(CAPITAL CASE)

No. 17-512

In the
Supreme Court of the United States

ROBERT EARL BUTTS, JR.,

PETITIONER,

v.

ERIC SELLERS, WARDEN,
GEORGIA DIAGNOSTIC
AND CLASSIFICATION PRISON,

RESPONDENT.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent's Brief in Opposition ("Respondent's Brief") only underscores the need for this Court to resolve both questions presented for review. It confirms that the lower courts are split over whether to measure counsel's performance against prevailing *national* norms or prevailing *state or local* norms, while proposing a free-floating test for attorney performance that offers lower courts no meaningful guidance. Likewise, Respondent insists that the Eleventh Circuit did not really mean what it said when it concluded that it "cannot and will not" consider the reasonableness of so-called "strategic" decisions by trial counsel. Accordingly, the Court should grant the Petition.

ARGUMENT

I. REVIEW IS ESSENTIAL TO RESOLVE THE CONFUSION OVER WHETHER TO MEASURE COUNSEL'S PERFORMANCE AGAINST PREVAILING *NATIONAL*, *STATE*, OR *LOCAL* PROFESSIONAL NORMS.

Respondent argues that when assessing the reasonableness of counsel's performance against prevailing professional norms, as directed by *Strickland v. Washington*, 466 U.S. 668 (1984), courts are free to apply whatever norms they want—be they national, state, or local. Rather than demonstrating that certiorari is unwarranted, this underscores the need for review. If Respondent's approach accurately reflected this Court's precedent, it would offer no guidance to courts in situations where local practices deviate from—and sanction

lesser advocacy than—national norms. This Court should grant certiorari to resolve the split and correct the Eleventh Circuit's error.

A. The Circuits Are Split.

Respondent concedes that circuit and state courts have applied multiple frameworks to identify *Strickland*'s "prevailing professional norms." Respondent admits that some courts have focused on national norms, while others have looked to state or local norms, while others have combined them. Respondent defends these varying standards and approaches by claiming that *all* are acceptable, as this Court has imposed "*no* particular set of rules," Resp. Br., at 3 (emphasis in original) for defining "prevailing professional norms." Respondent further argues that it is helpful for courts to be able to "look[] to a variety of standards – national, state, and local – as potential evidence of prevailing professional norms," *id.* at 19. Why relevant standards of practice are only "*potential* evidence" of prevailing professional norms is unexplained. As is how courts should balance conflicting or inconsistent national and local norms.

Respondent's arguments highlight why non-uniformity requires this Court's attention. *See* Sup. Ct. R. 10(a). Such a free-floating framework offers no meaningful guidance for lower courts and, if affirmed, risks increasingly divergent approaches within the circuits.

B. The Eleventh Circuit and the State Court Unreasonably Applied *Strickland*.

Contrary to Respondent's argument, *Strickland* contemplates that courts assessing counsel's performance will look to *national* norms, explaining that "[p]revailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable . . . ." 466 U.S. at 688 (citation omitted).

The Eleventh Circuit, however, has indicated that courts must measure counsel's conduct against *local* norms. *See Anderson v. Fla. Dept. of Corrections,* 752 F.3d 881, 903 (11th Cir. 2014). In this case, the Eleventh Circuit and the state court went even further, holding that trial counsel performed reasonably by following practices within a single judicial circuit within the state, which deviated from national norms to Butts's detriment. This is not and cannot be the law. Allowing local practices to supersede prevailing national norms would cause the federal constitutional guarantee of effective assistance of counsel to expand or contract from state to state or city to city. The Tenth Circuit recognized this danger in *Heard v. Addison*, explaining that "a defendant's Sixth Amendment right to counsel will never turn wholly on a particular office's practices, which may themselves . . . be deficient." 728 F.3d 1170, 1181 (10th Cir. 2013).

The Court should grant review to correct the Eleventh Circuit's error because it deepens the circuit split.

C. This Case Implicates the Circuit Split.

The outcome here turns on the answer to the question presented, as trial counsel unreasonably deviated from national norms due to purported local practices in three ways.[1]

1. Failure to Hire a Mitigation Expert.

First, trial counsel's failure to hire a mitigation expert was unreasonable given the prevailing professional norms reflected in the 1989 ABA Guidelines for the Appointment and Representation of Capital Defendants ("1989 ABA Guidelines") and Southern Center for Human Rights Defense Manual. Respondent wrongly suggests that Petitioner seeks to impose a *per se* rule that counsel must always hire a mitigation expert. Not so. Petitioner seeks only the application, under the facts of this case, of the this Court's precedent that counsel must conduct a thorough and sifting investigation into the defendant's background and social history to determine the existence of mitigating evidence that can be presented in support of a sentence of less than death. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000).

While this Court places no limits upon what evidence it considers mitigating, *Hitchcock v. Dugger*, 481 U.S. 393 (1987), its precedents establish that evidence of a troubled and deprived upbringing is undeniably mitigating, *Williams*, 529 U.S. at 396. As the investigation conducted in the state habeas proceedings established, Petitioner's background

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[1] Respondent erroneously suggests that Petitioner "primarily contends" that trial counsel was deficient only for failing to hire a mitigation expert. Resp. Br., at 26 & n.9.

was rife with such evidence. *Under these circumstances*, counsel performed deficiently in light of the prevailing professional norms by failing even to consult with a mitigation expert—an obligation which, in this case, should have been obvious.[2] As this Court has made clear, Petitioner "had a right – indeed a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel . . . failed to offer." *Williams*, 529 U.S. at 393. But counsel's failure to hire a mitigation expert to develop the many available strands of mitigation evidence and to synthesize them into a coherent narrative was unreasonable because counsel effectively folded his mitigation hand before trial and, when the jury returned guilty verdicts on six counts in barely over an hour, had left himself with no reasonable option for the penalty phase. It is this context-driven analysis—not the application of a *per se* rule—that demonstrates the deficiency of trial counsel's performance under the relevant national norms.[3]

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[2] The evidence of guilt was overwhelming. Trial counsel knew that the State would call witnesses who would testify that Butts confessed to the murder, that the State would call another witness who would testify that Butts possessed the murder weapon, and that Butts intended to testify that he was present at the murder scene.

[3] Because Petitioner makes a context-specific argument, not a *per se* argument, Respondent misses the mark by relying on ABA Guidelines indicating that a mitigation expert is not *always* necessary. *See* Resp. Br., at 26.

2. Failure to Discover All Reasonably Available Mitigation Evidence.

Second, trial counsel performed unreasonably under national norms by failing to discover reasonably available mitigating evidence. *Accord* 1989 ABA Guidelines, Guideline 11.4.1(C). Trial counsel's omissions were many and grave. Trial counsel failed to contact and interview Butts's older sister, who fled their dysfunctional home; Butts's closest uncle; Butts's mother's live-in boyfriend; and Butts's teachers. *See* Pet., at 26–27. These witnesses could have testified about the impact on Butts of his mother's substance abuse and repeated absences from the home, the absence of his severely mentally-ill father, his responsibility for caring for a brother with a severe behavioral disorder, his older sister fleeing the dysfunctional home around age 14 to live with a grandparent, and one of his mother's other boyfriend's forcing Butts to threaten another individual at gunpoint. *See id.*

Trial counsel's failures clearly fell below the prevailing national norms, pursuant to which counsel would have interviewed these key witnesses.

3. Failure to Introduce *Any* Humanizing Mitigation Evidence at Sentencing.

Third, trial counsel performed deficiently by failing to introduce any humanizing mitigation evidence during the penalty phase of Petitioner's trial. Under professional norms prevailing nationally, trial counsel should have introduced humanizing mitigation evidence even if counsel intended to argue residual doubt. *See Sallahdin v. Gibson*, 275 F.3d 1211, 1240 & n.10 (10th Cir. 2002);

1989 ABA Guidelines, Guideline 11.8.6(A). Moreover, as explained below, counsel's "strategic" decision to rely solely on residual doubt under the circumstances of this case was wholly unreasonable and did not support abandoning a strategy of presenting mitigating evidence about Butts's background and upbringing. *See infra* Part II. Trial counsel's failure to introduce *any* humanizing mitigation evidence was wholly inconsistent with national norms.

In sum, this Court should grant review to resolve the issue of whether prevailing *national* norms control.

II. REVIEW IS NEEDED TO RESOLVE THE SPLIT CREATED BY THE ELEVENTH CIRCUIT'S HOLDING THAT "STRATEGIC" DECISIONS ARE IMMUNE FROM CHALLENGE.

A. The Court of Appeals Below Created a Circuit Split.

Respondent claims that the Eleventh Circuit did not mean what it said when it concluded that it "cannot and will not second guess trial counsel's strategic decision to focus on residual doubt instead of mitigation evidence," *Butts v. GDCP Warden*, 850 F.3d 1201, 1208 (11th Cir. 2017). But the Eleventh Circuit's language is plain and unambiguous. Its novel standard—under which trial counsel's strategic decisions following adequate investigations would be *wholly immune* from review—is flatly inconsistent with *Strickland* and conflicts with numerous decisions from sister circuits. *See* Pet., at 29–31. Certiorari is warranted to resolve the split

the Eleventh Circuit has created, as this issue will recur regularly in cases involving ineffective-assistance-of-counsel claims. *See* Sup. Ct. R. 10(a).

Moreover, although Respondent labors to obfuscate the Eleventh Circuit's error by focusing on the district court opinion, the key section of the opinion regarding the "strategic" residual-doubt-only decision made no mention of the district court opinion at all. *See generally Butts*, 850 F.3d 1201.

B. The Additional Context Respondent Cites Does Not Cure the Eleventh Circuit's Error.

Respondent attempts to avoid the issue posed by the Eleventh Circuit's improper standard by claiming that it still reached the right result, given certain evidence mentioned in the district court and Eleventh Circuit opinions. Even considering those record citations, the Eleventh Circuit's holding still contravenes *Strickland*. Even if the Eleventh Circuit was *really* concluding that the decision was reasonable merely because residual-doubt-only is often effective, *see* Resp. Br., at 30, the fact that a "residual doubt" strategy is *sometimes* effective does not establish that it was objectively reasonable *in this case*. Under *Strickland*, courts must make a context-specific determination of the reasonableness of a challenged strategy, *see Wiggins v. Smith*, 539 U.S. 510 (2003), but the Eleventh Circuit failed to conduct that analysis here.[4] Second, even if counsel

[4] The cases where residual doubt was found to be a reasonable strategy are distinguishable. For example, unlike this case, *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000), was a murder-for-hire case where it was undisputed that the defendant was not present at the murder scene.

had conducted a thorough pre-trial investigation prior to making deciding the "strategic" decision to abandon mitigation as a defense, that decision still must be objectively reasonable. *See* Resp. Br., at 31 n.10.

Butts's Petition explains why a residual-doubt-only strategy was objectively unreasonable here, including because the jury heard overwhelming evidence of guilt at trial—including Butts's own testimony that he robbed the victim and two other witnesses' testimony that Butts confessed to being the triggerman. *See* Pet., at 32. These considerations demonstrate that no fair-minded jurist could conclude that the "strategic" choice was reasonable under the circumstances. But neither the district court nor the Court of Appeals analyzed these factors.

To be clear, Butts does not "fault trial counsel for their decision to pursue a residual doubt strategy at the sentencing stage," *contra Butts*, 850 F.3d at 1207, but rather for pursuing residual doubt *to the exclusion of mitigation*. Any competent trial counsel would have presented mitigating evidence about their client in an effort to humanize their client for the jury and give the jury a reason to spare the client's life. As reflected in the 1989 ABA Guidelines, prevailing professional norms required counsel to present at sentencing "*all* reasonably available evidence in mitigation unless there are *strong* strategic reasons to forego some portion of such evidence." 1989 ABA Guidelines, Guideline 11.8.6(A) (emphases added). Here, there were no strong strategic reasons to forego introducing *any* of the available mitigation evidence, let alone all of

that evidence. *See, e.g.*, *Williams v. Roper*, 695 F.3d 825, 850 (8th Cir. 2012) (rejecting "assumption that the mitigation evidence would 'defy' or be 'inconsistent with' the [residual doubt] strategy"); *Sallahdin,* 275 F.3d at 1240 n.10 (counsel introduced mitigation evidence consistent with the concurrent strategy of residual doubt).

Respondent's other arguments supporting a residual-doubt-only strategy fare no better. First, trial counsel Westin's statement that he "did not think Butts 'upbringing was extremely different from anybody else's, many other young men,'" Resp. Br., at 30, is manifestly unreasonable given the evidence that Butts had a schizophrenic father, a drug-addicted mother who was absent for long stretches and who brought violent drug dealers into the home, and a mentally-ill younger brother. Pet. App. 356–57. Second, even if one credited Westin's self-serving statement that he "felt that jurors in the Ocmulgee Judicial Circuit were not as sympathetic" to evidence of exceedingly difficult upbringings as they had been previously, *see* Resp. Br., at 30, such humanizing evidence undeniably presented the best chance for Butts's sentencing defense given the overwhelming evidence of guilt and speedy jury verdict.

Furthermore, Westin's testimony that "[m]ost of [the evidence the defense team uncovered in their investigation] really wasn't positive," Resp. Br., at 28, reflects a fundamental misunderstanding of the purpose of mitigating evidence. Even if one assumes that Butts's father's schizophrenia and his mother's drug addiction were not "positive" facts, they are mitigating because they help the jury to understand

that Butts did not have a normal development through no fault of his own. *See Penry v. Lynaugh,* 492 U.S. 302, 319 (1989). As this Court has held, even when "not all of the additional evidence [is] favorable," its double-edged nature would not excuse deficient performance. *Williams*, 529 U.S. at 396; *see also Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009). Such evidence "might not have made [a petitioner] any more likable to the jury, but . . . might well have helped the jury understand [him] and his horrendous acts." *Sears v. Upton*, 561 U.S. 945, 951 (2010).

Finally, Respondent recites the district court's list of other reasons Westin offered for choosing residual doubt only: "They were unable to locate family members who would testify for Butts, there was no physical evidence linking Butts to the murder weapon, Wilson was older than Butts and was a gang leader, and Wilson had already been found guilty of murdering Parks and was on death row." Resp. Br., at 29. These arguments are similarly unpersuasive. First, to the extent that the state habeas court found that Westin was unable to find family members to testify for Butts, that fact-finding was unreasonable given the numerous family members who testified that they were never contacted by the defense prior to the trial but would have testified if asked. *See* Pet., at 5–6. Second, while no physical evidence linked Petitioner to the murder weapon, one witness testified that he gave the murder weapon to Wilson after the murder "to hold temporarily." Resp. Br., at 5. Finally, Wilson's relative culpability was rendered irrelevant because

Petitioner's jury was unaware that he had been convicted and sentenced to death.

Accordingly, trial counsel's residual-doubt-only "strategy" was objectively unreasonable.

III. TRIAL COUNSEL'S DEFICIENCIES PREJUDICED BUTTS.

The Petition explains that the state court unreasonably concluded that counsel's deficient performance did not prejudice Butts. Pet., at 34-37. Respondent's attempts to shore up the state court's unreasonable prejudice analysis fall short. In a case where the defendant had committed no prior violent felonies and where there was *zero* mitigation evidence presented at sentencing, a proper reweighing of the newly-introduced mitigating evidence against the original evidence leads to one conclusion: No fair-minded jurist could deny that a reasonable probability exists that at least one juror would have voted for life had the jury heard the mitigation evidence presented during the state habeas proceedings.

First, Respondent relies on the district court's finding that "the [state] court determined that had the jury heard *all* of the new evidence, there is no reasonable probability they would have given Butts a different sentence," Resp. Br., at 35 (emphasis added). However, courts must *assess* all new evidence "taken as a whole," *see Rompilla*, 545 U.S. at 393, and may not conduct a "truncated prejudice inquiry." *Sears*, 561 U.S. at 955. Contravening this precedent, the totality of the state habeas court's analysis of the newly-offered mitigation evidence was merely this: "Even if this Court were to

determine that the failure to present [the] evidence of Petitioner's background and home life presented in the instant proceeding constituted deficient performance on the part of either trial or appellate counsel, the Court finds no prejudice: there is not a reasonable probability that the outcome of the trial or the appeal would have been different if such evidence had been presented at either stage." Pet. App. 313. This is the epitome of a truncated prejudice inquiry.

Second, although the district court found that "the state habeas court did not fail to analyze the effect of the new mitigating evidence and reweigh it against the evidence in aggravation," Resp. Br., at 35, that finding was also erroneous. While the state habeas court listed several aspects of the new mitigation evidence as background, it did not actually reweigh that evidence as part of its prejudice inquiry. *See* Pet. App. 298–313.

Third, the state court engaged in unreasonable fact-finding, for the multiple reasons detailed in Butts's Petition. *See* Pet., at 36–37. Most notably, the state court ignored or unreasonably discounted the impact of compelling evidence of Butts's difficult upbringing. *See id.*

Respondent's Brief therefore fails to undermine Petitioner's showing of prejudice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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