No. 22-982

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

BRIEF IN OPPOSITION

JON M. SANDS
FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA
LETICIA MARQUEZ
AMANDA BASS
407 W. Congress Street
Suite 501
Tucson, AZ 85701
(520) 879-7622

JEAN-CLAUDE ANDRÉ*
BRYAN CAVE LEIGHTON
PAISNER LLP
120 Broadway
Suite 300
Santa Monica, CA
90401
(310) 576-2148
jcandre@bclplaw.com

LOGAN M. RUTHERFORD
BRYAN CAVE LEIGHTON
PAISNER LLP
1200 Main Street
Suite 3800
Kansas City, MO 64105
(816) 374-3319

MATTHEW STANFORD
BRYAN CAVE LEIGHTON
PAISNER LLP
Two North Central
Avenue, Suite 2100
Phoenix, AZ 85004
(602) 364-7068

Counsel for Respondent

*Counsel of Record

August 23, 2023

CAPITAL CASE

QUESTION PRESENTED

Respondent Danny Lee Jones was convicted of murder in 1993. His counsel only started preparing for the penalty phase after six of the twelve weeks between conviction and sentencing had passed, resulting in a grossly inadequate mitigation case that failed to uncover extensive and powerful evidence of Jones's mental health issues. At the time, under Arizona's unique (now constitutionally invalid) capital sentencing regime, judges—not juries—weighed aggravators and mitigators and determined whether to impose the death penalty. The failure of Jones's counsel to sufficiently develop Jones's mitigation case in turn lead the judge to sentence Jones to death.

On state post-conviction review ("PCR"), Jones argued ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), based on counsel's failure to timely secure a mental health expert and neurological and/or neuropsychological testing. The PCR court disagreed after finding under the performance prong that an independent forensic psychiatrist whom the court had appointed at counsel's belated request had adequately addressed Jones's mitigation issues. On federal habeas review, the district court likewise disagreed with Jones, but on the prejudice prong. On two occasions, a Ninth Circuit panel (with differing judges due to deaths) unanimously found that the mitigation evidence that Jones had developed in federal evidentiary proceedings established prejudice and that the district court clearly erred in reaching a contrary conclusion.

The question presented is:

Whether this Court should summarily reverse a fact-bound application of *Strickland*'s prejudice requirement in the context of Arizona's now-constitutionally invalid death penalty regime, where it is undisputed that counsel performed deficiently in failing to develop his client's mitigation case and the panel correctly identified and applied the standards governing appellate review of federal court findings and ineffective-assistance-of-counsel claims.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Ryan Thornell is the Director of the Arizona Department of Corrections. Respondent Danny Lee Jones is incarcerated in an Arizona state prison. No party is a corporation.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES Page(s)

STATUTES

RULE

OPINIONS BELOW

The amended opinion of the court of appeals (App. 1-70) is reported at 52 F.4th 1104. The original opinion of the court of appeals (App. 113-65) is reported at 1 F.4th 1179, a prior opinion of the court of appeals is reported at 583 F.3d 626, and this Court's prior memorandum vacating that prior opinion is reported at 563 U.S. 932. The order of the district court (App. 188-240) is reported at 450 F.Supp.2d 1023.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2021, and amended on November 7, 2022. A petition for rehearing was denied on November 7, 2022. On January 31, 2023, Justice Kagan extended the original time to file a petition for a writ of certiorari up to and including April 6, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

COUNTERSTATEMENT

1. The facts framing this appeal are not in dispute here, and the court of appeals' decision does not disturb the jury's findings of guilt. As summarized by the courts below, after Jones and Robert Weaver spent the day drinking and using methamphetamine in Weaver's garage, they got into a fight during which Jones hit Weaver over the head multiple times with a baseball bat, killing him. Inside the house, Jones encountered Weaver's grandmother, whom he also hit on the head with the baseball bat. Jones then encountered Weaver's seven-year-old daughter, whom he hit on the head with the baseball bat and either strangled or suffocated her. App. 8; 189-90, 242-45.

2. Following his arrest for the murders of Weaver and his daughter and the attempted murder of

Weaver's grandmother,[1] Jones was appointed a public defender with only three-and-a-half years' legal experience, including none as lead capital counsel. App 9.

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

Despite the red flags indicating mental-health, neurological, and/or neuropsychological issues, and despite the prevailing standards calling for sentence-mitigation investigations to begin "immediately upon counsel's entry into the case" and to be "pursued expeditiously,"[2] counsel did nothing to investigate Jones's mental health until counsel requested an independent mental health evaluation pursuant to Arizona Rule of Criminal Procedure 26.5 *after* Jones' conviction.[3] App. 28-29.

---

[1] Weaver's grandmother initially survived the attack but eventually died from her injuries. The prosecution never amended the indictment after she died. App. 8 n.2.

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

[3] In fact, counsel did not do anything relating to Jones's sentence-mitigation case until approximately six of the twelve weeks between conviction and sentencing had passed. App. 9.

At sentencing, counsel called three witnesses: (1) his guilt-phase investigator, who testified about an alleged accomplice; (2) Jones's second step-father, Randy, who testified about Jones's complicated birth, multiple childhood head injuries, behavioral changes in his early teens, and substance abuse throughout his adolescence; and (3) Dr. Jack Potts, the independent forensic psychiatrist whom the court had appointed pursuant to counsel's belated Rule 26.5 request. C.A. E.R. 2492-2628.

Dr. Potts conducted only a "short and cursory evaluation" of Jones and prepared a report with less than one page of analysis. C.A. E.R. 1066-71. Although Dr. Potts identified seven possible mitigating factors and three possible mental health, neurological, and neuropsychological disorders, he lacked the time to conduct the kind of in-depth evaluation that would have been necessary to provide any diagnoses. C.A. E.R. 2566-67. Dr. Potts nevertheless urged that such an evaluation be done. He testified that "it would be valuable to have had some neurologic evaluations . . . such as a CAT scan, possibly an MRI, possibly EEG, [and] possibly some sophisticated neurological testing because I think there's very strong evidence . . . of traumatic brain injury, and . . . we may have organic neurologic dysfunctions" that "might shed some additional light on . . . why Mr. Jones behave[d] in the way he did" on the night of the murders. C.A. E.R. 2557-59.

The trial court, however, denied counsel's last-minute request for a continuance to obtain that testing and imposed two death sentences for the murders of Weaver and his daughter and twenty-five years for the attempted murder of Weaver's grandmother. C.A. E.R.

2628-29, 2644-45. The Arizona Supreme Court affirmed. *State v. Jones*, 917 P.2d 200 (1996) (App. 241-85).

3. Jones sought state post-conviction relief ("PCR"), asserting various claims, including two ineffective-assistance-of-counsel claims that included more than a dozen sub-claims. C.A. E.R. 1977-2069. As relevant here, Jones asserted (in what the district court later called "Claim 20(O)" and the Ninth Circuit panel called "Claim 1") that his trial counsel was constitutionally ineffective by failing to request a mental health expert in advance of the sentencing hearing and (in what the district court later called "Claim 20(P)" and the panel called "Claim 2") that counsel was constitutionally ineffective by failing to seek neurological and/or neuropsychological testing before sentencing. C.A. E.R. 2059-64 (PCR Claims 24(I)(2) and (3)). Now sitting as the PCR court, the same judge who presided over Jones's trial and sentenced him to death predictably denied Claim 20(O)/1 at a preliminary status conference based on the court's view that "Dr. Potts was a very good expert . . . I don't think counsel was ineffective as far as Dr. Potts." C.A. E.R. 1950. Although the court waited until after an evidentiary hearing six weeks later to deny Claim 20(P)/2, it likewise did so with a single conclusory sentence: "The report and testimony of Dr. Potts who was appointed by the Court, adequately addressed defendant's mental health issues." C.A. E.R. 188.

4. Thereafter, Jones filed the 28 U.S.C. § 2254 petition underlying this appeal. At an evidentiary hearing, Jones presented testimony from, among other witnesses, two defense experts (a psychiatrist and a neuropsychologist) who together diagnosed Jones with: (1) cognitive dysfunction (organic brain damage and a

history of numerous closed-head injuries); (2) poly-substance abuse; (3) post-traumatic stress disorder ("PTSD"); (4) attention deficit/hyperactivity disorder ("AD/HD"); (5) mood disorder; (6) bipolar depressive disorder; and (7) a learning disorder. App. 40.

Nonetheless, the district court dismissed both claims citing a purported lack of prejudice. With respect to Claim 20(O)/1, the court found that "Dr. Potts served as a *de facto* defense expert at sentencing and . . . the results of subsequent examinations performed by the parties' mental health experts have not established a more-persuasive case in mitigation than that presented through the testimony and report of Dr. Potts." App. 230. The court dismissed Claim 20(P)/2 after discounting most of the experts' diagnoses and finding that Jones could only prove that he suffered from AD/HD and possibly a low-level mood disorder, to which "the trial court would have assigned minimal significance." App. 234.

5. A unanimous panel of the Ninth Circuit reversed, finding that Jones had satisfied the deficient-performance and prejudice prongs of *Strickland* with respect to both claims.[4] With respect to deficient performance,

---

[4] A panel originally reached these conclusions in 2009 in *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009). This Court vacated that decision for reconsideration in light of *Cullen v. Pinholster*, 563 U.S. 170 (2011). *See Jones v. Ryan*, 563 U.S. 932 (2011). Judge Reinhardt replaced Judge B. Fletcher following her passing, and the panel ordered a limited remand to the district court to consider whether, under *Martinez*, Jones's ineffective-assistance claims were procedurally defaulted rather than adjudicated on the merits by the state court. *See Jones v. Ryan*, 572 Fed.Appx. 478 (9th Cir. 2014). The district court found that "*Martinez* does not apply" and denied Jones's request for further evidentiary development. App. 183; *see generally* App. 166-87. Judge Christen

the panel held that the PCR court unreasonably applied *Strickland* under 28 U.S.C. § 2254(d)(1) and that the PCR court's decision was also based on an unreasonable determination of the facts under section 2254(d)(2).[5] Although the State had primarily urged the Ninth Circuit to review the prejudice component of Jones's ineffective-assistance claims under section 2254(d) (Pet. C.A. Ans. Br. 21-33), the panel held that, because the PCR court did not reach the issue of prejudice as to either claim, and because Jones was diligent in attempting to develop his claims in state court,[6] *de novo* review was appropriate under the framework of *Wiggins v. Smith*, 539 U.S. 510, 534 (2003), and *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (when a court declines to address one of *Strickland*'s two prongs, there is no "adjudicat[ion] on the merits as to that prong," section 2254(d) does not apply, and the reviewing court "examine[s] this [unaddressed] element of the *Strickland* claim *de novo*"). App. 38-39, 68. Under that review and reviewing the district court's post-evidentiary-hearing findings for clear error, the panel concluded that Jones had demonstrated at least a "reasonable probability" that presentation of mental health expert testimony (Claim 1) or

---

then replaced Judge Reinhardt, who had since passed, and the panel issued a new opinion. *See Jones v. Ryan*, 1 F.4th 1179 (9th Cir. 2021) (App. 113-65). The opinion presently under review is the panel's amended opinion on denial of rehearing en banc.

[5] The State does not seek this Court's review based on these holdings.

[6] The State has not disputed Jones' diligence. App. 38-39.

neurological and/or neuropsychological testing evidence (Claim 2) would have changed Jones's sentence.[7] App. 39-62, 69-70 (quoting *Strickland*, 466 U.S. at 694).

Specifically, the panel held that "had counsel secured a defense mental health expert, that expert would have uncovered (and presented at sentencing) a wealth of available mitigating mental health evidence." App. 39-40. "[T]hat expert," the panel further explained, "could have provided substantial evidence—through neuropsychological testing or otherwise—that Jones suffered from mental illness, including evidence supporting any of the diagnoses made by experts in federal district court." App. 40; *see also* App. 69 ("[T]he results of the neuropsychological and neurological tests conducted by various experts during Jones's federal district court proceedings confirmed that Jones suffered from a variety of psychological disorders stemming from birth and exacerbated by long-term drug use and trauma that affected Jones's cognitive functioning.").

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

---

[7] Jones had appealed numerous other aspects of the district court's dismissal of his federal petition, which the panel did not address. App. 70.

nate past'" and "cognitive dysfunction." App. 41 (quoting C.A. E.R. 880-81); *see also* C.A. E.R. 850-882 (report). Dr. Stewart's findings, the panel explained, identified "a number of factors that may have contributed to Jones's cognitive dysfunction . . . even before he was born," "went into much greater detail than [Jones's second stepfather] Randy had provided [the state courts] regarding Jones's head injuries," catalogued "numerous traumatic experiences [Jones suffered] early in his life," and detailed the extent and likely etiology of Jones's substance abuse since age eight or nine.[8] App. 41-44.

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

---

[8] As the panel observed, Dr. Alan Goldberg, a neuropsychologist who gave Jones approximately 25 tests, made the remaining three diagnoses, and Dr. David Foy (a psychology professor) corroborated by declaration five of the seven total diagnoses. App. 45-46.

find a definitive diagnosis." App. 51-52 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982), and *Lambright v. Schriro,* 490 F.3d 1103, 1121 (9th Cir. 2007)). Indeed, the panel held, "a conclusive diagnosis was not necessary for a sentencer to consider the wealth of evidence that Jones suffered from some form of mental illness and how that illness contributed to his commission of the crimes." App. 54.

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

Recognizing that a federal habeas court's obligation is not simply to catalogue a defendant's mitigation evidence, but to "'reweigh the evidence in aggravation against the totality of available mitigating evidence,'" the panel discussed the aggravating factors found by the sentencing court: "that (1) Jones 'committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value'; (2) Jones 'committed the offenses in an

especially heinous or depraved manner'; (3) Jones was 'convicted of one or more other homicides . . . which were committed during the commission of the offense.'" App. 56 (quoting C.A. E. R. 2461-63).

Despite these aggravating factors, the panel concluded that "[t]he additional mitigating evidence was powerful" insofar as it included "numerous neurological disorders, including brain damage, and an extraordinarily abusive childhood." App. 57. All-in-all, with respect to Claim 20(O)/1, the totality of the evidence established "a reasonable probability that development and presentation of mental health expert testimony would have overcome the aggravating factors and changed the result of the sentencing proceeding." App. 57-58. Similarly, with respect to Claim 20(P)/2, the "results" of the neuropsychological and/or neurological testing "conducted by various experts during Jones's federal district court proceeding confirm[ing] that Jones suffered from a variety of psychological disorders stemming from birth and exacerbated by long-term drug use and trauma that affected Jones's cognitive functioning" "would have dramatically affected any sentencing judge's perception of Jones's culpability for his crimes, even despite the evidence of aggravating factors." App. 69.

The State sought rehearing en banc, which the Ninth Circuit denied. Judge Bennett, who was joined by nine judges, asserted that the panel "failed to afford the required deference to the district court's findings" and "improperly and materially lowered" the *Strickland* standard. App. 70-111. Judge Ikuta, joined by two of the judges who had also joined Judge Bennett's dissent, "agree[d] with Judge Bennett that . . . the panel . . . erred in failing to defer to the district court's findings," but wrote separately to complain that "the panel

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

REASONS FOR DENYING THE PETITION

The State seeks fact-bound error correction on a question of *Strickland* prejudice involving a now-unconstitutional, Arizona-specific sentencing regime. The State does not argue that there is any disagreement among the courts of appeals. Nor does the State purport to identify a situation where this Court, any court of appeals, or any state court of last resort has reached a different conclusion on similar facts. The circumstances of this case are undeniably peculiar: because Jones's death sentence was handed down before *Ring v. Arizona*, 536 U.S. 584 (2002), a judge, not a jury, weighed mitigating and aggravating circumstances, and Jones's counsel indisputably failed to uncover the extensive and powerful evidence of Jones's mental health issues, including the abuse and other factors that contributed to them. In fact, if there are any similarities between this case and others, it is that this Court has on at least five occasions found *Strickland* prejudice in cases involving brutal crimes where counsel (like Jones's) failed to investigate and present classic mitigating evidence.

The State acknowledges that the Ninth Circuit identified and purported to follow the correct standards in evaluating those circumstances. Pet. 16-17. Nonetheless, the State asserts that this Court's review—or really, summary reversal—is warranted because the Ninth Circuit "fail[ed] to apply the clear error standard" to the district court's factual findings (Pet. 21), "gave lip service" to the requirement that it reweigh Jones's new mitigation evidence against the aggravat-

ing evidence (Pet. 27), and "ignor[ed]" the State's rebuttal evidence (Pet. 26), and if the Ninth Circuit "had applied the prescribed framework it would have been compelled to affirm" (Pet. 29). The State's challenges are, in effect, a quibble with how the Ninth Circuit presented its opinion and, thus, do not warrant further review.

The panel, which over the appellate life of this case included five different judges, considered hundreds of pages of briefing, thousands of pages of record, and hours of oral argument between the initial 2007-09 habeas appellate proceedings (which resulted in a 36-page opinion), the 2012-14 appellate proceedings relating to *Martinez*, and the current proceedings—all of which were based on the same state-court record and district court evidentiary hearing and order—and then issued a thoughtful 51-page opinion, followed by an even more thoughtful 70-page amended opinion.[9] To suggest, as the State does, that the panel's massive efforts effectively jettisoned the applicable standards elevates form over substance.

At bottom, the State appears simply to believe that it should have prevailed on appeal and that any defensible opinion ruling otherwise would have taken up even more space in the Federal Reporter. In either case, the State is mistaken. Whether viewed as a fact-and-record-bound challenge to the result or a challenge to the panel's opinion-presentation style, neither calls for this Court's intervention. That the panel could have more forcefully and verbosely rejected the State's arguments and the district court's clearly erroneous findings does not make for this Court's review—let

---

[9] *See* note 4, *supra*.

alone the dramatic remedy of summary reversal. The petition should be denied.

I. THE COURT OF APPEALS FAITHFULLY APPLIED THE REQUIRED CLEAR-ERROR STANDARD IN GRANTING JONES RELIEF

The State's accusation that the panel failed to apply the correct standard of review is fanciful. That the court of appeals should apply the clear-error standard to the district court's findings was undisputed by the parties (Resp. C.A. Replacement. Op. Br. 2; Pet. C.A. Ans. Br. 14) and, more importantly, expressly adopted by the panel (App. 20). On both big-picture and granular issues, it is clear that the panel faithfully applied the high standard governing its review. Various clear errors were argued by Jones throughout his appellate briefing (Resp. C.A. Replacement. Op. Br. 57-69, Resp. C.A. Reply Br. 22-25), disputed by the State (Pet. C.A. Ans. Br. 33-52), then ultimately adopted by the panel. A well-worn standard of review need not be rehashed verbatim when its application is both undisputed by the parties and evident from the decision's careful reasoning.

Even engaging the State's assertion that "[i]f the panel had reviewed the district court's findings for clear error, it would have been required to [affirm]" confirms that the panel faithfully applied clear-error review because, contrary to the State's assertion, the district court's conclusions were not "well-supported." Pet. 22.

1. The State first complains that the panel "failed to acknowledge" (Pet. 22) the district court's finding that Jones's "new [mitigation] information is largely inconclusive or cumulative" (App. 229). That the panel did not cite this specific soundbite does not mean that the

panel failed to apply the proper standard in rejecting it. After carefully considering the totality of the mitigating evidence, the panel specifically found that "the testimony provided at the federal evidentiary hearing demonstrates the types of mitigation evidence that could and should have been presented at the penalty phase of Jones's trial." App. 52. This included "(1) prenatal chrome and nicotine exposure; (2) [Jones's] mother's malnutrition during pregnancy; (3) fetal trauma from beatings by his father; (4) a traumatic birth; (5) several severe head injuries; [and] (6) Jones's substantial and extensive drug and alcohol abuse, which began when he was eight or nine years old"—all of which "illustrate[d] how unfortunate circumstances outside of Jones's control combined to damage his cognitive functioning and mental health at the time of his crimes," none of which was inconclusive, and most of which was not cumulative of the paucity of mitigation provided at sentencing through Dr. Potts and Randy. App. 52-53.

This is particularly true with respect to "the results of the neuropsychological and neurological tests conducted by various experts during Jones's federal district court proceedings," which "confirmed that Jones suffered from a variety of psychological disorders stemming from birth and exacerbated by long-term drug use and trauma that affected Jones's cognitive functioning." App. 69. These results established that Jones suffered from "organic brain damage, poly-substance abuse, PTSD, AD/HD, mood disorder, bipolar depressive disorder, and a learning disorder." App. 69. And, as the panel properly found, their presentation "and the presentation of [their] contributing factors would have dramatically affected any sentencing judge's perception of Jones's culpability for

his crimes, even despite the existence of aggravating factors." App. 69.

2. The State similarly complains that the panel "failed to acknowledge" (Pet. 22) the district court's finding that Dr. Potts's testimony at sentencing "remains the most persuasive statement[s] in the record that neurological damage constituted a mitigating factor" (App. 232). But the panel properly explained that "Dr. Potts's findings" were "conditional," "compiled after far less preparation time and testing" (App. 53) than the 130 hours spent by Dr. Stewart and 25 tests administered by Dr. Goldberg (App. 41, 45), and "compris[ed] only a six-page report" (App. 53), as compared to Dr. Goldberg's 33-page report (App. 41). *See also* App. 69 (again stating that "Dr. Potts presented brief, conditional findings").

As the panel detailed, Dr. Potts conducted only a cursory examination and limited interview of Jones. He spent four hours with Jones before writing his report, one-and-a-half of which were used to complete an MMPI (personality testing). App. 10, 35. Dr. Potts also met with Jones for two hours the day before the sentencing hearing but *after* his report was written and submitted. App. 10, 35. Dr. Potts thus never asked Jones questions, for example, about his mental state at the time of the crimes (C.A. E.R. 694), about stressors associated with PTSD (C.A. E.R. 695), or whether he had "nightmares about something that happened in his childhood" (C.A. E.R. 698) and did not actually make "any diagnoses" of Jones. C.A. E.R. 690-92. All-in-all, as the panel properly concluded, Dr. Potts "was

a neutral expert and found his role limited as such."[10] App. 49.

Moreover, as the panel correctly observed, Dr. Potts himself believed that the new evidence relating to mitigation and Jones's culpability was superior to what he had provided the sentencing court. Specifically, Dr. Potts testified at the federal habeas hearing that "the reports submitted by the additional experts at the habeas proceeding" are the "'documents . . . one would expect to see in mitigation. . . . I believe they're very, very helpful, and . . . I know I would have liked to have had the exhaustive nature of these reports." App. 48 (quoting C.A. E.R. 666-67). Thus, the evidence that Jones adduced at the federal evidentiary hearing, as the panel correctly found, "would have been significantly more probative of Jones's mental state and more persuasive in reducing [his] culpability" than what Dr. Potts had provided at sentencing. App. 52-53.

3. The State next complains that, in relying on the diagnoses and opinions of Drs. Stewart and Goldberg to find prejudice, the panel "unfairly" faulted the district court for instead crediting the State's experts, Drs. Herring and Scialli. Pet. 23 (citing App. 218-19). Specifically, the State asserts that, the panel's holding that "[i]t was improper for the district court to weigh the testimony of the experts against each other in order to determine who was most credible and . . . try to find a definitive diagnosis" (App. 51-52) "is indefensible and illogical" (Pet. 24). The State is incorrect.

---

[10] Perhaps this is why the State, despite twice acknowledging (Pet. 16, 29) the district court's finding that "Dr. Potts served as a *de facto* defense expert at sentencing" (App. 230), does not challenge the Ninth Circuit's express rejection of that finding (App. 49-50).

As this Court has recognized, under the prejudice prong, a "reasonable probability" is one sufficient to "undermine[] confidence in the outcome," but is less than the "preponderance" or "more likely than not" standard. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). That distinction is particularly salient in the capital sentencing context and precludes courts from looking for a "definitive diagnosis" or conclusive answer by deciding which expert is the most credible because the defendant has a right to present all mitigating evidence—not merely the most convincing. *See Porter*, 558 U.S. at 42 (noting that even disputed expert testimony is relevant to capital sentencing because *Eddings*, 455 U.S. at 112, commands that "'the sentencer in capital cases must be permitted to consider any relevant mitigating factor'").

Here, the Ninth Circuit faithfully followed this logic and found that the district court erred by entirely discounting expert testimony that was critical to Jones's mitigation case.[11] As explained above (pp. 8-9,

---

[11] Moreover, the district court's bases for not crediting Drs. Stewart and Goldberg were flimsy at best. The district court initially discredited both simply because "Dr. Stewart's forensic work is done 'primarily for the defense'" and "Dr. Goldberg has never been retained by the prosecution in a capital case and presently has a 'working relationship' with the Federal Public Defender's Office," whereas Drs. Herring and Scialli "have offered testimony on behalf of both the State and criminal defendants or habeas petitioners." App. 218 (quoting C.A. E.R. 500-01, 575, and citing C.A. E.R. 342-43, 440). Putting aside whether a court should be making credibility determinations based on an expert's past affiliations, the district court's characterizations of the experts' work histories were clearly erroneous. Dr. Stewart's forensic work has not been "primarily for the defense," but has been extensive and included work for prisons, the courts, and other governmental agencies. C.A. E.R. 784-87, 500, 850-52. And

supra), the district court had found that Jones failed to present sufficient "evidence *confirming* that [he] suffers from neurological damage caused by head trauma or other factors" (App. 51). But after citing *Eddings* and explaining that this Court's precedent requires courts to consider "'any mitigating evidence' offered by the defendant" and that *Strickland* focuses on whether "new evidence was 'sufficient to undermine confidence in the outcome'"—not on whether one side's evidence preponderates—the panel held that "[i]t was improper for the district court to weigh the testimony of the experts against each other in order to determine who was most credible and . . . try to find a definitive diagnosis." App. 51-52 (quoting *Eddings*, 455 U.S. at 114, and *Lambright,* 490 F.3d at 1121). The panel's conclusion 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

---

with respect to Dr. Herring, the district court ignored the fact that her previous opinions and findings in support of a defendant squarely contradicted her opinions and findings in this case. C.A. E.R. 430-33, 1389-1466, 1468-70.

Perhaps more importantly, although these experts did appear in open court, the district court's credibility determinations were notably not made on the basis of the court's in-court observations, which indisputably would be entitled to special deference.

The only justification offered by the district court for finding either Dr. Stewart or Dr. Goldberg less credible than the State's experts based on their statements was the court's discrediting of Dr. Stewart based on his report's discussion of Jones's psychological profile. App. 206-07 n.7. But as explained below (pp. 19-20, *infra*), that justification was also clearly erroneous, as the panel properly concluded (App. 44-45).

the crimes" was thus correct and rightly faulted the district court.[12] App. 54.

4. The State also complains that the panel improperly "faulted the district court for finding that Dr. Stewart's credibility was diminished because 'he endors[ed] [Jones's] account of the crimes'"—specifically, Jones's assertion that another individual had killed Weaver's daughter. Pet. 24 (quoting App. 206-07 n.7). But the panel was correct.

As the panel explained, "Dr. Stewart opined that Jones had not previously mistreated or abused any child, that Jones had a 'history of submissive, almost child-like behavior, against older males,' and that Jones's 'psychological profile supports the events described by [Jones] on the night of the crimes.'" App. 44-45 (quoting C.A. E.R. 881-82). As the panel further explained, "[w]hen pressed on cross-examination whether he 'believed' Jones's versions of the events over the jury verdict, Dr. Stewart again affirmed his assessment that Jones's story was consistent with Jones's psychological profile." App. 45 (quoting C.A. E.R. 535). Specifically, Dr. Stewart testified that, "based on [his] assessment of [Jones's] psychological profile, . . . the story that [he] was told [by Jones] is consistent with that," that he is "asked on a regular

---

[12] None of the cases cited by the State (Pet. 20-23) is to the contrary. This Court's decisions in *Knowles v. Mirzayance,* 556 U.S. 111 (2009), and *Amadeo v. Zant,* 486 U.S. 214 (1988), did not involve capital sentencing. The same is true of the Ninth Circuit's decision in *Lambert v. Blodgett*, 393 F.3d 943 (9th Cir. 2004), and *Correll v Ryan*, 539 F.3d 938, 954 (9th Cir. 2008), held—as acknowledged by the panel here (App. 51)—that "in the procedural context of [a capital sentencing] case, the district court's role was not to evaluate [the two conflicting experts] in order to reach a conclusive opinion as to Correll's brain injury (or lack thereof)."

basis to make [such a] forensic interface," and that doing so is not "inappropriate or out of line." C.A. E.R. 536. In other words, Dr. Stewart testified only that Jones did not have the psychological profile of a predisposed child-killer. Dr. Stewart did not, as the district court erroneously found (App. 206-07 n.7), "purport to contradict the jury's findings." App. 45.

5. Finally, the State asserts that "the panel erred yet again" by invoking *Eddings v. Oklahoma,* 455 U.S. 104, 114 (1982) (holding that a sentencer in a capital case may not "refuse to consider, as a matter of law, any relevant mitigating evidence" offered by the defendant), by "micharacteriz[ing] the district court's finding[s]" with respect to "Jones's newly-proffered mitigation evidence," and then by "criticiz[ing]" those allegedly mischaracterized findings. Pet. 25. It is the State, however, that is engaging in mischaracterization because the "critici[sm]" that the State attacks is a straw man.

The panel opinion accurately quoted the district court as having concluded that Jones's mental conditions "do not constitute persuasive evidence in mitigation because they do not bear a relationship to [Jones's] violent behavior." App. 52 (quoting App. 233-34). The panel then observed that, "*if the sentencing court*, had decided not to consider the mitigating mental health condition evidence, *it* would have run afoul of *Eddings*." App. 52 (emphasis added). On its face, the panel's statement is merely an observation. And to the

extent it is potentially critical of any court, it is potentially critical of the sentencing court[13]—not the district court.[14]

II. THE COURT OF APPEALS PROPERLY WEIGHED JONES'S NEW MITIGATION EVIDENCE AGAINST THE AGGRAVATING FACTORS AND THE STATE'S REBUTTAL EVIDENCE

There is likewise no merit to the State's contention that "the panel wholly ignored the aggravating factors," "failed to consider the evidence 'that would have been presented had [Jones] submitted the additional

---

[13] As the panel observed, "*the Arizona Supreme Court* concluded that Jones's chaotic and abusive childhood and mental illness . . . did not constitute mitigating factors because Jones failed to demonstrate a connection to his conduct on the day of the murders" and that conclusion violated *Eddings*. App. 40 (discussing App. 279, 283) (emphasis added).

[14] Had the panel actually been critical of the district court, that criticism—contrary to the State's protestations—would have been well-founded. In refusing to find prejudice in the failure to present evidence of a lifetime of abuse and PTSD, for example, the district court stated that "the experts failed to extend their [PTSD] diagnoses beyond a finding that [Jones] experienced traumatic events in his childhood, and therefore did not establish a nexus between the abuse and the murders." App. 238-39; *see also* App. 222 (Jones "has not shown that he suffered from PTSD at the time of the murders"). These statements were clearly erroneous.

In testimony that the panel specifically discussed and quoted, Dr. Stewart explained that the "more overwhelmingly common" manifestation of PTSD "is a person having a short fuse; . . . overreacting to a situation; . . . finding themselves challenged by some things and then just going off. . . . *Certainly on the day of these murders, that was going on*." App. 43-44 (quoting C.A.E.R. 511) (emphasis added).

mitigation evidence'" at sentencing, and merely "gave lip service" to *Wiggins* and *Wong v. Belmontes,* 558 U.S. 15, 26 (2009) (per curiam). Pet. 27, 28 (quoting *Belmontes*, 558 U.S. at 26); *see also* Pet. 3 (asserting that "the panel failed to consider all of the evidence—including the aggravating circumstances and the State's rebuttal").[15]

The panel thrice acknowledged its obligation to "'consider all the evidence—the good and the bad'" and to "'reweigh the evidence in aggravation against the totality of available mitigating evidence,'" including "evidence 'both . . . adduced at trial, and the evidence adduced in the habeas proceeding[s].'" App. 23 (quoting *Belmontes,* 558 U.S. at 26), *Wiggins,* 539 U.S. at 534, and *Williams (Terry) v. Taylor*, 529 U.S. 362, 395 (2000)); *see also* App. 56 (again quoting *Wiggins*, 539 U.S. at. 534), 57 (again reciting standard).

The panel similarly twice acknowledged the aggravating factors found at sentencing (App. 14, 56 (quoting C.A. E.R. 2461-63)) and acknowledged the violent nature of the crimes, including the multiple times Jones was alleged to have beaten the victims in the head with a baseball bat and how Jones was alleged to have killed Weaver's seven-year-old daughter. App. 8, 57-58 n.13. That the panel did not specifically recount every additional gory detail that the State cites does not mean that the panel ignored them. Rather, as the panel specifically stated, neurological and/or neuropsychological "testing results and the presentation of contributing factors would have dramatically affected

---

[15] Indeed, the State contradicts itself by acknowledging earlier in its petition that "the panel listed Jones's aggravating factors and acknowledged it was required to weigh them against the mitigation evidence." Pet. 17 (citing App. 57-58) (emphasis removed).

any sentencing judge's perception of Jones's culpability for his crimes, *even despite the existence of aggravating factors*." App. 69 (emphasis added).

Finally, contrary to the State's assertion, the panel did not "impermissibly ignore[]" the State's new evidence developed during the federal habeas proceedings. Pet. 27. In particular, the panel specifically discussed the State's cross-examination challenges to Dr. Stewart's PTSD diagnosis (App. 43); discussed the State's efforts on cross-examination to establish that Dr. Potts recommended only neurological, not neuropsychological testing (App. 48); and devoted an entire page of its slip opinion to discussing the testimony of the State's experts: Drs. Herron, Herring, and Scialli (App. 46-47).

As with the State's assertion that the panel basically did not mention in its opinion the words "clear error" enough times, the State's assertion that the panel should have spent more time demonstrating its reweighing falls flat.

III. THE COURT OF APPEALS PROPERLY APPLIED *STRICKLAND*, WHICH COMPELS THE RELIEF GRANTED

The State finally asserts that, if "the panel had applied the prescribed framework it would have been compelled to affirm." Pet. 29. As explained above, the panel did apply the prescribed framework. That the State disagrees with the result of the panel having done so is understandable, but it is no reason for this Court to intervene.

Here, the judge who sentenced Jones to death was given only a short and "conditional" report from Dr. Potts that lacked any specific diagnoses (App. 53) and incomplete factual mitigation testimony from Randy

(App. 40, 42, 43, 46, 54, 57).[16] But as the panel properly found, "the results of the neuropsychological and neurological tests conducted by various experts during Jones's federal district court proceedings confirmed that Jones suffered from a variety of psychological disorders stemming from birth and exacerbated by long-term drug use and trauma that affected Jones's cognitive functioning." App. 69. And "[p]resentation of these results would involve presenting the contributing factors to his cognitive dysfunction, . . . including that his long-term substance abuse was induced by . . . . years of sexual abuse as a child" by his step-grandfather and abuse by Randy, among other mitigating facts. App. 69; *see also* note 16, *supra* (discussing Randy's abuse). The judge who sentenced Jones to death heard none of this mitigating evidence.

Precisely this type of evidence, however, has been held by this Court to justify a sentence less than death, even in the face of aggravating factors like those found by the judge here. *See, e.g., Porter*, 558 U.S. at 32-33, 41-44 (omitted evidence of abuse, troubled family history, and mental disorders sufficient to establish prejudice despite "cold, calculated, and premeditated" murder); *Terry Williams*, 529 U.S. at 368, 395, 398

---

[16] As the panel properly observed in recounting the evidence developed during the federal proceedings, "Randy erroneously testified [at sentencing] that Jones enjoyed a stable home life after age seven" (App. 40); Dr. Stewart and Jones's sister, Carrie, both described how Randy twice threatened to shoot himself in front of Jones and how Randy was "both verbally and physically abusive to Jones" (App. 43, 46; *see also* App. 54), which "Randy omitted" at sentencing (App. 57); "Randy [also] omitted . . . Jones's sexual abuse by his step-grandfather" (App. 57); and Dr. Stewart "went into much greater detail than Randy had provided regarding Jones's head injuries" (App. 42).

(omitted evidence of family abuse and mental capacity in case involving homicide preceded by a prior armed robbery and burglary, and succeeded by auto thefts, and two violent assaults on elderly victims, one of whom was left vegetative);[17] *Rompilla*, 545 U.S. at 378, 382, 390-93 (omitted evidence of family history, substance abuse, and the circumstances underlying the defendant's criminal history in case involving murder-by-torture during the commission of another felony by a defendant with prior violent convictions); *Wiggins*, 539 U.S. at 535 (omitted evidence of severe family abuse, sexual abuse in foster care, and diminished mental capacity in case where the defendant drowned a 77-year-old woman "in the bathtub of her ransacked apartment"); *Penry v. Lynaugh*, 492 U.S. 302, 307, 310, 340 (omitted evidence of mental retardation and family abuse in case involving brutal rape and murder that "was committed deliberately and with the reasonable expectation that the death of the deceased or another would result" and that there was "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.").

The State's only response to these analogous precedents is to note that they "'simply show[] that new mitigation evidence *can* establish prejudice'" and that "no two defendants or crimes is the same." Pet. 29 (quoting App. 93 n.12). Of course, every criminal case is different, but a court of appeals' obligation is to best follow this Court's most closely on-point precedents. *See, e.g., United States v. Hatter*, 532 U.S. 557, 567 (2001) ("The

---

[17] Notably, in *Williams*, this Court found prejudice even while applying AEDPA deference, which is "not in operation when," as here, "the case involves review under the *Strickland* standard itself." *Harrington v. Richter*, 562 U.S. 86, 101 (2011).

Court of Appeals was correct in applying [existing precedent] to the instant case, given that 'it is this Court's prerogative alone to overrule one of its precedents.'" (citation omitted)). And the takeaway from these precedents is that the Ninth Circuit's decision here rests comfortably with this Court's precedents. There is no reason to disturb it.

* * *

Ultimately, the court of appeal's determination was a correct application of appellate review and *Strickland*; certainly it was not an out-of-the-mainstream application that would in any way justify a request for extraordinary relief like summary reversal. And given the State's failure to even attempt to show the existence of any issue warranting plenary review, certiorari should be denied altogether.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JON M. SANDS
FEDERAL PUBLIC DEFENDER
DISTRICT OF ARIZONA
LETICIA MARQUEZ
AMANDA BASS
407 W. Congress Street
Suite 501
Tucson, AZ 85701
(520) 879-7622

JEAN-CLAUDE ANDRÉ*
BRYAN CAVE LEIGHTON
PAISNER LLP
120 Broadway
Suite 300
Santa Monica, CA
90401
(310) 576-2148
jcandre@bclplaw.com

LOGAN M. RUTHERFORD
BRYAN CAVE LEIGHTON
PAISNER LLP
1200 Main Street
Suite 3800
Kansas City, MO 64105
(816) 374-3319

MATTHEW STANFORD
BRYAN CAVE LEIGHTON
PAISNER LLP
Two North Central
Avenue, Suite 2100
Phoenix, AZ 85004
(602) 364 7068

Counsel for Respondent

August 23, 2023

*Counsel of Record