No. 22–982

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

For forty years this Court and the lower courts have relied on *Strickland* to assess claims of ineffective assistance of counsel. Under that framework, "[w]hen a defendant challenges 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 v. Washington*, 466 U.S. 668, 695 (1984). In considering this mixed question of law and fact, *see id.* at 698, "courts of appeals may not set aside a district court's factual findings unless those findings are clearly erroneous." *Knowles v. Mirzayance*, 556 U.S. 111, 126 (2009). The Ninth Circuit violated these two bedrock principles in granting Danny Jones relief and this case may therefore be resolved by a straightforward application of this Court's precedents.

In attempting to defend the Ninth Circuit's decision, Jones argues that the only "fact" a district court finds under this inquiry is whether there exists available mitigating evidence that was not presented at trial. Resp. Br. 21–22. That diminishes the district court's role far too much. Among other things, the district court is responsible for finding whether the defendant has proved the facts at issue (e.g., that he was abused as a child or that such abuse caused him to commit the crime). That will often require the district court, as it did here, to weigh the credibility and conflicting opinions of the defendant's experts with those of the State. The district court did not exceed its fact-finding function in making these

determinations, and its judgments on such factual issues are entitled to deference.

The Ninth Circuit also erred in a second way. A reviewing court assesses prejudice under *Strickland* by "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). The Ninth Circuit paid lip service to this rule but ignored it in practice. Jones tries to defend the decision below by arguing that a defendant need only "present[] substantial evidence of the kind that a reasonable sentencer might deem relevant to the defendant's moral culpability." Resp. Br. 14. This new materiality standard would remove from *Strickland* weighing both the aggravating evidence and the weight of the mitigating evidence. That directly contravenes *Strickland* and its progeny.

The relief which Petitioners seek is simple—an affirmation of the clear dictates of *Strickland* and the deference owed under Federal Rule of Civil Procedure 52(a)(6). Because the Ninth Circuit failed to review the district court's factual findings for clear error or correctly apply *Strickland*, this Court should reverse.

ARGUMENT

I. The District Court did not exceed its role as fact finder and its factual findings are entitled to deference.

A. *Strickland* requires a district court to find whether the proponent of mitigating evidence has established the facts supporting his habeas petition.

Strickland's ineffectiveness inquiry is a mixed question of law and fact. *Strickland*, 466 U.S. at 698. This inquiry requires the district court to make factual findings, which "are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a)." *Id.* For example, the district court may have to find whether trial counsel "carefully weighed his options before making a final decision," *Mirzayance*, 556 U.S. at 126, or whether trial counsel did any investigation or effectively advocated on behalf of his client, *see Porter v. McCollum*, 558 U.S. 30, 38 (2009). *See also United States v. Mathis*, 503 F.3d 150, 152 (D.C. Cir. 2007) (applying deference to district court finding that defendant would not have obtained a shorter sentence even if trial counsel had properly computed criminal history category).

In this case, Jones asserted that he had specific mental conditions and that those conditions were part of the reason he murdered Robert and Tisha Weaver. Those were factual claims, which the State disputed. The parties presented evidence for their conflicting view of the facts. The district court's role, as usual in an evidentiary hearing submitted to the court, was to hear and weigh the evidence and make findings of fact.

In particular, the district court was tasked with finding whether Jones had sustained his burden to show that he suffered from cognitive impairment, PTSD, ADHD, a mood disorder, or substance abuse and, if so, whether those conditions were causally connected to his crimes. Those factual findings may be overturned on appeal only if they are clearly erroneous. *See* Fed. R. Civ. P. 52(a); *Strickland*, 466 U.S. at 698.

This is blackletter law about the roles of trial courts versus appellate courts. But Jones argues that everything is different under *Strickland*. According to him, *Strickland* limits the district court's factfinding role to simply determining whether "substantial" mitigating evidence exists, irrespective of whether it is more persuasive than the contrary evidence on the same factual question. Resp. Br. 21–24. Here, that would apparently mean that the district court's role is simply to conclude whether there is a witness out there who will testify that Jones has PTSD, irrespective of whether, upon hearing all the evidence, the district court would conclude that Jones actually has PTSD or that his supposed PTSD caused him to commit the murders. That novel view of the law would have district courts granting habeas petitions left and right, without any assessment of whether there is a reasonable probability that the outcome would have changed.

Indeed, Jones's argument largely depends on an out-of-context quotation from *Williams v. Taylor*, 529 U.S. 362, 398 (2000). In *Williams*, this Court reversed a state court's *Strickland* prejudice analysis on several grounds. *Id.* at 397–98. In summarizing what the state

court got right, this Court observed that "[t]he court correctly found that as to 'the factual part of the mixed question,' there was 'really ... n[o] ... dispute' that available mitigation evidence was not presented at trial." *Id.* at 398 (citation omitted). From this, Jones invents a legal rule that "the factual part of the mixed question" is *limited* to whether "available mitigation evidence was not presented at trial." Resp. Br. 21 (quoting *Williams*, 529 U.S. at 398). But *Williams* never purported to create such a rule.

Jones's inference from *Williams*, that the district court acts as a mere conduit for the introduction of any potentially mitigating evidence, inappropriately narrows the district court's role and ascribes unsupported meaning to the Court's recitation of the factual and procedural history of a single case. Jones's reading of *Williams* is further in tension with his argument that the district court's role as factfinder is limited to determining whether the sentencer would have heard *substantial* mitigating evidence but for the errors of counsel. *See* Resp. Br. 23. Jones cannot reconcile how a district court could merely determine whether mitigating evidence was available that was not introduced at trial while also determining whether that mitigating evidence is substantial. Were a district court required to make a finding of substantiality, it would almost certainly need to weigh conflicting evidence, judge the credibility of witnesses, and consider how the evidence affected the defendant's conduct at the time of the crimes.

Jones posits that *Strickland*, *Wiggins*, and *Rompilla* make the same proposition that a district court's only role as fact finder is to decide whether

there is available mitigating evidence that was not presented at trial. Resp. Br. 21. While Jones's reading of *Williams* is strained, his interpretation of these cases in the same regard is untethered. *Strickland* merely says, in reference to the specific facts of that case, that "[t]he evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile to the sentencing judge." 466 U.S. at 699–700. Similarly, in *Wiggins*, the Court stated that "[t]he mitigating evidence counsel failed to discover and present in this case is powerful." 539 U.S. at 534. Finally, in *Rompilla*, Jones suggests that the factual inquiry ends with consideration of mitigation leads rather than actual mitigation evidence. Resp. Br. 21. But the Court in *Rompilla* never purported to find a reasonable probability of a different outcome on mitigation leads alone. Rather, the Court relied on mitigation evidence including but not limited to organic brain damage, extreme mental disturbance, a deprived childhood rife with documented abuse and neglect, and school records showing low cognition and low intellectual functioning. 545 U.S. at 392–93 (2005).

In *Strickland*, *Wiggins*, and *Rompilla*, the Court made no mention of how and to what degree a reviewing court should find facts when applying the prejudice framework, and Jones's suggestion to the contrary is wholly unsupported.

Jones next argues that the Ninth Circuit somehow vindicated the state sentencer's role by undoing the state court sentence. Resp. Br. 23. That is backwards. Federal courts respect state courts by leaving their

sentences intact, not by undoing them. Indeed, this Court has held that "[g]ranting habeas relief to a state prisoner intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Brown v. Davenport*, 596 U.S. 118, 132 (2022) (internal quotation marks omitted).

Jones's new approach to fact-finding in *Strickland* cases would wreak havoc with established law and create a new system of habeas review in which a petitioner can obtain relief merely by presenting *some* new mitigating evidence, even if the evidence is unpersuasive or entitled to little weight. This Court should decline to initiate that sea change in the law.

B. The District Court's factual determinations fell within the scope of *Strickland* and are entitled to deference under Rule 52(a)(6).

Where Jones and the State disagreed on a specific diagnosis, the district court held Jones to his burden of proof by weighing the conflicting evidence to determine what specific diagnosis could be subjected to the legal rigors of the *Strickland* balancing test. After considering the testimony and evidence admitted at the federal evidentiary hearing, the district court made several findings and detailed them in a section aptly named "[f]indings based on the new evidence." Pet. App. 218. In making these findings, the court noted that it was faced with a "latter day battle of experts" and had to "take[] into account the credibility of the parties' witnesses" in order to resolve the conflicting diagnoses. *Id*. In all, the court made findings concerning Jones's alleged cognitive

impairment, PTSD, ADHD, mood disorder, and substance abuse. *Id*. at 218–23.

For instance, when the district court found that "[p]etitioner has not presented persuasive evidence regarding either the existence or the cause of his alleged cognitive impairment," *see* Pet. App. 220, the court was making a factual finding that Jones failed to prove his alleged cognitive impairment. And because the district court found that Jones was not cognitively impaired at the time of the murders (as a matter of fact), it followed that he was not prejudiced (as a matter of law) when his trial counsel did not present evidence of cognitive impairment.

The court made similar findings with regard to Jones's allegations of PTSD, ADHD, and mood disorder. *Id*. at 222–23. The court found that Jones "has not shown that he suffered from PTSD at the time of the murders" because Jones's experts failed to complete a proper diagnosis using all of the criteria required by the DSM-IV and could not connect Jones's traumatic childhood experiences with the PTSD criteria. *Id*. at 222. The court also found that Jones's experts could not connect Jones's purported PTSD with his conduct at the time of the murders. *Id*.

Additionally, the court found that Jones had failed to prove that he suffered from "a major affective disorder, such as bipolar disorder," because he failed to demonstrate episodes of mania or hypomania. *Id*. at 223.

The court did find that Jones suffered from "ADHD, residual type" at the time of the crimes, but that "the condition is unrelated to violent behavior."

Id. at 222. Similarly, the court found that Jones proved he had a low-level mood disorder, but that "[n]one of the experts suggested a causal relationship between the condition and [Jones's] conduct during the crimes." *Id.* at 223. The district court's factual findings concerning Jones's alleged cognitive impairment, PTSD, ADHD, and mood disorder are supported by the record and are squarely consistent with the district court's charge to determine the facts of the case. These findings of fact are therefore entitled to deference under Federal Rule of Civil Procedure 52(a)(6).

Jones complains that the district court relied on its own "idiosyncratic assessment" of his experts and by "rejecting nearly all the diagnoses offered by [his] experts… wrongly refused to give 'any consideration' to the documentary, anecdotal, and clinical evidence of [his] mental health symptoms, their etiology, and their impact on his behaviors." Resp. Br. 24–25. But the district court did not refuse to consider Jones's evidence. Rather, the district court analyzed Jones's evidence and the contrary evidence, just like it would in any other case, and made factual findings (with appropriate explanations) accordingly. *See, e.g.*, Pet. App. 218–223.

This is confirmed by the court's treatment of Jones's allegations of sexual and physical abuse. The district court examined Jones's claims, noted that they were based largely on his own self-report, and determined that the sentencing judge would have viewed them with skepticism based on "their late disclosure, their inconsistency with other information in the record, and [Jones's] obvious motive to

fabricate." Pet. App. 238 (internal quotation marks omitted). The district court never stated that it refused to consider Jones's proffered evidence. Nor did it state, as Jones claims, that it would only consider mitigating evidence based "upon incontrovertible proof of a particular diagnosis." Resp. Br. 26. The court instead made findings of fact where a diagnosis was contested and considered the totality of Jones's mitigation evidence, for what it was worth, including mitigating evidence (such as Jones's allegations of sexual and physical abuse) that was not associated with a diagnosis that Jones had proven. Pet. App. 238.

II. Jones did not suffer prejudice under *Strickland*.

A. The district court correctly applied the proper standard under *Strickland*.

Strickland's prejudice inquiry turns on "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. Applying this standard, the district court held that "the new information is largely inconclusive or cumulative: it 'barely . . . alter[s] the sentencing profile presented to the sentencing judge.'" Pet. App. 229 (quoting *Strickland*, 466 U.S. at 700). The court concluded that Jones "has failed, therefore, to affirmatively demonstrate a reasonable probability that this additional information would alter the trial court's sentencing decision after it weighed the totality of the mitigation evidence against the strong aggravating circumstances proven at trial." *Id.*

(applying *Strickland's* reasonable probability standard).

In an attempt to get around the district court's clear reasoning, Jones argues that the district court applied a preponderance standard. Resp. Br. 40. But the only evidence that Jones marshals in support of this argument is actually just a repeat of his mistaken attack on the district court's factual findings. Resp. Br. 40–48.[1]

B. The Ninth Circuit erred by failing to weigh the total mitigation with the aggravation and by ignoring how an Arizona sentencing court would have considered the mitigating evidence.

In its rush to vacate Jones's death sentence, the Ninth Circuit made several errors. First, as discussed in Section I, it disregarded the district court's factual findings. Second, it made a bare acknowledgement of the aggravating circumstances, Pet. App. 56, but then concluded without support that there was a reasonable probability that Jones's new mitigation evidence would have changed the result of the proceeding. Pet. App. 57. Third, when analyzing the mitigating evidence, the Ninth Circuit ignored the findings of the sentencing court and the Arizona Supreme Court on independent review, and it failed to

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[1] As this Court reaffirmed in *Harrington v. Richter*, 562 U.S. 86 (2011), "the difference between *Strickland's* prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Id.* at 112 (quoting *Strickland*, 466 U.S. at 693, 697). Even if the district court came close to applying a preponderance standard, this case is not among the "rarest" of cases in which that difference matters.

apply Arizona law when analyzing how Jones's new mitigating evidence would have affected those decisions. Pet. Br. 36–39.

Jones's purported defense of the Ninth Circuit decision largely ignores these critical flaws. Resp. Br. 48–52. For example, Petitioner's Brief showed how Arizona law supported the district court's conclusion (rejected by the Ninth Circuit) that an Arizona sentencing court would have given little weight to Jones's assertions that he had suffered an abusive childhood. Pet. Br. 35 (citing binding appellate authority in Arizona). In response, Jones ignores Arizona law, and instead cites *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) for the proposition that a nexus between mitigation and a defendant's conduct is not *required* in order for it to be considered "persuasive." Resp. Br. 49. But the district court acknowledged the same principle, *see* Pet. App. 233–34, before further noting that a sentencer is entitled to determine the weight to be given to relevant mitigating evidence, *id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 114–15 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978)), which is what an Arizona sentencer would do under Arizona law. *See, e.g., State v. Ellison*, 140 P.3d 899, 927, ¶ 136 (Ariz. 2006) ("[C]hildhood troubles deserve little value as a mitigator for ... murders committed at age thirty-three.").

Jones further contends that "[t]he panel rightly compared [his] aggravation and mitigation evidence to that presented in *Porter*, *Williams*, *Rompilla,* and *Wiggins*." Resp. Br. 50. But this Court has rightly discouraged such a comparative approach to prejudice. *See Shinn v. Kayer*, 592 U.S. 111, 123 (2020)

("[B]ecause the facts in each capital sentencing case are unique, the weighing of aggravating and 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."). And even if a comparative approach were appropriate, that analysis does not support relief for Jones, because his aggravating circumstances are worse than those in the cases he relies upon and the new mitigating evidence he presented in habeas was less helpful to him.

Jones received two capital sentences because he: (1) bludgeoned one of his victims to death with a baseball bat; (2) dragged his second victim, a 7-year-old child, from under the bed where she was hiding, bludgeoned her with the bat, and then killed her either by strangulation or suffocation; and (3) bludgeoned his third victim, who later died from her injuries, with the bat.[2] Pet. App. 243–44.

The crimes committed by Williams, Wiggins, Porter, and Rompilla were committed against fewer victims and in some instances were less brutal. Williams received one capital sentence for killing his victim with a digging tool. *Williams,* 529 U.S. at 367–68. Wiggins received one capital sentence for drowning his victim in a bathtub. *Wiggins*, 539 U.S. at 514. Porter received one capital sentence for shooting one of his victims. *Porter*, 558 U.S. at 31–32. Rompilla received one capital sentence for repeatedly stabbing

[2] Jones was convicted of attempted first-degree murder his attempt to kill his third victim. This victim died as a result of her injuries after the case was indicted and the State elected to not amend the indictment.

his victim and then setting his victim's body on fire. *Rompilla*, 545 U.S. at 377.

The defendants in these cases also had fewer and, when considered in total, arguably less severe aggravating circumstances than Jones. Williams had one aggravating circumstance—future dangerousness based on Williams's prior criminal history. *Williams*, 529 U.S. at 396. Wiggins had one aggravating circumstance—he committed the murder as a principal in the first degree. *Wiggins*, 539 U.S. at 515. Porter had three aggravating circumstances—he had been previously convicted of another violent felony, the murder was committed during a burglary, and the murder was committed in a cold, calculated, and premeditated manner. *Porter*, 558 U.S. at 32–33. Rompilla had three aggravating circumstances—he committed the murder in the course of another felony, the murder was committed by torture, and Rompilla had a significant history of felony convictions indicating the use or threat of violence. *Rompilla*, 545 U.S. at 378.

By contrast, Jones had seven death-qualifying aggravating circumstances, reflecting the fact that his crimes were particularly brutal and were committed against multiple victims. *See* Pet. App. 80–83 (the aggravating circumstances were that Jones committed each murder for pecuniary gain; committed each murder in an especially heinous, cruel, or depraved manner; committed multiple murders; and murdered a young child.)

The mitigation side of the scale also differentiates this case from *Williams, Wiggins, Porter, and*

Rompilla. Unlike Jones, the new mitigating evidence those defendants offered in post-conviction substantially changed the relative weight of the mitigation to the aggravation.

Williams's trial mitigation consisted of testimony that he was a "nice boy" and that he had removed bullets from a gun so that he would not hurt anyone. *Williams,* 529 U.S. at 369. But in habeas, his new evidence showed: that he suffered from "borderline mental retardation"; that he failed to advance beyond the sixth grade; that he had received prison commendations for helping authorities break up a prison drug ring and for returning a guard's missing wallet; and that he was not likely to act in a dangerous or violent manner in the future, contrary to the future dangerousness death-qualifying aggravating circumstance found by the sentencer. *Id.* at 396.

Wiggins's only trial mitigation was that he had no prior convictions. *Wiggins*, 539 U.S. at 537. But in habeas, his new evidence showed that he was subjected to severe childhood abuse, including sexual molestation and repeated rape, and he suffered from homelessness and diminished mental capacities. *Id.* at 535.

Porter's trial mitigation consisted of testimony from his ex-wife concerning his behavior when he was intoxicated, and the fact that he had a good relationship with his son. *Porter*, 558 U.S. at 32. In habeas, his new mitigation detailed his heroic military service in two critical battles during the Korean War, his struggles to regain normality upon returning from the war, his childhood history of physical abuse, his

mental deficiencies, his difficulty reading and writing, and his limited schooling. *Id.* at 41.

Finally, Rompilla's trial mitigation consisted of "brief" testimony from five of his family members arguing residual doubt and asking the jury for mercy, along with testimony from his 14-year-old son that he loved his father and would visit him in prison. *Rompilla*, 545 U.S. at 378. In habeas, his new mitigation showed a family history of alcoholism, his severe physical abuse, his significant economic and emotional deprivation as a child, organic brain damage, diminished cognitive functioning, possible fetal alcohol syndrome, intellectual functioning in the intellectually disabled range, and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired at the time of the offense. *Id.* at 391–93.

In Jones's case, the trial court found that Jones had proved four non-statutory mitigating circumstances: that Jones (1) suffered from long-term substance abuse, (2) was under the influence of alcohol and drugs at the time of the offenses; (3) had a chaotic and abusive childhood; and (4) had a long-standing substance abuse problem which may be caused by genetic factors and aggravated by head trauma. Pet. App. 275.

As the district court correctly found, the new mitigation presented by Jones in habeas was largely unproven, unpersuasive, or cumulative to the extensive mitigation evidence previously offered in the Arizona courts. Pet. App. 85–92, 218–23, 227–39. The only new diagnoses that Jones proved were ADHD and

a low-level mood disorder, which the district court found were unrelated to his crimes. Pet. App. 222–223.

The tiny difference between Jones's mitigation at trial and his new mitigation demonstrates that his case is unlike *Williams, Wiggins, Porter, and Rompilla*. And contrary to his suggestion, Resp. Br. 51, there is no "category" of cases that always mandate a finding of *Strickland* prejudice. Indeed, this Court has disavowed the misguided attempt to justify a result based on a common characteristic. *See Kayer*, 592 U.S. at 123. And even if it were proper to reduce the complexities and peculiarities of a capital trial and capital defendant to a simple formula, Jones does not fit the mold. Jones may contest the viability of the district court's factual determinations, but the district court, showing proper deference to Arizona law as "the standards that govern the decision," reasonably determined that the new mitigation Jones proved in federal court did not tip the balance of the aggravating and mitigating circumstances in favor of life. *See* Pet. Br. 33–39. The Ninth Circuit erred by concluding otherwise.

C. *Strickland* does not call for a bare materiality standard in assessing prejudice.

Because Jones is not entitled to relief under *Strickland's* established prejudice analysis, he once again argues for a new test. Resp. Br. 33–40. Under established law, prejudice turns on "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. Jones seeks to lower this standard to a bar he can clear, contending that *Strickland* prejudice turns on the materiality of the available mitigation, rather than its persuasiveness. Resp. Br. 34–40.

But this Court has never adopted a materiality test for *Strickland* prejudice, and for good reason. Focusing solely on the materiality of the omitted mitigating evidence necessarily ignores whether there is a "reasonable probability" that the new mitigating evidence would have made a difference. *Strickland*, 466 U.S. at 695. Such a standard would pay no heed to whether the mitigating evidence is significant or to the significance of the aggravating evidence.

If, as Jones advocates, the question is only whether the omitted mitigating evidence is the kind of mitigation evidence material to moral culpability, then relief may be warranted in almost every case where not every scrap of mitigation was presented at trial. But this Cout has reaffirmed the principle that "[t]he *Strickland* standard is highly demanding." *Shinn v. Kayer*, 592 U.S. 111, 523 (2020) (internal quotation marks omitted). And while "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome," *Strickland*, 466 U.S. at 694, such a showing "requires a substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (internal quotation marks omitted).

Strickland, again, is instructive. There, the Court evaluated the weight and persuasiveness of the newly-proffered mitigation evidence and concluded, in

language echoed by the district court here, that the defendant had shown "insufficient prejudice to warrant setting aside his death sentence" because "[t]he evidence that [he] says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge." *Strickland*, 466 U.S. at 699–700; *see also* Pet. App. 229 ("[T]he new information is largely inconclusive or cumulative: it 'barely . . . alter[s] the sentencing profile presented to the sentencing judge.'") (quoting *Strickland*, 466 U.S. at 700).

The *Strickland* Court further noted that, in consideration of "the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." *Id*. at 700. Thus, *Strickland* made clear that prejudice turns on a balancing of the aggravating and mitigating evidence, not merely whether there exists material mitigating evidence.

The cases relied upon by Jones are not to the contrary; they faithfully considered the weight of the evidence. *See Williams*, 529 U.S. at 394, 397–98 (rejecting state supreme court's decision because it "failed to evaluate 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"); *Wiggins*, 539 U.S. at 534 ("The mitigating evidence counsel failed to discover and present in this case is powerful."); *Porter*, 558 U.S. at 41("the weight of

evidence in aggravation is not as substantial as the sentencing judge thought"); *Rompilla*, 545 U.S. at 391 (the new mitigating evidence "would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed").

Jones's attempt to create a rule calling for habeas relief whenever new, material mitigating evidence is introduced is further refuted by *Wong v. Belmontes*, 558 U.S. 15 (2009). In *Belmontes*, the Court considered the cumulative nature of some of the new "humanizing" mitigating evidence along with the negative impact the new mitigating evidence would have had on Belmontes's sentencing profile—namely that it would have introduced evidence that Belmontes had committed another murder. 558 U.S. at 22. Following *Strickland*, the Court focused on how the new evidence affected the balance between the mitigating and aggravating circumstances presented in the case. *Id.* at 26 (the characterization of aggravating evidence as scant "misses *Strickland's* point that the reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice"). Finally, contrary to Jones' assertion that a reviewing court cannot make "findings about the ultimate weight, credibility, and preponderation," Resp. Br. 45, of evidence in conducting a *Strickland* prejudice analysis, *Belmontes* did just that, noting that it was "hard to imagine" that additional mitigation evidence could outweigh the "most powerful imaginable aggravating evidence" presented in the case—the fact that Belmontes had previously committed another murder. *Belmontes*, 558 U.S. at 27–28. *Belmontes* is therefore an instructive reminder

that the strength of the new mitigating evidence alone is not sufficient to warrant relief under *Strickland*'s prejudice inquiry.

CONCLUSION

This Court should vacate and reverse the decision of the Ninth Circuit and remand to the district court with instructions to deny the writ.

Respectfully submitted,

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