No. 06-1317

IN THE

Supreme Court of the United States

JEFFREY DEVAN LEONARD,

Petitioner,

v.

THOMAS SIMPSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE

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THIS IS A CAPITAL CASE

QUESTION PRESENTED

Given that appellate courts must determine whether a "reasonable probability" exists that, absent the errors, the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death:

I. When evaluating ineffective assistance of counsel claims pursuant to the *Strickland* standard, may the Fourth and Sixth Circuits categorically refuse to consider mitigation evidence adduced during the capital post-conviction stage that differs only in degree (and not kind) from the mitigation evidence presented at trial?

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INTERESTS OF *AMICUS CURIAE* [1]

Established in the fall of 2005 at Harvard Law School, the Charles Hamilton Houston Institute for Race and Justice (CHHIRJ) seeks to honor the extraordinary contributions of one of the great lawyers of the twentieth century. Charles Hamilton Houston dedicated his life to using the law to address matters of racial discrimination. CHHIRJ is committed to continuing Mr. Houston's legacy through research, instruction, and advocacy.

CHHIRJ, through research and litigation, seeks to address various issues of disparity and racial justice. In the present case, CHHIRJ seeks to clarify and address the conflict that exists in the circuit courts over the application of the *Strickland* prejudice prong and suggests the need for this Court to review this case as a means to resolve this conflict.

STATEMENT OF THE CASE

The Sixth Circuit contravenes *Strickland* by constructing a barrier that excludes consideration of all mitigation evidence presented during post-conviction proceedings unless that evidence substantially differs in both degree and kind from the mitigation evidence produced at trial. The plain and commonsense *Strickland* language requires a reviewing court to take an unobstructed view of the post-conviction mitigation evidence to determine if the new evidence differs enough in degree *or* kind from the penalty stage evidence to create a "reasonable probability that, absent the errors, the sentencer would have concluded the balance of aggravating and mitigating circumstances did not warrant death." The Fourth and Sixth Circuits act contrary to

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[1] The parties have consented to the filing of the brief and their letters of consent have been filed with the Clerk of the Court. *Amicus curiae* states that no counsel for either party authored any part of this brief. No person or entity, other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Strickland by rigidly upholding the degree *and* kind barrier. The Third and Ninth Circuits consider evidence differing in degree *or* kind. The "degree *and* kind" versus "degree *or* kind" formulation confronts this Court with a narrow and outcome determinative circuit split.

This Court need not explain how or when new mitigation evidence of a substantially greater degree constitutes prejudice, but only if magnitude evidence *can* suffice to establish prejudice. Appellate courts certainly maintain the power to determine when post-conviction evidence is merely cumulative. However, under the Sixth Circuit's current approach, the degree and kind barrier mandates that even the most comprehensive post-conviction evidence be automatically considered cumulative if the broad topic category under which that evidence falls has already been broached at trial. As Judge Cole highlights in his dissent below, the Sixth Circuit's rule that even the most comprehensive post-conviction mitigation evidence can never be sufficient to establish prejudice unless it also substantially differs in kind from even the most barebones penalty phase evidence, cannot be reconciled with *Strickland*.

The conflict over whether new mitigation evidence substantially differing in degree *but not kind* can constitute prejudice also squarely divides the Fourth and Sixth, from the Third and Ninth Circuits. The Court should grant certiorari to resolve the conflict amongst the circuits and explain that erecting a degree and kind barrier to prejudice prong review violates *Strickland*.

The Kentucky Supreme Court never adequately[2] reached the prejudice inquiry, thereby providing this Court the opportunity to review the prejudice prong without the added confusion of prejudice prong AEDPA considerations. Every federal judge reviewing this case found performance prong deficiency. This Court could then assume *arguendo* performance deficiency, which would leave the prejudice prong concerns cleanly and squarely presented.

STATEMENT OF THE FACTS

Mr. Leonard's counsel called two penalty phase witnesses—Mr. Leonard himself and Dr. Philip Johnson. Mr. Leonard's testimony regarding his childhood failed to sway the jury to mark even a single mitigating factor on the death ballot. A panel of the Sixth Circuit unanimously agreed that Mr. Leonard's counsel was deficient in his decision to call Dr. Johnson as a defense witness. Mr. Leonard's post-conviction counsel presented what the trial judge considered to be an "impressive" amount of previously unheard mitigation evidence. Mr. Leonard's family members provided detailed, first-hand accounts of Mr. Leonard's abusive childhood. Five medical experts challenged both the conclusions and basis for Dr. Johnson's harmful testimony.

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[2] "[The Kentucky Supreme Court's] conclusion is certainly an unreasonable application of Strickland. It is unreasonable because it fails to provide any analysis of the additional mitigating evidence presented or even to identify such evidence." *Slaughter v. Parker,* 187 F. Supp. 2d 755 (2001); *see Williams v. Taylor,* 529 U.S. 362, 397-398 (2000) (finding that "the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigating evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation.").

A. Mr. Jeffrey Leonard and the Childhood Abuse Evidence

Mr. Jeffrey Leonard's upbringing was akin to "what you see on T.V." *Pet. App.* at 512a. One night, when Mr. Leonard was only eight years old, his stepfather fired a gun at him. As the bullet darted just over the boy's head, Jeffrey Leonard scrambled to leave the house through the front door while carrying his four-year-old brother in his arms. *Pet. App.* at 512a-513a. Mr. Leonard's mother "really whooped the devil" out of her children. *Pet. App.* at 523a. She beat Mr. Leonard with switches, belts, extension cords, and "anything else [she] could get her hands on." *Pet. App.* at 524a. The severe abuse Mr. Leonard suffered left him with adult scars on "the back of his shoulders, the front of his shoulders, sort of around the shoulder itself on each side, the chest area, the thighs and then on the sides of his thighs. He also had some scars on his forearms." *Pet. App.* at 556a.

Mr. Leonard also suffered neglect. One afternoon, four-year-old Mr. Jeffrey Leonard received an accidental gaping wound that cut into his underlying muscle and spanned the width of his forearm. He ran home to seek help from his family. Rather than rushing young Mr. Leonard to the emergency room, the family simply wrapped his arm in rags and left the wound to heal on its own. *Pet. App.* at 556a.

The jury only heard that Mr. Leonard's childhood "wasn't what you might call a real hard life." *Pet. App.* at 283a. "At times, you know, we was the best of home,' he stated. *Pet. App.* at 285a. To Mr. Leonard, being struck with an electrical cord was a reasonable punishment for staying out all night. *Id.* "If you call that abuse," Mr. Leonard told the jury, "that is what it is." *Id.*

B. Dr. Johnson's Testimony

At the time of the trial, Dr. Johnson worked for the Kentucky Correction Psychiatric Center (KCPC). *Pet. App.*

at 620a. The KCPC "has not since, at least, 1980 served to investigate mitigating factors for capital litigation." *Id.* At the time when Dr. Johnson was called to testify as a defense witness, the KCPC had signed an affidavit available to all attorneys in the state with notice that the agency "did not serve in the capacity of expert witness for the defense in capital cases." *Pet. App.* at 630a. Dr. Johnson was appointed by the trial court solely to conduct a competency examination. Dr. Johnson "was not at all prepared [for his penalty phase testimony], nor was he aware of what, in fact, mitigating evidence was and his role in the entire process." *Pet. App.* at 622a.

Dr. Johnson diagnosed Mr. Leonard as having a borderline personality disorder with anti-social traits. *Pet. App.* at 326a. Dr. Johnson stated that another name for Mr. Leonard's disorder is psychopathic personality disorder. *Pet. App.* at 347a. He stated that Mr. Leonard might have a predisposition for violent activities. *Pet. App.* at 333a. Dr. Johnson labeled Mr. Leonard a "marginally functioning individual." *Pet. App.* at 331a. Dr. Johnson predicted that an untreated Mr. Leonard would go "wandering around the country, never establishing any permanence, never achieving much of anything in his life, never contributing anything to society." *Id.* Dr. Johnson stated that if a group of people with lives that closely paralleled Mr. Leonard's were considered, "the likelihood of that group experiencing significant improvement in their life or in their condition is probably relatively poor as a group." *Pet. App.* at 351a.

C. The Post-Conviction Experts and the Medical History Evidence

The five medical experts who testified at Mr. Leonard's post-conviction proceedings were uniformly critical of Dr. Johnson's testing, diagnosis, and testimony. The experts determined that Dr. Johnson had incorrectly and prejudicially scored Mr. Leonard's diagnostic tests and im-

properly used the Rorschach drawing test as a tool for diagnosis. *Pet. App.* at 471a. Dr. Johnson's results were compared to "thrashing in the dark making hypotheses, but not having any way of verifying them." *Pet. App.* at 342a. The results thus could not be supported. *Pet. App.* at 448a.

Dr. Delbert Drogin concluded that Mr. Leonard suffered from a cognitive disorder that likely stemmed from a head injury that Mr. Leonard received as a child. *Pet. App.* at 376a. He also testified that there are a number of factors that indicate Mr. Leonard's potential for successful rehabilitation. *Pet. App.* at 399a. Lane Veltkamp, a clinical social worker, testified that a highly structured environment such as prison would be helpful for Mr. Leonard. *Pet. App.* at 718a. Dr. Eric Engum highlighted that Mr. Leonard "appeared to be performing very well within the institutional setting" of prison. *Pet. App.* at 496a. Dr. Engum explained that Mr. Leonard has engaged in "self-help" since being incarcerated and insisted that test scores indicate that Mr. Leonard has progressed "remarkably well." *Id.*

ARGUMENT

I. THE DEGREE AND KIND BARRIER VIOLATES *STRICKLAND* BY PRECLUDING A DETERMINATION OF WHETHER THERE EXISTS A REASONABLE PROBABILITY THAT, ABSENT THE ERRORS, THE SENTENCER WOULD HAVE CONCLUDED THE BALANCE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES DID NOT WARRANT DEATH.

Prejudice cannot be determined unless a court considers post-conviction evidence differing either in degree *or* kind. The *Strickland* Court fashioned the prejudice prong inquiry to gauge whether a defendant suffers actual prejudice from his counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 693 (1984) ("defendant must

show that [particular errors of counsel] actually had an adverse effect on the defense."). The Sixth Circuit's degree and kind requirement impedes a court's ability to determine prejudice because the court cannot consider how new mitigation evidence differing in degree *or* kind, *but not both*, would have influenced the penalty phase outcome. Contrary to opinions issued by the Fourth and Sixth Circuits, evidence that differs in either degree *or* kind can alter the outcome of a penalty phase proceeding by underscoring the extent of a defendant's reduced moral culpability. *See, e.g., Outten v. Kearney*, 464 F.3d 401, 420 (3d Cir. 2006) ("We have rejected expressly the Pennsylvania Supreme Court's conclusion that the failure to present additional mitigating evidence was not prejudicial simply because the jury had some awareness of a petitioner's childhood and mental illness."). Moreover, the degree and kind requirement precludes evaluation of post-conviction mitigation evidence differing in strength from penalty phase evidence on the same subject even if that penalty phase evidence never would had been introduced but for counsel's deficient performance. *See Hovey v. Ayers*, 458 F.3d 892, 930 (9th Cir. 2006) (eliminating "inaccurate and inconsistent" penalty phase testimony that would not have been introduced but for counsel's deficient performance).

A. Post-Conviction Mitigation Evidence Substantially Differing in Degree from Mitigation Evidence Adduced During the Penalty Phase Can Suffice to Establish Prejudice.

i. The degree and kind barrier conflicts with over two decades worth of this court's *Strickland* jurisprudence.

By requiring post-conviction mitigation evidence to "differ in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing" the Sixth Circuit cannot comply with this Court's mandate to

"consider the totality of the evidence before the judge or jury," because the degree *and* kind formulation categorically ignores evidence adduced during a post-conviction hearing that touches upon any subject raised during the penalty phase, no matter how skeletal the penalty phase treatment or how powerful the post-conviction evidence. *Broom v. Mitchell*, 441 F.3d 392 (6th Cir. 2006); *Strickland*, 466 U.S. at 695.

While not all instances of childhood abuse will be powerful enough to sway a jury to vote for a life sentence, this Court has repeatedly pointed to the *degree* of childhood abuse suffered by the defendant in finding that a defendant was prejudiced by counsel's failure to put forth mitigation evidence. In *Wiggins v. Smith*, this Court explicitly found that the *degree* of abuse can alter an offender's mitigation case: "Given the *nature and extent of the abuse*"[3], there is a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing, and that a jury confronted with such mitigating evidence would have returned with a different sentence." 539 U.S. 510, 534 (2003). Similarly, in *Williams v. Taylor*, the Court underscored the "extensive records graphically describing Williams' nightmarish childhood[4]" that were presented during

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[3] "Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster case. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case. Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535.

[4] "The jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive

the post-conviction hearings. *Williams*, 529 U.S. 362, 398 (2000).

The fact that this Court paid such painstaking attention to the *degree* of childhood abuse suffered by Mr. Wiggins and Mr. Williams demonstrates that *degree* of abuse is an important yardstick for determining prejudice. The Sixth Circuit's failure to consider the extent of the abuse suffered by Mr. Leonard—as presented during post-conviction proceedings—*because* of the fact of his cursory testimony during trial is contrary to this Court's consideration of degree in *Wiggins* and *Williams*. The Sixth Circuit would have summarily discarded all of the extensive childhood abuse evidence adduced during post-conviction, if either Mr. Williams or Mr. Wiggins had uttered even a single sentence to the effect of "I was abused as a child" during the penalty phase.

The majority opinion in *Slaughter* reads: "The jury already heard such [childhood abuse] testimony from [Mr.] Leonard himself." *Slaughter v. Parker*, 450 F.3d 224, 235-235 (6th Cir. 2006). Yet, close review of the entirety of Mr. Leonard's penalty phase testimony highlights the barebones nature of the attempted mitigation push.[5] A juror could have

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home), and then, after his parents were released from prison, had been returned to his parent's custody."

[6] Radolovich: What was your life like at home with your mother and your father?
Leonard: It wasn't—it wasn't what you might call a real hard life. I did wrong at times and I got punished for it.
Radolovich: How did your mother treat you?
Leonard: At times, you know, we was the best of home, you know. Then, again I would go out stay out all night, come back and all hell would break loose.
Radolovich: Were you ever abused?
Leonard: Yeah, you can say that.
Radolovich: How?

possibly concluded that *some minimal abuse* occurred as a result of Mr. Leonard's penalty phase testimony. However, the skeletal nature of Mr. Leonard's testimony combined with his equivocations as to the nature of the abuse and his suggestion that the punishment was deserved, precluded a reasonable juror from believing Mr. Leonard suffered from severe abuse. By contrast, the comprehensive childhood abuse evidence presented at the post-conviction hearings revealed the true *nature and extent* of the abuse that Mr. Leonard suffered. The Sixth Circuit brushed aside this detail-laden portrait of Mr. Leonard's abuse because it differed in *degree* but not *kind* from the cursory evidence presented at trial.

ii. The degree *and* kind versus degree *or* kind split squarely divides the Fourth and Sixth from the Third and Ninth Circuits.

The Third and Ninth Circuits reweigh mitigation evidence taken as whole by recognizing that a substantial change in the degree of mitigation evidence can suffice to establish prejudice. *See Outten v. Kearney*, 464 F.3d 401, 420 (3d Cir. 2006) (explaining that just because some evidence of childhood abuse had been presented to the jury, it did not necessarily follow that the jury had a comprehensive understanding of the abuse); *Stankewitz v. Woodford*, 365 F.3d 706, 716 (9th Cir. 2004) (explaining that "a penalty phase ineffective assistance claim *depends on the magnitude* of the discrepancy between what counsel did investigate and present and what counsel could have investigated and presented"). By contrast, the Fourth and Sixth Circuits refuse to

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Leonard:	Like, you know, at times, when I was being punished, and stuff, she would whip me with the extension cords and stuff like that. If you call that abuse, that is what it is.

Pet. App. at 284a-285a.

find prejudice unless the post-conviction mitigation evidence touches on a topic not introduced during the penalty phase. *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005) (finding that "to establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way—*in degree and kind*—from the evidence actually presented at sentencing").

In *Jermyn v. Horn*, the Third Circuit notes that evidence of childhood abuse was presented during the penalty phase, yet finds *Strickland* prejudice because the "strong and specific testimony about a horrific home" presented at the post-conviction hearings evidenced abuse of an "entirely different weight and quality." 266 F.3d 257, 310-311 (3d Cir. 2001). Similarly, in *Earp v. Ornoski*, five witnesses were called during the penalty phase, yet the Ninth Circuit recognized that the "degree of violence, abuse and alcoholism" suffered by Mr. Earp during his formative years "may well paint a materially different picture of Earp's background and culpability" by providing the jury with a "more detailed view of Earp's family background."[6] 431 F.3d 1158, 1177 (9th Cir. 2005).

The Fourth Circuit's decision in *Buckner v. Polk* exemplifies the opposite approach to *Strickland* taken by the Fourth and Sixth Circuits. 453 F.3d 195 (4th Cir. 2006). In *Buckner*, the jury heard only that Mr. Buckner's brother was

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[6] "First, the declarations set forth a more detailed view of Earp's family background. For instance, the declarations allege details of Earp's father's (Don Earp) alcoholic binges, sometimes leading to police dispatches and often resulting in serious beatings of Earp's mother. They also outline Don Earp's slide from alcoholism into suicide after being severely beaten himself, discussing how his violence toward the family and 'uncontrollable rages' intensified. The declarations also set forth an account of Ricky Earp's life after his father's suicide spent in the company of a similarly abusive and alcoholic stepfather in a house where 'finances, and indeed even food and shelter were inconsistent.'" *Earp*, 431 F.3d at 1177.

killed in a house fire. A wealth of information regarding Buckner's childhood was presented during post-conviction proceedings.[7] *Id.* at 204, 205. The *Buckner* Court found that, despite the dramatic difference in magnitude between Buckner's post-conviction and penalty phase mitigation evidence, the former "*differed primarily in degree rather than in kind*" from the evidence that [trial counsel] presented." *Id.* at 204.

A1. Social Science Research Proves That Evidence Differing In Degree But Not Kind Can Alter The Persuasive Effect Of A Defendant's Mitigation Case.

i. Corroboration permits the jury to obtain an independent evaluation of a defendant's social history, thereby making mitigation testimony credible, memorable, and persuasive.

Judge Cole, in his dissent from the denial of rehearing en banc, wrote: "The [majority's] holding presumes a defendant's self-serving testimony—even when he testifies to spare his own life—has the same impact regardless of whether other witnesses corroborate it. That conflicts with the Supreme Court's recognition in *Skipper v. South Carolina,* 476 U.S. 1, 8 (1976), that a defendant's testimony is inherently suspect and a jury will naturally discount it." *Slaughter v. Parker*, 467 F.3d 511, 513 (6th Cir. 2006) (Cole, J., dissenting). A substantial body of empirical evidence bolsters Judge Cole's position. Strong empirical data,

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[7] "The Maxwell affidavit recounts several aspects of Buckner's childhood and young adulthood that Childers did not raise or raised in less detail during sentencing. Buckner's father's physical abuse of his mother when Buckner was a child, his mother's alcoholism during his childhood, his mother's rumored sexual relationship with a female friend who lived with the family during his adolescence, his lack of regular medical and dental care as a child, the death of his father in 1991, and his mother's diagnosis of ovarian cancer." *Id.* at 204, 205.

compiled over the last fifty years, has established that support for a position can be enhanced simply by adding to the number of people who accord with that position. *See generally* Stephen G. Harkins, Richard E. Petty, *Effects of Source Magnification of Cognitive Effort on Attitudes: An Information Processing View*, Journal of Personality and Social Psychology, 40, 401-413 (1981).

In one study conducted by Richard Petty and Stephen Harkins, subjects were exposed to identical persuasive arguments under two different setups. The first group was exposed to the persuasive information as presented by a single person. The second group was exposed to the same persuasive information, but three separate individuals presented these arguments. The results of this and subsequent similar studies point to one conclusion: "Subjects exposed to strong arguments purportedly generated by three different persons generated more positive thoughts than subjects in the one-person condition" *See id.* Even when jurors are aware that defense witnesses share the goal of sparing a defendant's life, simply having independent perspectives on the defendant's social history enhances the persuasive effect of the mitigation evidence: "Our data indicate that six arguments from one person are not as persuasive as six arguments from six people, even when the subjects hearing the one speaker are aware that five other members of the group hold the same view." *Id.* at 411.

The empirical evidence on human decision-making concludes that "multiple sources enhance message processing because of recipients' perceptions that information from multiple sources is more likely to be based on different perspectives and independent pools of knowledge and, thus, more worthy of diligent consideration." *Id.* Corroborative mitigation evidence also enhances persuasion because of the opportunity to reorient to a new stimulus. *See generally* Stephen G. Harkin; Richard E. Petty, *Information Utility and the Multiple Source Effect*, Journal of Personality and Social

Psychology, 52, 260-268 (1987). "That is, each time a new source appears, the participant 'gears up' to process the message. If the arguments are new and compelling, the enhanced processing elicited by multiple sources should result in the generation of additional thoughts favorable to the advocacy or result in fewer thoughts unfavorable to the advocacy, or both." *Id.* Harkins concludes with the following example: "In a criminal trial, a defense attorney may have to decide how many character witnesses to call to support the defendant. The multiple source effect indicates that it would be better to have three people present three positive traits about the defendant than to have one person present all three traits." *Id.*

ii. Interviews with former capital jurors confirm the empirical evidence suggesting that corroboration enhances persuasive effect.

"The testimony of family witnesses, testimony somewhat unique to capital cases in terms of its permitted breadth, generally had a more positive influence on the jury than one might first expect given its inherent bias problems." Scott E. Sundby, *The Jury As Critic: An Empirical Look At How Capital Juries Perceive Expert and Lay Testimony*, 83 Va. L. Rev. 1109, 1159 (1997). Jurors repeatedly emphasize the factual role that family member testimony provided during the penalty phase. These jurors say that by serving in a family historian role, the testimony of a family member allows a juror to place the defendant's social history in context. *Id.* at 1156. One juror emphasized that family member testimony can bring otherwise amorphous facts to life: "While the defendant's child abuse was also documented through neutral sources like court documents, it was the sisters' stories that *every interviewed juror* remembered. Perhaps as remarkable as the sisters' testimony is how distinctly and in what detail the jurors remembered the testimony even several years after the trial." *Id.* at 1157. Another focused on

the powerful impact that a mother's plea for her son's life can have on a jury: "[His] mother...cast a lot of doubt in my mind about his need for capital punishment." *Id.* at 1156.

iii. Mitigation evidence that portrays a defendant's social history comprehensively, vividly and accurately enhances the jury's objective decision making.

Empirical evidence suggests that enhanced vividness of testimony has a strong effect on decision-makers by increasing persuasion and recall. *See* Stephen M. Smith; David R. Shaffer, *Vividness Can Undermine or Enhance Message Processing: The Moderating Role of Vividness Congruency*, Personality and Social Psychology Bulletin, 26, 769-779 (2000). In one case capital jurors voted to give a defendant life despite hearing about his detailed prior violent crime history, including penalty phase testimony from one of the offender's prior rape victims. *See generally*, Scott E. Sundby, *The Jury As Critic: An Empirical Look At How Capital Juries Perceive Expert and Lay Testimony* (1997). Jurors in that case switched their votes to life after hearing family member testimony that vividly and graphically described a "hideous" childhood from which it was "amazing [the defendant] survived." *Id.*

Studies conducted by Stephen Smith reach the conclusion that "participants who read arguments containing vivid imagery congruent with the message conclusion showed the strongest attitudinal differentiation between strong and weak arguments. *Id.* at 776. The story of Mr. Leonard's stepfather, drunk and angry, shooting a bullet from his gun over eight-year-old Jeffrey Leonard's head as he ran from the house carrying his four-year old brother, contains precisely the type of vivid imagery that a jury would remember in great detail even several years after the trial. *Pet. App.* at 524a-525a.

iv. Family member testimony humanizes a defendant by creating an opportunity for jurors to sympathize with the defendant and his family.

Friends and family members "make the jury realize that the defendant is a person about whom others care and are able to sketch a picture of the defendant's life as only someone close to the defendant could." *The Jury As Critic* at 1163. The District Court, in granting Mr. Leonard habeas relief, described the consequences of a defendant not being humanized due to a lack of corroborative character testimony:

> "[The jury] saw "James Earl Leonard," in many senses, the man who never was, standing alone and defiant. [Mr.] Leonard was a man [who] testified recklessly; a man who apparently was so unloved and so uncared for that not a single individual, relative or friend would vouch for him though his life hung in the balance."[8]

Slaughter v. Parker, 187 F. Supp. 2d 755, 841 (W.D. Ky. 2001). As Professor Steven Garvey concluded after his study on empathy in capital sentencing, "...consistent with the prevailing wisdom, jurors who sympathize with the defendant do in fact appear *less apt to vote for death* than jurors who don't." Stephen P. Garvery, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?,* 98 Columbia L. Rev. 1538, 1559 (1998).

Jurors appear to be able to empathize better with defendants by first experiencing an emotional connection with

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[8] Tellingly, similar sentiments have been echoed by former capital jurors themselves: "After it was all over, I asked [the defense attorney], I said, 'Couldn't you find in this man's life one person as a character witness?'" *The Jury As Critic* at 1169.

the defendant's family. *The Jury As Critic* at 1163. "At the most basic level, from an emotional viewpoint, the testimony shows that someone cares about the defendant and believes that he has some redeeming value." *Id.* "Part of the emotional impact appears to stem from the jurors' ability to relate to the parents or sibling in a way that they simply cannot to the defendant that has committed this horrible crime." *Id.* at 1154. "The juror interviews are replete with statements about how such testimony was 'nerve-bending,' and how, as the jury listened to the testimony, 'it got sort of shaky in there,'" *Id.* at 1153. "One juror kept coming back to the sister's testimony because it brought the case to a personal level." *Id.* at 1154 (internal citation omitted). The juror stated that the family members' testimony was the *only* mitigating factor that made her *much less* likely to vote for death. *Id.* "Another juror, who had been a holdout for death because of the circumstances of the crime, identified the family members' testimony...as what persuaded him to vote for life without parole rather than a death sentence." *Id.* A final quotation from these capital juror interviews captures the powerful impact of family member character corroboration: "with such background, the jury can look at a picture of the defendant in his little sailor suit [when] he was only four or five years old, and, for at least a moment, see the defendant as someone other than the adult sitting twenty feet away on trial for two repulsive torture murders." *Id.* at 1158.

B. Failure To Eliminate Erroneously Introduced Aggravating Evidence Violates *Strickland* By Precluding An "Absent The Errors" Prejudice Determination.

The Sixth Circuit used the fact of Dr. Johnson's testimony to preclude serious consideration of the post-conviction expert testimony but ignored the fact that, but for the deficient performance that every federal judge has acknowledged, Dr. Johnson never would have testified and the

jury never would have heard his inaccurate, unreliable, unprofessional, and damaging testimony. If a reviewing court does not eliminate inaccurate and erroneously introduced aggravating evidence that would never have been heard by the jury but for counsel's deficient performance, then the court has not conducted a prejudice review "absent the errors." *Strickland*, 466 U.S. at 695. The Sixth Circuit's failure to consider evidence differing in degree but not kind, prevents the requisite measurement of the distance between post-conviction mitigation evidence and penalty phase evidence on the same subject that included aggravating testimony that would never have been considered had counsel performed adequately.

While this Court has never expressly addressed a case where counsel's deficient performance led to aggravating testimony being introduced during the penalty phase, no reasonable jurist could doubt that the *Strickland* Court meant for both the erroneous omission of mitigating factors and the inclusion of erroneous aggravating evidence to be considered when conducting prejudice analysis. The important distinction lies not in whether the harmful evidence resulted from added aggravation or omitted mitigation, but whether the totality of the evidence—mitigation and aggravation—taken as a whole established that the error(s) had a pervasive effect that undermines confidence in the outcome. *Id.* at 699.

Lest there be any doubt, a look at this Court's handling of *Brady* materiality cases, which gave rise and are identical in nature to the *Strickland* prejudice prong, demonstrates that erroneous aggravating factors should be struck from an evidentiary "reweighing." *See id.* (explaining that the *Strickland* prejudice analysis finds its roots in the *Brady* materiality test). This Court, in *Banks v. Dretke*, eliminated the erroneous testimony of a witness from materiality consideration when the aggravating impact of the witness' statements was the result of the failure of the prosecution to

disclose the witness' identity as a paid informant. *See* 540 U.S. 668, 702 (2004).[9]

In *Hovey*, the Ninth Circuit conducted *Strickland* prejudice prong analysis in a case in which the defense attorney's failure to prepare the key mitigation witness, a medical doctor, led to "devastating" results on cross-examination. 458 F.3d at 930. The Ninth Circuit eliminated the "inaccurate and inconsistent" testimony from consideration before reweighing the evidence because "the jury was left with the erroneous impression that Hovey had never been treated for a mental illness before committing his crimes, that Hovey may have fabricated a mental illness to obtain mercy at sentencing, and that Hovey's psychiatric expert based his conclusions on a substantially incomplete understanding of the facts." *Id.*

By contrast, the Sixth Circuit's *Slaughter* decision, far from eliminating the damaging effects of Dr. Johnson's testimony, cites the doctor's testimony as support for the notion that Mr. Leonard's medical history had already been covered during the penalty phase. Also contrary to the Ninth Circuit in *Hovey*, the *Slaughter* Court failed to consider that Dr. Johnson diagnosed Mr. Jeffrey Leonard despite *never completing a full battery of tests* on him, *improperly* using the Rorschach drawing test as the basis of a mental health diagnosis, and *incorrectly* and *prejudicially* scoring some of his test results.

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[9] "Farr's trial testimony was the centerpiece of the Banks prosecution's penalty-phase case. That testimony was cast in large doubt by the declaration Banks ultimately obtained from Farr and introduced in the federal habeas proceeding. Had jurors known of Farr's continuing interest in obtaining Deputy Huff's favor and his receipt of funds to set Banks up, they might well have distrusted Farr's testimony, and, insofar as it was uncorroborated, disregarded it." *Banks*, 540 U.S. at 702.

CONCLUSION

For the aforementioned reasons, *amicus* Charles Hamilton Houston Institute for Race and Justice urges the Court to grant certiorari.

Respectfully submitted,

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