No. 22-982

In The
Supreme Court of the United States

RYAN THORNELL,

Petitioner,

v.

DANNY LEE JONES,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF THE STATE OF SOUTH DAKOTA AND 20 STATES AS *AMICI CURIAE* IN SUPPORT OF THE STATE OF ARIZONA

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QUESTION PRESENTED

Did the Ninth Circuit Court of Appeals 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 corpus* relief?

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INTEREST OF *AMICI CURIAE*

Amici curiae states have a shared interest in the surety and finality of state court sentencing judgments in criminal cases, particularly in homicide cases. *Amici curiae* states therefore share an interest in limiting federal *habeas corpus* review to the strict and deferential standards prescribed by federal law.[1] Per these standards, federal *habeas corpus* courts are not permitted to simply second-guess and usurp state sentencing judgments and force states to relitigate sentences in perpetuity. But the Ninth Circuit Court of Appeals committed these very sins in this case (and not for the first time). Accordingly, *amici curiae* states write to vindicate their interests in the finality of their state sentencing judgments and the application of appropriately deferential standards to the review of such judgments in federal *habeas corpus.*

SUMMARY OF ARGUMENT

It has become *de rigueur* in capital *habeas corpus* practice to collaterally attack a capital sentence by tossing an alphabet soup of various mental disorders –

[1] The majority of *amici curiae* states impose the death penalty in aggravated homicide cases. However, Alaska, Iowa, North Dakota, Virginia, and West Virginia do not impose the death penalty but have joined this brief because the principle that *Strickland* prejudice cannot be accurately assessed without considering *all* the evidence, good and bad, is vital to the finality of both capital and non-capital state sentencing judgments.

PTSD, FASD, AD/HD, CPD, OBD, ID, LD, BD, CD – against the mitigation wall to see what might stick. But evidence of these disorders is often grasping (if not wholly fabricated) and generally depends on junk science from a cottage industry of experts ideologically opposed to capital sentences. Proscriptions on the assertion of frivolous claims are openly flouted in pursuit of this strategy because the objective is not actually to prove that a defendant suffers from any such disorders but to forestall indefinitely the date when a capital inmate exhausts his due process and must serve his sentence. Danny Lee Jones' assertion of a litany of stock mitigation mental disorders (many of which have no correlation to violent behavior) is typical of this well-worn strategy.

But the more-is-better approach to federal capital *habeas corpus* mitigation isn't invariably better. As often as not, it opens the door to a more comprehensive and effective counter-mitigation case by the state, bringing unwanted attention to a defendant's criminal history or inviting a damaging differential diagnosis between some newly-claimed disorder and sociopathy. *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (expanding mitigation case would have opened the door to a second murder committed by defendant); *Burger v. Kemp*, 107 S.Ct. 3114, 3124 (1987) (counsel who "offered no mitigating evidence at all" was not ineffective when such evidence would have opened the door to defendant's diagnosis of antisocial personality disorder). As this Court has noted in many cases, opening such doors can

do a capital defendant more harm than good, as, in fact, it has here.

The strict standards governing federal *habeas corpus* are formulated to protect states from the perpetual relitigation of its criminal judgments. Here the panel circumvented those standards with a grossly one-sided examination of the evidence and an apparent intent to substitute its view of the facts for those of the district court. Such freewheeling practices intrude on state primacy in defining and enforcing societal norms within their borders. Consequently, the panel's decision should be reversed.

ARGUMENT

A. The Ninth Circuit Panel's Decision Offends State Interests In Enforcing Criminal Laws And The Finality Of State Sentencing Judgments

Within our federal structure, "states possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). This primacy extends to the adjudication of "constitutional challenges to state convictions" in *habeas corpus. Harrington v. Richter*, 562 U.S. 86, 103 (2011). State courts, not federal courts, play "the leading role in assessing [constitutional] challenges to state sentences." *Shinn v. Kayer*, 592 U.S. at 111, 124 (2020).

State primacy in the fields of criminal and *habeas corpus* law gives rise to strong state interests "in the

integrity of their criminal and collateral proceedings" and "in the finality of criminal convictions." *Williams v. Taylor*, 529 U.S. 420, 436 (2000); *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Finality "is essential to both the retributive and deterrent functions of criminal law." *Shinn v. Ramirez*, 596 U.S. 366, 391 (2020). But finality is compromised by "serial relitigation" of state criminal judgments occasioned by "undue interference from the federal courts." *Shinn*, 596 U.S. at 391; *Hill v. McDonough*, 547 U.S. 573, 584 (2006).

Undue federal disruption of state judgments "overrides the states' core power to enforce criminal law," which in turn imposes "significant costs" on states and "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Shinn*, 596 U.S. at 376; *Davila v. Davis*, 582 U.S. 521, 537 (2017). First, "a federal order to retry or release a state prisoner overrides the state's sovereign power to enforce 'societal norms through criminal law.'" *Shinn*, 596 U.S. at 376, quoting *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). Second, federal writs of *habeas corpus* frustrate "the states' sovereign power" to "punish admitted offenders." *Engle*, 456 U.S. at 127; *Davila*, 582 U.S. at 537. Third, undue meddling in state judgments "disturbs the state's significant interest in repose for concluded litigation." *Harrington*, 562 U.S. at 103. These costs "inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the state and the victims of crime alike." *Calderon*, 523 U.S. at 556. To ensure that federal *habeas corpus* review hews to the narrow path imposed

by federal law, the "extraordinary remedy" of federal *habeas corpus* relief is "narrowly circumscribed" to cases of "extreme malfunctions in the state criminal justice systems." *Shinn*, 596 U.S. at 375, 377.

B. The Ninth Circuit Panel Conducted A One-Sided *Strickland* Analysis

The systemic malfunction of concern here is the extremely one-sided *Strickland* analysis behind the Ninth Circuit panel's decision to grant Jones *habeas corpus*. The panel weighed the new expert mitigation testimony presented in *habeas corpus* (Drs. Stewart, Goldberg, Foy) against the expert mitigation testimony that was presented at sentencing (Dr. Potts) and essentially concluded that three experts were better than one when weighed against the statutory aggravators. PETITION APPENDIX at 39-40, 56-58. There are two problems with the panel's methodology.

First, the panel was required to weigh the new mitigating evidence developed in *habeas corpus* against the "entire body" of the evidence – including the state's counter-mitigation evidence – not just against Jones' old mitigating evidence and not just against the statutory aggravators. *Wong*, 558 U.S. at 20. Aggravating evidence in a capital case includes both statutory and non-statutory evidence, such as school, military or health records which reveal discrepancies in a defendant's historical mitigation narrative or reports from state counter-mitigation experts that expose methodological or diagnostic flaws in a

defendant's medical mitigation evidence. *Burger*, 107 S.Ct. at 3124. The panel weighed Jones' new mitigating evidence against only the statutory aggravators rather than the full complement of aggravating evidence. PETITION APPENDIX at 51, 56-58.

Second, it was simplistic for the panel to condemn trial counsel's mitigation performance because only one expert testified at Jones' sentencing. At the time of Jones' sentencing, the mitigation strategy of piling on disorders and experts was not yet perfected or *en vogue* as it is now. The then-applicable ABA guidelines (which, incidentally, this Court has found to *not* set the standard for reasonable representation)[2] required

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[2] The panel's decision leans on the ABA guidelines as though they are an authoritative standard of performance when, really, they are merely "guidelines." PETITION APPENDIX at 25, 26, 27, 63. This Court has consistently repudiated efforts to set the ABA's guidelines up as inexorable commands that must be met in all death penalty cases. In *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009), this Court stated that "Strickland stressed . . . that American Bar Association standards and the like are only guides to what reasonableness means, not its definition. We have since regarded them as such." According to *Van Hook*, the ABA's guidelines do not "have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment." *Van Hook*, 558 U.S. at 13-14 (Alito, J., concurring). *Van Hook* imposes only one general requirement: that counsel make objectively reasonable choices. *Van Hook*, 558 U.S. at 8-9. Beyond that, it is not appropriate to apply "checklists" or "specific guidelines," such as those promulgated by the ABA, to counsel's decision making in defense of a death case. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1406 (2011). In any event, comparing Jones' trial counsel's mitigation investigation to the ABA's guidelines reveals that it substantially complied with the ABA guidelines at the time.

simply that "[c]ounsel should secure the assistance of experts where it is necessary or appropriate for . . . . the sentencing phase of the trial" and the "presentation of mitigation" evidence. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases at 11.4.1(d)(7) (1989). Trial counsel complied with this guideline through the unchallenged testimony of Dr. Potts. PETITION APPENDIX at 161 ("state did not call a competing expert" to challenge Dr. Potts), 231.

The value of having Dr. Potts' testimony come in unchallenged by any state counter-mitigation expert was immeasurably beneficial to Jones because the sentencing court credited Jones with the mitigating effects of a chaotic and abusive childhood, substance abuse and head trauma. PETITION APPENDIX at 197. But, once challenged by the state's counter-mitigation case, Jones' mitigation case took a severe hit. So much so that it calls into question whether the sentencing court would have given Jones as much credit for these mitigators as it did if the state's counter-mitigation evidence had been before it.

The panel's decision disregards the reality that a single, unchallenged mitigation expert can be more effective, more "appropriate" in the parlance of the ABA guidelines, than multiple mitigation experts who are challenged (to potentially devastating effect) by the state's battery of counter-mitigation experts. *Strickland v. Washington*, 104 S.Ct. 2052, 2059 (1984) (no ineffective assistance where defense psychiatric evidence proffered in *habeas corpus* would have led to the

state "putting on psychiatric evidence of its own"); *Wong*, 558 U.S. at 20.

Criticism of Jones' trial counsel for having one mitigation expert also overlooks this Court's observation that "[t]he current infatuation with 'humanizing' the defendant as the be-all and end-all of mitigation disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won't buy it." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1408 (2011); PETITION APPENDIX at 55 (criticizing sentencing because trial court "heard almost nothing that would humanize" Jones). Credibility of both counsel and client is vital in a capital sentencing defense. When convincing a sentencer of a defendant's acceptance of responsibility and remorse may make the difference between life or death, capital defense counsel cannot afford to squander credibility on dubious or double-edged mitigation. The best-case scenario of presenting assailable mitigation evidence is that the sentencer "simply won't buy it;" worst-case scenario is that such evidence may turn the sentencer against a defendant because it is seen as disingenuous and blame-shifting. This Court has long recognized that "heavy-handed" mitigation strategies are not the "be-all and end-all of mitigation" because of the risk that they can open the door to detrimental state counter-mitigation evidence. *Wong*, 558 U.S. at 25; *Pinholster*, 131 S.Ct. at 1408.[3]

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[3] *Burger*, 107 S.Ct. at 3124 (counsel was not ineffective when he "offered no mitigating evidence at all" when presenting such

Such is the case here. As detailed in the district court's weighing of Jones' mitigation evidence against the state's counter-mitigation evidence, "humanizing" Jones with a deeper mitigation investigation came at a definite and discernable cost to Jones' credibility and the unchallenged force of his original mitigation case. For example:

- Jones' claim of PTSD from "extreme" childhood physical and sexual abuse was discredited by the facts that Jones did not disclose this alleged abuse until 2002 (nine years after his sentencing) and a 1983 record in which Jones described his allegedly abusive step-father as his "real dad" who was "the only one that ha[d] treated me good" and who "ha[d] never hit me or anything." PETITION APPENDIX at 55, 105-107, 237-238. Jones' own mother, who reacted to Jones' abuse allegations by describing him as an inveterate "liar,"[4] stated that Jones' step-father "did not

evidence "would have revealed matters of historical fact that would have harmed his client's chances for a life sentence"); *Darden v. Wainwright*, 106 S.Ct. 2464, 2474 (1986) (counsel was not ineffective when available mitigating evidence "would have opened the door for the state to rebut with evidence of [Darden's] prior convictions"); *Wong*, 558 U.S. at 19, 24 (counsel was not ineffective when efforts to "humanize" defendant would have opened the door to damaging state rebuttal evidence of a second murder perpetrated by defendant).

[4] As demonstrated in *Allen v. United States*, 4:07-CV-00027 (D.Ct.E.D.Mo.), inventing or exaggerating childhood abuse is a stock mitigation tactic. In *Allen*, counsel invented a narrative that Allen had been subjected to severe, clinically-significant childhood abuse. But when counsel sought to enlist Allen's mother in this narrative, she (like Jones' mother) said she would not tell

hit me or the children." PETITION APPENDIX at 106-107, 206. Jones' PTSD allegation was further undermined by his experts' failure to demonstrate that Jones met all the diagnostic criteria for the disorder or to formally diagnose it themselves. PETITION APPENDIX at 204, 222.

- Jones' claim of severe head trauma from a "mugging" while he was in the military was eviscerated by contemporaneous hospital records which reported that, rather than being knocked into a three-day coma with a 2 x 4, Jones was found passed-out in a ditch due to extreme alcohol intoxication. PETITION APPENDIX at 204, 221. When he regained

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that "lie." *Allen*, 4:07-CV-00027, Docket 374 at 252. Judge E. Richard Webber's 278-page opinion was barely restrained in his condemnation of the childhood abuse allegations as: "false and misleading," "fiction," "incredible," "unbelievable," consisting of "factual statements, which were inaccurate or totally refuted by the record," "not credible," supported by "no believable evidence of the horrific allegations," supported by "no credible evidence" of abuse, "dubious," "inconsistent and unpersuasive" and "exaggerated." *Allen*, 4:07-CV-00027, Docket 374 at 258, 252, 140, 139, 161, 257, 259, 260, 261. Other examples of manufactured afflictions are found in *Rhines v. Weber*, 00-CV-5020 (D.S.D.), Docket 323 (claiming unsubstantiated cognitive processing disorder due to alleged childhood exposure to neurotoxins); *Piper v. Sullivan*, 20-CV-5074 (D.S.D.), Docket 67 (alleging unsubstantiated FASD claim); *United States v. Rodriguez*, 04-CV-00055 (D.N.D.), Docket 752 (alleging unfounded intellectual disability claim); *Wooten v. Norris*, 03-CV-00370 (D.E.D.Ark.), Docket 29 (alleging PTSD due to allegedly brutal abuse as a child); *Rankin v. Payne*, 06-CV-00228 (D.E.D.Ark.), Docket 115 (rejecting claim of intellectual disability); *Johnson v. Steele*, 13-CV-02046 (D.E.D.Mo.), Docket 35 (raising claim of "acute stress disorder" due to alleged abuse as a child).

consciousness, Jones stated that he had drunk "many beers." He exhibited "no apparent trauma," his head was "atraumatic," he had only a "minor abrasion and a tender area over [his] right parietal scalp," and the results of neurological examination and cognitive testing were "normal." PETITION APPENDIX at 204, 221.

- Jones' principal claim that trial counsel had been ineffective for failing to obtain "neuropsychological testing [that] was essential in assessing [his] psychological state" was decimated by post-sentencing testing conducted by both Jones' own new mitigation experts and the state's counter-mitigation experts. This testing was either inconclusive or negative for cognitive or neurological deficits. PETITION APPENDIX at 67, 220, 233. The negative post-sentencing testing was corroborated by IQ and cognitive testing from Jones' school years which scored him "solidly in the average range" and the "normal" results of neurological testing conducted when Jones' allegedly was "mugged." PETITION APPENDIX at 204, 220-221.

The panel's decision completely ignores these and other defects in Jones' expanded mitigation case.

Delving deeper into Jones' personal history and alleged afflictions hurt his mitigation case more than it helped. It led the state to develop a counter-mitigation case that exposed Jones as a fabulist and discredited his "best" medical mitigators. Jones' own trial counsel found that efforts to humanize Jones turned

up too much evidence that "cut both ways." PETITION APPENDIX at 236. In the "battle of experts" that ensued from the state's development and introduction of convincing evidence to counter Jones' original and expanded mitigation cases, Dr. Potts' testimony went from "tantalizing," "unambiguous" and "unchallenged" at trial to "ambiguous," "equivocal," "conflicting" and "inconclusive" in *habeas corpus.* Compare PETITION APPENDIX at 62, 65, 231 with PETITION APPENDIX at 91, 99, 102, 104, 107, 110, 161, 218, 229, 231, 233. In mitigation, as in architecture, less sometimes is more.[5]

But rather than "consider[ing] all the relevant evidence that the [state *habeas corpus* court] would have had before it if [Jones] had pursued a different path – not just the mitigation evidence [Jones] would have presented," the panel's prejudice analysis looked to only the side of the evidence most favorable to Jones, as though it were performing no more than a summary judgment analysis. *Wong*, 558 U.S. at 20. In this respect, this case is *Kayer* all over again.

In *Kayer*, the defendant argued his counsel should have presented mitigating evidence of his addiction to alcohol, bipolar disorder and childhood hardships. *Kayer*, 592 U.S. at 115. After the state and federal district courts denied *habeas corpus* relief, the Ninth Circuit reversed in an opinion that, as here, invited a stinging dissent. The dissent pointed out that, as here,

[5] *Wong*, 558 U.S. at 25 (pointing out that it is not true that a "more-evidence-is-better" approach to mitigation is always better); *Strickland*, 104 S.Ct. at 2059; *Burger*, 107 S.Ct. at 3124; *Darden*, 106 S.Ct. at 2474.

the Ninth Circuit's decision had "cast aside . . . AEDPA's highly deferential standard of review" and had, as here, conducted a result-oriented "*de-novo*-masquerading-as-deference" prejudice analysis. *Kayer*, 592 U.S. at 117. Like the *Kayer* dissent, the dissenting Ninth Circuit judges in this case (and the district court) got it right.

C. The Ninth Circuit Panel Usurped The District Court's Reasonable And Permissible Factual Findings

Here, as in *Kayer*, the threshold for reversing the district court's factual determinations was higher than whether the Ninth Circuit panel believed the district court got it "wrong" or "would have decided the case differently." *Kayer*, 592 U.S. at 117; *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). The panel was not at liberty to reverse the district court's factual determinations without examining "*each* ground" supporting them and identifying how they were an "unreasonable" or impermissible view of the evidence. *Kayer*, 592 U.S. at 120 (italics in original); *Anderson*, 470 U.S. at 573-574; *Amadeo v. Zant*, 486 U.S. 214, 223 (1988). As in *Kayer*, the panel did not even attempt to undertake such an examination in this case let alone make such a showing.

The Ninth Circuit panel referenced the state's counter-mitigation experts only five times in its 70-page decision, and then only in passing. PETITION APPENDIX at 42, 46, 54 (Drs. Herron and Herring once and Scialli thrice). The panel decision contains

zero analysis of how these experts' methodologies and opinions are not objective, credible or sound, how their opinions are allegedly outweighed by Jones' mitigation evidence, or how the district court's view of this counter-mitigation evidence was unreasonable or impermissible. *Amadeo*, 486 U.S. at 223; *Anderson*, 470 U.S. at 573-574. The panel even (wrongly) asserts that it had been "improper for the district court to weigh the testimony of the experts against each other in order to determine who was the most credible," as though *Strickland* forbade the district court from factoring the marginal credibility of Jones' experts into its analysis. PETITION APPENDIX at 51. This is hardly the deferential examination of "*each* ground supporting the state court decision" required by federal law. *Kayer*, 592 U.S. at 120.

As in *Kayer*, here "there [was] no ignoring the obvious conclusion that a reasonable jurist could conclude that [Jones] was not in fact prejudiced" by his counsel's performance. *Kayer*, 592 U.S. at 118. Unlike the panel, the district court (and the dissent from the denial of rehearing *en banc*) closely examined "*each* ground" in mitigation and aggravation – and deduced that the state's counter-mitigation case had kicked the stilts out from under Jones' original and expanded mitigation cases. *Kayer*, 592 U.S. at 120. Jones' late-reported childhood abuse by his step-father was discredited by Jones himself and Jones' mother. This negated the medical basis for his alleged PTSD. Jones' PTSD was further discredited by the absence of any evidence that he was re-experiencing any past trauma

at the time of the murder and his experts' failure to demonstrate that Jones satisfied all four diagnostic criteria. PETITION APPENDIX at 102-104. Jones' alleged head traumas were exposed as illusory. PETITION APPENDIX at 204, 221. Jones' principal claim that trial counsel had been ineffective for not securing neuropsychological testing for sentencing was negated by subsequent testing that was negative or inconclusive for cognitive or neurological deficits. PETITION APPENDIX at 99-101. The remainder of Jones' mitigators were cumulative, inconclusive and, more importantly, did not correlate with or explain his violent behavior. PETITION APPENDIX at 100, 103, 105. The district court properly weighed "the good" of Jones' mitigation evidence against "the bad" of the state's counter-mitigation evidence. *Wong*, 558 U.S. at 26. On the record before it, the district court's factual findings were inarguably "permissible." *Anderson*, 470 U.S. at 574. The Ninth Circuit panel did not afford those findings the deference they were owed.

By now it should be universally understood that the question of a reasonable probability of a different result at the heart of the *Strickland* prejudice analysis cannot be accurately assessed without considering *all* evidence bearing on guilt or innocence, mitigation and aggravation, culpability or blamelessness. But, coming, as it does, from a circuit that routinely "openly defies" this Court's *habeas corpus* standards in capital cases, and has had its application of AEDPA standards reversed in 14 cases between 2002 and 2020, the panel's decision fits a familiar pattern. *Schad v. Ryan*,

709 F.3d 855 (9th Cir. 2013) (Tallman dissenting); *Kayer*, 592 U.S. at 117.

Unlike capital sentencing trial counsel, federal *habeas corpus* counsel can be cavalier about the danger of opening the door to damaging counter-mitigation evidence. *Wong*, 558 U.S. at 19, 25. After all, there is nothing to lose. *Wong*, 558 U.S. at 25. But federal courts cannot be so cavalier in conducting their reviews of state court sentencing judgments without compromising the finality of those judgments and improperly subjecting them to perpetual relitigation. *Shinn*, 596 U.S. at 390.

CONCLUSION

The Ninth Circuit panel's decision in this case should be reversed.

Respectfully submitted this 5th day of February 2024.

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