)), "a mental health expert . . . would have told the story of an individual whose entire childhood was marred by extreme physical and emotional abuse, which in turn funneled him into early onset substance abuse that exacerbated existing cognitive dysfunction" (Pet.App.54-55). By not receiving that evidence, "the sentencing judge 'heard almost nothing that would humanize [Jones] or allow [him] to accurately gauge his moral culpability.'" Pet.App.55 (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009)). Without that evidence, "the sentencing judge had little to counterbalance the aggravating factors" and, thus, failed to consider the mitigating evidence brought to light only after the district court conducted an evidentiary hearing. Pet.App.55.

Recognizing that a federal habeas court's obligation is not simply to catalogue a defendant's mitigation evidence, but to "reweigh the evidence in aggravation against the totality of available mitigating evidence," the panel twice discussed the aggravating factors found by the sentencing court (Pet.App.14-15, 56) and acknowledged the violent nature of the crimes, including the multiple times Jones was alleged to have beaten Weaver over the

head with a baseball bat and how Jones was alleged to have killed Weaver's grandmother and seven-year-old Tisha (Pet.App.8, 56-57 n.13).

"[E]ven despite the existence of [these] aggravating factors," the panel concluded that "[t]he available additional mitigating evidence was powerful," insofar as it included substantial evidence of "numerous neurological disorders, including brain damage, and an extraordinarily abusive childhood." Pet.App.57, 69. With respect to Claim 20(O)/1, the totality of the evidence established "a reasonable probability that development and presentation of mental health expert testimony would have overcome the aggravating factors and changed the result of the sentencing proceeding." Pet.App.57-58.

Similarly, with respect to Claim 20(P)/2, the "results" of the neuropsychological and/or neurological testing "conducted by various experts" showing that Jones "suffered from a variety of psychological disorders stemming from birth and exacerbated by long-term drug use and trauma that affected Jones's cognitive functioning" "would have dramatically affected any sentencing judge's perception of Jones's culpability for his crimes, even despite the evidence of aggravating factors." Pet.App.69.

The State sought rehearing en banc, which the court of appeals denied. Judge Bennett, who was joined by nine judges, asserted that the panel "failed to afford the required deference to the district court's findings" and "improperly and materially lowered" the *Strickland* standard. Pet.App.70-111. Judge Ikuta, joined by two of the judges who also joined Judge Bennett's dissent, wrote separately to complain that

"the panel had no business" conducting "de novo review of the state court's decision" "in the first place." Pet.App.111-12.

SUMMARY OF ARGUMENT

A district court's factfinding role in assessing *Strickland* prejudice is limited to determining whether the original sentencer would have learned about substantial mitigating evidence if the defendant had constitutionally adequate counsel; *Strickland* does not deputize federal district courts as substitute state sentencers. If the defendant presents substantial evidence of the kind that a reasonable sentencer might deem relevant to the defendant's moral culpability, even despite powerful aggravation evidence, relief is warranted. Findings regarding that evidence's ultimate credibility, weight, and preponderation are properly reserved to the state sentencer at resentencing.

The district court here ran afoul of *Strickland* by passing judgment on the persuasive value of Jones's available-yet-omitted mitigation evidence. After correcting that error, the court of appeals encountered a record practically indistinguishable from those in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Porter v. McCollum*, 558 U.S. 30 (2009), and ordered resentencing. This Court should affirm.

I. Under *Strickland v. Washington*, 466 U.S. 668 (1984), setting aside a death sentence on ineffective-assistance-of-counsel grounds requires proof of deficient performance and resulting prejudice.

Strickland's prejudice inquiry is a mixed question of law and fact whose constitutional dimension "favors *de novo* review even when answering a mixed question primarily involves plunging into a factual record." *U.S. Bank N.A. ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 583 U.S. 387, 396 n.4 (2018). Only those factual findings *properly made* by a district court in assessing *Strickland* prejudice are subject to clear-error review.

Strickland's prejudice inquiry limits "the factual part of the mixed question" and, thus, a federal district court's factfinding role, to determining whether substantial mitigation evidence was "available" but "not presented at trial." *Williams v. Taylor*, 529 U.S. 362, 398 (2000). A district court accordingly errs when its factfinding assumes the role of state sentencer by disregarding the opinions of one party's experts based on the superior credibility of the other party's experts, deciding how much weight to assign to the defendant's available-yet-omitted mitigation evidence, or determining whether this evidence preponderates over the evidence in aggravation.

The district court here did all three. By rejecting nearly all the diagnoses offered by Jones's experts, the district court refused to consider any of the substantial documentary, anecdotal, or clinical evidence of Jones's mental health symptoms, their etiology, and their behavioral impact.

Nothing in this Court's *Strickland* jurisprudence conditions the relevance of mitigation evidence upon incontrovertible proof of a definitive diagnosis. Thus, the court of appeals properly considered the substantial evidence supporting Jones's diagnoses and

refused to defer to the district court's excessive findings.

II. The "legal part" of *Strickland*'s prejudice inquiry tests the materiality of the available-yet-omitted mitigation evidence by determining whether there is a "reasonable probability" that, had that evidence been considered at the original sentencing, the sentencer "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. A reasonable probability is not proof by a preponderance: It is a legal determination that the available-yet-omitted mitigation evidence is the kind of evidence that "might well have influenced the [sentencer's] appraisal of [the defendant's] moral culpability" such that, considered against the evidence in aggravation, its omission deprived the defendant of a fair proceeding and renders the death sentence unreliable. *Williams*, 529 U.S. at 397-98.

The district court erred by applying a preponderance standard based on its legally erroneous credibility findings regarding Jones's available-yet-omitted mitigation evidence. Then, after improperly disregarding nearly all the evidence supporting Jones's experts' diagnoses, the district court rejected Jones's remaining mitigation evidence as unpersuasive based on its improper predictions of what weight an Arizona sentencer ultimately would have assigned it.

A proper prejudice analysis by the district court would have abstained from making findings about the ultimate weight, credibility, and preponderation of Jones's available-yet-omitted mitigation evidence,

which not only describes "the kind of troubled history [this Court has] declared relevant to assessing a defendant's moral culpability," *Wiggins*, 539 U.S. at 535, but actually would have undermined the State's death-eligibility case. Indeed, this Court has consistently held that relief is warranted where the available-yet-omitted mitigation evidence reveals a life story rife with severe sexual, physical, and emotional abuse, as well as mental injury and impairment, even when weighed against horrific aggravation evidence. The panel rightly placed Jones's case into the same category.

ARGUMENT

This appeal is limited to *Strickland*'s prejudice prong—namely, whether there is a "reasonable probability" that Jones would have received a sentence less than death if trial counsel's deficient performance had not deprived his sentencer of substantial mitigation evidence that was available at his original sentencing.[10] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

For Jones, the available mitigating evidence reveals precisely the kind of "troubled history" that this Court has time and again deemed so "powerful," *Andrus v. Texas*, 140 S. Ct. 1875, 1883, 1886 (2020) (per curiam); *Wiggins v. Smith*, 539 U.S. 510, 534-35 (2003); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982), that it "might well have influenced the [sentencer's] appraisal of [the defendant's] moral culpability," *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam). *See also Rompilla v. Beard*, 545 U.S. 374, 393 (2005); *Wiggins*, 539 U.S. at 538; *Williams v. Taylor*, 529 U.S. 362, 398 (2000). Yet Jones's sentencer heard almost none of it. Jones's sentencer did not hear all the substantive evidence of Jones's cognitive impairment due to brain damage, of the physical, emotional, and sexual abuse he suffered at the hands of multiple family members, of his self-medication with drugs and alcohol to manage his post-traumatic stress, of his apparent learning disability, or of his lifelong battle with mental illness that had

[10] The State does not challenge the panel's deficient-performance finding. *See* note 5, *supra*.

culminated in self-harm, uncontrolled anger, and suicidal ideation some five years *before* the murders.

"Because the state courts found [Jones's] representation adequate, they never reached the issue of prejudice[.]" *Rompilla*, 545 U.S. at 390. As such, after holding that the state court's deficient-performance finding was objectively unreasonable under 28 U.S.C. § 2254(d)(1) and (d)(2), the panel "examine[d] th[e prejudice] element of [Jones's] *Strickland* claim *de novo*.".[11] Pet.App.21-24; *Rompilla*, 545 U.S. at 390 (when a court declines to address one of *Strickland*'s two prongs, there is no "adjudicat[ion] on the merits as to that prong," and section 2254(d) does not apply).

The deference owed to the district court's findings in assessing *Strickland* prejudice is similarly circumscribed. "Ineffectiveness is not a question of 'basic, primary, or historical fact.'" *Strickland*, 466 U.S. at 698 (citation omitted). Nor is it the role of a federal district court on collateral review to "make the state-law evidentiary findings that would have been at issue at sentencing." *Wiggins*, 539 U.S. at 536. Rather, "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland*, 466 U.S. at 698. And where, as here, that mixed question lies within "the constitutional realm," this Court has "often held that the role of appellate courts 'in marking out the limits of a standard through the process of case-by-case adjudication' favors *de novo* review even when

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[11] The State does not challenge this aspect of the panel's decision. *See* note 7, *supra*.

answering a mixed question primarily involves plunging into a factual record." *U.S. Bank N.A. ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 583 U.S. 387, 396 n.4 (2018); *see also California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.").

Accordingly, only those factual findings *properly made* by a district court in assessing *Strickland* prejudice "are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a)." *Strickland*, 466 U.S. at 698. Clear error occurs when, "on the entire evidence," a reviewing court is "left with the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citation omitted). But where "the key evidence consisted primarily of documents and expert testimony," a more "extensive" review is appropriate. *Id.* at 243. Regardless, "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984).

I. CLEAR-ERROR DEFERENCE IS INAPPLICABLE TO THE DISTRICT COURT'S LEGALLY ERRONEOUS FINDINGS THAT EXCEEDED THE FACTUAL COMPONENT OF THE *STRICKLAND* PREJUDICE INQUIRY

A. *Strickland*'s Prejudice Inquiry Limits Federal District Courts' Factfinding Role To Determining Whether Substantial Mitigation Evidence Was Available But Not Presented At The Original Sentencing

This Court identified what it deems the "correct[]" delineation between the factual and legal components of *Strickland*'s prejudice inquiry in *Williams,* 529 U.S. at 398. *Accord Wood v. Carpenter*, 907 F.3d 1279, 1291 & n.10 (10th Cir. 2018) (Tymkovich, C.J.) ("[T]he Court [in *Williams*] noted this approach was 'correct[],' thus endorsing the distinction itself."). There, the Court confirmed that the "factual part of the mixed question" and, thus, the district court's factfinding role, is to decide whether "available mitigation evidence was not presented at trial." *Williams*, 529 U.S. at 398; *accord Strickland*, 466 U.S. at 699-70 (assessing prejudice by first examining "[t]he evidence [petitioner] says his trial counsel should have offered at the sentencing hearing"); *Wiggins*, 539 U.S. at 534 (beginning prejudice analysis with accounting of "[t]he mitigating evidence counsel failed to discover and present"); *Rompilla*, 545 U.S. at 390 (beginning prejudice analysis with examination of "mitigation leads" effective counsel "would have found"). Accordingly, if the defendant introduces substantial mitigation evidence that was available yet not

introduced by counsel at sentencing, the "factual part of the mixed question" ends, and the analysis proceeds to the legal part of the *Strickland* prejudice inquiry.

In the capital sentencing context, mitigation is broadly defined as "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Eddings*, 455 U.S. at 113-14 (adopting *Lockett* rule). Indeed, the Eighth Amendment requires "that the [sentencer] be able to consider and give effect to all relevant mitigating evidence offered by" the defendant. *Boyde v. California*, 494 U.S. 370, 377-78 (1990). Arizona capital sentencing at the time of Jones's trial worked the same way. *See State v. Fierro*, 804 P.2d 72, 84 (Ariz. 1990) (discussing A.R.S. § 13-703(G) and holding that "[t]he trial judge must consider all mitigating circumstances proffered by the defendant."). In fact, around the time of Jones's sentencing, the Arizona Supreme Court had "urge[d]" sentencing courts "to treat all arguably mitigating evidence as a non-statutory mitigating circumstance entitled to at least some weight." *State v. Gallegos*, 870 P.2d 1097, 1119 (Ariz. 1994).

Accordingly, the district court's factfinding role below was limited to determining whether Jones's original sentencer "would have learned" about any additional substantial mitigation evidence if Jones had constitutionally adequate counsel. *Porter*, 558 U.S. at 41; *Williams*, 529 U.S. at 395.

Strickland and its progeny do not deputize federal district courts as substitute state sentencers.[12] The state sentencer, not the federal district court, "determine[s] the weight to be given relevant mitigating evidence." *Eddings*, 455 U.S. at 114; *accord State v. Doerr*, 969 P.2d 1168, 1181 (Ariz. 1998) ("The [state sentencer] has broad discretion in determining the weight and credibility given to mental health evidence."). The state sentencer, not the federal district court, conclusively resolves conflicts between competing expert opinions. *See Porter*, 558 U.S. at 43 ("While the State's experts identified perceived problems with the tests that [defendant's expert] used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge."). And the state sentencer, not the federal district court, ultimately decides whether that mitigation evidence preponderates. *See Fierro*, 804 P.2d at 84 ("The burden [at sentencing] is on the defendant to prove any mitigating circumstances by a preponderance of the evidence."); *cf. Andrus*, 140 S. Ct. at 1887 (explaining that *Strickland* prejudice asks whether the "available mitigating evidence taken as a whole might have sufficiently influenced the jury's appraisal of [the defendant's] moral culpability" (cleaned up)).

Therefore, a district court errs as a matter of law when its purported factfinding not only determines whether substantial "available mitigation evidence

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[12] The panel respected this boundary below by holding only that Jones "is entitled to relief and *resentencing*." Pet.App.70 (emphasis added).

was not presented at trial," *Williams*, 529 U.S. at 398, but goes a step further and assumes the role of state sentencer by resolving competing expert opinions, deciding how much weight the proffered mitigation will receive, and determining whether that mitigation preponderates vis-à-vis the evidence in aggravation.[13]

B. The District Court Erred As A Matter Of Law By Making Findings That Exceeded The Factual Component Of *Strickland*'s Prejudice Inquiry

The district court made exactly that error below. Instead of limiting its factfinding to identifying the available-yet-omitted mitigation evidence, it made its own findings about the ultimate credibility, weight, and preponderation of that evidence.

Relying on its own idiosyncratic assessment of their work histories, the district court started by citing the supposedly superior credibility of the State's experts (Dr. Steven Herron, a psychiatrist; Dr. Anne Herring, a neuropsychologist; and Dr. John Scialli, a psychiatrist) as a basis for ignoring nearly all of Jones's new mitigation evidence. Pet.App.218-19. The district court never found that no objectively reasonable Arizona sentencer could have found Jones's experts credible. Yet it discarded their opinions—and more importantly, the substantial

[13] Unlike the district court's approach, this standard shows appropriate respect for the decisions of state sentencers consistent with the federalism concerns animating the position advanced by amici for the State. *See* State of South Dakota et al. Amicus Br. 3 (arguing that states should have "primacy in defining and enforcing societal norms within their borders").

evidence supporting those opinions—almost entirely.[14] By rejecting nearly all the diagnoses offered by Jones's experts on that apparent basis, the district court also wrongly refused to give "any consideration" to the documentary, anecdotal, and clinical evidence of Jones's mental health symptoms, their etiology, and their impact on his behaviors. *Porter*, 558 U.S. at 42-43; *see also Eddings*, 455 U.S. at 114 ("[N]either may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.").

As a result, aside from considering the evidence that Jones suffered from AD/HD and a low-level mood disorder—to which it improperly decided a state sentencer "would have assigned minimal significance" (Pet.App.234)—the district court disregarded all the other evidence Jones offered about his "character or record and any of the circumstances of the offense . . . as a basis for a sentence less than death," *Lockett*, 438 U.S. at 604, about which an Arizona sentencer necessarily "would have learned" but for trial counsel's deficient performance, *Williams*, 529 U.S. at 395. The district court's refusal to consider this evidence was "predicated on a misunderstanding of the governing rule of law," and, therefore, erroneous as a matter of law. *Bose Corp.*, 466 U.S. at 501.

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[14] Dr. Stewart's extensive forensic work for prisons, courts, and government agencies (C.A.E.R.784-87, 500-01, 850-53) clearly refutes the district court's characterization of his work as "primarily for the defense" (Pet.App.218). Meanwhile, the district court's finding makes no mention of the conflicting opinions and findings Dr. Herring has offered in other cases. C.A.E.R.430-33, 1389-1466, 1468-70.

Indeed, this Court has never endorsed the district court's apparent view that mitigation evidence regarding a defendant's mental health depends for its relevance upon incontrovertible proof of a particular diagnosis. *See, e.g.*, Pet.App.232 ("[T]he diagnoses not specified in Dr. Potts's report, PTSD and ADHD, are the conditions about which the parties' experts were unable to agree."), 233 ("[T]he results of neuropsychological tests presented by the parties are largely ambiguous and inconclusive."). Conversely, this Court has steadfastly observed a "low threshold" for relevant mitigation evidence, which is met so long as it "tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Tennard v. Dretke*, 542 U.S. 274, 284-85 (2004) (internal quotation marks and citation omitted). In fact, "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." *Payne v. Tennessee*, 501 U.S. 808, 822 (1991).

This standard applies equally to the reports and testimony of mental health experts. Although it is true that "the State's experts identified perceived problems with the tests that [Jones's experts] used and the conclusions that [they] drew from them," the district court was not free to then "discount entirely the effect that [their] testimony might have had on the jury or the sentencing judge." *Porter*, 558 U.S. at 43; *accord Abdul-Salaam v. Sec'y, Pa. Dep't of Corr.*, 895 F.3d 254, 270 n.7 (3d Cir. 2018); *Detrich v. Ryan*, 677 F.3d 958, 987 (9th Cir. 2012), *on reh'g en banc*, 740 F.3d 1237 (9th Cir. 2013); *Sochor v. Sec'y, Dep't of Corr.*, 685 F.3d 1016, 1029 (11th Cir. 2012); *see also Wearry v.*

Cain, 577 U.S. 385, 394 (2016) ("[T]he state postconviction court improperly . . . emphasized reasons a juror might disregard new evidence while ignoring reasons she might not."). It therefore erred as a matter of law when it nonetheless did so.

C. The Court Of Appeals Did Not Err By Considering The Available Mitigation Evidence That The District Court Erroneously Disregarded

The court of appeals panel identified and corrected the district court's legally erroneous refusal to consider the totality of Jones's available mitigation evidence. Instead of assuming the role of state sentencer, the panel "correctly" refocused *Strickland*'s prejudice inquiry on whether "available mitigation evidence was not presented at trial," a question which the district court failed to answer—let alone, even acknowledge. *Williams*, 529 U.S. at 398.

The panel found "a reasonable probability that had counsel secured a defense mental health expert, that expert would have uncovered (and presented at sentencing) a wealth of available mitigating mental health evidence," including "substantial evidence . . . that Jones suffered from mental illness, including evidence supporting" several diagnoses. Pet.App.39-40. Jones's introduction of this "significant evidence" in turn "demonstrate[d] that such evidence could have been uncovered and presented at sentencing." Pet.App.40.

That is all the factfinding that *Strickland*'s prejudice inquiry entails and, thus, the only part of the inquiry to which Rule 52(a) applies. Because Jones's

proffered evidence undisputedly constitutes substantial evidence that was "available" yet "not presented" at his original sentencing, its consideration is indispensable to assessing *Strickland* prejudice. *Williams*, 529 U.S. at 398; *see also Andrus*, 140 S. Ct. at 1887 (recognizing that "the apparent tidal wave of available mitigating evidence" omitted at sentencing "raises a significant question" as to whether it "might have sufficiently influenced the jury's appraisal of Andrus' moral culpability as to establish *Strickland* prejudice" (cleaned up)). The panel therefore did not err by refusing to defer to the district court's legally erroneous findings.

D. The Arguments For Reversal In The State's Brief And Judge Bennett's Dissent Ignore This Court's Precedent Limiting The Factual Part Of *Strickland*'s Prejudice Inquiry

Both the State and Judge Bennett's dissent overstate the scope of the district court's factfinding role. The "thorough and detailed factual findings" of the district court referenced in the State's brief (at 24-25) reach far beyond the facts required to assess *Strickland* prejudice, namely, whether substantial mitigation evidence was "available" yet "not presented at trial." *Williams*, 529 U.S. at 398. That determination does not, as the State suggests (at 24), depend upon antecedent findings on what impairments or diagnoses Jones's evidence indisputably proved, the strength of those conditions' relationship to violent behavior, or the existence of a "causal relationship" with the murders. The "factual part" of *Strickland*'s prejudice test simply asks

whether the substantial evidence Jones offered at the federal habeas proceeding constitutes "mitigation" that was "available" at his original sentencing but "was not presented at trial." *Williams*, 529 U.S. at 398.

Nor is there any support in the record for the State's suggestion (at 28) that the panel—by faithfully following and applying this Court's *Strickland* jurisprudence—"implicitly created an exception to clear-error review by holding that the district court may not make credibility determinations in the first instance." For starters, the panel expressly disavowed such a holding. Pet.App.52 ("This is not to say, of course, that a district court is prohibited from making credibility determinations."). The panel instead held (correctly, as explained *infra*, Part II(C)) that a district court cannot, by way of a credibility determination, "independently evaluate which expert was most believable or try to find a definitive diagnosis," as doing so usurps the role of the state sentencer and exceeds the district court's limited role to decide "only whether there existed a 'reasonable probability' that 'an objective fact-finder' in a state sentencing hearing" (Pet.App.51 (citation omitted)) "might well have [been] influenced" by "the available mitigating evidence," *Wiggins*, 539 U.S. at 538.

Contrary to the State's contention (at 28-30), conclusive credibility and diagnostic findings are not "essential" to resolving whether "available mitigation evidence was not presented at trial." *Williams*, 529 U.S. at 398; *see also Porter*, 558 U.S. at 43 ("[I]t was not reasonable to discount entirely the effect that [the defense expert's contested] testimony might have had on the jury or the sentencing judge."); *Tennard*, 542

U.S. at 285 ("[A] State cannot bar the consideration of evidence if the *sentencer* could reasonably find that it warrants a sentence less than death." (cleaned up)); *Eddings*, 455 U.S. at 114 ("[N]either may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence."). Otherwise, a defendant could not have relevant, available mitigating evidence considered in *Strickland*'s prejudice analysis whenever the State disputes his evidence or presents a rebuttal expert (which almost always occurs). Instead, evidentiary disagreements, including those between experts, go to "the weight and credibility given to mental health evidence," *Doerr*, 969 P.2d at 1181, which, as the State acknowledges (at 28), "[a]n Arizona sentencing court would perform."

The State's argument (at 30-31) that the panel was obligated to defer to the district court's rejection of Jones's sexual and physical abuse evidence fails for the same reason. Granted, considerations like delayed disclosure, record inconsistencies, and motive to fabricate may permit an eventual sentencer to disbelieve and, thus, assign little or no weight to such evidence. *See, e.g.*, *State v. Medrano*, 914 P.2d 225, 227 (Ariz. 1996) (defendant's "self-serving testimony is *subject to* skepticism and *may be* deemed insufficient to establish mitigation" (emphasis added)). But that same sentencer just as easily might credit Jones's evidence of childhood sexual, emotional, and physical abuse given the corroborating evidence from Jones's sister recounting the physical abuse they both endured (C.A.E.R.982-87), from Jones's parents confirming that his sexual abuser babysat him as a child, introduced him to drugs, and got him drunk for fun (C.A.E.R.1713, 1719), and from Dr. Stewart

opining that drugging Jones as a child and keeping him quiet about it were predatory behaviors consistent with sexual abuse (C.A.E.R.539, 864).

Nor does the answer change because, for example, the expert reports evidencing Jones's sexual abuse were "most likely based upon [Jones's] self-report to Dr. Foy." Pet.App.206; *see Wiggins*, 539 U.S. at 534-35 (crediting expert report detailing sexual abuse of defendant "based on [the expert's] conversations with [the defendant] and members of his family" as "powerful" mitigating evidence). Such considerations concern that evidence's eventual weight, not its substance. The district court accordingly exceeded its factfinding role when it refused to consider Jones's proffered evidence of sexual and physical abuse in assessing *Strickland* prejudice, despite substantial corroborating evidence in the record, based on its view that a state sentencer "would likely have viewed" Jones's evidence of sexual and physical abuse "with skepticism." Pet.App.238. Thus, Rule 52(a) does not apply, and the panel owed no deference to that finding.

Nor did the panel "uncritically adopt[] Jones's narrative wholesale," as the State suggests (at 31). Exactly the opposite is true. By acknowledging that substantial evidence's existence as relevant mitigation, the panel faithfully applied the factual part of *Strickland*'s prejudice test without invading, as the district court did, the role of the state sentencer to conclusively determine its credibility, weight, and preponderation.

Judge Bennett's dissent similarly misapprehends a federal district court's factfinding role and, by extension, the resulting reach of clear-error deference. His dissent mistakenly asserts that Rule 52(a) encompasses all of the district court's findings, including that "the State's experts . . . were generally more credible than the defense experts," that Jones's cognitive impairment evidence "was not persuasive," that his PTSD evidence "was unconvincing," that his sexual and physical abuse evidence "should be discounted," that his ADHD evidence "does not serve as persuasive mitigation evidence," and that his mood disorder evidence "is not persuasive mitigation evidence." Pet.App.86-91.

But each of the adverse findings listed in Judge Bennett's dissent attacks the ultimate persuasiveness of Jones's available-yet-omitted mitigation evidence, to which clear-error deference does not apply. Because "Rule 52(a) does not inhibit an appellate court's power to correct errors of law," *Bose Corp.*, 466 U.S. at 501, the panel did not err insofar as it declined to defer to the district court's erroneous legal findings masquerading as factual ones.

II. THE DISTRICT COURT MISAPPLIED *STRICKLAND*'S REASONABLE PROBABILITY STANDARD BY REQUIRING JONES TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE WOULD HAVE RECEIVED A DIFFERENT SENTENCE

A. The Reasonable Probability Standard Tests The Materiality, Not The Ultimate Persuasiveness, Of The Available Mitigation Evidence Not Presented At Sentencing

The "legal part" of *Strickland*'s prejudice test, which the panel properly reviewed (and this Court reviews) *de novo*, considers the "strength of the . . . evidence." *Williams*, 529 U.S. at 370-71, 398. Because Jones challenges the imposition of a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. To make that assessment, this Court "reweigh[s] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. As this Court explained in *Strickland*, a "reasonable probability" does not describe an "outcome-determinative standard" akin to that applicable to newly discovered evidence claims, but is "somewhat lower" because an ineffective assistance claim "asserts the absence of one of the crucial

assurances that the result of the proceeding is reliable." *Strickland*, 466 U.S. at 693-94.

Therefore, Jones "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Whether "it is possible that a jury could have heard [the new mitigation evidence] and still have decided on the death penalty . . . is not the test." *Rompilla*, 545 U.S. at 393. Reliability is the test. And a death sentence can be made unreliable "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694. Indeed, equating reasonable probability with preponderance "would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposed' to [this Court's] clearly established precedent." *Williams*, 529 U.S. at 405-06; *see also Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (collecting cases rejecting equation of standards).

Strickland prejudice instead "finds its roots in the test for materiality" of undisclosed or unavailable evidence. *Strickland*, 466 U.S. at 694. The materiality of available-yet-excluded mitigation evidence turns on "whether in its absence [the defendant] received a fair [proceeding], understood as a [proceeding] resulting in a [sentence] worthy of confidence." *Kyles*, 514 U.S. at 434. This assessment depends upon the "cumulative effect" of the evidence's omission from the sentencing proceeding, *id.* at 436-37, and it must account for "the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken" with effective counsel, *United States v. Bagley*, 473 U.S. 667, 683 (1985).

The new evidence need not be unimpeachable, undisputed, or even entirely favorable to be material. *See Sears v. Upton*, 561 U.S. 945, 949-50 (2010) (relying on "informal personal accounts . . . does not undermine the well-credentialed expert's assessment") (citation omitted)); *Porter*, 558 U.S. at 43 (rejecting use of competing State expert opinion as basis "to discount entirely the effect that [the defense expert's] testimony might have had on the jury or the sentencing judge"); *Williams*, 529 U.S. at 396 ("Of course, not all of the additional evidence was favorable to Williams.").

Nor must it "undermine or rebut the prosecution's death-eligibility case." *Williams*, 529 U.S. at 398. Even evidence that is "unrelated to [the aggravating circumstances] may alter the [sentencer's] selection of penalty." *Id*. In fact, relevant mitigation evidence need not share a "nexus" with the underlying offense at all. *Tennard*, 542 U.S. at 287; *State v. Newell*, 132 P.3d 833, 849 (Ariz. 2006).

It follows that the "reweighing" that occurs in assessing *Strickland* prejudice is categorically distinct from the weighing performed by a state sentencer. Indeed, treating the two as synonymous would risk "overrid[ing] the States' core power to enforce criminal law" by stripping state sentencers of their exclusive authority to determine whether new mitigation evidence introduced in a post-sentencing proceeding is sufficiently credible and weighty to warrant a different punishment. *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022). This concern reaches its zenith where, as here, that evidence is only first introduced in a *federal* habeas proceeding. After all, "[i]t is for the state court—and not for . . . this Court . . . —to undertake

this reweighing in the first instance." *Sears*, 561 U.S. at 956; *cf. Porter*, 558 U.S. at 40-43 (reweighing mitigation evidence introduced during *state* postconviction proceedings); *Wiggins*, 539 U.S. at 534-36 (same); *Williams*, 529 U.S. 397-98 (same); *cf. also Shinn v. Kayer*, 592 U.S. 111, 121-22 (2020) (per curiam) (same); *Wong v. Belmontes*, 558 U.S. 15, 26-28 (2009) (per curiam) (same).

Instead, this Court's *Strickland* prejudice jurisprudence invariably applies reweighing to test whether the available-yet-omitted mitigation evidence is the kind that "might well have influenced the jury's appraisal of [the defendant's] moral culpability" despite the aggravation evidence. *Porter*, 558 U.S. at 41; *Rompilla*, 545 U.S. at 393; *Wiggins*, 539 U.S. at 538; *Williams*, 529 U.S. at 398. And this Court has regularly recognized evidence of severe or pervasive childhood abuse, cognitive impairment, or mental health difficulties as "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535. This is true "even if it does not undermine or rebut" the evidence in aggravation.[15] *Williams*, 529 U.S. at 398.

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[15] This Court's test accurately reflects that state sentencers regularly find "troubled histories" relevant to defendants' moral culpability and independently sufficient to justify a life sentence rather than death, even in highly aggravated capital cases. Russell Stetler et al., *Mitigation Works: Empirical Evidence of Highly Aggravated Cases Where the Death Penalty Was Rejected at Sentencing*, 51 Hofstra L. Rev. 89 (2002). This holds true in Arizona. *See, e.g., State v. Stuard*, 863 P.2d 881 (Ariz. 1993); *State v. Jimenez*, 799 P.2d 785 (Ariz. 1990); *State v. Doss*, 568 P.2d 1054 (Ariz. 1977); *State v. Graham*, 660 P.2d 460 (Ariz. 1983); *State v. Stevens*, 764 P.2d 724 (Ariz. 1988).

Williams came first. There this Court held that, even with AEDPA deference (which does not apply here), and despite being accompanied by additional unfavorable evidence of his criminal history, the defendant's available-yet-omitted evidence of extreme childhood abuse and neglect and evidence of mental impairment was the kind of mitigation evidence that "might well have influenced the jury's appraisal of his moral culpability." *Williams*, 529 U.S. at 397-98. This Court reached that conclusion despite powerful aggravation evidence of the defendant's future dangerousness to society, including evidence he committed multiple violent felonies both before *and after* the murder, including two post-murder assaults on elderly victims—one of which had left the victim in a "vegetative state." *Id.* at 368-70.

This Court's calculus did not change three years later in *Wiggins*. The defendant there had drowned an elderly woman in her own bathtub. 539 U.S. at 514. Nevertheless, relying on *Williams*, this Court held that the available-yet-omitted mitigation evidence showing a childhood plagued by severe "physical and sexual abuse" at the hands of his mother and foster parents was the kind of evidence that "'might well have influenced the jury's appraisal' of [his] moral culpability." *Id.* at 518, 538 (quoting *Williams*, 529 U.S. at 398).

So too in *Rompilla*. That defendant, who already had several prior violent felony convictions, repeatedly stabbed his victim before setting him on fire. *Rompilla*, 545 U.S. at 378. The available-yet-omitted mitigation evidence there again revealed a childhood rife with emotional and physical abuse,

domestic violence, and evidence of mental impairment, including evidence that his alcoholic mother drank during her pregnancy with him and once stabbed his father; that his alcoholic father frequently beat, berated, and neglected him, his brother, and his mother; and that he had organic brain damage that impaired his cognitive functioning. *Id.* at 391-93. Although "a jury could have heard it all and still have decided on the death penalty," this Court emphasized "that is not the test" before holding, as it had in *Wiggins* and *Williams*, that "[i]t goes without saying" that the available-yet-omitted mitigation evidence was the kind of mitigation evidence that "'might well have influenced the jury's appraisal' of [the defendant's] culpability." *Id.* at 393 (citations omitted).

Finally, in *Porter*, this Court once again held that, even with AEDPA deference, the defendant's available-yet-omitted mitigation evidence, including evidence of childhood physical abuse, trauma related to military service, long-term substance abuse, and mental impairment was the kind of evidence "which 'might well have influenced the jury's appraisal of [the defendant's] moral culpability.'" *Porter*, 558 U.S. at 41-42. This was true despite the aggravation evidence showing that the defendant, who had been convicted of first-degree murder for killing his ex-girlfriend and her boyfriend, had a prior violent felony conviction and had committed at least one of the murders during a burglary in a cold, calculated, and premeditated manner. *Id.* at 32, 41-42.

To be sure, none of those cases holds that every habeas petitioner who presents available-yet-omitted

mitigating evidence of an abusive childhood, cognitive and behavioral impairments, or mental illness is automatically entitled to relief. *Wong* illustrates this limitation. There, this Court denied relief because introducing such evidence also would have "put into play aspects of [the defendant's] character that would have triggered admission of the powerful . . . evidence" that the defendant had committed a second murder—evidence that the defendant had successfully kept out of evidence at the original sentencing. 558 U.S. at 22. Accordingly, this Court dismissed as "fanciful" the notion that a mitigation strategy allowing for that evidence's admission might reasonably have changed his sentencing outcome. *Id.* at 28.

Importantly, though, *Wong* does not hold that habeas relief is foreclosed whenever a state disputes—even forcefully—new mitigation evidence. As this Court has subsequently observed, it is "unsurprising" when new mitigation evidence opens the door to "some adverse evidence." *Sears*, 561 U.S. at 951. Instead, *Wong* simply supplies a limiting principle to this Court's settled precedent holding that substantial material mitigation evidence omitted at sentencing due to deficient counsel undermines the integrity of a death sentence.

All told, *Strickland* and its progeny required the district court to assess prejudice by determining whether there is a reasonable probability that Jones would have received a different sentence absent his trial counsel's errors. A reasonable probability is not proof by a preponderance that Jones would have received a different sentence. Rather, it is a legal determination that the kind of mitigation evidence

Jones introduced is material to his moral culpability such that, even when considered against the evidence in aggravation, its absence deprived Jones of a fair proceeding and rendered his death sentence unworthy of confidence such that the state sentencer should be given an opportunity—in his case, a first opportunity—to consider it.

B. The District Court Failed To Apply The Proper Standard In Determining That Jones Was Not Prejudiced

The district court erroneously applied a preponderance standard based on a set of legally erroneous findings regarding the ultimate persuasiveness of Jones's new mitigation evidence. It began by weighing the opinions of Jones's and the State's experts against each other to determine whose experts were generally more credible, an assessment that was based primarily on their past affiliations.[16] Pet.App.218-19. The district court then compounded its error by disregarding the testimony, reports, and evidence offered by Jones's experts based on their supposedly inferior credibility. Its refusal to consider Jones's evidence of cognitive impairment as mitigation

[16] The panel rightly rejected the district court's "mistaken[]" finding that Dr. Stewart had opined on a "factual issue" related to Jones's responsibility for Tisha's murder. Pet.App.44-45. In fact, and contrary to the district court's (and the State's and dissent's) characterization, Dr. Stewart testified only that Jones's "psychological profile" did not fit that of a predisposed child killer and notably refused the State's invitation on cross-examination to say that he "believed" Jones's story that someone else had killed Tisha. Pet.App.44-45 (citing C.A.E.R.535, 881-82).

was "based upon the reports and testimony of Drs. Herring and Scialli." Pet.App.219-22. Its refusal to consider Jones's PTSD evidence likewise was based entirely on Dr. Scialli's contrary assessment, which was rooted in the debatable, if not flawed, theory that PTSD cannot be relevant mitigation unless Jones "had 're-experienced' the traumatic event at the time of the murders."[17] Pet.App.216, 222. Its rejection of Jones's AD/HD evidence as "persuasive mitigation evidence," too, was "based on Dr. Scialli's testimony that the condition is unrelated to violent behavior." Pet.App.222-23 (citation omitted). And its rejection of Jones's bipolar disorder evidence as "persuasive evidence in mitigation" was based on Dr. Scialli's reported "absence of evidence of manic or hypomanic symptoms."[18] Pet.App.217, 223.

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[17] Notably, Dr. Herron, the State's own expert, and the only testifying expert who actually treated Jones, concluded that "he could not rule . . . out" neurological dysfunction, cognitive impairment, or PTSD as possible diagnoses. Pet.App.210. Moreover, Dr. Stewart roundly rebutted Dr. Scialli's flashback theory by testifying that the typical manifestation of PTSD is not the stereotypical experience society associates with the disorder, like that of a veteran reexperiencing a combat situation. Rather, the "more overwhelmingly . . . common" PTSD experience, and the one that Dr. Stewart described Jones as "[c]ertainly" experiencing on day of the murders, is that of "a person having a short fuse; . . . overreacting to a situation; . . . finding themselves challenged by some things and then just going off." Pet.App.43-44 (quoting C.A.E.R.511).

[18] The district court's rejection of Jones's bipolar symptomology based solely on Dr. Scialli's assessment that Jones's description of "highs and lows" "sounded like having an average day as opposed to a down-and-out day, and that's not mania or hypomania," further undermines that finding's reliability.

The district court's subsequent disposition of Jones's claims after disregarding all his available mitigation evidence further illustrates its errant use of a preponderance standard. After rejecting the evidence offered by Jones's experts, the district court found that Dr. Potts—despite being a Rule 26.5 evaluator whose self-described "cursory examination" consisted of less than 10 total hours working on Jones's case (C.A.E.R.654)—had nevertheless "served as a de facto defense expert at sentencing" and that his testimony and report had offered a "more-persuasive case in mitigation" than those of the parties' experts.[19] Pet.App.229-30.

According to the district court, the diagnostic "ambiguity" created by those experts' testimony and reports meant that Dr. Potts's report remained "the most persuasive statement in the record that neurological damage constituted a mitigating factor."[20] Pet.App.232. Meanwhile, the lack of expert

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Pet.App.217. This is especially true given that Dr. Herron, a State expert, treated Jones "[b]ased upon a working diagnosis of bipolar disorder" and "believed the diagnosis of bipolar disorder was reasonable" (Pet.App.210), that Dr. Stewart testified that Jones's correctional medical records "talk about symptoms that are consistent with mania or with what we call hypomania" (C.A.E.R.529), and that other medical records described repeated manic episodes (C.A.E.R.1039-42, 1050, 1055).

[19] Dr. Stewart, by contrast, spent approximately 130 hours working on Jones's case. Pet.App.148.

[20] This characterization of Dr. Potts's report stands in stark contrast with the state sentencing court's effective refusal to acknowledge Dr. Potts's report as such. Pet.App.232. In denying trial counsel's request for a continuance to obtain the testing that Dr. Potts had recommended, the trial court concluded that "the

consensus on the PTSD, brain damage, and major mood disorder diagnoses, which Dr. Potts's report either did not mention or diagnose at all, had rendered them irrelevant to the district court's prejudice assessment. Pet.App.232. The panel rightly rejected this overzealous "factfinding" by the district court, which had effectively reduced most of Jones's available-yet-omitted mitigation evidence to a near nullity.

The same is true of the district court's rejection of Jones's neuropsychological testing evidence showing brain damage. Relying on its prior refusal to consider the substantial evidence supporting the cognitive impairment, PTSD, and major mood disorder diagnoses made by Jones's experts, the district court found that the "largely ambiguous and inconclusive" test results "do not support these diagnoses." Pet.App.233.

An appropriate analysis, as the panel's opinion shows, would have looked much different. Indeed, had the district court properly limited its analysis to the materiality of Jones's new mitigation evidence, it would have been compelled to find that Jones's evidence, even if not sufficiently persuasive in its view

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evidence," which included Dr. Potts's report, "is very slim, nonexistent, in fact, that the defendant has anything that requires any kind of neurological examination." Pet.App.196. Moreover, although Dr. Potts's report identified seven mitigating circumstances (J.A.140), including the potential for neurologic sequelae contributing to Jones's behavior (*i.e.*, brain damage), the Arizona Supreme Court on independent review of Jones's death sentence *rejected* four out of seven of Dr. Potts' identified mitigators for lack of evidence (Pet.App.266-84).

to render a lesser sentence inevitable or even likely, was still material to Jones's moral culpability notwithstanding the evidence in aggravation.

At the federal evidentiary hearing, Jones relied on testimony and reports from well-credentialed experts who relied on comprehensive documentary, anecdotal, and clinical evidence to introduce substantial mitigation evidence that his original sentencer never knew about, much less considered. This included evidence showing that Jones endured years of severe physical abuse by not only his biological father, but also by his stepfather, Randy; sexual abuse as a young child by his step-grandfather, who used alcohol and marijuana to facilitate that abuse when Jones was only nine years old and continued abusing Jones until he was thirteen. C.A.E.R.855-62, 864-65, 869, 871, 876, 929-30, 943. It included evidence, separately corroborated by his sister, that Jones's second stepfather, Randy, physically and emotionally abused Jones by repeatedly beating him and his mother, and even by twice putting a gun to his own head and threatening to kill himself in front of Jones. C.A.E.R.982-87.

It also included evidence of Jones's prenatal chrome and nicotine exposure, his mother's malnutrition during her pregnancy with him, fetal trauma from beatings by Jones's biological father, his traumatic and anoxic birth, the multiple severe head injuries he suffered throughout his life, the extensive drug and alcohol abuse that started when Jones was only eight or nine years old, and his lifelong battle with serious mental illness, including medical records of self-harm, uncontrolled anger, and suicidal ideation

from five years before the murders. C.A.E.R.855-57, 862-65, 929-30, 942-44, 1713, 1719. Jones's experts relied on this evidence, numerous neuropsychological tests, and clinical judgment to diagnose Jones with several psychological disorders, including cognitive dysfunction or impairment due to organic brain damage and a history of head injuries, polysubstance abuse brought on by a combination of genetic predisposition and self-medication to cope with an abusive childhood, PTSD, AD/HD, mood disorder, bipolar depressive disorder, and a learning disorder. C.A.E.R.870-80, 925, 933-34, 942-44, 950, 952, 978.

A proper prejudice analysis by the district court would have abstained from making findings about the ultimate weight, credibility, and preponderation of Jones's available-yet-omitted mitigation evidence. It likewise would have resisted the temptation to decide on behalf of the state sentencer whether to accept the various diagnoses to which Jones's experts had credited that evidence after careful study. Instead, the legally appropriate inquiry would have focused on whether the state sentencing court could have "accurately gauge[d] [Jones's] moral culpability" for the murders without considering the available-yet-omitted mitigation evidence. *Porter*, 558 U.S. at 41.

The answer to that inquiry, as a matter of law, would have been "no." Because such evidence describes "the kind of troubled history [this Court has] declared relevant to assessing a defendant's moral culpability," even against the type of aggravation evidence here, its errant omission from the original sentencing proceeding necessarily undermines the

integrity of Jones's death sentence. *Wiggins*, 539 U.S. at 535.

Moreover, although by no means necessary to prove prejudice, Jones's new mitigation evidence would have "undermine[d] or rebut[ted] the prosecution's death-eligibility case." *Williams*, 529 U.S. at 398. Specifically, it would have undermined the State's theory of Jones's pecuniary gain motive under A.R.S. § 13-703(F)(5) (1993) (the "F(5) aggravator"), and that Jones had a "heinous" or "depraved" state of mind under A.R.S. § 13-703(F)(6) (1993) (the "F(6) aggravator")—aggravators which the State alleged with respect to both Robert's and Tisha's murders, thus constituting four of the seven aggravators against Jones. J.A.2-3, 9-10.

To prove the F(5) aggravator, Arizona law required the prosecution to prove that Jones's motivation for Robert's and Tisha's murders was "the expectation of the receipt of anything of pecuniary value"—and not merely its consequence. J.A.2, 9. The trial court found the F(5) aggravator proved based on the prosecution's evidence that Jones "wanted to get out of Bullhead City because of pending warrants," "knew of Robert Weaver's gun collection," and "took the guns and used them to obtain a ride to Las Vegas and to obtain cash for living expenses." J.A.2, 9. Importantly, the trial court's special verdicts specifically noted the lack of any evidence showing that Jones's actions reflected "conduct arising from an anger explosion." J.A.4, 11. As for the F(6) aggravator's "heinous" or "depraved" elements, which center on the defendant's state of mind, the prosecution relied on evidence that Jones struck Robert and Tisha multiple times beyond what

was necessary to kill them, strangled or suffocated Tisha, and senselessly perpetrated the murders against helpless victims. J.A.2-3, 9-10.[21]

Jones's available-yet-omitted mitigation evidence undermines both findings. A constitutionally adequate mitigation investigation would have allowed the trial court to hear expert testimony, supported by extensive documentary, anecdotal, and clinical evidence showing a life shaped by chronic trauma that not only had a psychological impact, but also changed Jones's brain's hardwiring. C.A.E.R.808-09, 818-19, 849-82, 923-34, 941-50, 971-80, 1039-40, 1050, 1052-53. Jones's associated symptoms notably included "having a short fuse," "overreacting to a situation," and "just going off." C.A.E.R.511-12.

Jones's available-yet-omitted mitigation evidence also would have supplied powerful evidence to support the significant impairment statutory mitigator under A.R.S. § 13-703(G)(1) (1993) (the "G(1) mitigator"), which the trial court rejected citing an absence of evidence showing that Jones's conduct arose "from an anger explosion."[22] J.A.3-4, 10-11. That evidence

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[21] The Arizona Supreme Court affirmed the trial court's F(6) findings, except with respect to its separate determination that Jones killed Tisha to eliminate her as a witness. Pet.App.272. As the court of appeals panel properly found, because "it was not necessary to kill a seven-year-old girl or her grandmother in order to steal guns," "these senseless murders are consistent with an outburst by someone suffering from organic brain injuries and other serious medical disorders," which made Jones's available-yet-omitted mitigation evidence "especially relevant." Pet.App.56-57 n.13.

[22] The G(1) mitigator applies if "[t]he defendant's capacity to appreciate the wrongfulness of his conduct or to conform his

would also have supported the non-statutory mitigators of mental illness, potential for rehabilitation, and lack of future dangerousness that the trial court and Arizona Supreme Court found unproven. J.A.6, 13; Pet App. 279, 283.

Simply put, the new mitigation evidence "would have destroyed the benign conception of [Jones's] . . . mental capacity" presented at sentencing and accordingly undermines the integrity of his death sentence. *Rompilla*, 545 U.S. at 391.

C. The Court Of Appeals Correctly Held That Jones's Available-Yet-Omitted Mitigation Evidence Was Sufficient As A Matter Of Law To Undermine Confidence In His Death Sentence

The court of appeals panel rightly identified the district court's errant use of a preponderance standard to evaluate Jones's mitigation evidence. Starting with the district court's "improper" declaration that the State's experts were "more credible" than Jones's, the panel held that the district court erred by deciding which experts were "most believable" and then using that determination to find that Jones had not

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conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution." A.R.S. § 13-703(G)(1) (1993). The trial court found that Jones appreciated the wrongfulness of his conduct because he attempted to avoid detection after the crimes. J.A.4, 11. But because the elements for proving the mitigator are disjunctive, a finding that Jones appreciated the wrongfulness of his conduct after the offense does not undermine evidence that he lacked capacity to conform his conduct to the requirements of law. *See State v. Rossi*, 741 P.2d 1223, 1229 (Ariz. 1987).

"presented 'evidence *confirming* that [he] suffers from neurological damage caused by head trauma or other factors.'" Pet.App.51. Instead of making conclusive credibility and diagnostic determinations to decide whether Jones more likely than not would have received a sentence less than death, the district court's "ultimate focus" should have been, as the panel found, "whether the new evidence was 'sufficient to undermine confidence in the outcome'" of Jones's original sentencing (Pet.App.52 (citation omitted)), which would have faithfully applied this Court's *Strickland* jurisprudence. *See, e.g.*, *Porter*, 558 U.S. at 36, 42-43 (granting habeas relief despite lack of expert consensus on whether defendant had cognitive defects due to brain damage).

The panel also correctly held (Pet.App.52) that the district court erred in finding that, to be considered "persuasive," Jones's mitigation evidence must be connected to the murders. *See Tennard*, 542 U.S. at 287 (rejecting "nexus" requirement). Indeed, this Court has repeatedly characterized the tragic details of a defendant's life story, many with no connection whatsoever to the underlying crime, as the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Porter*, 558 U.S. at 41 (quoting *Wiggins*, 539 U.S. at 535).

An appropriate assessment of *Strickland* prejudice would have accounted for all the available mitigating evidence "that could and should have been presented at the penalty phase of Jones's trial." Pet.App.52. Although by no means "wholly one sided," that evidence—including how Jones witnessed and experienced severe physical, sexual, and emotional

abuse by family members as a young child, how he used drugs and alcohol to cope and self-medicate, and how a combination of substance abuse, prenatal and childhood trauma, and severe head injuries affected his brain—"would have significantly impacted the overall presentation of Jones's culpability with respect to his mental state, and painted a vastly different picture of Jones's childhood and upbringing." Pet.App.54-55. Without that evidence, the sentencing judge at Jones's original sentencing could not have "accurately gauge[d] his moral culpability." *Porter*, 558 U.S. at 41.

The panel's reweighing of Jones's mitigation evidence against the aggravation evidence confirmed the materiality of the available-yet-omitted mitigation evidence and, hence, the prejudicial effect of its omission from his original sentencing. The panel rightly compared Jones's aggravation and mitigation evidence to that presented in *Porter*, *Williams*, *Rompilla*, and *Wiggins*. As in each of those cases, Jones's aggravation evidence was significant, showing that he had beaten his victims to death, including one who was under the age of 15, though possibly not for pecuniary gain or in an especially heinous or depraved manner, given the available-yet-omitted mitigation evidence showing his conduct to be the result of an outburst attributable to traumatic brain damage and severe mental illness. Pet.App.56.

Also like each of those cases, the available-yet-omitted mitigation evidence that Jones presented at the evidentiary hearing, although disputed by the State, tells a life story rife with severe sexual, physical, and emotional abuse, as well as brain injury

and mental impairments about which the sentencing judge learned little to nothing at the original sentencing.[23] Pet.App.57-59. And in each of those cases—two with AEDPA deference—this Court held that the errant omission of available-yet-omitted mitigation evidence from the original sentencing proceeding so impeded the sentencer's accurate assessment of the defendant's moral culpability that, despite the gruesome countervailing evidence, the death sentences imposed were unworthy of the confidence that *Strickland* demands.

The panel rightly placed Jones's death sentence into the same category. The available-yet-omitted mitigation evidence is no less relevant to assessing Jones's moral culpability, and the evidence in aggravation no different in kind from that at issue in those cases in which this Court has granted relief.[24] Nor is there anything in the record to suggest that

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[23] The panel also examined decades' worth of undisturbed Ninth Circuit case law notably drawing similar contrasts between unquestionably brutal murders and evidence of tragic personal histories marked by family abuse, substance abuse, and mental impairment. *See* Pet.App.59-61.

[24] This case's distinct procedural posture vis-à-vis *Williams*, *Wiggins*, *Rompilla*, and *Porter* only magnifies its evidentiary indistinguishability. In each of those cases, this Court reversed the courts of appeals' *denial* of habeas relief, twice with the additional hurdle of AEDPA deference not present in this case. Conversely, here, the State's brief urges this Court to reverse the court of appeals panel's *grant* of habeas relief without so much as attempting to distinguish Jones's evidence from that which, on balance, has repeatedly been held sufficient as a matter of law to undermine confidence in the outcome of a capital penalty phase proceeding.

Jones, by introducing his new mitigation evidence, would somehow be opening the door to "the worst kind of bad evidence" in rebuttal. *Contrast Wong*, 558 U.S. at 26. The panel thus did not err by holding that the available-yet-omitted mitigation evidence undermines confidence in Jones's death sentence.

D. The State's Brief And Judge Bennett's Dissent Invite This Court To Hold That A Federal District Court Assumes The Role Of State Sentencer In Assessing *Strickland* Prejudice

The State's argument that the panel misapplied *Strickland* collapses beneath its own weight. For starters, the State argues (at 32) that the panel errantly rejected "the district court's findings regarding the persuasiveness of Jones's newly-proffered mitigation evidence." But, as explained repeatedly throughout this brief, and as the authority cited in the State's own brief confirms, assigning weight to relevant mitigation evidence is the province of the state sentencer, not a federal district court on collateral review.[25] Indeed, the State acknowledges as much (at 32-33) before oddly insisting that "the district court . . . only assigned [Jones's mitigation evidence] the appropriate weight," which was itself based on the district court's own assessment of what

[25] None of this Court's decisions cited in the State's brief (at 31-35) supports its apparent view that a federal district court on collateral review may make the same evidentiary findings reserved for the state sentencer. *See, e.g.*, *Jones v. Mississippi*, 593 U.S. 98, 108 (2021) (noting that *Eddings* and its ilk "afford *sentencers* wide discretion in determining 'the weight to be given relevant mitigating evidence'" (emphasis added)).

weight a state sentencer "would have assigned" to that evidence. In other words, the State does not deny, but instead defends as correct, the district court's assumption of the state sentencer's role. The law says otherwise.

The State's hefty reliance (at 34-35) on Arizona case law to supposedly forecast how much weight an Arizona sentencer ultimately would have assigned the available-yet-omitted mitigation evidence here does not change this calculus. "[B]ecause the facts in each capital sentencing case are unique, the weighing of . . . mitigating evidence in a prior published decision is unlikely to provide clear guidance about how a state court would weigh the evidence in a later case." *Kayer*, 592 U.S. at 123.

The State's criticism of the panel's analysis of the evidence in aggravation falls similarly flat. To begin, the panel's amended opinion plainly disproves the State's suggestion (at 36) that the panel relied only "on the *outcomes* of several Supreme Court and Ninth Circuit cases" to assess the aggravating evidence against Jones. In fact, the panel methodically analyzed the types of aggravation evidence that this Court and the Ninth Circuit have held are no match for the kind of available-yet-omitted mitigation evidence that Jones introduced. *See* Pet.App.58-61. The aggravating evidence against Jones is no different in kind from that introduced against those defendants whose available-yet-omitted mitigation evidence nevertheless undermined confidence in their death sentences. And instead of trying to distinguish that authority, the State again mistakenly dedicates several pages (at 36-39) using Arizona case law to

predict the weight a state sentencer would have assigned the aggravating circumstances against Jones and then concludes that they "demonstrate an exceedingly strong case in favor of death."

The State's reliance on *Wong* is also misplaced. Jones's new mitigation evidence would not have risked the introduction of "the worst kind of bad evidence," *i.e.*, an undisclosed additional murder, as it did in *Wong*, 558 U.S. at 26. Instead, Jones's available-yet-omitted mitigation evidence is indistinguishable from the kinds of evidence that this Court has repeatedly held "might well have influenced the [sentencer's] appraisal of [the defendant's] moral culpability" despite the commission of horrific murders accompanied by powerful aggravating evidence. *Williams*, 529 U.S. at 398; *accord Porter*, 558 U.S. at 41; *Rompilla*, 545 U.S. at 393; *Wiggins*, 539 U.S. at 538.

Judge Bennett's dissent merely echoes these misconceptions. Its assertion that the panel failed to "seriously reweigh" the aggravation and mitigation evidence mistakenly treats a federal district court's role on collateral review as indistinguishable from that of a state sentencer. Pet.App.97. And it makes no attempt to distinguish the evidence here from that which this Court deemed sufficient on balance to warrant relief in *Williams*, *Wiggins*, *Rompilla*, and *Porter*. Instead, it errantly declares that a state sentencer would have assigned *de minimus* weight to the mitigation evidence, *see* Pet.App.98-108 (dismissing mitigation as "weak," making "minimal" or "no difference," entitled to "little," "minimal," or "slight" mitigating weight, or lacking "persuasive

corroboration"), and overwhelming weight to the aggravation evidence, *see* Pet.App.108-110 (describing aggravators as "the weightiest," given "extraordinary weight," "especially strong," or "entitled to great weight"). And it does so by erroneously relying on Arizona case law assessing the evidence in other capital cases.

Simply put, Judge Bennett's dissent repeats the State's misguided invitation for this Court to hold that a federal district court's reweighing role on collateral review is the same as that of a state sentencer. This Court's settled precedent roundly refutes this conception. Unlike a state sentencer's final determinations as to evidentiary weight, credibility, and preponderation, the reweighing that occurs under *Strickland* and its progeny asks whether the available-yet-omitted mitigation evidence is the kind that "might well have influenced the [sentencer's] appraisal of [the defendant's] moral culpability" even despite the evidence in aggravation. *Williams*, 529 U.S. at 398; *accord Porter*, 558 U.S. at 41; *Rompilla*, 545 U.S. at 393; *Wiggins*, 539 U.S. at 538. The panel recognized, respected, and correctly applied this distinction in holding that, in Jones's case, it is.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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