No. 22-982

IN THE
Supreme Court of the United States

RYAN THORNELL,
Petitioner,

v.

DANNY LEE JONES,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI CURIAE[1]

The American Civil Liberties Union Foundation ("ACLU") is a national nonprofit, nonpartisan organization with approximately 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as an amicus. The ACLU has filed amicus briefs in several cases relating to habeas corpus relief, including *Williams* v. *Taylor*, 529 U.S. 362 (2000), *Bousley* v. *United States*, 523 U.S. 614 (1998), and *Stewart* v. *Martinez-Villareal*, 523 U.S. 637 (1998). The ACLU of Arizona is a statewide affiliate of the national ACLU.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL has a particular interest in protecting the constitutionally guaranteed writ of habeas corpus, and it has filed amicus briefs in several cases relating to that writ, including *Banister* v. *Davis*, 140 S. Ct. 1698 (2020), *Ayestas* v. *Davis*, 584 U.S. 28 (2018), and *Harrington* v. *Richter*, 562 U.S. 86 (2011).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or their counsel made such a contribution.

This case involves the potential execution of a person who contends he was sentenced in state court in violation of the Sixth and Fourteenth Amendments. Amici have a strong, shared interest in protecting the right to effective assistance of counsel and defending the just administration of post-conviction relief. This Court has appropriately determined time and again that failure to present mitigation evidence of the sort at issue here—diagnosed cognitive disorders and severe abuse—is prejudicial, even in the face of powerful aggravation evidence. Adoption of petitioner's position would effectively abrogate that jurisprudence and signify that such mitigation evidence is no longer sufficient to cause prejudice. Amici therefore file this brief in support of respondent.

SUMMARY OF ARGUMENT

After careful review of the record, the Ninth Circuit concluded that trial counsel's failure to develop and present mitigation evidence to the sentencing judge, under Arizona's now-defunct judicial-sentencing scheme, prejudiced Danny Lee Jones. Applying *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Ninth Circuit identified a reasonable probability that, absent that error, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. That opinion is nothing out of the ordinary. It strikes no new ground, it offers no new law, and it marks no factual departure from literally hundreds of other habeas decisions by circuit courts around the country. It is both well-supported and correct.

Petitioner nonetheless contends the Ninth Circuit misapplied *Strickland*. Petitioner makes that contention not because the court misstated the standard, but because, in petitioner's view, it failed to give suf-

ficient attention to the district court's factual conclusions and to the evidence in aggravation.

Petitioner's first argument misses the focus of the prejudice analysis. The opinion below was right to focus its review on the balance of aggravation and mitigation evidence overall, and not on the credibility of any one particular witness. Put differently, the issue before the Ninth Circuit was not whether it believed one witness over another, but whether there is a reasonable probability that the sentencer would have moved toward leniency after hearing both sides.

Petitioner's second argument stretches so far beyond binding precedent that the Court need not spend much time addressing it. Petitioner subtly asks for a categorical rule that would treat the sort of aggravation evidence here as prejudice-proof, such that any reviewing court would be "forced" to conclude that counsel's failure to put on mitigation evidence could not have prejudiced respondent.

Petitioner can make that argument only by repeating the same error it assigns to the Ninth Circuit: ignoring one side of the evidence. The evidentiary hearing revealed an array of mitigation evidence, including respondent's diagnosed cognitive disorders and a childhood marred by sexual and physical abuse. The Ninth Circuit correctly concluded that the balance of evidence in mitigation and aggravation placed this case comfortably among this Court's precedents finding *Strickland* prejudice. Those cases have confirmed, time and again, that the failure to present this sort of mitigation evidence is sufficient to create a reasonable probability of a different outcome when considered along with the aggravating evidence, and thus sufficient to satisfy *Strickland*'s prejudice requirement. And those precedents align perfectly with what

the Ninth Circuit did here, on both procedure and substance.

The decision below should be affirmed.

STATEMENT

1. The mitigation evidence originally presented at trial was slim. As the Ninth Circuit recognized, the only defense-side mitigation witness who testified before the state court was Jones's second step-father, Randy Jones.[2] Pet. App. 57. Randy offered second-hand testimony about Jones's birth and abuse of drugs, and about the abuse Jones suffered at the hand of his first step-father. Pet. App. 57.

Dr. Jack Potts—a court-appointed witness who conducted a diagnostic evaluation after meeting with Jones for just four hours—also testified. Pet. App. 10. Dr. Potts acknowledged he faced "significant time pressure" in preparing his report. Pet. App. 13. Although he confirmed that the abuse Randy described would predispose Jones to a possible affective disorder, he could not make any particular diagnosis. Pet. App. 11–12. By his own admission, Dr. Potts would have benefitted from additional information about Jones's history, including "some neurologic evaluations" or "possibly some sophisticated neurological testing." Pet. App. 11. Such testing "would be valuable to have to pin down the diagnosis." Pet. App. 11. When asked whether further testing could "shed some additional light" on why Jones "behave[d] in the way he did on March 26, 1992," Dr. Potts testified that it would have. Pet. App. 11.

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[2] To avoid confusion, amici refer to Randy Jones as "Randy" and to respondent Danny Jones as "Jones" or "respondent."

2. The habeas evidentiary hearing before the district court revealed that a constitutionally adequate investigation would have uncovered powerful mitigation evidence that had been either under-investigated by trial counsel or outright omitted by Randy Jones. Expert psychiatric witnesses conducted the testing that Dr. Potts would have liked to see, and diagnosed Jones with (1) cognitive dysfunction; (2) poly-substance abuse; (3) post-traumatic stress disorder; (4) attention deficit/hyperactivity disorder; (5) mood disorder; (6) bipolar depressive disorder; and (7) a learning disorder. Pet. App. 40.

What is more, the evidence demonstrated that Jones's sole mitigation witness, Randy, also abused Jones—a fact that trial counsel was unaware of during sentencing. Pet. App. 54. Randy beat Jones with a belt and a buckle, physically abused Jones's mother, pointed a gun to his own head and threatened to kill himself in front of Jones, and engaged in other forms of severe physical and verbal abuse near or toward Jones. Pet. App. 46, 54.

The evidence also demonstrated that Randy's own father (*i.e.*, Jones's step-grandfather) sexually abused Jones from age nine to thirteen. Pet. App. 44, 53–54. The evidence suggested that the grandfather introduced Jones to marijuana and alcohol when Jones was just nine in order to facilitate the abuse. Pet. App. 44, 53–54. In sum, the new evidence presented at the evidentiary hearing "told the story of an individual whose entire childhood was marred by extreme physical and emotional abuse." Pet. App. 54–55.

Dr. Potts likewise testified at the evidentiary hearing—this time to explain the limited scope of his sentencing testimony. He explained without equivocation that he "was not hired for mitigation." Pet. App. 47.

In his own words, Dr. Potts recalled: "Mine was a cursory examination. . . . [I]nterviewing one family member certainly is not adequate, I believe, for what would be considered capital mitigation. It is below the standard of care." Pet. App. 48.

On appeal, and based on this record, the court of appeals held that counsel's investigation and preparation of mental health evidence for the penalty phase was deficient (Pet. App. 39), and petitioner has not challenged that ruling in this appeal.

ARGUMENT

I. THE NINTH CIRCUIT'S *STRICKLAND* PREJUDICE ANALYSIS IS CONSISTENT WITH THE ANALYSES CONDUCTED BY THIS COURT.

To establish prejudice under *Strickland*, a petitioner must "show that there is a reasonable probability" that "the result of the proceeding would have been different" but for counsel's errors—that is, "a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. That required Jones to show that if his counsel had presented the full array of available mitigation evidence that a constitutionally adequate investigation would have disclosed, there is a reasonable probability that the court would have returned a sentence other than death.

The Ninth Circuit correctly concluded that such a probability exists: "Testimony explaining Jones's history 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.

Petitioner's main argument criticizes the Ninth Circuit for engaging in a fact-intensive evaluation of the record and of the mitigation evidence that should have been—but was not—introduced at sentencing. Pet. Br. 2–3. Petitioner contends that such an undertaking is somehow aberrational and ultimately unlawful. In Petitioner's telling, the Ninth Circuit failed to give appropriate deference to the district court's fact-findings and failed to give appropriate weight to the aggravating evidence in finding that counsel's deficient performance prejudiced the defense. Pet. Br. 2–3.

But, contrary to petitioner's arguments, this decision was not an outlier. Quite the opposite. As amici demonstrate below, the Ninth Circuit's analysis aligns comfortably with the settled approach this Court and other lower courts have taken in a long line of *Strickland* cases, *i.e.*, conducting a searching review of the totality of mitigation evidence, weighing it with the aggravating evidence, and evaluating how that evidence would have impacted the sentence of death.

A. This Court Has Repeatedly Concluded that Counsel's Unreasonable Failure to Investigate and Present Readily Available Mitigation Evidence Undermines Confidence in a Death Sentence.

This Court has long recognized the fundamental importance of mitigation evidence, even in the face of substantial aggravation evidence. Thirty-five years ago, in *Penry* v. *Lynaugh*, this Court remanded for resentencing after jurors were not instructed that they could consider "evidence of [the defendant's] mental retardation and abused background." 492 U.S. 302, 327 (1989). Mitigation evidence is so critical, the Court reasoned, that only when the sen-

tencer can "consider and give effect to" mitigating evidence "can we be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g].'" *Id.* at 319 (quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976)). An omission of mitigation evidence creates the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 328 (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978)). "When the choice is between life and death, that risk is unacceptable." *Id.*; see also *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982) (noting that consideration of the offender's life history is a "part of the process of inflicting the penalty of death") (citation omitted); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality) (invalidating Ohio law that did not permit consideration of aspects of a defendants background).

AEDPA did not dislodge these principles. On at least four occasions (two with AEDPA deference and two without), the Court has concluded that the failure to present mitigation evidence at sentencing was sufficient to undermine confidence in a death sentence. Each time, the Court has reconsidered whether the relevant habeas court "evaluate[d] the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Williams* v. *Taylor*, 529 U.S. 362, 397–98 (2000).

1. Start with *Williams*. No one could question the strength of the aggravating evidence: Terry Williams received a death sentence for a homicide that was preceded by armed robbery, burglary, and grand larceny, and succeeded by auto theft and two separate violent assaults on elderly victims—one of

whom was left in a "vegetative state." *Id.* at 368. In mitigation, the jury heard evidence from Williams's mother and two neighbors, who described him as a "nice boy" and not a violent person. *Id.* at 369. The jury also heard from a psychiatrist, who relayed Williams' statement that, in one of his robberies, "he had removed the bullets from a gun so as not to injure anyone." *Id.* Defense counsel also "repeatedly emphasized the fact that Williams had initiated the contact with the police that enabled them to solve the murder and to identify him as the perpetrator of the recent assaults, as well as the car thefts." *Id.*

Williams sought post-conviction relief, and the state habeas court held an evidentiary hearing. *Id.* at 370.[3] There, evidence revealed that Williams experienced extreme mistreatment, abuse, and neglect during his early childhood, was "borderline mentally retarded, had suffered repeated head injuries, and might have mental impairments organic in origin," among other evidence. *Id.* (cleaned up). The state habeas court concluded that counsel's failure to present this mitigation evidence constituted prejudicial ineffective assistance, and recommended that Williams receive a resentencing. *Id.* at 371. The Virginia Supreme Court did not accept that recommendation, concluding that the omitted mitigation evidence "barely would have altered the profile of this defendant that was presented to the jury." *Id.* at 372.

This Court disagreed, reasoning that the Virginia Supreme Court "failed to evaluate the totality of the

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[3] Importantly, in *Williams* and in *Porter*, this Court found prejudice even while applying AEDPA deference, which is "not in operation when," as here, "the case involves review under the *Strickland* standard itself." *Harrington*, 562 U.S. at 101.

available mitigation evidence." *Id.* at 397. In the Court's estimation, "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398.

2. The Court followed a similar path three years later, in *Wiggins* v. *Smith*, 539 U.S. 510 (2003). Wiggins left his 77-year-old victim "drowned in the bathtub of her ransacked apartment." *Id.* at 514. Defense counsel, without conducting the necessary foundational investigation, made the decision to focus on Wiggins's direct responsibility for the crime without uncovering or presenting any evidence of his life history or family background. *Id.* at 516. As in *Williams*, a post-sentencing evidentiary hearing revealed that Wiggins had suffered "severe physical and sexual abuse" during his childhood, at the hand of his mother and a series of foster parents. *Id.* In contrast to *Williams*, however, the state habeas court concluded that counsel made a tactical decision that did not constitute ineffective assistance, and thus did not conduct a prejudice analysis. *Id.* at 517–18.

After concluding that defense counsel's performance was in fact deficient, this Court assessed prejudice by "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence." *Id.* at 534. The available mitigating evidence of severe physical and sexual abuse that plagued Wiggins's childhood, the Court explained, "taken as a whole, 'might well have influenced the jury's appraisal' of Wiggins' moral culpability." *Id.* at 538 (quoting *Williams*, 529 U.S. at 398).

3. This Court again evaluated the prejudicial impact of failure to conduct an adequate mitigation in-

vestigation in *Rompilla* v. *Beard*, 545 U.S. 374 (2005). Rompilla was convicted of stabbing his victim repeatedly before setting him on fire, and had a significant history of violent felony convictions. *Id.* at 377–78. On the other side of the ledger at trial was evidence from five of Rompilla's family members, who "beseeched the jury for mercy, saying that they believed Rompilla was innocent and a good man." *Id.* at 378. Rompilla's 14-year-old son testified that he loved his father, and would visit him in prison. *Id.* The jury acknowledged this mitigation evidence, but assigned greater weight to the aggravating factors and sentenced Rompilla to death. *Id.*

Rompilla sought federal habeas relief, asserting that counsel rendered ineffective assistance for failing to investigate and present mitigation evidence about his childhood, mental capacity, and alcoholism. *Id.* at 378. Had counsel looked at the file from Rompilla's prior conviction, they would have found a range of mitigation evidence disclosing a bleak childhood colored by alcohol abuse and mental disorders, and test scores showing that Rompilla's IQ "was in the mentally retarded range." *Id.* at 391, 393. The state habeas court nevertheless concluded that counsel's performance was adequate, and denied relief without assessing prejudice. *Id.* at 378.

This Court again disagreed, concluding that counsel's failure to investigate mitigation further was deficient and prejudicial. *Id.* at 393. If counsel had investigated Rompilla's records, his files would have revealed a "childhood and mental health very different[] from anything defense counsel had seen or heard." *Id.* at 390. Although this Court recognized "it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test." *Id.* at 393. On the contrary, "[i]t goes with-

out saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [his] culpability, and the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *Id.* (internal citations omitted).

4. Consider, finally, *Porter* v. *McCollum*, 558 U.S. 30 (2009) (per curiam). George Porter was convicted of two counts of first-degree murder for the shooting of his former girlfriend and her boyfriend. *Id.* at 31–32. In mitigation, the jury heard evidence that he had a good relationship with his son, that he "has other handicaps that weren't apparent during the trial," and that he was not "mentally healthy." *Id.* at 32. The trial court, serving as the sentencer under the Florida law then in effect, found that the State had proved four aggravating circumstances related to the murder of Porter's ex-girlfriend, and found no mitigating circumstances. *Id.* The jury recommended the death sentence, which the trial court imposed. *Id.*

A post-conviction evidentiary hearing revealed new evidence that described Porter's abusive childhood, his heroic military service and the trauma it caused him, his long-term substance abuse, and his impaired mental health and mental capacity—none of which was known to his penalty-phase counsel. *Id.* at 33. The post-conviction trial judge concluded, however, that this evidence would not have made a difference in the outcome of the case, and the Florida Supreme Court affirmed. *Id.* at 36–38.

Yet again, this Court concluded, after reweighing the evidence in aggravation and mitigation, that Porter had established a probability of a different outcome sufficient to undermine confidence in his

death sentence. *Id.* at 44. The jury heard nothing about Porter's service in two of the most horrific battles of the Korean war, his childhood history of physical abuse, or his brain abnormality and limited schooling. *Id.* at 41. This evidence, weighed against the aggravating circumstances on the other side of the ledger, is precisely the type of evidence that is "relevant to assessing a defendant's moral culpability." *Id.*

B. The Ninth Circuit's Analysis Tracked *Williams*, *Wiggins*, *Rompilla*, and *Porter*.

Williams, *Wiggins*, *Rompilla*, and *Porter* each involved horrific offenses and substantial aggravating circumstances. In each case, this Court reviewed the aggravation and mitigation evidence presented at sentencing against the post-conviction mitigation evidence assembled by the district court on habeas. And in each case, this Court concluded that the mitigating evidence may well have spared a person from a death sentence. That is exactly what the Ninth Circuit did here, and petitioner's arguments to the contrary ignore the record and this Court's own precedents.

First, petitioner contends the Ninth Circuit erred by rejecting the district court's finding that the State's experts were more credible than Jones's experts. Pet. Br. 27. But the Ninth Circuit did not "reject" those findings, and, indeed, took care to emphasize that "of course" a district court is not "prohibited from making credibility determinations." Pet. App. 52. The court of appeals explained that the district court erred *not* because it made a credibility determination, but because it used that determination as the basis for its conclusion that no prejudice resulted. Pet. App. 52.

The focus of the prejudice analysis is not on resolution of a battle of the experts, but on whether the new evidence was sufficient to undermine confidence in the outcome. This is not a novel proposition; it is consistent with both this Court's precedents and the weight of intermediate appellate authority. The Ninth Circuit itself previously highlighted this precise point in *Correll* v. *Ryan*. See 539 F.3d 938 (9th Cir. 2008). There, the court observed that "in the procedural context of this case, the district court's role was not to evaluate the evidence in order to reach a conclusive opinion as to Correll's brain injury (or lack thereof)." *Id.* at 952 n.6. Instead, the "district court should have decided only whether there existed a 'reasonable probability' that 'an objective fact-finder' in a state sentencing hearing would have concluded, based on the evidence presented, that Correll had a brain injury that impaired his judgment at the time of the crimes." *Id.*; see also *Abdul-Salaam* v. *Sec'y of Pa. Dep't of Corr.*, 895 F.3d 254, 270 n.7 (3d Cir. 2018) (recognizing that even findings that are "perhaps insufficient to independently establish additional mitigators" could still "suggest a variety of mental illnesses and abuse-related disorders that bolster [the] mitigation defense").

This neutral rule holds true for both mitigation evidence and aggravation evidence. See *United States* v. *Barrett*, 985 F.3d 1203, 1224 n.10 (10th Cir. 2021) (declining to weigh credibility of witnesses who offered aggravation evidence because the analysis is whether there is "a reasonable probability his mental impairments would have caused the jury to impose a lesser sentence"); *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."). Consistent with this well-recognized principle, there is no discussion—none—of the comparative credibility of experts in *Williams*, *Wiggins*, or *Rompilla*.

Second, petitioner contends the opinion below failed to evaluate the aggravation evidence along with the mitigation evidence. Pet. Br. 36. Not so. The Ninth Circuit reiterated the three aggravating factors found by the trial judge: (1) Jones "committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value"; (2) Jones "committed the offenses in an especially heinous or depraved manner"; and (3) Jones was "convicted of one or more other homicides . . . which were committed during the commission of the offense." Pet. App. 56.

The Ninth Circuit also discussed the violent nature of the crimes in detail. Pet. App. 8. In fact, the opinion makes no secret of the fact that Jones murdered his friend by striking him "over the head multiple times with a wooden baseball bat," struck his friend's grandmother with the same baseball bat, and searched for, beat, and either strangled or suffocated a seven-year-old girl who was hiding under a bed. Pet. App. 8.

The Ninth Circuit then weighed the evidence in aggravation against the totality of available mitigation evidence. Pet. App. 56–57. As in *Williams*, *Wiggins*, *Rompilla*, and *Porter*, the post-conviction evidentiary hearing revealed powerful new mitigation evidence. Like Wiggins, Jones experienced horrific sexual abuse throughout childhood from his own family members—including from the father of his main mitigation witness during sentencing. Pet. App. 44. Like Williams, Wiggins, and Rompilla, Jones both experi-

enced and observed severe physical abuse at home. Pet. App. 43. And like Williams, Rompilla, and Porter, Jones suffered from serious cognitive issues, including cognitive dysfunction, poly-substance abuse, post-traumatic stress disorder, ADHD, mood disorder, bipolar depressive disorder, and a learning disorder. Pet. App. 40.

This wealth of evidence was unknown to defense counsel during sentencing. The Ninth Circuit reasonably concluded, after a searching analysis aligned with those conducted by this Court, that this evidence was sufficient to undermine confidence in the outcome. Petitioner's effort to distinguish the panel's opinion from this Court's precedents is thus unavailing.

Petitioner seeks to sweep certain mitigation evidence under the rug based on its interpretation of state law. For example, petitioner asserts that evidence of an abusive childhood is "entitled to little weight" in Arizona if "a defendant commits a murder past early-adulthood." Pet. Br. 35. But "little weight" is not the same as no weight, and the sentencer could still consider that evidence. Moreover, even if it made logical sense to imagine that the effects of childhood trauma evaporate at age 22 (they do not), such a blanket rule would ignore that this Court's own precedents have holistically considered evidence about a defendant's childhood in *Williams* (in his 30s at time of offense), *Rompilla* (late 30s), and *Porter* (mid-50s). This Court specifically observed in *Porter* that the trial judge who held the postconviction hearing "discounted the evidence of Porter's abusive childhood because he was 54 years old at the time of the trial." 558 U.S. at 37. Yet the Court declined to follow that logic when evaluating prejudice, instead concluding that Porter's "childhood history of physical abuse"

was among the evidence that "might well have influenced the jury's appraisal of [his] moral culpability." *Id.* at 41 (citation omitted).

Similarly, petitioner would demand an established causal connection between childhood abuse and the offense conduct before considering that evidence in mitigation. Pet. Br. 35. But, again, this Court does not require sentenced individuals to demonstrate precisely how their own abuse manifested within their offense conduct. On the contrary, "it is unreasonable to discount to irrelevance the evidence of [an] abusive childhood" because such evidence is exactly the sort of thing that might matter to a juror assessing moral culpability. *Porter*, 558 U.S. at 43; cf. *Tennard* v. *Dretke*, 542 U.S. 274 (2004) (rejecting "constitutional relevance" test that would have required a "nexus" between mitigating evidence and crime as criterion for admissibility).

Petitioner also asserts that if the court of appeals panel had properly considered the aggravating evidence, it "would have been forced to conclude that the aggravating circumstances outweighed Jones's mitigation." Pet. Br. 36. This assertion, too, flies in the face of this Court's established jurisprudence. This Court found prejudice in *Williams* even though Williams killed his elderly victim with a mattock; in *Wiggins* even though Wiggins left his elderly victim drowned in her bathtub; in *Rompilla* even though Rompilla stabbed his victim repeatedly and set him on fire; and in *Porter* even though Porter shot his ex-girlfriend and her new boyfriend.

The Court has never treated a set of aggravating facts, no matter how severe, as categorically immune from review under *Strickland*'s balancing test. Nor should it. The ultimate penalty determination in a capital case—as a matter of federal constitutional

law—involves a unique moral judgment about whether or not the defendant should be sentenced to death. See *Kennedy* v. *Louisiana*, 554 U.S. 407, 419 (2008) (reiterating that the imposition of punishment "necessarily embodies a moral judgment"). This is an incredibly subjective and personal decision. And while judges endeavor in good faith to predict how new mitigation evidence might shift that culpability calculus, they can of course never know with certainty just how much undisclosed mitigation evidence is necessary—weighed against the existing mitigation and aggravation landscape—to change a vote from death to life. This inherent uncertainty is precisely why "[w]e do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in that outcome.'" *Porter*, 558 U.S. at 44 (citation and alteration omitted). Omitted mitigation evidence has, even in the face of significant aggravating circumstances, been sufficient to establish such a probability. Indeed, juries around the country have voted for life even in some of the most aggravated capital prosecutions.[4] Petitioner's argument stems from the novel and improper prem-

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[4] *See* Russel Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46(4) Hofstra L. Rev. 1161, 1229-56 (2018) (cataloguing nearly 200 aggravated capital trials that resulted in life sentences, including thirteen cases with teenage victims); Russel Stetler *et al.*, *Mitigation Works: Empirical Evidence of Highly Aggravated Cases Where the Death Penalty Was Rejected at Sentencing*, https://shorturl.at/bdDT0 (revised Dec. 24, 2021) (updating article in late 2021 with 350 new aggravated cases that resulted in life sentences, including 57 cases with teenage victims)

ise that some offense conduct cannot be counterbalanced, and this Court should reject it.

II. THE NINTH CIRCUIT'S *STRICKLAND* PREJUDICE ANALYSIS IS CONSISTENT WITH THE ANALYSES CONDUCTED BY FEDERAL COURTS OF APPEALS.

The Ninth Circuit's adherence to this Court's precedents is, without more, sufficient to affirm its decision. But it bears emphasis just how ordinary that decision was. Courts of appeals across the country routinely follow the same steps when assessing prejudice from failure to present mitigation evidence. Those analyses are indistinguishable from the Ninth Circuit's analysis here. In case after case, federal courts weigh aggravating evidence against the original and evidentiary hearing mitigation evidence and conclude that failure to present the categories of mitigation evidence at issue here was sufficient to undermine confidence in a death sentence.

Other circuits have, for example, found prejudice from failure to present mitigation evidence in cases involving childhood sexual abuse, see *Simmons* v. *Luebbers*, 299 F.3d 929, 939 (8th Cir. 2002); *Foust* v. *Houk*, 655 F.3d 524, 545–46 (6th Cir. 2011); *Stevens* v. *McBride*, 489 F.3d 883, 893 (7th Cir. 2007), in cases involving childhood physical abuse, see *Jermyn* v. *Horn*, 266 F.3d 257, 309–12 (3d Cir. 2001); *Cauthern* v. *Colson*, 736 F.3d 465, 483–87 (6th Cir. 2013); *Ferrell* v. *Hall*, 640 F.3d 1199, 1234–36 (11th Cir. 2011); *Smith* v. *Mullin*, 379 F.3d 919, 944 (10th Cir. 2004), and in cases involving previously undiagnosed cognitive disorders, see *Williams* v. *Stirling*, 914 F.3d 302, 319 (4th Cir. 2019); *Blystone* v. *Horn*, 664 F.3d 397,

427 (3d Cir. 2011); *Williams* v. *Anderson*, 460 F.3d 789, 804–05 (6th Cir. 2006).[5]

To conclude that the Ninth Circuit's analysis here—which was, in some cases, more detailed than those conducted by other courts—was flawed in some respect would constitute a sea change in an area of law that concerns a choice between life or death.

CONCLUSION

For these reasons, the Court should affirm the decision below.

Respectfully submitted,

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[5] The analysis is not a one-way ratchet. Courts of appeals of course routinely conclude that new mitigation evidence would *not* change the outcome. *See Livaditis* v. *Davis*, 933 F.3d 1036, 1048 (9th Cir. 2019); *Pye* v. *Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1049 (11th Cir. 2022) (en banc). What matters is not the outcome, but the analysis—which is consistent across circuits.

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