No. 20-7065

IN THE

Supreme Court of the United States

ANIBAL CANALES, JR.,

Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTION DIVISION,

Respondent.

On Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Fifth Circuit

BRIEF OF LEGAL ACADEMICS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI*[1]

This case concerns the analysis that appellate courts should use in assessing whether a defense attorney's failure to properly present mitigation was prejudicial under this Court's test in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Wiggins v. Smith*, 539 U.S. 510 (2003). *Amici* are legal academics whose scholarship has relied on the work of the Capital Jury Project (CJP) to better understand the administration of the death penalty in the United States.

The CJP is a study originally funded by the National Science Foundation to determine how jurors in capital cases decide between life and death sentences. The CJP has in-depth standardized interviews (lasting on average three to four hours) with 1,350 jurors from 360 capital cases from 14 different States, of which roughly half served on juries that returned a life sentence and half served on juries that returned a sentence of death. Since its inception, CJP researchers have published over 70 articles and two books based on the data.[2]

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[1] Pursuant to Supreme Court Rules 37.2(a) and 37.6, Amici certify that no party's counsel authored this brief in whole or in part and that no person other than Amici and their counsel, and no party or party's counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All counsel of record received timely notice of Amici's intent to file this brief more than ten days prior to its due date, and all parties consented to filing of this brief.

[2] The Capital Jury Project's original purpose and methodology is described in William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043 (1995). Further interviews were conducted pursuant to a National Science Foundation grant in 2006 to elaborate on earlier

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- Sheri Lynn Johnson, the James and Mark Flanagan Professor of Law and the Assistant Director of the Cornell Death Penalty Project at Cornell Law School;
- Paul Marcus, the Haynes Professor of Law at the College of William and Mary;
- Marla Sandys, Interim Chair and Associate Professor in the Department of Criminal Justice at Indiana University;
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Amici's collective research on the capital jury decision-making process has provided key insights for

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findings bringing the total number of jurors interviewed to 1,350. *See* William J. Bowers, Christopher E. Kelly, Ross Kleinstuber, Elizabeth S. Vartkessian & Marla Sandys, *The Life or Death Sentencing Decision: It's at Odds with Constitutional Standards; Is It Beyond Human Ability*, in *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* 425, 430-32 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 3d ed. 2014).

understanding how capital jurors process and weigh mitigating evidence when deciding whether to impose a death sentence.

SUMMARY OF ARGUMENT

As the petition explains, the Fifth Circuit departed from the rule this Court has long applied to decide claims of prejudice at the penalty phase of a capital trial by erroneously concluding that *Harrington v. Richter*, 562 U.S. 86 (2011), raised the threshold of proof. This brief explains why this error was outcome-determinative. Had the Fifth Circuit applied the correct rule, it would have found prejudice.

Under the correct rule, as stated in this Court's on-point precedents, the capital juror's decision-making is critical: "[The] prejudice [prong] requires only 'a reasonable probability that at least one juror would have struck a different balance' regarding [the defendant's] 'moral culpability.'" *Andrus v. Texas*, 140 S. Ct. 1875, 1886 (2020) (per curiam) (quoting *Wiggins*, 539 U.S. at 537-38). The best research in the field establishes that the standard would have been met here. In concluding otherwise, the Fifth Circuit: (1) failed to recognize that capital jurors approach the case in mitigation as constituting a story that must be assessed in its entirety; (2) failed to recognize that certain forms of mitigating evidence will have an outsized effect on a juror's decision; and (3) failed to realize that jurors are capable of and do elect to impose life sentences even in cases with strong aggravating evidence. These failures were a consequence of the Fifth Circuit's legal error, which warrants this Court's review.

ARGUMENT

I. The Fifth Circuit's Legal Rule Is Inconsistent with Real-World Jury Behavior

A. Capital Jurors Process Mitigation as a Narrative, Not a Checklist

In answering the prejudice question, the Fifth Circuit's opinion considers Canales's newly discovered mitigation through a point-by-point comparison with this Court's prior cases finding prejudice. The Fifth Circuit, for example, found Canales's case weaker than the mitigation in *Wiggins*, because while both defendants had horrendous childhoods, Wiggins also had a diminished mental capacity and did not have a prior record of violence. *See* Pet. App. 6a-7a; *see also id*. at 7a-8a, (comparing Canales's mitigation to Rompilla, Porter, and Williams). This approach, which the dissent describes as a "paint-by-numbers" approach to prejudice, *id.* at 17a (Higginbotham, J., dissenting), essentially uses a checklist to see if a type of mitigation evidence was present in prior cases, and, if not, then sees the defendant's mitigation as weaker than the comparison case.

This approach fundamentally misunderstands jurors' decision-making process in choosing between a life and death sentence. In stark contrast to a checklist approach, social science has found that jurors typically utilize a story or narrative framework for processing the evidence that they have heard. *See generally* Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, in *Inside the Juror* ch. 8 (Reid Hastie ed., 1993). Consistent with other studies, the CJP has found that this approach carries over into the penalty phase of a capital trial. Scott E. Sundby, *The*

Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony, 83 Va. L. Rev. 1109, 1178-79 (1997); John Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 Hofstra L. Rev. 1035, 1039-43 (2008).

One juror's description typifies the decision-making process that most jurors use:

> [I began developing a story] as soon as they started presenting the case. I used the evidence as it was being presented, as well as later discussion during jury deliberations to create a story. I had my own version of the story when the jury started deliberating, but after discussion with the jury, the members, I was able to kind of maybe adjust my conclusions of some certain facts.

Sundby, *Jury as Critic*, *supra*, at 1177 n.138 (alteration in original); *see also* Craig Haney, *Commonsense Justice and Capital Punishment*, 3 Psych. Pub. Pol'y & L. 303, 329 (1997) (noting that polled jurors "embraced a narrative version of the defendant's life, put themselves in his shoes . . . and came to an empathetic understanding of his social history from a largely subjective perspective"); Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 Psych. Pub. Pol'y & L. 267, 273-74 (2001) (jurors construct stories about cases based on the fit between the expert testimony, the juror's pre-existing views, and the juror's final story).

The Fifth Circuit's checklist approach ignores the importance that jurors place on understanding the defendant's life story as a narrative arc, and that individual jurors can react differently to the same mitigation. While capital defendants' backgrounds often have overlap in mitigation—*e.g.*, traumatic childhoods, poverty, sexual abuse, struggles in school—every story ultimately is unique and must be assessed on its own. Each juror will use the witnesses' testimony about the defendant's life to see if he or she can gain an understanding of how the defendant came to do the crime and if there is a humanity in him worth saving. "The more a juror reported having felt sympathy . . . for the defendant, having found the defendant likeable as a person, or having imagined being in the defendant's situation, the more likely she was to cast her first vote for a sentence of life imprisonment." Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26, 63 (2000).

Based on the CJP's studies of cases that have resulted in life sentences, Canales's mitigation tells a life story that, when taken as a narrative whole, resonates with jurors who vote for life: a child growing up impoverished in a gang-ridden area without adult guidance, surrounded by violence and substance abuse, and subjected to physical and sexual abuse by his own guardian. Most importantly, that mitigation narrative would have been told through the type of testimony that jurors respond to: stories of poverty marked by constant hunger; descriptions of alcoholic parents who completely neglected their children; a lack of stability marked by attending twenty-six schools before the age of eighteen; graphic recountings of how Canales was stripped and beaten as a child and sexually molested;

stories about Canales witnessing a shooting at age nine, being forced to join a gang at age nine, and being stabbed at age twelve. *See* Pet. App. 9a-10a (Higginbotham, J., dissenting). This type of testimony must be considered as interwoven threads of an overarching narrative that, when considered as a whole, has an undeniable effect that simply cannot be captured through a checklist approach.[3] *See* Garvey, *The Emotional Economy of Capital Sentencing*, *supra*, at 57 ("If a juror believed that the defendant experienced . . . abuse as a child, labored under the burden of a mental defect or [intellectual disability], was emotionally disturbed," "was a loner in the world, or had generally gotten a raw deal in life, the usual response was sympathy or pity"); Blume et al., *Competent Capital Representation*, *supra*, at 1039-43.

B. The Fifth Circuit's Approach Failed to Account for the Importance of Different Types of Mitigation in Advancing the Narrative

By using a quantitative approach based on categories of evidence, the court failed to understand that the presence or absence of certain types of mitigation has an outsized influence on how jurors view the story for life. For example, as happened in Canales's trial, the failure to present any family members talking about

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[3] The majority opinion also notes that "Canales's mitigating evidence of childhood abuse and mental illness does little to explain why he participated in the murder." Pet. App. 7a n.2. This statement not only goes against this Court's ruling that mitigation does not require a nexus to the crime, *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (reversing Fifth Circuit), but also reflects a failure to understand how jurors use mitigation as an overarching narrative in deciding against a death sentence.

the defendant's life and their love of the defendant is particularly devastating to the case for life. Jurors in such cases would react to the failure by asking, "Couldn't you find in this man's life one person as a character witness?" Sundby, *Jury as Critic*, *supra*, at 1152 & n.96 (quoting juror and examining jurors' negative assumptions about a defendant where family members did not testify).

The CJP has discovered, however, that not only is family testimony critical in combatting negative assumptions where none testify, their testimony about the defendant and their love for him is a linchpin for jurors' receptivity to all other types of mitigation. Sundby, *Jury as Critic*, *supra*, at 1152-55. Jurors frequently explained that the primary value of a defendant's family member testifying resided in witnessing the love and affection flowing between the defendant and the family member. *Id*. at 1151-62. While the stories and insights they provided were important, the jurors make clear that the stories were only part of a larger understanding that they gained upon hearing such witnesses. Jurors reported that—often to their surprise given their anger towards the defendant after hearing the guilt and aggravating evidence—their anger dissipated upon seeing that the defendant was someone who was loved by others and who was capable of loving back. *Ibid*.

In the present case, the testimony of Canales's sister, Elizabeth, therefore, would have been extremely important to advancing his narrative for life, because she clearly loves the defendant and because she had vivid stories about the severe hardships and abuse he suffered growing up (and, of course, because as noted

above, the failure to have any family testify is particularly detrimental to the case for life).

Her testimony, moreover, would have played an additional critical role that the Fifth Circuit failed to account for. She also would have testified about how Canales had protected her from their abusive stepfather despite the dire consequences that he would suffer at his stepfather's hands, and how he would sacrifice his food so that his sisters would not go hungry. *See* Pet. 12-13 (citing record). These are the types of actions that often have a dramatic effect on jurors' perception of the defendant because it counters the prosecution's depiction of the defendant as a violent person looking out only for himself. Instead, the jury comes to see the defendant as a multidimensional human being who is much more than the crime for which he was convicted. *See* Blume et al., *Competent Capital Representation*, *supra*, at 1053 (capital jurors respond to mitigation that humanizes the defendant). Indeed, a strong correlating factor with the likelihood that a juror believed the defendant felt remorse was if the juror also believed that the defendant loved his family. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 Cornell L. Rev. 1599, 1619-21 (1998).

C. The Fifth Circuit Overlooked That Capital Jurors Are Open to Consideration of Mitigation Even in Highly Aggravated Cases

The Fifth Circuit's analysis suffers from a third fundamental misunderstanding of juror decision-making. The majority's analysis places great emphasis on the aggravating evidence and seems to believe that the

aggravating evidence can be so great that jurors will not be able to move beyond it and consider even highly compelling mitigation such as that in Canales's case. This simply is not true (we also would note that the aggravation in Canales's case is not particularly aggravated compared to other capital cases in the CJP study, but will accept the majority's characterization in making this point).

One need only follow the news to realize that even in cases that all would agree are highly aggravated, such as the theater shooting in Colorado that left twelve dead and seventy wounded, juries still return life sentences. *See* Jordan Steffen & John Ingold, *James Holmes Sentenced to Life in the Aurora Theater Shooting*, Denv. Post (Aug. 7, 2015), https://www.denverpost.com/2015/08/07/james-holmes-sentenced-to-life-in-prison-in-the-aurora-theater-shooting/. And a review of cases from 1979 to 2018 confirms that mitigating evidence can overcome strong aggravation even in cases that jurors rate as the most aggravated: killings involving a child, a law enforcement officer, or multiple victims. *See* Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 Hofstra L. Rev. 1161, apps. 2-4 (2018) (cataloguing over 200 cases from the years 1979-2018 where juries returned life sentences in cases involving child victims, law enforcement victims, and multiple victims). Moreover, CJP data indicates that a gang-related killing, such as occurred in Canales's case, is viewed by capital jurors as significantly less aggravated than the killing of a child, a law enforcement officer, or multiple victims. *See* Marla Sandys, Sara M. Walsh, Heather Pruss & Dylan

Cunningham, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* 393, 411 tbl.1 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 3d ed. 2014) (asked if death sentence was only appropriate penalty for certain types of killings, 61.5% said 'yes' for child victims, 41.4% for police officer victim, 34.5% for multiple victims, compared to 24.1% for killing by gang member).

Using its checklist approach, the Fifth Circuit placed great emphasis on the fact that Canales's murder was "cold-blooded" rather than "compulsive." Pet. App. 8a (comparing Canales to the defendant in *Williams v. Taylor*, 529 U.S. 362 (2000)). As the CJP has found, however, the fact that a murder was "cold-blooded" can be overcome where the mitigation provides an understanding of the defendant's life with which jurors can sympathize. *See, e.g.*, Scott E. Sundby, *A Life and Death Decision: A Jury Weighs the Death Penalty* 133-59 (2005) (describing how defense counsel changed the jurors' views by humanizing the defendant despite having convicted him of two torture-murders); *see also* Sundby, *Jury as Critic*, *supra*, at 1170-78 (detailing how jurors reached a life sentence in case involving defendant with an extensive violent crime record who had committed a brutal rape-murder).

Moreover, mitigation evidence does not merely weigh against aggravation in jurors' minds—it also lessens aggravation. That is because jurors find a crime to be less heinous and the defendant to pose less of a future danger the more that the defense is able to

humanize the defendant for the jurors. *See* Blume et al., *Competent Capital Representation*, *supra*, at 1038. In short, the empirical evidence belies the Fifth Circuit's assumption that one in twelve jurors was unlikely to find that compelling mitigation can outweigh an extremely aggravated murder.

CONCLUSION

This Court has made the capital juror's decision-making the focal point when deciding if prejudice has occurred where defense counsel was constitutionally deficient in presenting mitigation at trial. In making this determination, it is critical that appellate courts use an analysis that is consistent with empirical findings on how capital jurors assess aggravating and mitigating evidence. In this case, the Fifth Circuit's majority's opinion finding that prejudice did not exist is contrary to the empirical evidence that: (1) jurors make the penalty decision based on the entirety of the defendant's narrative for life; (2) certain types of mitigation is particularly influential with jurors; and (3) even in cases with highly aggravating evidence, jurors can find the mitigation calls for a life sentence. Under the correct legal rule, as set forth in this Court's precedents, prejudice should have been found.

This Court should grant the petition for writ of certiorari and reverse.

Respectfully submitted,

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