No. 11-1215

IN THE
Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,
Petitioner,
v.
ROLAND COLSON, WARDEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF NATIONAL ASSOCIATION OF SOCIAL WORKERS AND NATIONAL ALLIANCE ON MENTAL ILLNESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ANAND S. RAMAN
Counsel of Record
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
Anand.Raman@skadden.com

Attorney for Amici Curiae

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BRIEF OF NATIONAL ASSOCIATION OF SOCIAL WORKERS AND NATIONAL ALLIANCE ON MENTAL ILLNESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The National Association of Social Workers ("NASW") and the National Alliance on Mental Illness ("NAMI") respectfully submit this brief as *amici curiae* in support of petitioner Abu-Ali Abdur'Rahman.[1]

STATEMENT OF INTEREST

NASW is the world's largest association of professional social workers, with nearly 145,000 members. The NASW, Tennessee Chapter has 2,149 members. NASW provides continuing education, enforces a Code of Ethics, conducts and publishes research, promulgates professional criteria, and develops policy statements on issues of importance to the profession. Social workers act as expert witnesses in a variety of proceedings, such as child abuse and neglect, rape trauma, Post Traumatic Stress Disorder, and the penalty stage of capital murder cases.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2(a), counsel for *amici curiae* provided the parties timely notice of its intent to file an *amicus curiae* brief, and each party signified its consent.

NAMI is the nation's largest grassroots organization dedicated to improving the lives of individuals and families affected by mental illness. NAMI has a long history of advocating for policies and programs to prevent the unnecessary incarceration of people living with serious mental illness and to facilitate better services for persons with these illnesses during incarceration and following discharge.

SUMMARY OF ARGUMENT

Petitioner Abu-Ali Abdur'Rahman is on death row today because of his counsel's failure to offer the jury evidence of his compelling and excruciating life history and mental illness as mitigating factors in weighing whether to spare his life.

Readily available documentary and testimonial evidence would have shown that Abdur'Rahman suffered an almost unimaginable, horrific childhood involving physical torture by his alcoholic father, such as beatings with weapons on his genitals and other parts of his body, being hogtied, and being forced to eat vomit and other vile substances. This abuse, coupled with estrangement from and abandonment by his alcoholic mother, led to lifelong difficulties and multiple mental illness diagnoses, none of which his counsel sought to discover or use. Experienced professionals who reviewed Abdur'Rahman's social history described it as "bizarre," of a type they "had never heard of," "one of the saddest stories," and "one of the most compelling social histories." This evidence exemplifies in the extreme the type of "troubled history" this Court has determined is

highly "relevant to assessing a defendant's moral culpability." *Wiggins v. Smith,* 539 U.S. 510, 535 (2003).

Moreover, trial counsel made no attempt to discover or explain to the jury the circumstances of a prior homicide conviction introduced by the prosecution. That evidence would have shown the jury that, in the period leading up to the homicide, Abdur'Rahman had been the target of a group of sexual predators, had been assaulted by this group, and that the homicide itself was a panicked attack on one of his tormentors. This failure "left the jury knowing hardly anything about him other than the facts of his crimes," as it "heard almost nothing that would humanize" Abdur'Rahman. *Porter v. McCollum,* 130 S. Ct. 447, 449, 454 (2009).

Had counsel fulfilled their professional responsibility to uncover and use this compelling mitigating evidence, "there is a reasonable probability that at least one juror would have struck a different balance," *Wiggins*, 539 U.S. at 537. Indeed, the one court to have heard the extensive omitted mitigating evidence concluded just that and granted *habeas* relief to Abdur'Rahman. *Abdur'Rahman v. Bell*, 999 F. Supp. 1073 (M.D. Tenn. 1998).

The Sixth Circuit, while not disagreeing that counsel rendered deficient performance or that a "sentencer might find [the omitted mitigating evidence] to be compelling," reversed the *habeas* court's decision based on a conclusory and erroneous determination that Abdur'Rahman could not have been prejudiced "because the mitigating evidence that could have been introduced also contained harmful

information." *Abdur'Rahman v. Bell,* 226 F.3d 696, 708-09 (6th Cir. 2000).

This categorical rule – that failure to introduce so-called "double-edged" mitigating evidence can *never* constitute prejudicial error – is contrary to the reasoning of this Court's precedents and has been rejected by most of the Circuits. In cases such as *Porter* and *Williams v. Taylor*, 529 U.S. 362 (2000), this Court has determined that failure to adduce mitigating evidence that has a double-edged aspect has resulted in prejudice to defendants. The horrific details of Abdur'Rahman's life history, none of which was heard by the jury, are at least as compelling or more so than those in this Court's precedents where prejudice has been found.

NASW and NAMI urge this Court to grant certiorari in this case to correct the injustice resulting from Abdur'Rahman's counsel's deficient performance and to decide important issues relating to how double-edged mitigating evidence is treated when determining whether counsel's deficient performance has prejudiced the defendant.

ARGUMENT

I. Abdur'Rahman's Social and Mental Health History Comprised Compelling Mitigation Evidence.

Abdur'Rahman's trial counsel had an opportunity and obligation to present a compelling mitigation case, one that would have explained and linked together his nightmarish childhood and lifelong men-

tal illness. The sentencing case could have blunted the State's aggravation evidence by showing that a prior homicide conviction of Abdur'Rahman's involved his attempt to protect himself, and that his actions were linked to and consistent with his mental disorders. Abdur'Rahman's trial counsel presented no part of this accurate, substantiated, and heartrending picture to the jury.

A. Abdur'Rahman Endured a Nightmarish Childhood.

The impact of Abdur'Rahman's social history is apparent from the vivid terms used by those familiar with its full scope. Abdur'Rahman's brother described their childhood as "the hell we lived in." *Habeas* Hr'g Tr. 627, Feb. 10-13, 1998 ("*Habeas* Tr."). Dr. Robert Sadoff testified that Abdur'Rahman's abuse was "unspeakable." *Id.* 475. The district court characterized Abdur'Rahman's upbringing as "bizarre." Pet. App. 155a.

Abdur'Rahman's sufferings stand out even among other similar cases. Dr. Sadoff, who at the time of the *habeas* hearing in 1998 had over thirty-five years' experience in forensic psychiatry, testified that Abdur'Rahman's abuse included mistreatment that he had "never heard before." *Habeas* Tr. 475. Dr. Diana McCoy, who had twenty-five years of experience in clinical psychology, noted that Abdur'Rahman's was "one of the saddest stories" she had ever encountered, as well as "one of the most compelling social histories" of any mitigation case she had been involved in. *Id.* 663. Dr. Raymond

Winbush labeled Abdur'Rahman's childhood as "singularly the worst case of abuse I have come across in 25 years being an academic psychologist." *Id.* 1315.

Abdur'Rahman's Violently Abusive Father. The indelible image from Abdur'Rahman's childhood is of a kindergarten-aged boy, hogtied naked in a closet and left there by his father. *Id.* 631. But that image is only one episode in Abdur'Rahman's history of violent abuse at the hands of his alcoholic father. The abuse included regular beatings with leather straps and billy clubs. *Id.* 634. It also included capricious torture in the name of discipline. To take one example, as a young teen, Abdur'Rahman's father made him eat a package of cigarettes and a cigar as punishment for kissing neighborhood girls. *Id.* 634. This caused him to vomit, and Abdur'Rahman's father then forced him to eat the vomit. *Id.*

The abuse had a distinct sexual link. For instance, Abdur'Rahman's father struck the end of his penis with a billy club in response to his son's masturbation. *Id.* 632, 634-35. Likewise, during the closet hogtying incident, Abdur'Rahman's father tethered his penis to a clothes hook. *Id.* 475.

Abdur'Rahman's Distant Mother. While Abdur'Rahman's father raged, his mother – also an alcoholic – remained disconnected and emotionally distant. Her lifelong emotional distance was perhaps best exemplified by her abandonment of her first three children (Abdur'Rahman's half-siblings) in the woods. *Id.* 623-24, 787. One of those children, Nancy Lancaster, saw her mother again only once before she became an adult. *Id.* 788-89. Lancaster later observed her mother interacting with Ab-

dur'Rahman and his full siblings. Lancaster summarized their mother's approach by stating: "I have never seen my mother form any kind of bond with the children. I never seen her touch them or hug them or anything like that." *Id.* 797.

Abdur'Rahman's mother never protected him from the abuse his father inflicted, though she was well aware of it and endured severe beatings herself. *Id.* 476, 625. Neither did his mother comfort Abdur'Rahman or his siblings after they were beaten. *Id.* 634.

Effects of the Family Upbringing. The family's brutal and toxic atmosphere took a devastating toll. Abdur'Rahman and his two full siblings – the only three children to be raised by Abdur'Rahman's father and mother – were left with an inability to cope with stress or anger. Abdur'Rahman's sister Sylvia was repeatedly institutionalized in mental hospitals. *Id.* 626, 815. She frequently became violent, suffered from bi-polar disorder, and needed constant medication. *Id.* 626, 816. Sylvia also attempted suicide numerous times *Id.* 803-04, 812. Abdur'Rahman's brother Mark was prone to explosive fits of rage and physically abused both his wife and children. *Id.* 819, 821. Mark was also arrested on allegations that he sexually abused his children. Days later, he committed suicide. *Id.* 627. For all his own problems, however, Mark always maintained that Abdur'Rahman suffered more severe abuse than he did. *Id.* 630.

Trial Counsel's Failure to Present Family History Evidence. The jury heard no evidence of Abdur'Rahman's family history during the sentencing phase of the trial, though much of it was readily available. Abdur'Rahman's half-sister Nancy Lancaster would have been willing to testify on his behalf. *Id.* 832. Other information was available in Abdur'Rahman's records. Pet. App. 209a-210a. Instead, as one of his trial attorneys, Sumter Camp, admitted, the defense team developed absolutely no theory of the defense for the mitigation phase, beyond a general plea for mercy. *Habeas* Tr. 725. Trial counsel consequently made no real effort to investigate Abdur'Rahman's background or social history. *Id.* 741. Nor was the lack of investigation or presentation of this evidence part of some larger tactical plan. Rather, Camp conceded that counsel simply made no effort to come up with a sentencing case designed to save Abdur'Rahman's life, *id.* 762. They turned a blind eye to "evidence [that] adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." *Rompilla v. Beard*, 545 U.S. 374, 393 (2005).

Defense counsel thereby "left the jury knowing hardly anything about" Abdur'Rahman "other than the facts of his crimes," having "heard almost nothing that would humanize" him. *Porter,* 130 S. Ct. at 449, 454 (2009); *Habeas* Tr. 734. As Camp himself put it, the defense team's failures to present mitigating evidence meant counsel "didn't give the jury any reason not to impose death." *Habeas* Tr. 741.

B. Abdur'Rahman Suffered Lifelong Mental Illness Caused By Childhood Trauma.

The abuse Abdur'Rahman endured caused lifelong mental illness that would have been critical for the jury to consider. Dr. Sadoff, whom the State's own psychologist described as one of the top ten forensic psychiatrists in the United States, *Habeas* Tr. 143-44, vividly described the root causes and manifestations of Abdur'Rahman's mental illness. As Dr. Sadoff concluded, childhood abuse caused Abdur'Rahman to suffer from Post Traumatic Stress Disorder (PTSD) throughout his life. *Id.* 455, 458. Likewise, Abdur'Rahman developed Borderline Personality Disorder as a result of his terrible family situation. *Id.* 456. As with his PTSD, Borderline Personality Disorder became a lifelong condition for Abdur'Rahman. *Id.* 458. Expert psychologist Dr. Diana McCoy confirmed Dr. Sadoff's diagnosis of both PTSD and Borderline Personality Disorder. *Id.* 655-56.

The Diagnoses of PTSD and Borderline Personality Disorder Closely Fit Abdur'Rahman's Personality. The causative factors associated with the development of Borderline Personality Disorder precisely fit Abdur'Rahman's life history. The disorder may arise as a method of coping with childhood stress. *Id.* 460. In such cases, Borderline Personality Disorder has a deep-seated cause in an individual's fear of abandonment, and persons with this disorder commonly feel an emptiness inside them. *Id.* Abdur'Rahman lived just such a life of childhood stress, fear, and emptiness, which in Dr. Sadoff's opinion,

caused his Borderline Personality Disorder. *Id.* 475, 478. As a school official concluded when Abdur'Rahman was 15: "[Abdur'Rahman] is a frightened child who attempts to cover his fears and to hide his low opinion of himself." *Id.* 598; Sayre Jr. High School "Request for Psychological Service," included in Exhibit 6 to McCoy Social History ("McCoy App."). Abdur'Rahman also deeply feared abandonment, and sought to avoid this abandonment and pain both in solitude and by taking up religious causes. *Habeas* Tr. 476-77.

Patients with Borderline Personality Disorder are prone to making self-harming gestures, not out of a serious desire to harm themselves or commit suicide but to ensure they are given attention and not abandoned. *Id.* 480-81. Abdur'Rahman fits this criterion as well. He had many documented incidents of self-harming behavior, including his repeated head-slamming after an arrest in 1969, *id.* 553, and immediately following his arrest for the murder that is the subject of this appeal, as documents withheld until after his conviction have shown. Petition for Certiorari 22.

Dr. Sadoff also noted that Borderline Personality Disorder is characterized by impulsiveness: anger quickly boils up in people with this condition because of their instability and lack of trust. *Habeas* Tr. 462, 481-82. Abdur'Rahman was impulsive and violent when he was fearful or angry. *Id.* 482. Small and effeminate, he was often in danger and felt the need "to fight his way out." *Id.*

Abdur'Rahman's life history also matches the profile of PTSD. Abdur'Rahman suffered night-

mares because of his childhood trauma. *Id.* 484. He was unable to form lasting relationships. *Id.*

Mental illness has been a lifelong condition for Abdur'Rahman. Woven tightly into his personality, his mental illness and record of self-harming behavior was noted in his school reports, military personnel file, court-ordered evaluations, prison records, and trial testimony for the 1972 homicide involving Michael Stein. Pet. App. 211a-212a.

Trial Counsel's Failure to Present Mental Health and Social History. Defense counsel failed to present any evidence of Abdur'Rahman's extensive history of mental illness. The evidence was abundant, *id.* 211a-213a, but went uncollected for the same reason trial counsel presented no social history evidence: Camp and lead counsel Lionel Barrett had no strategy for the mitigation phase other than a naked plea for mercy from Abdur'Rahman and his wife. *Habeas* Tr. 725.[2] Nor was counsel's decision part of some master strategy; rather it flowed inevitably from counsel having conducted no investigation into Ab-

[2] In this regard, trial counsel's failure to investigate amplifies the *Brady* violation by state authorities that is also the subject of the Petition for a Writ of Certiorari in this case. Had counsel conducted a proper examination of Abdur'Rahman's mental health history, they would have had evidence of his history of self-harm, including butting his head against walls, which should have prompted them to seek out evidence of similar behavior in his arrest for the crime at issue in this appeal. The withheld evidence would have confirmed the mental health history and provided additional evidence that Abdur'Rahman suffered from serious mental illness at the time.

dur'Rahman's mental health or social history. *Id.* 764.

C. Sexual Abuse and Mental Illness Factored Into Abdur'Rahman's Prior Homicide.

Abdur'Rahman's first experience as a victim of sexual assault while incarcerated came when he was just sixteen years old. *Id.* 640. After being groped in the shower and propositioned by fellow detainees in a reformatory in Annandale, New Jersey, Abdur'Rahman panicked. Demonstrating his extreme emotional reaction to this behavior, Abdur'Rahman made a self-harming gesture – an attempt at suicide by hanging – and was promptly placed on suicide watch and transferred to a state mental hospital. *Id.* The sexual abuse worsened at the mental hospital. *Id.*

When Abdur'Rahman arrived in prison for another offense for which he was convicted in late 1970, he immediately became the subject of other inmates' predatory sexual advances. *Id.* 652. Abdur'Rahman was one of the younger, smaller inmates – the type typically targeted for such behavior. Bishop Dep. 21:4-15, Jan. 22, 1998.

Michael Stein, the leader of a loosely-affiliated collection of inmates known as the "DC Group," requested that Abdur'Rahman perform oral sex on him. Abdur'Rahman refused. Handwritten statement of Abdur'Rahman dated 4/2/72, included in McCoy App. Ex. 12. ("Handwritten 4/2/72 Stmt."). During this time, Abdur'Rahman became fearful and

began carrying a knife for protection. *Habeas* Tr. 652. He also became very upset that inmates spread rumors that he was homosexual. Stein was a prime mover behind these rumors, and Abdur'Rahman confronted him on at least two occasions about these rumors. Delagrange Dep. 18:18-22, Jan. 28, 1998.

Approximately one month prior to the homicide for which Abdur'Rahman was convicted, two inmates assaulted him in retaliation for his refusal to engage in certain sexual acts with another inmate. During the following weeks, Michael Stein continued spreading false rumors that Abdur'Rahman had performed sex on him. Handwritten 4/2/72 Stmt. One night, Abdur'Rahman again confronted Stein about the ongoing rumors that Abdur'Rahman was homosexual. The discussion became heated, with Stein pushing Abdur'Rahman and laughing at him. Delagrange Dep. 18:24-25, 19:14-15. Abdur'Rahman "lost his temper . . . got very angry," and impulsively stabbed Stein. *Id.* 18:25-19:2. A psychiatrist testified at Abdur'Rahman's subsequent trial that the incident was caused by mental illness: "[T]his young man was never able or capable of withstanding any form of stress, and he attacked. . . . [H]is mind has a defect in it." Masri Test. 48:22-49:5, Sept. 11, 1972.

The State produced evidence at sentencing in the Daniels case (the subject of the current proceeding) that Abdur'Rahman had been convicted of murdering Stein. Pet. App. 156a. As a consequence, at sentencing, trial counsel did not face the issue of whether to present evidence about Abdur'Rahman's background in a vacuum, as the jury was already aware of the prison homicide. Rather, counsel faced

a choice between offering *some* explanation for what the jury had already heard or presenting nothing. During the *habeas* hearing, trial counsel Camp was asked on cross-examination whether, knowing that it might open the door to discussion of Abdur'Rahman's previous misconduct, Camp would still have presented evidence regarding Abdur'Rahman's social history and mental illness. With the benefit of hindsight, Camp acknowledged, "If by comparison all the jury is going to hear [is that] the man has been previously convicted of murder, yes sir. I would want to put something in there." *Habeas* Tr. 755. As Camp himself recognized, the impact of the prior murder conviction was substantial and should have been part of any rational defense mitigation case.

II. The Sixth Circuit's Categorical Exclusion of Double-Edged Evidence in Determining Prejudice is Irreconcilable With This Court's Precedent.

The Sixth Circuit reversed Judge Campbell's order granting Abdur'Rahman's petition for a writ of *habeas corpus* relief and held that "because the mitigating evidence that could have been introduced also contained harmful information, Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death." 226 F.3d at 709. The Sixth Circuit acknowledged that "it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling," but stated that "the same evidence likewise

has aspects that would be compelling evidence of aggravating circumstances." *Id*. at 708-09. The court did not engage in any weighing of the mitigating versus so-called aggravating evidence. Rather, it rested its decision solely on the fact that the evidence "contained a description of Petitioner's motive for killing a fellow prison inmate and a history of violent character traits." *Id.* at 709. In so doing, the Sixth Circuit took an approach that is irreconcilable with this Court's precedents, in which it has engaged in such weighing, and in particular cases, held that failure to introduce double-edged evidence – such as mental illness diagnoses or context for a prior conviction – has constituted deficient performance that prejudiced the defendant.

There is no dispute in this case that counsel's performance was inadequate. The only question is whether that deficient performance resulted in prejudice, which requires a defendant to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington,* 466 U.S. 668, 694 (1984). In assessing prejudice, the court must "*reweigh* the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534 (emphasis added). In states such as Tennessee, where a vote by *one juror* for life will preclude imposition of the death penalty, the question is whether "there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 537.

On multiple occasions, this Court has found that the defendant established prejudice where the evidence that counsel failed to introduce had some double-edged or potentially negative aspects. For example, in *Porter,* 130 S. Ct. 447, penalty-phase counsel failed to discover and introduce evidence that "described [Mr. Porter's] abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity." *Id.* at 449. The trial judge who conducted the state post-conviction proceeding held that Porter had not been prejudiced by the failure to introduce any of the new evidence, and concluded that the evidence regarding Mr. Porter's military service – which included multiple periods of being Absent Without Leave, or "AWOL," including a criminal conviction for the same – "would have reduced the impact of Porter's military service to inconsequential proportions." *Id.* at 451 (internal quotation marks omitted). The Court rejected that conclusion, holding that it was unreasonable for the lower court to conclude that the evidence of Porter going AWOL on multiple occasions would have reduced the evidence of military service to "inconsequential proportions," and that the evidence was consistent with the defendant's "theory of mitigation." *Id.* at 455.

The Court's opinion in *Porter* is replete with language illustrating the balancing that courts must do when assessing the impact of undiscovered evidence, with words such as "on the other side of the ledger," "tip the balance," "mitigating side of the scale," "reduc[ing] the ballast on the aggravating side of the

scale," and "str[iking] a different balance." *Id.* at 454. The categorical approach taken by the Sixth Circuit in Abdur'Rahman's case is inconsistent with this standard.

In *Williams,* 529 U.S. 362, the Court determined that the defendant, Williams, had been denied effective representation by counsel and that counsel's performance had prejudiced the defendant where counsel failed to introduce evidence in mitigation relating to the defendant's abuse and neglect in childhood, mental impairments and a head injury, and expert testimony that Williams would not pose a danger to society if kept in a structured environment. *Id.* at 370-71. The Court pointedly noted that "[o]f course, not all of the additional evidence was favorable to Williams," and that the evidence would have revealed repeated other criminal activity. *Id.* at 396. Yet, the Court concluded that there was a "comparatively voluminous amount of evidence that did speak in Williams' favor," *id.* at 396, and the failure to discover that evidence constituted deficient and prejudicial performance. In other words, this Court engaged in precisely the weighing of favorable versus unfavorable evidence that the Sixth Circuit refused to do.

These cases show that it is not uncommon for mitigating evidence to have double-edged aspects, but that the mere existence of such aspects does not automatically end the inquiry. Thus, the question is not whether the evidence had some aspect that could have been harmful in some context. Rather, the prejudice assessment should be made based on the "totality of the omitted evidence," *id.* at 397, to de-

termine if there is "a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence," *id.* at 399 (internal quotation marks omitted).

Consistent with this Court's decisions, six Circuits have taken an approach that weighs the new mitigating evidence against the potential aggravating evidence, as opposed to applying a categorical rule like the Sixth Circuit has done. *See Correll v. Ryan,* 539 F.3d 938, 955 (9th Cir. 2008) (finding prejudice but noting that the omitted evidence "could be either dehumanizing or mitigating, depending on the context and history given for each cited fact"); *Outten v. Kearney*, 464 F.3d 401, 422 (3d Cir. 2006) (state court erred "in reaching the determination that [the defendant] could not establish prejudice because [the] records contained some harmful information"); *Emerson v. Gramley,* 91 F.3d 898, 907 (7th Cir. 1996) (finding prejudice based on failure to introduce mental capacity and life history evidence, despite the fact that its mitigating value was "outweighed or at least offset by the . . . additional evidence of criminal and other antisocial behavior"); *Smith v. Mullin,* 379 F.3d 919, 943 & n.11 (10th Cir. 2004) (finding prejudice and rejecting district court's characterization of the supposed "double-edged" nature of the mental health mitigating evidence because the district court "misunderst[ood] . . . the purpose for which such mitigation evidence would have been presented," *i.e.,* to provide an "explanation" for how the defendant's brain damage resulted

in outbursts of violence); *Kenley v. Armontrout,* 937 F.2d 1298, 1308 (8th Cir. 1991) ("We do not agree as a matter of law that there was no prejudice because the other evidence would have significantly worsened the perception of Kenley's character. Rather, we believe the testimony would have put the aggravating evidence in context along with the mitigating evidence."); *Harris v. Dugger,* 874 F.2d 756, 764 (11th Cir. 1989) (counsel's failure to adduce character evidence was prejudicial even though the evidence "was fraught with danger" and it could have "permitted the state to add some prior unlawful acts to the proof already in the case").

III. Petitioner Was Prejudiced By Counsel's Failure to Discover and Introduce Compelling Mitigating Evidence.

The mitigating evidence that counsel failed to introduce in this case – relating to his extremely abusive childhood, his mental illness, and context for his prior murder conviction – is precisely the type of compelling evidence that this Court has found to satisfy the prejudice standard. Abdur'Rahman's horrific life history is at least as bad as that recounted in this Court's other decisions and was described by an expert of 26 years' experience as "singularly the worst case of abuse I have come across" and by another experienced expert as one of the "most compelling social histories" and "saddest stories." These tragic facts, coupled with counsel's failure to develop *any* mitigating evidence, compels the conclusion that "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale,

there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins,* 539 U.S. at 537.

Abdur'Rahman's horrific childhood, which involved parents with alcoholism and mental illness, extreme physical beatings to Abdur'Rahman and his siblings and mother, and cruel physical confinement, is just the type of "troubled history" that this Court has determined is highly "relevant to assessing a defendant's moral culpability," *id. at* 535. As this Court noted in *Penry v. Lynaugh*, there is a "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse." 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

Competent counsel could have adduced mitigating expert evidence giving some context to the nexus between Abdur'Rahman's devastating childhood abuse and his adult violent behavior. Scientific literature reveals childhood abuse is correlated with psychological consequences, including violent and antisocial behaviors, in adults. *See, e.g.,* R. Shore, *Rethinking the Brain: New Insights into Early Development* 40-41 (Families and Work Institute 1997) (Children experiencing parental rejection or neglect are more likely to exhibit antisocial traits and violent behavior); Diana English et al., *Childhood Victimization and Delinquency, Adult Criminality, and Violent Criminal Behavior, A Replication and Extension, Final Report* 33-34 (2004) (Abused, neglected children are 2.7 times more likely to be arrested for

violent criminal behavior as adults).

Expert evidence relating to the effects of extreme childhood abuse on adult life would have portrayed Abdur'Rahman in a much more sympathetic light and provided a mitigating context for his offenses. Such evidence is likely to have a significant impact on juror sentencing decisions. For example, 43 percent of former capital jurors in one study indicated that they were less likely to vote for a death sentence when presented with evidence that the defendant suffered serious childhood abuse. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1576 tbl. 10 (1998).

The importance of developing this type of mitigating evidence is underscored by several decisions from this Court. *See Porter,* 130 S. Ct. at 449, 455 (counsel failed to introduce evidence of the defendant's "abusive" childhood, and holding that it was unreasonable for the state court to "discount to irrelevance" this evidence)*; Wiggins,* 539 U.S. at 535, 537 (describing "severe privation and abuse in the first six years of [the defendant's] life," and concluding that "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance"); *Williams,* 529 U.S. at 398 ("the graphic description of Williams' childhood, filled with abuse and privation . . . might well have influenced the jury's appraisal of his moral culpability").

Moreover, counsel's failure to offer any evidence whatsoever to explain or place into context Ab-

dur'Rahman's 1972 conviction for the murder of a fellow inmate was highly prejudicial. As described in more detail above, the homicide occurred in response to sexual abuse Abdur'Rahman suffered in prison. This evidence would very likely have moved one or more jurors to have feelings of compassion and sympathy for Abdur'Rahman – and certainly would have been preferable to providing absolutely no context for the homicide. As this Court indicated in *Rompilla*, the failure to provide mitigating context to an aggravating prior conviction is a critical failure, which is likely to result in prejudice. In *Rompilla*, the Court stated – in words equally applicable to Abdur'Rahman – that "[w]e may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest." 545 U.S. at 386 n.5. Moreover, evidence that Abdur'Rahman's behavior during the incident was impulsive and fully consistent with his underlying mental illness is particularly relevant in light of this Court's observation in *Williams* that counsel's performance was deficient and prejudicial where counsel failed to adduce evidence that the defendant's "violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation," 529 U.S. at 398. Rather than considering the mitigating evidence relating to the prior conviction in the prejudice inquiry, as is called for in *Rompilla*, the Sixth Circuit simply stated that the new evidence described Abdur'Rahman's "motive for killing a fellow prison inmate," which it character-

ized as "evidence of aggravating circumstances" and, on that basis, held that Abdur'Rahman had not suffered prejudice.

Counsel's failure to introduce evidence of Abdur'Rahman's multiple mental illness diagnoses throughout his life was also highly prejudicial. There is overwhelming evidence that Abdur'Rahman suffered from serious mental illness, including Borderline Personality Disorder, PTSD, dissociation, and delusional thinking. Jurors are less likely to impose a death sentence if evidence indicates that the defendant suffered from mental illness. *See* Michelle Barnett et al., *Differential Impact of Mitigating Evidence in Capital Case Sentencing*, 7 Journal of Forensic Psychology Practice 39, 42 (2007). Jurors are also much less likely to recommend death where the evidence indicates that the defendant has multiple mental illness diagnoses. One study found that jurors "were more lenient in sentencing and less likely to vote for death when evidence suggested that the defendant suffered from an increased number of psychosocial and psychological problems." Veronica S. Tetterton & Stanley L. Brodsky, *More is Sometimes Better: Increased Mitigating Evidence and Sentencing Leniency*, 7 Journal of Forensic Psychology Practice 79, 83-84 (2007). Specific diagnoses such as psychotic disorders and delusions have been shown to contribute significantly to jurors' recommendations of life over death. John Matthew Fabian, *Mitigating Murder at Capital Sentencing: An Empirical and Practical Psycho-Legal Strategy*, 9 Journal of Forensic Psychology Practice 1, 31 (2009).

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Counsel's failure to introduce any mitigating evidence "left the jury knowing hardly anything about him other than the facts of his crimes," and the jury "heard almost nothing that would humanize" Abdur'Rahman. *Porter*, 130 S. Ct. at 449, 454. Had counsel utilized the significant amount of compelling mitigation evidence that was available, there is at least a reasonable probability that at least one juror would have struck a different balance. *Wiggins,* 539 U.S. at 537.

IV. The Sixth Circuit Improperly Characterized Evidence of Mental Illness as an Aggravating Factor.

The Sixth Circuit stated that the new evidence described Abdur'Rahman's "history of violent character traits" and described his motive for the prison homicide, which it characterized collectively as evidence of "aggravating circumstances,"[3] and on that basis refused to consider the potential mitigating aspects of this evidence. 226 F.3d at 709.

As noted above, expert evidence indicates that Abdur'Rahman's traits of anger, poor impulse control, and violence are associated with his mental illness. It violates the Eighth Amendment and the

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[3] Abdur'Rahman's character traits and motive for the prison homicide are not relevant to any of the "statutory" aggravating factors under Tennessee's death penalty statute. *See* Tenn. Code Ann. § 39-2-203 (1987). Moreover, the death penalty cannot be imposed unless the statutory aggravating factors "are not outweighed" by any mitigating circumstances. Tenn. Code Ann. § 39-2-203(g) (1987).

Due Process Clause of the Fourteenth Amendment to criminalize mental illness or enhance punishment due to a person's mental illness. *See Robinson v. California,* 370 U.S. 660, 666 (1962); *Zant v. Stephens,* 462 U.S. 862, 885 (1983). Inasmuch as the Sixth Circuit has characterized Abdur'Rahman's mental illness and traits stemming from those diagnoses as "aggravating circumstances," and on that basis refused to consider the potential mitigating aspects of this evidence, the Sixth Circuit unconstitutionally stigmatizes Abdur'Rahman's mental illness.

Furthermore, the Sixth Circuit's approach is inconsistent with this Court's precedent finding that failure to present evidence of mental illness can contribute to a finding of prejudice. *See Porter,* 130 S. Ct. at 453; *cf., Brewer v. Quarterman,* 550 U.S. 286, 292-93 (2007) (defendants must be allowed to present evidence of mental illness in mitigation of punishment in such a way that the evidence has a meaningful effect, even where the "mitigating evidence served as a 'two-edged sword' because it tended to confirm the State's evidence of future dangerousness as well as lessen his culpability for the crime").

CONCLUSION

For the foregoing reasons, and for those stated by Petitioner, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

ANAND S. RAMAN
Counsel of Record
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
Anand.Raman@skadden.com

Attorney for Amici Curiae

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