No. 24-13905

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CHARLIE WASHINGTON,
Petitioner,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

Appeal from the United States District Court
For the Middle District of Alabama
Case No. 2:14-cv-60-ECM
The Honorable Emily C. Marks

BRIEF OF AMICI CURIAE LAW, SOCIAL SCIENCE, AND CRIMINAL JUSTICE SCHOLARS IN SUPPORT OF PETITIONER

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amici curiae, through their undersigned counsel, hereby certify that, in addition to the persons and entities listed in the certificate in Petitioner's brief, the following persons and entities have an interest in the outcome of this case:

1. Blume, John H., *amicus curiae*;
2. Cui, Gregory, counsel for *amici curiae*;
3. Garvey, Stephen P., *amicus curiae*;
4. Gohara, Miriam, *amicus curiae*;
5. Haney, Craig, *amicus curiae*;
6. Jain, Amit, counsel for *amici curiae*;
7. Johnson, Sheri Lynn, *amicus curiae*;
8. Roderick & Solange MacArthur Justice Center, firm for *amici curiae*;
9. Stetler, Russell, *amicus curiae*;
10. Sundby, Scott E., *amicus curiae*; and
11. Vartkessian, Elizabeth, *amicus curiae*.

/s/ Amit Jain

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are multidisciplinary scholars and experts in law, social science, and criminal justice whose work recognizes the impact and import of mitigation evidence in the modern American death penalty system. They have written extensively about capital juries based on, among other things, interviews with more than 1,000 jurors from hundreds of capital cases across the country, as well as a database compiling 625 aggravated cases in which jurors declined to impose death.

Amici are:

- John H. Blume, the Samuel F. Leibowitz Professor of Trial Techniques and the Director of the Cornell Death Penalty Project at Cornell Law School;
- Stephen P. Garvey, the A. Robert Noll Professor of Law at Cornell Law School;
- Miriam Gohara, Deputy Dean for Experiential Education and Clinical Professor of Law at Yale Law School;
- Craig Haney, Distinguished Professor of Psychology at the University of California, Santa Cruz;

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party, and no person other than *amici* or their counsel, contributed money intended to fund preparation or submission of this brief. All parties have consented to the filing of this brief.

- Sheri Lynn Johnson, the James and Mark Flanagan Professor of Law and the Assistant Director of the Cornell Death Penalty Project at Cornell Law School;
- Russell Stetler, the National Mitigation Coordinator for the federal death penalty projects from 2005 until his retirement from full-time work in 2020;
- Scott E. Sundby, Robert C. Josefsberg Chair in Criminal Advocacy and Dean's Distinguished Scholar at University of Miami, School of Law; and
- Elizabeth Vartkessian, Executive Director of Advancing Real Change and former Research Fellow in the School of Criminal Justice, University at Albany, State University of New York.

Amici's collective work on the capital jury decision-making process has yielded key insights regarding how capital jurors process and weigh mitigating evidence when deciding whether to impose a death sentence.

INTRODUCTION

At Charlie Washington's capital sentencing, the jury "heard almost nothing that would humanize" Mr. Washington or "allow them to accurately gauge his moral culpability." *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam). Instead, they received ill-prepared testimony from two family members whom Mr. Washington's attorney had met for the first time just minutes earlier, the testimony comprising less than four pages of the trial transcript. Even so, two jurors voted for life. Had one more done so, under Alabama law, the jury could not have chosen death.

Despite the troves of mitigation the jury never saw or heard, the state courts found no reasonable probability that a competent penalty-phase presentation would have helped spare Mr. Washington from death. That was objectively unreasonable in light of clearly established Supreme Court precedent and decades of research on how mitigation can impact capital jurors. Far from being cumulative, the details of Mr. Washington's life experiences and relationships would have allowed jurors to construct a full narrative of his life and understand him better as a human being. That understanding would not have justified his crimes or absolved him of responsibility, but it likely would have caused one or more decisionmakers to choose life. As *amici*'s research has shown, mitigation has done precisely that in hundreds of capital cases across the country, including those with highly aggravating circumstances.

ARGUMENT

I. Mitigation Evidence Is Critical Because It Allows Juries to Construct a Fuller Narrative of the Defendant's Life.

A. Jurors Process Mitigation Evidence to Better Understand the Defendant's Life, Not to Excuse the Crime.

Studies show that jurors process evidence and make decisions by constructing an overarching narrative or story. *See, e.g.*, Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, *in* INSIDE THE JUROR ch. 8 (Reid Hastie ed., 1993) (hereinafter "*The Story Model*"); Ryan J. Winter & Edith Greene, *Juror Decision-Making*, *in* 2 HANDBOOK OF APPLIED COGNITION 739, 743 (Francis Durso ed. 2007) (hereinafter "*Juror Decision-Making*"). In trials, evidence is often presented in "unwieldy" and "unstory-like" fashion through "a disconnected question and answer format." *The Story Model* at 195. To make sense of this information, jurors must organize what they see and hear into a narrative. *Id.* at 198. Once jurors have constructed the narrative they find most convincing, they choose the verdict option that best fits that narrative. *See id.* at 217.

Whereas guilt-phase jurors construct a narrative of the crime, penalty-phase jurors construct a narrative of the defendant's life. *See* John H. Blume, Sheri Lynn Johnson, & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 Hofstra L. Rev. 1035, 1043 (2008) (hereinafter "*Competent Capital Representation*") ("Because

jurors—like everyone else—make meaning of the world through the use of stories, the question of whether to sentence the defendant to death or to life imprisonment often depends on whether the prosecution story or the defense story is more compelling."). The penalty phase is an opportunity for the jurors to understand not just "the criminal acts" at issue, but "the defendant's entire life history." Craig Haney, *Commonsense Justice and Capital Punishment*, 3 Psychol. Pub. Pol'y & L. 303, 329 (1997) (hereinafter "*Commonsense Justice*"). At bottom, sentencing jurors are not asked to decide whether a person should be convicted or punished, but rather "whether the defendant should live or die." *Competent Capital Representation* at 1035. The answer turns on "the defendant's overall moral culpability." Scott E. Sundby, *The Jury as Critic*, 83 Va. L. Rev. 1109, 1117 (1997) (hereinafter "*Jury as Critic*").

Without a compelling mitigation narrative, jurors are left to assess moral culpability with only the prosecution's narrative, which tends to focus on the nature of the crime to paint a picture "of a vile, dangerous, and remorseless defendant." *Competent Capital Representation* at 1050. "It is not easy to persuade most people to willfully choose to kill another human being," and "dehumanizing a defendant helps to overcome a juror's natural human inhibition against taking another person's life." Sheri Lynn Johnson et al., *When Empathy Bites Back: Cautionary Tales from Neuroscience for Capital Sentencing*, 85 Fordham L. Rev. 573, 574 (2016)

(hereinafter "*When Empathy Bites Back*"). By defining the person based solely on his worst actions, without context, the prosecution's narrative creates fear, and "fear of the defendant drives votes for death." *Competent Capital Representation* at 1051. Such a one-sided presentation is especially dangerous because of the risk that biases, including those concerning race and gender, will take on outsized influence. *See* Sheri Lynn Johnson, *Explaining the Invidious: How Race Influences Capital Punishment in America*, 107 Cornell L. Rev. 1513, 1534-35 (2022) (describing mock juror studies showing that "Black defendants were sentenced to death more frequently than white defendants"); Jeffrey Fagan et al., *Getting to Death: Race and the Paths of Capital Cases After* Furman, 107 Cornell L. Rev. 1565, 1612 (2022) ("Victim gender, then, like victim race, plays a role in narrowing the profile of cases both eligible for death and that receive death.").[2]

Competently developed mitigation provides jurors with a different, fuller narrative of the defendant's life. The point is not to excuse the crime, but to "humaniz[e] the defendant." *Competent Capital Representation* at 1038. Mitigation evidence does not "negate[] the fact" that severe punishment is mandated for the crime at issue. Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 Am. J. Crim. L. 1, 7 (2018)

[2] Mr. Washington is a Black man; Julian and Florence McKinnon were white. *See Many Murders, Few Executions*, Equal Justice Initiative (Nov. 7, 2005), https://eji.org/files/dp-bhm-many-murders-few-executions-11-07-05.pdf.

(hereinafter "*In Defense of the Injured*"). Jurors understand this; even when severe punishment is warranted, they are "sensitive to various contextualizing pieces of information about the defendant and his background." *Commonsense Justice* at 329.

To construct a narrative of the defendant's life, however, jurors must be presented with the kinds of rich, overlapping details from various perspectives that create compelling stories. "It is not enough to present a case in mitigation; the defense case for life must resonate with jurors. It must be comprehensive, consistent, coherent, and credible. For example, a juror in a capital case will frequently reject a 'half-baked' case of mental illness, a consideration which—in the abstract—is considered by jurors to be highly mitigating." *Competent Capital Representation* at 1039. "A specific story of a particular horrific instance of abuse," on the other hand, "resonates with jurors more than general assertions that the defendant was abused." *Id.* at 1040; *accord, e.g.*, *Jury as Critic* at 1158 ("[V]erbal pictures . . . are worth a thousand clinical words."). What resonates with one juror, moreover, may affect other jurors differently based on their life experiences, world views, and biases. "In short, the devil is in the details." *Competent Capital Representation* at 1039.

When jurors can construct a "comprehensive, consistent, coherent and credible" narrative of the defendant's life, it tends to engender sympathy and empathy, which leads jurors to spare the defendant from death. *See id.* at 1051 ("The

more sympathy a juror feels . . . and the more able he is to imagine himself in the defendant's situation, the more likely a juror is to vote for life."); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26, 67 (2000) (hereinafter "*Emotional Economy*") ("[J]urors who sympathize with the defendant do in fact appear less apt to vote for death than jurors who don't."); *When Empathy Bites Back* at 575 ("[E]mpathy lies at the core of the capital trial."). Understanding the defendant and where he has come from can lead jurors to "believe that the crime was not as heinous," to view the defendant as less dangerous, and to see that he is not remorseless. *Competent Capital Representation* at 1038. Empirical studies show that these are the "primary considerations" that "drive juror decision-making at the penalty phase." *Id.* at 1037; *see* Mark E. Olive, *Narrative Works*, 77 UMKC L. Rev. 989, 1018 (2009) (hereinafter "*Narrative Works*") (describing decisions from this Court, the Fourth Circuit, and the Fifth Circuit illustrating that "an honest and detailed mitigation narrative has strong potential for influencing decision-makers").

As interviews with actual capital jurors have revealed, "many different types of mitigation resonate with jurors. Low intelligence, mental illness, child abuse, extreme poverty, remorse, lack of a significant prior record, and lesser culpability are just some of the categories of mitigation that, in a particular case, can lead jurors to choose life over death." *Competent Capital Representation* at 1038. Even "mundane experiences or preferences"—as simple as whether someone likes certain

vegetables—can help jurors relate to the defendant. *When Empathy Bites Back* at 590, 596. These kinds of rich details can make a real difference for jurors because they "remind them that the defendant is an individual." *Id.* at 597.[3]

For example, jurors who spared Bryan Clay from death for the rape and murder of a mother and daughter returned a special verdict form identifying the mitigating factors they relied on. *See* Russell Stetler, Maria McLaughlin, & Susan Garvey, *Mitigation that Worked: Empirical Evidence of Why Jurors Rejected the Death Penalty in Some Highly Aggravated Capital Cases*, Nevada Special Verdict Forms, Online Appendix, 53 Hofstra L. Rev. 729 (forthcoming 2025) (hereinafter "*Mitigation that Worked*").[4] The jurors emphasized the circumstances of Mr. Clay's childhood—"witness[ing] domestic violence in the home" amidst a lack of "parental guidance," "family support," and "permanent childhood stability (i.e., multiple elementary schools in the same year)." *Id.*, Online Appendix at 14-16. They also cited his "youth and lack of maturity" at the time of the offense, and that he was "under the influence" during the crime. *Id.* They further relied on the people in his life, pointing to his "love for his child, London," and that "Mr. Clay's mother loves him." *Id.* These and other mitigating factors did not excuse Mr. Clay's crimes, but they helped the jury understand him enough to spare his life.

[3] *See Witherspoon v. Illinois*, 391 U.S. 510, 520 n.17 (1968) (citing basic "humanity" and "shuddering recognition of a kinship" capital jurors can feel for defendant).
[4] https://hofstralawreview.org/53-3-stetler-appendix/.

"In short, credibly telling the defendant's story can make the difference between life and death." *Competent Capital Representation* at 1038.

B. When Jurors Understand the Full Narrative of a Defendant's Life, They Are More Likely to Choose Life Over Death, Even in Highly Aggravated Circumstances.

Importantly, when capital jurors are able to construct a full narrative of the defendant's life, they are more likely to choose life over death, even in highly aggravated circumstances. "High profile cases yielding life sentences in the wake of extensive mitigation cases—such as those involving Terry Nichols (who participated in the Oklahoma City bombing), and Brian Nichols (who killed a state court judge and others while escaping from his rape trial in a Georgia courthouse)—reflect the new reality that no crimes, no matter their severity, are invariably punished by death." Carol S. Steiker et al., *Entrenchment and/or Destabilization?*, 30 Law & Inequality 211, 233 (2012).[5] "More mundane examples occur week after week in courtrooms across the country, as jurors choose life sentences for serial killers, cop killers, child killers, and others guilty of the most reviled and abhorrent crimes." Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned*

[5] Two different juries spared Terry Nichols from the death penalty—one federal and one state. *See* Russell Stetler, Maria McLaughlin, & Dana Cook, *Mitigation Works: Empirical Evidence of Highly Aggravated Cases Where the Death Penalty Was Rejected at Sentencing*, 51 Hofstra L. Rev. 89, 90 & n.9, 98 (2022) (hereinafter "*Mitigation Works*").

Moral Response in Capital Sentencing, 11 U. Pa. J.L. & Soc. Change 237 (2007) (hereinafter "*Mystery of Mitigation*").

For example, jurors spared James Gordon from the death penalty despite his convictions for torturing and killing several women. *See Mitigation Works* at 133. Alongside evidence about these highly aggravated murders, the jury also heard significant mitigation. *See id*. With the full picture of Mr. Gordon's nightmarish childhood and horrific crimes, the jury deliberated for 17 hours and ultimately voted to spare him from the death penalty. *See Triple Murderer Is Spared Death*, N.Y. Daily News (Dec. 19, 1998).[6] In explaining their decision, jurors pointed to evidence that Mr. Gordon was born to an adolescent mother, his sister was raped, and his mother was a thief and often "overslept not sending children to school." *Mitigation that Worked* at 809.[7] As one juror put it, "It was the mitigating factors. . . . What he did was terrible, but you have to look at everything behind that." *Triple Murderer Is Spared Death*, N.Y. Daily News (Dec. 19, 1998).

Examples like Mr. Gordon underscore that "the effective investigation and presentation of mitigation evidence can forestall a death sentence no matter how death-worthy the crime facts may appear at first glance." *Mitigation that Worked* at 730.

[6] https://www.nydailynews.com/1998/12/19/triple-murderer-is-spared-death.
[7] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5340594.

II. The State Courts' Analysis Is Squarely at Odds with How Jurors Actually Process Mitigation Evidence.

Contrary to a robust body of research and experience, the state courts unreasonably downplayed and dismissed critical mitigating evidence—including evidence of Mr. Washington's loving relationships, impoverished and traumatic childhood and adolescence, substance abuse, employment history, and mental health challenges—based on three mistaken assumptions.

First, the state courts' conclusion that testimony from Mr. Washington's family and friends "would only have been cumulative," ECF 59 at 67, was premised on a debunked checklist-style approach to mitigation. The federal district court attempted to bolster the state courts' reasoning by concluding that the passage of time blunted the impact of Mr. Washington's painful childhood, but this contravened Supreme Court precedent and empirical research about how such evidence can push jurors to choose life. *Second*, the state courts' claim that additional aggravation would have cancelled out the new mitigation overlooked that jurors must understand a defendant as a moral being to be open to *any* mitigating evidence. *Third*, the state courts' contention that the crime was simply too brutal to mitigate—and that the unpresented mitigation did not "justif[y]" the killings, *id.*—ignored why jurors have chosen life in many more-aggravated cases.

Amici address each point in turn.

A. The Unpresented Family Evidence Would Have Equipped Jurors to Build a Robust Narrative of Mr. Washington's Life and Relationships.

The state courts held that Mr. Washington failed to show prejudice in part because his family members' and friends' additional testimony "would only have been cumulative to what those who testified had to say" at trial. ECF 59 at 67; *accord id.* at 68-69, 71. As the record makes plain (and the research underscores), that conclusion blinks reality.

Contrast what the sentencing jury had before it with the evidence before the Rule 32 court. At the penalty phase, the jury heard two witnesses speak 325 words—fewer than the number of words in the "Interest of *Amici Curiae*" section of this brief. *See* Vol. 7, Trial Tr. 108-11. One of Mr. Washington's sisters briefly testified that the family was "close" and that Mr. Washington was a "good brother," citing an instance in which he helped her repaint her salon. *Id.* at 108-09. A second sister agreed the family was "close" and noted that when she had recently been in the hospital, Mr. Washington called to check in. *Id.* at 110-11. This presentation (totaling fewer than four transcript pages) was so minuscule that defense counsel did not reference Mr. Washington's family (or any aspect of his character) during his hasty closing argument. *See id.* at 116-19.[8]

[8] Counsel also assured jurors that they would hear from Mr. Washington himself. *See* Vol. 7, Trial Tr. 106. But Mr. Washington did not testify, *see id.* at 112, and counsel never attempted to explain this broken promise to the jury.

In contrast, at the Rule 32 hearing, a slew of key witnesses testified—in detail, at length, and with numerous examples—regarding Mr. Washington's character and strong work ethic, *see, e.g.*, Vol. 25, Rule 32 Tr. 175 (Debbie Jackson, Mr. Washington's brother's partner); Vol. 26, Rule 32 Tr. 56 (Michael Turner, Mr. Washington's nephew); *id.* at 110-11 (Linda Turner, Mr. Washington's sister); *id.* at 127-29 (Billie Whitehurst, Mr. Washington's former employer); the financial support he provided for his family across various stages of his life, *see, e.g.*, Vol. 25, Rule 32 Tr. 175-76 (Jackson); Vol. 26, Rule 32 Tr. 14-17 (Annie Washington, Mr. Washington's mother); *id.* at 32-35 (Patricia Glenn, Mr. Washington's stepsister); *id.* at 57 (Michael Turner); *id.* at 110-12 (Linda Turner); and, most importantly, his deep and loving relationships with a large network of family and friends, *see, e.g.*, Vol. 25, Rule 32 Tr. 175 (Jackson); Vol. 26, Rule 32 Tr. 16-17 (Annie Washington); *id.* at 32-37 (Glenn); *id.* at 54-60 (Michael Turner); *id.* at 110-12 (Linda Turner).[9]

[9] Patricia Glenn and Linda Turner were the two witnesses who testified briefly at sentencing and at much greater length during the Rule 32 hearing. At the Rule 32 hearing, Glenn testified that she would have liked to have said more at sentencing, but "just said what the[] lawyers asked me." Vol. 26, Rule 32 Tr. 39. Turner testified that, prior to trial, she had not even realized her testimony could be helpful. *Id.* at 124. Trial counsel met with Glenn and Turner only once—during a 24-minute break between the guilty verdict and the commencement of the penalty phase. Vol. 25, Rule 32 Tr. 78. Trial counsel also failed to provide a mitigation specialist with the records she needed to perform a complete evaluation. *See id.* at 116-18; *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (finding counsel incompetent for failing to prepare for penalty phase "until a week before the trial" and failing to investigate records).

Mr. Washington's expert witness offered additional texture regarding Mr. Washington's "highly productive work skills and ethics beginning at a very young age," *id.* at 151; his work history, *see id.* at 153; and his decision to leave home at age 13 or 14 to work due to his alcoholic stepfather's failure to provide for his mother, *see id.* at 154-55.

By deeming all of this "cumulative to what those who testified [at trial] had to say," ECF 59 at 67, the state courts conceived of mitigation as akin to a checklist. On this view, once a juror has heard *any* evidence about a general topic, the juror has checked off that category of mitigation, and any additional or more specific evidence does not move the needle.

That understanding contravenes the science (to say nothing of Supreme Court law and common sense). As outlined above in Part I.A, effective mitigation enables jurors to construct a robust understanding of the arc of a defendant's life, illustrating that something within him is worth saving. As a result, "an honest and detailed mitigation narrative" is hardly cumulative—instead, it "has strong potential for influencing jurors" in a manner that checking boxes does not. *Narrative Works* at 1018. Moreover, specific stories and vignettes tend to resonate far more with jurors than general statements. *See supra* p. 7. And all of this is more, not less, true in more aggravated cases. *See, e.g.*, *Mitigation that Worked* at 735-36 (concluding that in highly aggravated cases, "unique and holistic mitigation narratives, rich in

detail, . . . are critical to the overall objective of humanizing the individual facing the ultimate punishment"); *cf.* Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 Am. J. Crim. L. 41, 44 n.7 (2013) (collecting cases in which rich, textured mitigation narratives overcame strong aggravation and led juries to choose life).

These principles have greater force still in the context of testimony from family and friends. Empirical studies of real-world jurors establish that such testimony can exert a significant impact at the penalty phase, as jurors are often moved by seeing affection shared between a defendant and a member of his family. *See, e.g.*, *Jury as Critic* at 1151-62. Such evidence often presents "the first sliver of an insight that there is good in the defendant, as well as evil," opening the door to the case for life in jurors' minds. *Id.* at 1153. Yet it is effective "only when presented in sufficient detail as to present a coherent and full factual picture of the defendant." *Id.* at 1161. Where, as occurred in Mr. Washington's trial, family witnesses offer only cursory testimony, jurors are "likely to view such character testimony derisively, as an effort to manipulate them." *Id.* Moreover, jurors often note "the *absence* of family testimony" unfavorably. *Id.* at 1152 & n.96.

Accordingly, although trial counsel's paltry presentation still managed to persuade two jurors to choose life, it likely left others wondering why Mr. Washington's sisters did not have more to say—and why counsel could not find

additional witnesses to back them up. That is precisely what the prosecution argued to the jury in closing: "They have not offered anything [mitigating] other than . . . that there is no significant criminal history. Nothing else. A life is on the line and the best thing a family member can say is you are a good brother." Vol. 7, Trial Tr. 120. The absence of compelling family testimony would have been especially damaging to the extent race or gender heightened jurors' barriers to empathy. *See supra* p. 6.[10]

For these reasons, the state courts were gravely wrong to dismiss the unpresented family-and-friends testimony as somehow cumulative of the barebones presentation at the penalty phase. Family members' testimony of how Mr. Washington showed his love for them throughout his life—including by working from a young age to provide much-needed financial support to his mother, siblings, and neighborhood; serving as a beloved father figure to his nephew; supporting his loved ones through specific health issues and other crises; and more—would have helped the jury understand Mr. Washington as a multidimensional human being who was more than the worst things he had ever done, creating a powerful case for life. *See Competent Capital Representation* at 1053.

[10] Counsel's attempt to explain this absence—by eliciting two sentences of testimony that Mr. Washington's other siblings were out of town or "working" and so could not attend his life-or-death sentencing proceeding, Vol. 7, Trial Tr. 111—bordered on farcical.

B. The Evidence of Childhood Trauma Could Have Had a Powerful Mitigating Effect.

In an effort to bolster the state courts' unreasonable analysis, the district court improperly discounted arresting evidence of Mr. Washington's childhood trauma. ECF 59 at 73-78. Specifically, the witnesses at the Rule 32 hearing provided crucial context regarding severe challenges Mr. Washington faced throughout his life—none of which the jury knew about. The post-conviction record established that Mr. Washington's childhood was nothing short of horrific: His father was shot and killed when Mr. Washington was in his infancy; his mother suffered from debilitating polio; his alcoholic stepfather inflicted physical "whuppings" upon him and his siblings; he grew up in extreme poverty without electricity or plumbing, forcing him and his siblings to go to the bathroom in an outhouse and huddle by wood stoves to keep warm; his household was rife with alcohol abuse and drug use; he dropped out of middle school due to his family's poverty; his older brother died by suicide when Mr. Washington was still young; and many members of his family experienced mental illness. *See, e.g.*, Vol. 26, Rule 32 Tr. 23-32, 47-54, 86-99, 148-58; ECF 59 at 10.[11]

[11] Witnesses at the Rule 32 hearing also testified to several other devastating experiences Mr. Washington had as an adult, including another of his brothers dying from a drug overdose, Mr. Washington being on a phone call with a close friend when the friend shot himself in the head and died by suicide, and Mr. Washington's wife experiencing a miscarriage shortly thereafter. *See, e.g.*, Vol. 26, Rule 32 Tr. 24-

Despite Mr. Washington's impoverished childhood, the loss of his father and brother, his beatings at the hands of his stepfather, and dropping out of middle school to work—experiences the district court curtly summarized as "less than ideal"—the court reasoned that the evidence was "insufficiently mitigating" because, as a 55-year-old at the time of the murders, Mr. Washington "was far removed" from these formative events. ECF 59 at 73, 78. Yet the Supreme Court itself has held that discounting evidence of childhood trauma based on the passage of time constitutes an unreasonable application of Supreme Court law. In *Porter v. Attorney General*, the Eleventh Circuit similarly "deferred to [a state court's] conclusion that, in light of the defendant's age at the time of the crime"—in his mid-fifties, like Mr. Washington—evidence of his abusive childhood was "entitled to little if any[] mitigating weight when compared to the aggravating factors." 552 F.3d 1260, 1274 (11th Cir. 2008) (internal quotation marks omitted). The Supreme Court summarily

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25, 65-70, 157-58. The post-conviction record also showed that Mr. Washington grappled with alcohol and substance abuse challenges throughout his life, beginning at age 5 or 6, when he was just a child and too young to choose to drink. *See, e.g.*, *id.* at 154-60, 199-202; Vol. 27, Rule 32 Tr. 3-6 (Mr. Washington's expert witness); *id.* at 44-45 (state's expert witness). Again, none of this humanizing evidence was before the jury. *See, e.g.*, Michelle E. Barnett, Stanley L. Brodsky, & Cali Manning Davis, *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 Behav. Sci. & L. 751, 764 (2004) (hereinafter "*Makes a Difference*") (noting that substance abuse can have a mitigating effect, but must be "frame[d] . . . in the context of the defendant's background").

and unanimously reversed, explaining that the state court had unreasonably "discount[ed] to irrelevance the evidence of Porter's abusive childhood." *Porter*, 558 U.S. at 43.[12]

In other cases, too, the Supreme Court has "recognized the inescapable salience of [capital defendants'] troubled histories to their sentencers' assessments of their moral culpability." *In Defense of the Injured* at 44; *see id.* at 39-45. For good reason: Early trauma can affect the entire course of a person's life. *See, e.g.*, Craig Haney, CRIMINALITY IN CONTEXT: THE PSYCHOLOGICAL FOUNDATIONS OF CRIMINAL JUSTICE REFORM 87-134 (2020) (reviewing extensive scientific literature on this point). Unsurprisingly, then, empirical studies show that evidence of childhood trauma and abuse can exert a powerful mitigating pull on real-world capital jurors. *See, e.g.*, *Mitigation that Worked* at 819 (adverse childhood experiences presented as mitigation in roughly one-quarter of catalogued highly-aggravated cases resulting in life sentences); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1559 (1998) (hereinafter "*Aggravation and Mitigation*") (over one-third of capital jurors surveyed less likely

[12] The district court relied on this Court's decision in *Callahan v. Campbell*, 427 F.3d 897 (11th Cir. 2005), as support for its conclusion. *See* ECF 59 at 72-73. But *Callahan* predated the Supreme Court's decision in *Porter*. Moreover, both *Callahan* and this Court's decision in *Porter* cite back to the same flawed reasoning in *Francis v. Duggar*, 908 F.2d 696, 703 (11th Cir. 1990)—reasoning the Supreme Court rejected by summarily reversing in *Porter*.

to choose death after learning the defendant had experienced serious child abuse). In assuming otherwise, the district court contravened the law and the science alike.

C. The Unpresented Evidence Would Not Have Been Negated Simply Because It Might Open the Door to Other Evidence.

The state courts further opined that some of this avalanche of unpresented mitigation would have been canceled out by other evidence. In particular, the Alabama Court of Criminal Appeals reasoned that if Mr. Washington's counsel had introduced the above-discussed mitigating evidence regarding his background, his relationships, and the challenges he faced throughout his life, it "would have opened the door to negative evidence" that Mr. Washington had fallen out of contact with some of his children, had been unfaithful in his marriages, and had threatened his coworkers. ECF 59 at 68, 74.[13] Although Mr. Washington's former employer testified at the Rule 32 proceeding that he was a good employee, *see* Vol. 26, Rule 32 Tr. 127, the Rule 32 court reasoned that this would have opened the door to evidence regarding instances in which Mr. Washington allegedly threatened coworkers, *see* ECF 59 at 67. Finally, although Mr. Washington was diagnosed with bipolar disorder and brain impairment, *see* Vol. 26, Rule 32 Tr. 168-70, 173-99, the

[13] The district court declined to explain why the door was not open to this evidence already, given Mr. Washington's sisters' testimony at sentencing (sparse though it was). *See* ECF 59 at 74.

courts reasoned that such evidence would have been canceled out by the contrary views of the state's expert, *see* ECF 59 at 67, 74-75.

But there is no reason to conclude that the state's modest new evidence would have *canceled out* the tidal wave of unpresented mitigation. *See, e.g.*, *Porter*, 558 U.S. at 43 ("While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury.").[14] "Sometimes the most persuasive picture just shows [the defendant] as a human being, one who has done good and bad, and is sorry for the bad, one who loves and is loved, someone for whom hope is still possible." *Competent Capital Representation* at 1053. *Amici*'s research shows that having the full—albeit imperfect—picture of the defendant's life can cause jurors to vote for life, not because the evidence is universally positive, but because it helps the jury understand the defendant as a person.

[14] As the *Porter* Court understood, evidence of mental illness or intellectual deficits can exert a powerful mitigating impact. *See, e.g.*, *Aggravation and Mitigation* at 1539, 1559, 1564-65; *Makes a Difference* at 764. And here, even the state's expert conceded that Mr. Washington had a below-average or "high borderline" IQ. Vol. 27, Rule 32 Tr. 34-35. Supreme Court law clearly establishes the relevance of such evidence as mitigation, even if it falls short of rendering a defendant categorically ineligible for death. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 518, 535 (2003); *Williams*, 529 U.S. at 396.

Moreover, to be receptive to Mr. Washington's case for life in the first place, jurors needed to understand Mr. Washington as a complex human being—someone capable of loving and being loved. *See supra* Part I.A. Detailed, meaningful evidence of family relationships would have been especially powerful in this regard. *See supra* Part II.A. Evidence of mental health issues (or coming from a background of poverty) could also have opened some jurors to considering life. *See* H. Mitchell Caldwell & Thomas W. Brewer, *Death Without Due Consideration?: Overcoming Barriers to Mitigation Evidence by "Warming" Capital Jurors to the Accused*, 51 How. L.J. 193, 221 (2008). Ultimately, a competent mitigation presentation would have enabled jurors to *contextualize* the evidence in aggravation, both old and new. That there may have been additional aggravation evidence would not have canceled out the critical impact of the mitigation evidence on the jury.

D. The Severity of the Offense Would Not Have Nullified the Impact of the Mitigation Evidence.

Finally, the state courts unreasonably assumed that the severity of Mr. Washington's offenses would have nullified the impact of any additional mitigation evidence. The Rule 32 court, for example, stated that "[i]n light of Mr. Washington's brutal attack upon and murder of an elderly couple, whom he worked for for years," there was "no reasonable probability" that presenting evidence of brain impairment and other psychological issues would have made a difference. ECF 59 at 68.

Experience disproves that assumption. As shown by hundreds of capital cases in which jurors voted for life, mitigation evidence can have a significant impact even for those convicted of the most disturbing of crimes. For every circumstance that the state courts believed made this case highly aggravated, *amici* have encountered multiple other cases that were just as, if not more, extreme—and yet resulted in sentences of life.

For example, the state courts viewed Mr. Washington's crimes as aggravated because he killed multiple people. *See* ECF 59 at 3. But so did Ricky Abeyta (who killed a state police officer, his ex-girlfriend, her daughter, her adult sister, a 19-year-old, a sheriff's deputy, and a 6-month-old baby), Roberto Aguirre (who killed his stepsons, 3-year-old son, and mother-in-law), and Said Biyad (who killed his four children), all of whom jurors spared from the death penalty. *See Mitigation Works* at 108.[15]

The state courts also noted that Mr. Washington's crimes involved killing by blunt force trauma. ECF 59 at 3. But so did the crimes of Ora Carson (who beat his 3-month-old son to death), Bryan Clay (who used a claw hammer to kill a woman and her 10-year-old daughter), and Marc Colon (who beat his girlfriend's 3-year-old daughter to death)—all spared death. *See Mitigation Works* at 112-13.

[15] Similarly, this Court held that a murder involving three victims "d[id] not preclude [it] from concluding prejudice has been established." *Cooper v. Sec'y, Dept. of Corrs.*, 646 F.3d 1328, 1356 (11th Cir. 2011).

Finally, Mr. Washington's crimes occurred during the commission of burglary and robbery. ECF 59 at 3. But so did the crimes of Albert Jarrett, Clarence Conyers, and Jeff Boppre—all of whom were spared from death as well. *See Mitigation Works* at 138, 152, 157.[16] Jurors across the country, from Texas (Roberto Aguirre) to Arkansas (Albert Jarrett) to Idaho (Ora Carson), chose life in these cases.

Moreover, Mr. Washington's case does not present other significant aggravating factors to which jurors tend to react strongly. He did not, for example, kill a police officer. *See* Marla Sandys et al., STACKING THE DECK FOR GUILT AND DEATH 393, 411 tbl.1 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 3d ed. 2014) (finding 41.4% of those surveyed believed death was the only appropriate penalty for cases involving police officer victims). In contrast, Ronald Hamilton (Virginia), Benny Hatley (Arkansas), and Sanford Marshall (Indiana) each killed at least one police officer, and all were spared from death by juries. *See Mitigation Works* at 169, 172, 181.

The point is not to minimize the severity of Mr. Washington's crimes, but rather to show that even for highly aggravated offenses, mitigation can still make the difference between life and death. *See* Russell Stetler, *The Past, Present, and Future*

[16] Indeed, this Court has found prejudice from failures to investigate mitigation in other cases specifically involving double-murders of elderly couples in the course of home robberies. *See Armstrong v. Dugger*, 833 F.2d 1430, 1432-34 (11th Cir. 1987) (pre-AEDPA); *Porter v. Wainwright*, 805 F.2d 930, 931-36 (11th Cir. 1986) (pre-AEDPA).

of the Mitigation Profession, 46 Hofstra L. Rev. 1161, apps. 2-4 (2018) (cataloguing over 200 cases where juries returned life sentences in cases involving child victims, law enforcement victims, and multiple victims); Scott E. Sundby, A LIFE AND DEATH DECISION 140-41, 150-51 (2005) (describing a "grisly constellation of facts" involving "torture and extreme brutality," and how the jury nevertheless voted for life in light of significant mitigation); *Narrative Works* at 1003 (discussing the Fifth Circuit's rejection of the "brutality trumps" argument).

This finding is borne out not just in individual examples, but across larger datasets. For example, in one study, researchers found that "[m]ost of the circumstances that elicited sympathy or pity continued to do so in more complex multiple regression models," demonstrating that "a juror's sympathy or pity remained significant or near-significant no matter how vicious or depraved the defendant's crime." *Emotional Economy* at 58.

Particularly unreasonable was the state courts' assertion that mitigation would not have made a difference because it could not "justif[y]" Mr. Washington's crimes. ECF 59 at 67, 71. "[M]itigation is never an excuse for the crime. Mitigation is sentencing information that explains a person's life in context." *In Defense of the Injured* at 7; *accord, e.g.*, *Mystery of Mitigation* at 261 ("[M]itigation is a means of introducing evidence of a disability or condition which inspires compassion, but which offers neither justification nor excuse for the capital crime."). Mitigation

persuades jurors to vote for life because it helps them understand, sympathize with, or even pity the person—even though jurors know that nothing can ever justify the person's severe crimes. *Amici*'s collective research has documented hundreds of cases in which mitigation has persuaded jurors to do exactly that.

* * *

In sum, the state courts and the district court clearly and fundamentally erred in writing off mitigation evidence of the volume and kind present here. Two jurors already chose life for Mr. Washington based on the paltry mitigation case his counsel presented. In light of decades of research about how sentencing jurors process mitigation evidence, there is ample reason to expect that the unpresented mitigation could have persuaded at least one more juror to vote with them.

CONCLUSION

For the foregoing reasons, the Court should reverse.

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Respectfully submitted,

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I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because this brief contains 6,495 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: July 8, 2025

/s/ Amit Jain
Amit Jain

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2025, I electronically filed the foregoing *Brief of* Amici Curiae *Law, Social Science, and Criminal Justice Scholars in Support of Petitioner* with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 8, 2025

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