

No. 22-_____

**In the
Supreme Court of the United States**

RYAN THORNELL,

Petitioner,

v.

DANNY LEE JONES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED**CAPITAL CASE**

Over thirty years ago, Respondent Danny Lee Jones beat Robert Weaver to death and also beat and strangled Weaver's 7-year-old daughter, Tisha, to death, for which he was convicted and sentenced to death. The district court denied habeas relief following an evidentiary hearing on Jones's ineffective-assistance-of-sentencing-counsel claims. But a Ninth Circuit panel reversed the district court, giving *no* deference to the district court's detailed factual findings. Judge Mark Bennett authored a nine-judge dissent from the denial of en banc rehearing.

The Question Presented is:

Did the Ninth Circuit violate this Court's precedents by employing a flawed methodology for assessing *Strickland* prejudice when it disregarded the district court's factual and credibility findings and excluded evidence in aggravation and the State's rebuttal when it reversed the district court and granted habeas relief?

STATEMENT OF RELATED PROCEEDINGS

Jones v. Ryan, No. 18–99005 (United States Court of Appeals for the Ninth Circuit) (order denying petition for rehearing and rehearing en banc, and amended opinion reversing judgment of district court denying habeas relief filed on November 7, 2022).

Jones v. Ryan, No. CV–01–00384–PHX–SRB (United States District Court for the District of Arizona) (order denying habeas relief on remand from the Ninth Circuit Court of Appeals filed on May 24, 2018).

Ryan v. Jones, No. 09–1314 (United States Supreme Court) (opinion granting petition for writ of certiorari, vacating judgment, and remanding to United States Court of Appeals for the Ninth Circuit entered on April 18, 2011).

Jones v. Ryan, No. 07–99000 (United States Court of Appeals for the Ninth Circuit) (opinion reversing judgment of district court denying habeas relief filed on October 2, 2009).

Jones v. Schriro, No. CV–01–384–PHX–SRB (United States District Court for the District of Arizona) (order denying motion to alter or amend the judgment filed on November 7, 2006).

Jones v. Schriro, No. CV–01–384–PHX–SRB (United States District Court for the District of Arizona) (order denying petition for writ of habeas corpus filed on September 1, 2006).

State v. Jones, No. CR–00–0512–PC (Arizona Supreme Court) (order denying petition for review of lower court’s order denying post-conviction relief filed on February 15, 2001).

States v. Jones, No. CR–14141 (Superior Court of Arizona in and for the County of Mohave) (order denying post-conviction relief filed on May 23, 2000).

States v. Jones, No. CR 93–0541–AP (Arizona Supreme Court) (opinion affirming convictions and sentences on direct appeal filed May 7, 2006).

State v. Jones, No. CR–14141 (Superior Court of Arizona in and for the County of Mohave) (judgment of guilt and sentences entered December 9, 1993).

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OPINIONS BELOW

The amended panel opinion reversing in part the denial of habeas relief, and the order and dissenting opinions regarding denial of panel rehearing and rehearing en banc are reported at 52 F.4th 1104. App. 1–112. The original opinion reversing in part the denial of habeas relief is reported at 1 F.4th 1179. App. 113–65. The district court’s order denying habeas relief on remand is unpublished. App. 188–240. This Court’s opinion remanding to the court of appeals is reported at 131 S. Ct. 2091.

The court of appeals’ first opinion in this case reversing in part the denial of habeas relief is reported at 583 F.3d 626. The district court’s orders denying habeas relief are unpublished, as are the state court’s orders denying post-conviction relief. The Arizona Supreme Court’s opinion affirming Jones’s convictions and death sentences on direct appeal is reported at 917 P.2d 200. App. 241–85.

JURISDICTION

The Ninth Circuit denied rehearing and filed its amended opinion reversing in part the denial of habeas relief on November 7, 2022. On January 31, 2023, Justice Kagan extended the time to file this petition until April 6, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI, § 1.

INTRODUCTION

Review and summary reversal are warranted here, where at least ten Ninth Circuit judges believed the amended panel opinion merited en banc review. Judges Bennett and Ikuta authored dissents for those judges, with Judge Bennett stating in explicit terms that this Court should correct yet another example of the Ninth Circuit’s misapplication of *Strickland* in a capital case. App. 76 (“[W]e should have taken this case en banc so that the Supreme Court, which has already vacated our judgment once, does not grant certiorari a second time and reverse us.”).

Bedrock principles of appellate review dictate that “courts of appeal 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). And this Court has reiterated time and again that when reviewing prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), in the capital sentencing context, courts are required to “reweigh the evidence in aggravation against the totality of available mitigating evidence” to determine whether there is a reasonable probability of a different outcome. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). Yet in order to justify erroneously granting habeas relief from Jones’s death sentences for the second time in fourteen years, the Ninth Circuit took an approach in direct conflict with both of these principles.

Jones, who was sentenced to death in 1993 for beating his friend to death with a baseball bat and then beating and strangling to death his friend’s 7-year-old daughter, received *two* evidentiary hearings

on his claim asserting ineffective assistance of counsel at sentencing—one in state court and one in federal court prior to Pinholster and Ramirez/Jones, which arguably render Jones’s federal hearing an extra-AEDPA windfall. The judges who presided over those hearings both denied relief from Jones’s death sentence. The panel opinion, however, granted relief on Jones’s death sentences based on perceived prejudice from counsel’s purported ineffectiveness at sentencing. *See* App 1–70. The district court made detailed factual and credibility findings following an evidentiary hearing that well-supported its conclusion that Jones failed to prove *Strickland* prejudice. But the panel ignored those findings, instead making its own, without even reviewing the lower court’s findings for clear error, “as mandated” by this Court’s case law. *See* App. 111.

To make matters worse, the panel failed to consider all of the evidence—including the aggravating circumstances and the State’s rebuttal—in evaluating Jones’s “new” mitigating evidence. That approach directly conflicts with this Court’s directive that courts “must consider all the evidence—the good and the bad—when evaluating prejudice.” *Wong v. Belmontes*, 558 U.S. 15, 26 (2009).

Fourteen years ago this Court vacated an earlier decision by the Ninth Circuit in this very case that also improperly granted habeas relief from Jones’s death sentence. *See Ryan v. Jones*, 563 U.S. 932 (2011) (vacating judgment and remanding in light of *Cullen v. Pinholster*, 563 U.S. 170 (2011)). This Court’s intervention is warranted for the second time in this case because the Ninth Circuit cavalierly dismissed this Court’s precedent on its way to

undoing the judgments of the federal and state courts below.

STATEMENT OF THE CASE

A. Jones's murders of Robert and Tisha Weaver, and attempted murder of Katherine Gumina.

On the evening of March of 1992, Jones was with his friend Robert Weaver, in the Bullhead City, Arizona, home where Robert lived. App. 242. While in the garage, Jones suddenly attacked Robert with a baseball bat, beating him in the head at least three times. *Id.* at 242–43. Jones then went into the house, where Robert's grandmother, Katherine Gumina was watching television and Robert's 7-year-old daughter, Tisha, was coloring, and attacked Ms. Gumina with the bat. Tisha ran to her parents' bedroom and hid under the bed, but Jones dragged her out, beat her with the bat, and strangled her. *Id.* at 243.

While Jones started loading Robert's gun collection into Ms. Gumina's car, Robert regained consciousness and tried to flee. Jones viciously attacked him again with the bat, this time killing him. *Id.* at 243–44. Robert's wife, Jackie, arrived home a few minutes later and found Robert dead on the garage floor, Ms. Gumina unconscious on the living room floor, and Tisha dead in a bedroom. *Id.* at 244–45.

Jones's brutal attack on Robert resulted in death by "multiple contusions and lacerations of the central nervous system caused by multiple traumatic skull injuries." *Id.* at 245. Jones murdered Tisha in the same manner, with the addition of possible

asphyxiation. *Id.* After the crimes, Jones fled to Las Vegas where he was eventually arrested. *Id.* at 245–46.

The State charged Jones with two counts of premeditated first-degree murder and one count of attempted first-degree murder.¹ *Id.* at 246. “At trial, [Jones] testified that he killed Robert Weaver in self-defense, that he struck Katherine Gumina reflexively and without criminal intent because she startled him, and that another person killed Tisha Weaver.” *Id.* The jury convicted Jones on all counts. *Id.*

B. Jones’s sentencing.

The State alleged three aggravating factors for both murders: Jones committed the murders for pecuniary gain, A.R.S. § 13–703(F)(5)²; Jones committed the murders in an especially heinous, cruel, or depraved manner, A.R.S. § 13–703(F)(6); and Jones was convicted of multiple murders, A.R.S. § 13–703(F)(8). *Id.* at 246. The State additionally alleged for Tisha’s murder that she was under age 15, A.R.S. § 13–703(F)(9). *Id.* at 246–47. The trial court found that the State proved each of these factors. *Id.*

Before sentencing, the trial court granted a motion by Lee Novak, Jones’s counsel, for a mental health examination. App. 190. The court appointed Dr. Jack Potts, the Chief of Forensic Psychiatry for

¹ Ms. Gumina died before trial, but the State opted not to amend the indictment. App. 246.

² The State cites to the version of the sentencing statute in effect at the time of Jones’s offenses.

the Correctional Health Services in Maricopa County. *Id.* at 10.

At the sentencing hearing, Novak proffered two statutory mitigating circumstances: (1) Jones's capacity to appreciate the wrongfulness of his conduct and conform it to the law was significantly impaired, A.R.S. § 13-703(G)(1); and (2) he was under unusual and substantial duress, A.R.S. § 13-703(G)(2). App. 274. He also proffered multiple nonstatutory mitigating circumstances: the victims' family's "indifference" to whether he received the death penalty; a chaotic and abusive childhood; potential for rehabilitation; lack of future dangerousness if confined to prison; participation of another individual; history of substance abuse and intoxication at the time of the offenses; head injuries; mental illness; and remorse. *Id.* at 274-75.

Novak presented testimony from Randy Jones, Jones's stepfather who was also a retired sheriff's deputy. R.T. 12/8/1993, at 39, 62. Randy testified that Jones's biological father physically abused Jones's mother and that Jones's first step-father verbally and physically abused Jones. *Id.* at 41-46. Randy further testified that Jones suffered multiple head injuries as a teenager, had a history of drug and alcohol abuse, which began when Jones's first step-grandfather introduced him to marijuana at age 11 or 12, and that Jones participated in treatment programs. *Id.* at 47-50, 52-61, 65-67. Randy stated that Jones's behavior deteriorated after he began abusing drugs and alcohol and that he was an alcoholic by age 17. *Id.* at 51-53, 55-57, 60-62; see also App. 9-10, 173, 191-92.

Dr. Potts testified about the mitigating factors he had identified in Jones's case, including Jones's "chaotic and abusive childhood" and its effect on his mental health and development (about which Dr. Potts offered details); Jones's history of significant substance abuse; likelihood that he suffered from an attenuated form of bipolar disorder; history of multiple head injuries; and genetic predisposition for substance abuse and affective disorders. R.T. 12/8/1993, at 80–92, 94–98, 100–04. When discussing Jones's head injuries, Dr. Potts explained that there were usually "long term neurologic sequelae" that can damage the brain and make it susceptible to changes such as lower thresholds for aggression. *Id.* at 100. He also stated that additional testing would "clearly assist in coming to a more definitive conclusion" regarding whether Jones had brain damage and recommended additional testing "specifically for forensic purposes." *Id.* at 103, 137.

Dr. Potts further explained that there was strong evidence that Jones suffered a traumatic brain injury and believed there was evidence of organic neurologic dysfunction since Jones was 13. *Id.* at 78–80. He testified that additional neurological testing would be helpful "to pin down the diagnosis." *Id.* Such testing also "could help in clarifying and giving us etiology as the behavioral components, the explosive outbursts, the aggression, the mood changes, and the changes that occurred in his personality as noted by his mother when he was about 13, 14 years of age." *Id.* Ultimately, and significantly, Dr. Potts opined that he believed any additional testing "would be corroborative of my clinical impressions and my diagnostic impressions in my report." *Id.*; see also App. 192–95.

After Dr. Potts testified, Novak requested a continuance to obtain the additional testing Dr. Potts recommended. App. 195. The trial court denied the request. *Id.*

The next day, Novak renewed his request, offering in support some of Jones's military records documenting a head injury he suffered while in the Marines. App. 196. The trial court admitted the records, but denied the continuance, stating that "the evidence is very slim, nonexistent, in fact, that the defendant has anything that requires any kind of neurological examination." *Id.*

In reaching his sentencing decision, the trial judge addressed the aggravating factors in great detail, affording them substantial weight in the sentencing calculus. App. 80–83. The court found three aggravating factors as to both murders, finding that they were committed for pecuniary gain, were committed in an especially heinous, cruel, or depraved manner, and that Jones committed multiple murders. *Id.* With respect to Tisha's murder, the court found an additional aggravating factor based on her age. *Id.* at 80.

The trial court did not find any statutory mitigating circumstances, but found proven as non-statutory mitigating factors that Jones suffered from long-term substance abuse; was under the influence of alcohol and drugs at the time of the offense; had a chaotic and abusive childhood; and suffered from substance abuse problem may have resulted from genetic factors and aggravated by head trauma. App. 197.

In discussing the mitigation, the court observed that Jones's conduct did not arise "from an anger

explosion or delusion caused by drugs or alcohol use,” but was more consistent with the State’s theory that he “committed the acts of murder so that he could steal Robert Weaver’s guns.” App. 84. The court also noted that Jones had “shown that he [was] willing to lie if it benefit[ed] him,” and that he and a fellow inmate “manufactured” a “tale” about another person (Frank Sperlazzo) committing the murders. *Id.* at 84, 197; *see also id.* at 276–77 (Arizona Supreme Court finding that the “evidence is not sufficient to establish that Sperlazzo participated in the crime”).

Ultimately, the judge concluded that the mitigating circumstances were not sufficiently substantial to outweigh the aggravating factors and call for leniency, and sentenced Jones to death for each murder.³ App. 84.

The Arizona Supreme Court affirmed Jones’s convictions and sentence on direct appeal. App. 285. The court affirmed the sentencing judge’s findings regarding aggravating factors, except concluded that the record did not support the finding that Jones killed Tisha to eliminate her as a witness. App. 266–74. Independently reviewing the sentence, however, the Arizona Supreme Court found that the mitigation was not sufficiently substantial to call for leniency and affirmed Jones’s death sentences. *Id.* at 283–84.

³ The court sentenced Jones to life without the possibility of release for 25 years for Ms. Gumina’s attempted murder. App. 84 n.8.

C. State post-conviction proceeding.

Jones filed a petition for post-conviction relief raising numerous claims, including those at issue here: that (1) sentencing counsel was ineffective for relying on Dr. Potts instead of retaining an independent neuropsychologist and neurologist, and (2) sentencing counsel was ineffective for failing to timely request neurological and neuropsychological testing. App. 176. The post-conviction court denied the first claim, but set the second for an evidentiary hearing. App. 15–16.

Randy Jones, Jones’s mother Peggy, and Novak testified at the hearing. Randy’s testimony focused on when he provided information to Novak before sentencing. App. 177. Peggy testified regarding the information she provided to Novak, and also stated that after she married Randy, Jones “had a normal childhood” and a “good home life.” *Id.* at 85, 177.

Novak testified about his work on the case and investigation into Jones’s background. Novak stated that Dr. Potts “was great to work with,” “did everything that we would have wanted someone that we had hired to do,” and was “a valuable witness for the defense.” App. 85. The post-conviction court denied relief. *Id.* The Arizona Supreme Court denied review. *Id.*

D. Federal habeas proceedings.

Jones sought federal habeas relief, again raising his ineffective-assistance-at-sentencing claims. The district court agreed with the parties that the claims were adjudicated on the merits for purposes of 28 U.S.C. § 2254(d). However, this Court had not yet decided *Cullen v. Pinholster*, 563 U.S. 170 (2011),

which made clear that review under § 2254(d) is limited to the state court record, and so the district court held an evidentiary hearing on the claims.

1. The hearing evidence and the district court's findings.

Jones presented testimony from three mental health experts: (1) Dr. Potts; (2) Dr. Pablo Stewart, a psychiatrist; and (3) Dr. Alan Goldberg, an attorney and neuropsychologist; he also submitted reports from psychologist Dr. David Foy and neuropsychologist Dr. Shoba Sreenivasan. App. 85–86, 205 n.6. The State presented testimony from Dr. Steven Herron, a psychiatrist; Dr. Anne Herring, a neuropsychologist; and Dr. John Scialli, a psychiatrist. *Id.*

The district court's order denying habeas relief included detailed summaries of the witnesses' testimony, App. 200–18, and thorough factual findings based on the hearing evidence. These included findings on credibility—for example, the district court noted that Dr. Stewart's forensic work was done “primarily for the defense” and that Dr. Goldberg had never been retained by the prosecution in a capital case and had a “working relationship” with the Federal Public Defender's Office. *Id.* at 218. Drs. Herring and Scialli, in contrast, had testified both for the State and criminal defendants or habeas petitioners, and Dr. Scialli had “been retained with equal frequency by the defense and the prosecution.” *Id.* at 218–19. The court then went on to make findings regarding the specific evidence presented and the “new” mitigation Jones asserted should have been presented at sentencing.

Cognitive Impairment

The court found that Jones failed to establish that he suffered from cognitive impairment. App. 219–22. While Jones’s experts relied on school performance (grades and standardized test scores), discrepancy between performance and verbal IQ scores, and neuropsychological test results to diagnose cognitive impairment, alternative explanations existed to explain Jones’s declining school performance, including “absenteeism, family stresses, substance abuse, and lack of motivation.” *Id.* at 220. Moreover, Jones’s overall IQ score was “solidly in the average range.” *Id.* Further, while Jones’s experts attributed the primary cause of his cognitive impairment to head injuries, anecdotal reports about those purported head injuries were inconsistent and unsupported by documentation or medical records. *Id.* at 220–22.

Post-traumatic Stress Disorder

The court found that Jones failed to establish that he suffered from PTSD at the time of the murders—“none of [Jones’s] experts completed an appropriate diagnosis using all of the criteria set forth in the DSM-IV.” App. 222. Moreover, Jones’s experts could not relate their PTSD diagnoses to Jones’s conduct during the murders.

Attention Deficit/Hyperactivity Disorder (AD/HD)

The court found that Jones suffered from AD/HD disorder at the time of the crimes, but that the condition was unrelated to violent behavior and thus was not persuasive mitigation. App. 222–23.

Mood Disorder

The court found that Jones did not establish that he suffered from a major affective disorder. App. 223 While the evidence suggested he may suffer from “a chronic, low-level mood disorder,” the court did not find that to be persuasive mitigation because “[n]one of the experts suggested a causal relationship between the condition and [Jones’s] conduct during the crimes.” *Id.*

Substance abuse

The court found, “based upon the undisputed testimony, that at the time of the crimes [Jones] suffered from dependence on alcohol, amphetamine, and cannabis.” *Id.*

2. Denial of habeas relief and subsequent proceedings.

Based on these findings the district court concluded that Jones failed to demonstrate *Strickland* prejudice. The court concluded that “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 report and testimony of Dr. Potts” at sentencing. App. 230. The results of neuropsychological testing were “largely ambiguous and inconclusive” and failed to “demonstrate that [Jones] suffered from cognitive impairment or PTSD at the time of the murders.” *Id.* at 233–35. Moreover, the conditions that Jones *did* establish—ADHD and low-level mood disorder—“do not constitute persuasive evidence in mitigation because they do not bear a relationship to [Jones’s] violent behavior.” *Id.* at 233. Thus, Jones failed “to

affirmatively demonstrate a reasonable probability that this additional information [presented at the evidentiary hearing] 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.* at 229; see *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (to prove prejudice defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

Jones appealed and, in 2009, the Ninth Circuit issued an opinion reversing the district court, holding that Novak was ineffective at sentencing for failing to obtain a partisan mental health expert and timely move for neurological and neuropsychological testing, and failing to conduct additional mitigation investigation and present sufficient witnesses and evidence at sentencing. *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009). On the State's Petition for Writ of Certiorari, this Court remanded for further consideration in light of *Pinholster*, 563 U.S. 170. *Ryan v. Jones*, 563 U.S. 932 (2011).

After the case languished for over three years on remand, in 2014 the Ninth Circuit remanded to the district court to consider whether "under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc)," Jones's ineffective-assistance claims were procedurally defaulted rather than adjudicated on the merits by the state court. *Jones v. Ryan*, Ninth Circuit No. 07-99000, Dkt. #138. After addressing the Ninth Circuit's question, the district court again denied habeas relief. App. 166–87. Jones appealed.

E. Amended panel opinion.

On appeal for the second time, a Ninth Circuit panel reversed for the second time. The panel acknowledged that AEDPA governed its review of Jones’s ineffective assistance claims but, because it concluded that the post-conviction court did not address *Strickland*’s prejudice prong, it elected to review for prejudice de novo. App. 23–24, 37, 131–32. The court also held that the post-conviction court’s conclusion that Jones failed to establish deficient performance was unreasonable both under § 2254(d)(1) and (2). *Id.* at 24–37, 62–67, 132–44, 157–63. The panel thus also reviewed Claims 1 and 2 de novo.

After finding deficient performance, the panel addressed *Strickland* prejudice and held—contrary to the state post-conviction court and the district court—that there was a reasonable probability that, had Novak obtained a defense mental health expert and sought neuropsychological and neurological testing, the results of sentencing would have been different. App. 37–62, 68–70, 144–57, 163–65.

The court began its analysis by finding that, based on the federal evidentiary hearing, a defense expert would have presented “a wealth of available mitigating mental health evidence” including diagnoses of: “(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.” App. 39–40, 147. The panel then recounted the testimony of Jones’s experts from the

federal hearing, accepting their testimony in full at face value. *Id.* at 41–46, 148–52.

Although the panel acknowledged that it reviews the district court’s factual findings for clear error, it swept aside, ignored, or criticized those findings without finding them clearly erroneous, with one narrow exception. The panel held that the district court’s finding that Dr. Potts was a “de facto defense expert” was clearly erroneous based on Dr. Potts’s “repeated” statements that he was a neutral expert and Novak’s statement that he was initially cautious about what information he provided to Dr. Potts.⁴ App. 49–50. The panel also justified ignoring the district court’s credibility findings by holding that it was inappropriate for the court to “weigh the testimony of the experts against each other in order to determine who was the most credible.” *Id.* at 51.

Next, the panel justified disregarding the district court’s conclusion that Jones’s mental conditions were not “persuasive” mitigation because they were unconnected to Jones’s violent behavior by holding that “if the sentencing court had decided not to consider the mitigating mental condition evidence, it would have run afoul of *Eddings*,⁵ which held a

⁴ The district court’s conclusion was supported, however, by Novak’s testimony that he considered Dr. Potts “part of the defense team,” App. 198, that Dr. Potts “indicated that his role was going to be to help us” and “actively assisted developing mitigation, planning strategy,” and that his meeting with Dr. Potts prior to his testimony at sentencing “was more like meetings I’ve had since with aggravation/mitigation experts who are part of our defense team,” *id.* at 209–10.

⁵ *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

sentence in a capital case may not ‘refuse to consider, as a matter of law, any relevant mitigating evidence’ offered by the defendant.” App. 52. Notably, the panel ignored altogether the district court’s finding that Jones failed to establish that he suffered from cognitive impairment.

Briefly acknowledging that the State’s experts disputed some of Jones’s expert’s diagnoses, the panel nonetheless disregarded that rebuttal testimony, stating that “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.” App. 54.

Finally, although the panel *listed* Jones’s aggravating factors and acknowledged it was required to weigh them against the mitigation evidence, App. 56–57, nowhere did the court discuss the aggravation or its weightiness as compared against the proffered mitigation.

F. Denial of en banc review and Judge Bennett’s and Judge Ikuta’s dissents.

The State sought en banc rehearing. The court denied the motion and issued an amended opinion, but Judges Bennett and Ikuta authored stinging dissents from that denial. App. 70–112.

Writing for nine judges, Judge Bennett observed that the panel “improperly and materially lowered *Strickland’s* highly demanding standard and failed to afford the required deference to the district court’s findings—essentially finding that no such deference was due.” App. 71. The dissent faulted the panel for taking “Jones’s evidence at face value, while failing

to appropriately credit everything on the other side of the balance—the district court’s factual and credibility findings, the overwhelming aggravating circumstances, and the State’s extensive rebuttal evidence.” *Id.* at 93. Judge Bennett thus identified two major flaws in the panel’s approach: 1) it failed to “consider all the evidence—the good and the bad,” *Wong [v. Belmontes]*, 558 U.S. [15,] 26 [(2009)], and ‘reweigh the evidence in aggravation against the totality of available mitigating evidence,’ *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)”; and 2) it “improperly brushed aside the district court’s well-reasoned factual and credibility determinations” without first finding that they were clearly erroneous. *Id.* at 97.

Regarding the first error, Judge Bennett noted that although the panel claimed to have reweighed the aggravation and mitigating evidence, it never “assess[ed] the *weight* of the aggravation evidence, which was overwhelming.” App. 97 n.14.

As for the second error, Judge Bennett faulted the panel for improperly disregarding the district court’s credibility determinations, noting that, in determining whether there is a reasonable probability that a death sentence would not have been imposed, “a court must be able to assess the weight or probable effect of the evidence on the sentence by, for example, making credibility determinations.” App. 95. Regarding mitigation, Judge Bennett observed that the panel had no basis for rejecting the district court’s findings that, for example, Jones’s IQ was average and some of the instances of head injuries were not credible. *Id.* at 99, 99 n.15.

Judge Bennett then conducted the proper *Strickland* prejudice analysis as mandated by this Court's decisions. He looked to the trial mitigating evidence, which included "Jones's substance abuse, the influence of alcohol and drugs on Jones at the time of the murders, Jones's chaotic and abusive childhood, and the fact that Jones's substance abuse may have resulted from genetic factors and been aggravated by head trauma." App. 98. Judge Bennett next reviewed the "new" mitigation evidence presented in the district court, paying heed to the district court's factual and credibility findings, concluding that "the 'new' mitigation evidence is far from overwhelming, and the district court found it 'largely inconclusive or cumulative.'" *Id.* at 99–108. Finally, the dissent turned to the aggravating factors, noting that each "is entitled to substantial weight." *Id.* at 108–10. Reweighing the original mitigating circumstances, "the 'new' mitigation evidence, which is cumulative, inconclusive, and weak," and the "aggravating circumstances that weigh heavily under Arizona law," Judge Bennett concluded that "there is simply no substantial likelihood of a different result" and thus, no *Strickland* prejudice. *Id.* at 110.

Writing for three judges, Judge Ikuta also dissented, stating that while she agreed with Judge Bennett's analysis, "the panel had no business conducting such a de novo review in the first place." App. 111. Judge Ikuta wrote that, because the state post-conviction court "rejected Jones's claim that trial counsel was ineffective at sentencing without referencing *Strickland v. Washington*, 466 U.S. 668 (1984), or explaining its reasoning" and nothing in the state court's decision "rebutted the presumption

that it adjudicated the prejudice prong of *Strickland* on the merits,” the panel should have reviewed *Strickland* prejudice under 28 U.S.C. § 2254(d)’s highly deferential standard. App. 111–12.

REASONS FOR GRANTING THE PETITION

I. THE PANEL’S DECISION FAILED TO AFFORD THE REQUIRED DEFERENCE TO THE DISTRICT COURT’S FINDINGS AND IMPROPERLY AND MATERIALLY LOWERED *STRICKLAND’S* HIGHLY DEMANDING PREJUDICE STANDARD.

A. The panel afforded no required deference to the district court’s factual findings, and instead disregarded them and substituted its own findings to justify granting habeas relief.

The panel erred here “by failing to review the district court’s factual and credibility findings, as mandated” by this Court’s decisions. App. 111. Its egregiously flawed *Strickland* prejudice analysis takes “Jones’s evidence at face value,” without crediting the district court’s extensive factual and credibility findings regarding that evidence. *Id.* at 93. The panel’s decision thus directly conflicts with the bedrock rule that “courts of appeal 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).

This Court has “stressed that the clearly-erroneous standard of review is a deferential one, explaining that ‘if the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the

trier of fact, it would have weighed the evidence differently.” *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573–74 (1985)). Thus, “[w]here there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Anderson*, 470 U.S. at 574.

A district court’s findings based on witness credibility, moreover, must receive “even greater deference.” *Id.* at 575. However, the clear error standard still applies “even when the district court’s findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.” *Id.* at 574.

Finally, no deviation from the clearly erroneous standard is warranted “simply because this is a constitutional case, or because the factual findings at issue may determine the outcome of the case.” *Maine v. Taylor*, 477 U.S. 131, 145 (1986). Here, the panel erred by failing to apply the clear error standard “before effectively overturning the lower court’s factual findings” by completely disregarding them. *Knowles*, 556 U.S. at 126.

As recounted above, the district court made thorough and detailed factual findings regarding the mitigation Jones presented at the federal hearing. For example, the court found that: Jones failed to prove cognitive impairment or that he suffered from PTSD during the murders; Jones’s ADHD was not persuasive as mitigation; Jones did not suffer from a major mood disorder; and any low-level mood disorder was unpersuasive as mitigation. App. 219–23.

Based upon these findings regarding specific mitigating factors, the district court further found that “the new information is largely inconclusive or cumulative” to the information presented to the sentencing judge. App. 229. Moreover, because Dr. Potts’ report and testimony went unchallenged at sentencing, the sentencing court found that Jones suffered from substance abuse, likely suffered from a major mental illness, and suffered head injuries that increased the potential for cognitive impairment. Thus, the district court found that “Dr. Potts’ finding at sentencing remains the most persuasive statement in the record that neurological damage constituted a mitigating factor.” *Id.* at 232.

The panel failed to acknowledge these findings, much less afford them deference. Instead, it substituted its own findings that directly contradicted the district court’s. For example, the panel found, contrary to the district court, that the hearing evidence established Jones’s cognitive dysfunction and numerous neurological disorders including “brain damage,” and that this type of evidence constituted “a wealth of available mitigating mental health evidence.” App. 39–40, 52–53, 57–58. The panel’s failure to afford deference to the district court’s factual findings, without first applying the clearly erroneous standard, was error.⁶

Moreover, where the panel did acknowledge the district court’s findings, it faulted them unfairly. The

⁶ If the panel had reviewed the district court’s findings for clear error, it would have been required to conclude that the district court did not clearly err because its conclusions were well-supported by testimony of the witnesses at the hearing over which the court presided.

district court determined, based on testimony presented at the hearing, that the State's experts, Drs. Herring and Scialli, were generally more credible than Jones's experts, Drs. Stewart and Goldberg. App. 218–19. Relying on *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008), the panel held that this finding was error, not because it wasn't supported by the record, but instead because “[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 whether Jones had presented ‘evidence confirming that [he] suffers from neurological damage caused by head trauma or other factors.’” App. 51. The panel said that the district court's focus should have been instead on “whether the new evidence was ‘sufficient to undermine confidence in the outcome.’” *Id.* at 52.

But as Judge Bennett correctly observed, “*Correll* does not establish that the district court's credibility determinations here were improperly made.” App. 94–95. In fact, the Ninth Circuit has held (correctly) that “[f]actual findings and credibility determinations made by the district court in the context of granting or denying [a habeas] petition are reviewed for clear error.” *Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir. 2004). And in *Correll* itself, the court of appeals reviewed the district court's credibility findings for clear error. 539 F.3d at 954 n.7. The panel here had no basis for sweeping aside the district court's credibility findings.

Furthermore, when deciding whether there is a “reasonable probability” that the sentencer would not have imposed a death sentence under *Strickland*, “a court must be able to assess the weight or probable effect of the evidence on the sentence by, for

example, making credibility determinations.” App. 95. It is simply common sense that, for example, mitigation testimony that is wholly incredible would not create a reasonable probability of a different outcome. The panel’s holding that a district court should not make credibility findings in assessing *Strickland* prejudice—especially where, as here, it is faced with conflicting expert testimony—is indefensible and illogical.

The panel additionally faulted the district court for finding that Dr. Stewart’s credibility was diminished because he “endors[ed] [Jones’s] account of the crimes.” App. 87 n.7. In making that finding, however, the district court quoted directly from Dr. Stewart’s declaration: “Danny’s psychological profile supports the events as described by Danny on the night of the crimes, *including Frank’s responsibility for Tisha Weaver’s murder.*” *Id.* at 87 n.7, 206–07 n.7. In assessing Dr. Stewart’s credibility, the district court took “into account his willingness to present an opinion on a factual issue which concerns only the guilt phase of the trial and which was resolved, with a result contrary to that reached by Dr. Stewart, by the jury, the trial court, and the Arizona Supreme Court.” *Id.* at 44, 206–07 n.7.

The panel, incredibly, concluded that the district court’s conclusion was “mistaken” because Dr. Stewart “did not purport to contradict the jury’s findings.” App. 45. Judge Bennett was “puzzled” by this in light of Dr. Stewart’s unambiguous statement that he believed that Jones’s psychological profile supported the events as Jones described them, specifically including Jones’s claim that another individual murdered Tisha. *Id.* at 87 n.9. Thus, to the extent the panel’s criticism constitutes a holding

that the district court’s credibility finding was clearly erroneous, that holding itself is error since the district court’s finding was supported by the record. See *Amadeo*, 486 U.S. at 223 (court of appeals may not reverse factual finding that “is plausible in light of the record viewed in its entirety”).

Finally, the panel erred yet again by dismissing the district court’s findings regarding the persuasiveness of Jones’s newly-proffered mitigation evidence. The district court found that several categories of mitigation—Jones’s diagnoses of ADHD and mood disorder—were not “persuasive evidence in mitigation because they do not bear a relationship to [Jones’s] violent behavior.” App. 233–34. The panel criticized this conclusion, stating that “if the sentencing court had decided not to consider the mitigating mental condition evidence, it would have run afoul of *Eddings*, which held a sentencer in a capital case may not ‘refuse to consider, as a matter of law, any relevant mitigating evidence’ offered by the defendant. 455 U.S. at 114.” *Id.* at 52.

That criticism plainly mischaracterizes the district court’s finding. The district court *explicitly acknowledged Eddings’* holding that “the sentencer in a capital proceeding must consider all relevant mitigation evidence.” App. 233–34 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings*, 455 U.S. 104). However, the district court also correctly noted that *Eddings* still permits “[t]he sentencer ... [to] determine the *weight* to be given relevant mitigating evidence.” 455 U.S. at 114–15 (emphasis added). Thus, the district court concluded that “the trial court would have assigned minimal significance to testimony indicating that Petitioner suffered from ADHD and a low-level mood disorder, and that this

weight would not have outbalanced the factors found in aggravation.” App. 234. *Eddings* requires nothing more. *Styers v. Ryan*, 811 F.3d 292, 299 (9th Cir. 2015). The panel mischaracterized the district court’s decision in its haste to disregard this factual conclusion.

B. The panel improperly and materially lowered *Strickland*’s highly demanding prejudice standard by failing to weigh the “new” mitigation against the aggravating factors and ignoring the state’s rebuttal evidence.

This Court has repeatedly made clear that, when assessing *Strickland* prejudice in capital sentencing, newly-proffered mitigation is only a piece of the puzzle. A reviewing court must consider the entirety of the record because “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 (emphasis added). Answering this question requires courts to “reweigh the evidence in aggravation against the totality of available mitigating evidence” to determine whether there is a reasonable probability of a different outcome. *Wiggins*, 539 U.S. at 534; *Pinholster*, 563 U.S. at 198; *see also Berghuis v. Thompson*, 560 U.S. 370, 389 (2010) (“In assessing prejudice, courts ‘must consider the totality of the evidence before the judge or jury.’”). Thus, a reviewing court “must consider all the evidence—the good and the bad—when evaluating prejudice.” *Belmontes*, 558 U.S. at 26; *see also Bobby v. Van Hook*, 558 U.S. 4, 13 (2009) (faulting court of appeals for giving aggravating factors “short shrift” and thus

“overstat[ing] further the effect additional mitigating evidence might have had”).

Under these controlling precedents, to establish prejudice Jones must show a reasonable probability that the sentencing judge would have rejected a death sentence after he “weighed the entire body of mitigating evidence ... against the entire body of aggravating evidence.” *Belmontes*, 558 U.S. at 20;

Here, the panel impermissibly ignored entire categories of relevant evidence as required by this Court’s case law. Although the panel gave lip service to the requirement that it “must ‘reweigh the evidence in aggravation against the totality of available mitigating evidence,’” App. 56 (quoting *Wiggins*, 539 U.S. at 534), it never actually *did* that mandatory reweighing. Instead, the panel merely listed the aggravating circumstances found by the sentencing court and never mentioned them again, much less assessed their weight against the mitigating evidence. *See id.* at 56–57.

In fact, as Judge Bennett noted, the panel made clear that it wholly ignored the aggravating factors when it stated that the sentencing judge “heard *almost nothing* that would ... allow [him] to accurately gauge [Jones’s] moral culpability.” App. 95–96. In other words, the panel considered evidence that “Jones had brutally, cruelly, and senselessly killed a seven-year-old girl, her seventy-four-year-old great-grandmother, and her father, all with a baseball bat, and all for financial gain,” as “almost nothing” relevant to Jones’s moral culpability. *Id.* By only reciting, and not following, this Court’s mandate that it reweigh the mitigating evidence against the aggravating factors, the panel impermissibly

“watered down *Strickland*’s demanding standard.”
Id.

The panel not only failed to consider the aggravating factors, it likewise failed to consider the evidence “that would have been presented had [Jones] submitted the additional mitigation evidence.” *Belmontes*, 558 U.S. at 26. After briefly mentioning the testimony from the State’s three experts at the federal evidentiary hearing, the panel justified ignoring their conclusions by asserting that “a conclusive diagnosis was not necessary for a sentence 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.” App. 54.

With its sweeping dismissal of the State’s rebuttal evidence, the panel failed to account for the effect the State’s experts’ testimony would have had on the weight of the “new” mitigation Jones presented. For example, contrary to Dr. Stewart, Drs. Herring and Scialli concluded that Jones did not suffer from cognitive impairment. According to the panel, however, those conclusions were immaterial, apparently because the testimony of Jones’s experts was mitigating whether or not the State presented evidence to dispute it. That is not what *Strickland* demands. See *Belmontes*, 558 U.S. at 26 (courts “must consider all the evidence—the good *and the bad*—when evaluating prejudice”) (emphasis added). Instead, the panel considered *only* the evidence that was helpful to Jones. *Strickland* requires more.

The panel attempted to justify its flawed approach with an extensive discussion of prior decisions that “involved brutal crimes, but with the

additional common thread that counsel did not properly investigate and present available classic mitigating evidence.” App. 58–61. As Judge Bennett observed, however, these cases “simply show[] that new mitigation evidence *can* establish prejudice, even in horrific cases.” *Id.* at 93 n.12. But as Judge Bennett further observed, none of the cases cited by the panel commit the same egregious errors as contained in the panel decision. *Id.* at 95–96 n.12. Moreover, the hallmark of individualized sentencing is that no two defendants or crimes is the same, so comparisons such as those undertaken by the panel have limited application.

II. A PROPER *STRICKLAND* ANALYSIS WITH THE REQUIRED DEFERENCE TO THE DISTRICT COURT’S FINDINGS PRECLUDES A FINDING OF PREJUDICE.

Had the panel followed the prescribed framework it would have been compelled to affirm the district court’s denial of habeas relief. As demonstrated below, a *Strickland* prejudice analysis that includes all relevant facts in the record and affords proper deference to the district court’s findings must fail to find prejudice.

First, as the district court found, Dr. Potts “served as a de facto defense expert at sentencing” and provided information “clearly favorable to [Jones].” App. 231. Dr. Potts informed the sentencing court that, at the time of the murders, Jones’s ability to conform his conduct to the requirements of the law was impaired and his use of drugs and alcohol significantly contributed to his conduct. *Id.* Additionally, rendered opinions about the effects Jones’ state of mind, early childhood experiences,

and genetic predisposition for substance abuse had on his behavior at the time of the murders. *Id.* at 231–32. Trial counsel further elicited Dr. Potts’ opinion that “had it not been for the intoxication, the alleged offense would not have occurred.” *Id.* at 12.

Next, the district court concluded that “[t]he record developed since Dr. Potts’s report has added detail but also ambiguity to the diagnoses Dr. Potts offered in mitigation.” App. 231. The court noted that, while Dr. Potts placed “substantial emphasis” on Jones’s head injuries, Jones presented no additional evidence “confirming that [Jones] suffers from neurological damage caused by head trauma or other factors.” *Id.* at 232. Thus, “Dr. Potts’s finding at sentencing remains the most persuasive statement in the record that neurological damage constituted a mitigating factor.” *Id.*

The new diagnoses Jones offered in district court, PTSD and ADHD, “are the conditions about which the parties’ experts were unable to agree,” and even a finding that Jones suffered from a “residual form” of ADHD “is a fact of little or no mitigating value, because, as Dr. Scialli, testified, it bears no causal relationship to violent conduct.” App. 232. *See Eddings*, 455 U.S. at 114-15 (“The sentencer . . . may determine the weight to be given relevant mitigating evidence.”).

Because the results of neuropsychological tests presented at the federal evidentiary hearing were ambiguous and inconclusive, the district court found that Jones did not demonstrate that he suffered from cognitive impairment or PTSD at the time of the murders. Thus, the district court found that Jones could not demonstrate that he was prejudiced by

trial counsel's failure to seek neuropsychological testing. App. 233.

The district court also noted that the sentencing judge “would likely have viewed with skepticism [Jones’s] more-recent allegations of sexual and physical abuse, given their late disclosure, their inconsistency with other information in the record, and [Jones’s] ‘obvious motive to fabricate.’” App. 238 (quoting *State v. Medrano*, 914 P.2d 225, 227 (Ariz. 1996)). The sentencing judge also would have assigned this type of information little mitigating weight due to “the lack of causal connection between the crimes and the new allegations of abuse.” *Id.* Finally, the district court concluded that the school, medical, and military records presented for the first time in the habeas proceeding “are largely cumulative and of little mitigating value.” *Id.* at 238–39.

Given the district court’s findings that the new information Jones presented in federal court would not have been persuasively mitigating, Jones cannot establish that he was prejudiced under *Strickland’s* standard. That conclusion becomes even clearer when Jones’s new mitigating evidence is assessed, as it must be, against the background of the “entire body of aggravating evidence.” *See Belmontes*, 558 U.S. at 20.

The evidence established that Jones murdered Robert Weaver in brutal fashion, leaving a trail of blood through the garage. App. 74, 81–82. Robert posed no obstacle to Jones’ goal of taking the guns after the initial blows and appeared to be attempting to flee when Jones attacked him the second time,

inflicting the final blow while Robert was helpless and kneeling on the ground. *Id.* at 82.

Jones murdered Tisha equally as brutally, inflicting the same types of injuries as on her father, with the addition of “possible asphyxiation.” App. 76, 245. Seven-year-old Tisha “knew that her great-grandmother had been attacked, and she struggled with defendant for her life.” *Id.* at 269; *see also id.* at 83. Jones inflicted on Tisha brutality “exceeding the amount of violence necessary to cause death.” *Id.* at 74 n.4, 109–110, 273–74. The young child presented no “obstacle to [Jones’s] goal of taking Robert’s guns, and [] was a helpless victim.” *Id.* at 56–57 n.13, 272; *see also id.* at 83. Finally, Jones committed these vicious murders “as part of a plan to obtain [Robert’s] gun collection and leave Bullhead City.” *Id.* at 109, 268.

In light of the district court’s findings regarding the new information presented in federal proceedings, Jones cannot demonstrate a reasonable probability that information would have altered the sentencing judge’s conclusion after the judge would have weighed the totality of the mitigation against these “strong aggravating circumstances.” App. 92, 229. Had the panel below adhered to this Court’s precedents by deferring to the district court’s findings and including the strong aggravating factors in its analysis, it would have been compelled to conclude that Jones failed to establish *Strickland* prejudice, and affirmed the district court’s denial of habeas relief. But in its haste to erroneously grant relief for the second time in this case, the Ninth Circuit panel disregarded the district court’s careful and considered factual findings, and then compounded that error by ignoring this Court’s

dictates to consider the entirety of the relevant evidence when assessing *Strickland* prejudice. The decision below thus merits summary reversal.

CONCLUSION

This Court should grant the petition for writ of certiorari.

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