No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

MICHAEL LEDFORD,

Petitioner,

-v-

ERIC SELLERS, Warden
Georgia Diagnostic Prison,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTION PRESENTED FOR REVIEW

THIS IS A CAPITAL CASE

In light of this Court's decision in *Buck v. Davis*, 137 S. Ct. 759 (2017), did Mr. Ledford's trial counsel provide ineffective assistance by affirmatively introducing mental health evidence that he has antisocial personality disorder and was "a psychopath" – a diagnosis that was, as a matter of case law in the state and circuit, *per se* aggravating?

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Petitioner, MICHAEL LEDFORD, respectfully petitions this Court to issue a Writ of Certiorari to review the order of the Supreme Court of Georgia denying discretionary review of a final judgment entered by the Superior Court of Butts County, Georgia.

OPINIONS BELOW

The order of the Supreme Court of Georgia denying Mr. Ledford's application for a certificate of probable cause to appeal the decision of the Superior Court of Butts County ("CPC Application") was entered on August 14, 2017, and is attached as Appendix A to this petition. The order of the Superior Court of Butts County denying Mr. Ledford's petition for a writ of habeas corpus was entered on August 24, 2016, and is attached to this petition as Appendix B.

JURISDICTION

Mr. Ledford invokes the jurisdiction of this Court pursuant to Section 1257(a) of Title 28 of the United States Code. 28 U.S.C. § 1257(a). Mr. Ledford asserts a deprivation of his rights as secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy [...] the Assistance of Counsel for his defense . . . ."

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution, section 1, provides, in relevant part: "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

PROCEEDINGS BELOW

A. Statement of Facts

On July 25, 2006, Mr. Ledford sexually assaulted and killed Jennifer Ewing on the Silver Comet Trail, a bicycle path that follows an abandoned train line through northern Georgia. Following his arrest, the State indicated it would try him in the Superior Court of Paulding County, Georgia, and seek the death penalty. The trial court appointed two attorneys, Thomas West and Jimmy Berry, to represent Mr. Ledford. Given the overwhelming evidence of Mr. Ledford's guilt,

trial counsel focused their efforts on preparing for the penalty phase of the trial. (*See, e.g.*, H.T. 142; 235-36).[1]

In addition to the nature of the crime[2] and Mr. Ledford's prior criminal history, trial counsel's investigation revealed additional damaging information. Records from Highland Rivers, a facility where Mr. Ledford had received mental health treatment, documented his diagnosis with antisocial personality disorder, a condition that was, as a matter of law, aggravating.[3] (See, D.Ex. 14). Trial counsel's investigation also revealed, however, that Mr. Ledford had been subjected throughout his childhood to horrific physical and sexual abuse, abject poverty, and neglect. Trial counsel further learned that a number of Mr. Ledford's relatives were alcoholics, suggesting that his own well-documented history of alcohol addiction had a genetic etiology.

Trial counsel knew that they would be obliged to disclose the Highland Rivers records containing Mr. Ledford's prior diagnosis to the State when and if they filed a notice of intent to rely on mental health evidence. *See*, O.C.G.A. §17-6-4(b)(2). They nonetheless filed such a notice. (ROA 3404). At the subsequent motions hearing, counsel indicated that they anticipated presenting expert testimony as to Mr. Ledford's mental health during the penalty phase of his trial. (4/8/09 PTH at 31-33). In response, the State noted that the defense's intent to present expert

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[1]While this petition will refer to Mr. Berry and Mr. West collectively as "trial counsel," it was Mr. West who had responsibility for assembling the penalty-phase presentation and who consulted with the mitigation investigator. (H.T. 219). Mr. West decided upon the penalty-phase theory, examined most of the penalty-phase defense witnesses, and made the closing argument. Accordingly, it is his testimony in post-conviction that has the most relevance to the analysis of trial counsel's deficient performance.

[2]Mr. Ledford also tried to conceal his role in Mr. Ewing's death. When he returned home from on July 25, 2006, with a wound to his penis, he told his mother and hospital officials that he had been bitten by a prostitute whom he had refused to pay.

[3]See discussion *infra* at 11-13.

mental health testimony obligated them to "provide the State a reasonable opportunity to obtain its own evaluation of the defendant." (*Id*. at 33).

Mr. Ledford's counsel would ultimately retain four mental health experts, two of whom focused upon – and would later testify to – his family history and alcohol abuse.[4] The other two experts would buttress the aggravating diagnosis of antisocial personality disorder and, moreover, would introduce an additional, even more aggravating diagnosis: psychopathy.[5]

Dr. Thomas Sachy, a psychiatrist, concluded that Mr. Ledford suffered from Leukoariosis, a condition characterized by "white matter lesions" on the frontal lobe of his brain. (Tr. 7050). Dr. Sachy also found that Mr. Ledford suffered from mesial temporal sclerosis, particularly located in the amygdala. (Tr. 7040). The implication of this combination of impairments, however, was that Mr. Ledford was unable to control his anger, was prone to violence, lacked empathy, was impaired in judgment, and was impaired in morality – traits mirroring the aggravating aspects of anti-social personality disorder. (Tr. 7044-46). Dr. Sachy further opined that Mr. Ledford was a psychopath and discussed with counsel how they might introduce this evidence. (R. Ex. 19, pg. 17567).

Dr. Robert Shaffer, a neuropsychologist, administered psychological tests confirming Dr. Sachy's finding there was damage to the frontal and temporal lobes of Mr. Ledford's brain. He

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[4] Dr. Morris testified about Mr. Ledford's upbringing, including: his family's poverty; the history of sexual abuse within the family; familial alcohol and substance abuse issues; the "primitive parenting" that Mr. Ledford received; and his physical abuse by his father. He discussed how the combination of these factors shaped Mr. Ledford and created the person before the jury. Dr. William Morton testified exclusively about alcohol abuse and how it impacted Mr. Ledford's life. Further, trial counsel presented additional experts who had treated Mr. Ledford in the past, although they were not retained by the defense and served effectively as witnesses.

[5] While psychopathy is not a recognized diagnosis under the DSM-V (or even the DSM-IV-TR), it is considered an advanced antisocial personality disorder.

also concluded, however, that Mr. Ledford was a "sexual sadist" and a psychopath. (Tr. 7182; 7189).

Under Georgia law at the time of Mr. Ledford's trial, his counsel could have precluded any discussion of his mental health by electing not to present mental health testimony on his behalf. Such a decision would not only have kept the aggravating testimony of their own experts out of the jury's deliberations, but would also have prevented the State from presenting mental health experts and evidence of its own. Trial counsel had disclosed the Highland Rivers records to the State; they accordingly knew that the State was aware of and would pursue Mr. Ledford's antisocial diagnosis. Indeed, trial counsel's own notes acknowledged that Mr. Ledford would be labeled antisocial. (R.Ex. 142). As trial counsel later attested, however, they never considered not presenting mental health evidence during the penalty phase of the trial. (*Id*. at 158). As Mr. West would later testify, he believed that, the law notwithstanding, Mr. Ledford's diagnosis was mitigating because being antisocial was not his fault. (H.T. 157). Mr. West also testified he did not have a strategy for dealing with a diagnosis of antisocial personality disorder and was "not too concerned" with such a diagnosis. (H.T. 157-58.)

Mr. Ledford was tried in September of 2007. On September 25, 2007, Mr. Ledford's jury returned a verdict of guilty of one count of malice murder, two counts of felony murder, three counts of aggravated battery, one count of aggravated sodomy, two counts of kidnaping with bodily injury, and one count of aggravated assault.

At the penalty phase, trial counsel ultimately presented the testimony of Dr. Sachy and Dr. Shaffer along with their two other mental health experts.[6] Trial counsel specifically elicited

[6] Trial counsel further argued that Mr. Ledford had suffered brain damage as the result of a fall from a tree, even though his medical records did not indicate that he had suffered any head

testimony from their experts that "[p]sychopathy is a condition that's used to describe individuals who seem not to have any emotion reaction to other people." (Tr. 7189); see also *ibid* ("Q: You had mentioned a few minutes ago Psychopathy. Now tell the Jury what that means").

In turn, the state called two mental health experts, a psychologist, Dr. Kevin Richards and a psychiatrist, Dr. David Walker. Dr. Richards administered two psychological tests, the Minnesota Multiphasic Personality Inventory (MMPI) and the Psychopathy Checklist-Revised (PCL-R). Based on his testing and clinical examination, he concluded Mr. Ledford was a psychopath and suffered from antisocial personality disorder. Dr. Walker diagnosed Mr. Ledford as being antisocial. (*See e.g.*, Tr. 7284-87).

A sample of Dr. Richards's testimony describing Mr. Ledford as a psychopath highlights how damaging it was:

> Psychopathy . . . . [is] marked primarily by people who are not particularly concerned with society, societal rules, societal norms, the rights and feelings of others. Their behavior is primarily driven in the interest of meeting their own needs or satisfying their own desires . . . . [Y]ou'll find lots of examples of times when they did things because they wanted something or wanted to do something and they were willing to violate a societal norm, a law, or the rights and feelings of another person without any particular regard for the impact that behavior might have on them. So these folks are sort of callous. They lack empathy . . . . People with psychopathy don't have - - they're kind of absent of that [sense of right and wrong] . . . . [I]f you think of it in terms of a more sort of common sense or common language thing . . . it's like not having a conscience . . . . [,] not having a sense of empathy or a sense of regard or a sense of remorse for things that you do . . . . Individuals with psychopathy, more often than not what you'll find is a whole range of criminal behaviors, a whole range of things for which they may or may not have been arrested for and they may or may not acknowledge . . . .

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injury as a result of the fall in question. Because trial counsel "suspected[4] he hit his head," however, they believed that this speculative theory was the "best . . . we had".[5] (H.T. at 152).

(Tr. 7284-87).

Trial counsel did nothing to rebut the diagnoses or testimony of the State's experts. Instead, Mr. West repeatedly argued in closing that Mr. Ledford *was indeed* antisocial. (*See e.g.*, Tr. 7514; 7517; 7518; 7520; 7523; 7526 and 7533). Mr. West elaborated that because Mr. Ledford suffers from this affliction, he does not consider the consequences of his actions, does not consider the harm caused to others, and has no empathy or sympathy for those he harms. Mr. West described Mr. Ledford as someone who thinks, "I want this and I'm going to get it and if I don't get it . . . you're in trouble." (Tr. 7526). Mr. West further noted that someone suffering from antisocial personality disorder is unable in change course in certain situations, even though he would know that what he was doing was wrong. (Tr. 7520).

Following Mr. West's presentation, the prosecution argued that life without parole was "not an appropriate punishment" for Mr. Ledford based upon "expert testimony to the effect essentially that [he] does not have a conscience . . . ." (Tr. 7499.)

> Michael Ledford is a psychopath. He doesn't take responsibility. He doesn't have empathy for others. He doesn't have concern about the welfare for others. He is centered on himself. I submit to you, ladies and gentlemen, that he's not going to live with the consequences of his actions . . . . He has no remorse. He is either unable or unwilling to feel sorry for what he has done.

(Tr. 7499-7500).

The State also evoked Mr. Ledford's future dangerousness to argue against a sentence of life without parole.

> Michael Ledford is a psychopath. He wants what he wants, and he's going to get it. He's going to continue to victimize people . . . . Nobody's going to be safe. He's going to be preying on people to the best of his ability.

(Tr. 7501).

On September 30, 2007, Mr. Ledford's jury recommended that he be sentenced to death for malice murder.[7]

B. Procedural History

After an unsuccessful motion for new trial, Mr. Ledford appealed his conviction and sentences to the Supreme Court of Georgia, which affirmed his convictions and sentences on March 25, 2011. *Ledford v. State*, 289 Ga. 70, 709 S.E. 2d 239 (2011). After his timely-filed motion for reconsideration was denied on April 12, 2011, *ibid*, Mr. Ledford petitioned this Court for a writ of certiorari, which was denied on November 7, 2011. *Ledford v. Georgia*, 565 U.S. 1017 (2011).

On October 9, 2012, Mr. Ledford filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County. On August 24, 2016, following briefing and an evidentiary hearing, the superior court signed a proposed order drafted by Respondent that denied Mr. Ledford's petition. On September 6, 2016, Mr. Ledford timely filed his Notice of Appeal and, following an extension, submitted a timely CPC Application to the Supreme Court of Georgia on March 31, 2017. That application was denied on August 14, 2017. This timely petition for a writ of certiorari follows.

STATEMENT OF THE CASE

It is hardly uncommon to hear a capital defendant described as "antisocial" or "a psychopath" – terms with a cultural capital that have a powerful effect upon a jury. It is quite remarkable, however, for that characterization to be advanced by the defendant's *own counsel*.

[7] In addition to the death sentence, the trial court imposed two (2) life without parole sentences and four (4) twenty-year sentences – with all sentences to run consecutively. The felony murder convictions were treated as surplusage.

Nor was this catastrophe the product of a mistake or accident. Mr. Ledford's trial counsel elicited these diagnoses from the *defense's own expert witnesses* and dwelled upon them at length during closing arguments. Trial counsel's behavior is all the more astounding for the fact that they could have prevented the introduction of this damaging testimony altogether. Trial counsel, however, was unable to imagine a penalty-phase case without mental health evidence, even knowing that these particular diagnoses were, as a matter of law, aggravating and not mitigating. This tunnel-vision prevented counsel from realizing that they could have presented a compelling case in mitigation based upon Mr. Ledford's harrowing background without opening the door for the State to portray him as a remorseless, unrepentant, and continuously dangerous psychopath. As illustrated by this Court's recent decision in *Buck v. Davis*, trial counsel's unreasonable errors profoundly prejudiced Mr. Ledford. Certiorari should follow.

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Mr. Ledford's claim of ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984) was raised in his petition for writ of habeas corpus filed in the Superior Court of Butts County, Georgia, and in his CPC application to the Supreme Court of Georgia.

REASONS WHY THE PETITION SHOULD BE GRANTED

ARGUMENT

I. The Georgia Supreme Court Erred in Finding that Mr. Ledford's Ineffective Assistance of Counsel Claim "Lack[ed] Arguable Merit."[8]

Per this Court's decision in *Strickland* and its progeny, "[a]n ineffective assistance [of counsel] claim has two components: a petitioner must show (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). With respect to the first prong, Mr. Ledford must demonstrate that counsel's performance "fell below an objective standard of reasonableness," defined as "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688; *see also Wiggins*, 539 U.S. at 521 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms"). With respect to prejudice, the test is whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see also Williams v. Taylor*, 529 U.S. 362, 362 (2000). When assessing prejudice in the penalty phase of a capital case in a state like Georgia, where non-unanimity on a death verdict results in a life sentence, the question becomes whether there is "a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537; *see also Humphrey v. Morrow*, 717 S.E.2d 168, 173 (Ga. 2011) (same).

Mr. Ledford readily meets both prongs of this *Strickland* standard.

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[8] *See Ledford v. Sellers*, Georgia Supreme Court Case No. S17E0955, Order of August 14, 2017 (denying a Certificate of Probable Cause to Appeal).

A. Counsel Performed Deficiently in Allowing *and Introducing* this Aggravating Evidence

Trial counsel were well aware that their introduction of mental health evidence during the penalty phase of Mr. Ledford's case would at the very least open the door for the state to present records and expert testimony that he was antisocial or a psychopath. They were also aware that they could close and bolt the door to that evidence by simply opting not to present mental health evidence themselves. Georgia law *was* and *is* clear. Before any party can introduce the issue of a criminal defendant's mental health into a case, the defense must give notice of its intent to present such evidence and testimony. (Uniform Superior Court Rule 31.5). Unless and until such notice is given, the defendant's mental health *cannot* be brought before the jury. *See Abernathy v. State*, 265 Ga. 754, 754-55 (1995) (state may only present mental health evidence if the defense first presents such evidence); *see also Nance v. State*, 272 Ga. 217, 220 (2000) (same). For its part, the State is prohibited from conducting its own mental health evaluation of a defendant unless and until the defense invites the issue of the defendant's mental health into the proceedings. *See Pope v. State*, 286 Ga. 1, (2009) (trial court erred in having defendant evaluated where defense had not served notice of its intent to rely on mental health evidence).

The law also *was* and *is* clear as to the consequence of trial counsel opening the door to these particular diagnoses. The case law in this jurisdiction put counsel on notice that a diagnosis of antisocial personality disorder was, as a matter of law, *evidence in aggravation of punishment. See, Weeks v. Jones*, 26 F.3d 1030, 1035, n.4 (11th Cir. 1994) (diagnosis of antisocial personality disorder is not mitigating as a matter of law); *Reed v. Secretary, Florida Dept. of Corrections*, 593 F.3d 1217, 1245 (11th Cir. 2010) ("diagnosis of antisocial personality disorder was . . . not good mitigation."); *Cummings v. Secretary for Dept. Of* Corrections, 588 F.3d 1331, 1368 (11th Cir. 2009)("a diagnosis of antisocial personality disorder, which is not mitigating but damaging.");

Evans v. Secretary, Dept of Corrections, 703 F.3d 1316, 1332 (11th Cir. 2013) ("we have consistently held, this evidence is potentially aggravating as it suggests that [the defendant] has antisocial personality disorder, which is a trait most jurors tend to look dis-favorably upon, that is not mitigating but damaging."); *Kokal v. Secretary, Dept. of Corrections*, 623 F.3d 1331, 1349 (11th Cir. 2010)(same); *Suggs v. McNeil*, 609 F.3d 1218, 1229 (11th cir. 2010)(same); *Gray v. Epps*, 616 F.3d 436, 449 (5th Cir. 2010) (antisocial personality disorder could be interpreted as aggravating); *Daniels v. Woodford*, 428 F.3d 1181, 1204, 1210 (9th Cir. 2005 (indicating testimony suggesting a capital defendant is a sociopath is aggravating rather than mitigating).

Further, trial counsel testified they had significant experience in defending capital cases in Georgia and had attended numerous capital training seminars, including those presented by the Georgia Capital Defender. (*See, e.g.*, R.X. 13 at 19; R.X. 14 at 8). At the time, both national and state capital trainers emphasized that it was trial counsel's obligation to do *whatever was necessary* to prevent any testimony to the effect that their client was either antisocial or a psychopath. (P. Ex. 7, Affidavit of Pamela B. Leonard[9]) ("We have, for more than a decade, advised lawyers who represent capitally charged defendants to make every effort to exclude evidence that the defendant has an antisocial personality disorder or is a psychopath"); (P. Ex 8, Affidavit of Sean D. O'Brien[10]) ("To a reasonable degree of legal certainty, no competent capital defense attorney

[9]Pamela B. Leonard, the Chief Mitigation Specialist and Chief Investigator for the Multi-County Public Defender and then as Deputy Director for Mitigation and Investigation for the Georgia Capital Defender, developed the agenda for state wide training for capital defense teams in Georgia.

[10]Sean O'Brien is a nationally-renowned lawyer and professor and expert in capital trial, appellate, and post-conviction litigation who routinely presents at national seminars on how to prepare and defend death penalty cases.

would ever, under any circumstances, introduce evidence from any mental health expert that his or her client has psychopathy or ASPD").

Accordingly, trial counsel faced a straightforward choice. They could not refute these aggravating diagnoses; on the contrary, their own experts corroborated them. But while trial counsel could not hope to overcome or ameliorate these diagnoses, they could *absolutely preclude* them from the jury's deliberations. Given their ability to shield Mr. Ledford from the harm of these diagnoses, allowing such evidence into his case *by any means* would have constituted deficient performance. Trial counsel, however, exacerbated their unreasonable failures by not only permitting the admission of these diagnoses, but by *affirmatively* presenting them to the jury through their own expert witnesses. As discussed *infra* at 19, the fact that this aggravating evidence came from the defense's own witnesses surely amplified its impact upon the jury. Remarkably, trial counsel then compounded these harms even further by devoting much of their closing argument to a discussion of the most aggravating qualities of these diagnoses.

Given that a diagnosis of psychopathy or ASPD is "death in a bottle . . . no competent capital defense attorney would ever, under any circumstances, *introduce* evidence from any mental health expert that his or her client has psychopathy or ASPD." (P.X. 8, Affidavit of Sean D. O'Brien (emphasis added).) Indeed, "[i]t would be preferable to present no mental health experts at all than to inject such damning, unreliable evidence into a capital case." *Id.*

Trial counsel never considered that option, however. Mr. West testified he decided to go with mental health evidence because it was the "best theory we had." (H.T. 152). Mr. West admitted that he reached that conclusion, however, without even considering that he could opt not to present mental health testimony at all. (H.T. 158). Having never examined that possibility, trial counsel never contemplated what a penalty phase case would look like if this aggravating evidence

were excluded from it. See *infra* at 14-15. Whether trial counsel failed to appreciate fully how prejudicial this evidence would be[11], their "strategic" decision to present mental health as mitigation was uninformed and unreasonable. *See, e.g., Sears v. Upton* , 561 U.S. 945, 954 (2010) ("We reject [] any suggestion that a decision to focus on one potentially reasonable trial strategy . . . was 'justified by a tactical decision' when 'counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background'" (*quoting Williams v. Taylor*, 529 U.S. at 396).

B. The Evidence of Mr. Ledford's Horrific Background, Minus this Aggravating Evidence, Would, Within Reasonable Probability, Have Yielded a Different Result

But for their unreasonable myopia, trial counsel would have realized that they could present a compelling and mitigating account of the tragedy, depravity, poverty and abuse that Mr. Ledford had suffered throughout his life *and* exclude any testimony that he was antisocial or a psychopath. Instead of presenting the evidence of Mr. Ledford's horrific upbringing through their mental health experts[12], trial counsel could have employed, for instance, a testifying social worker, who could have told the story of Mr. Ledford's life history in a coherent manner, but would not – indeed, *could* not – have testified to his mental health issues. (*See e.g.*, P.X. 9, Report of Mary McLaughlin). This would have entirely changed the sentencing picture before the jury. Mr. Ledford would still have been able to present powerful evidence of the poverty, incest, molestation, familial alcohol abuse, physical violence, neglect and poor parenting, residential instability, social

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[11]As noted *supra* at 5, Mr. West testified he did not have a strategy for dealing with a diagnosis of antisocial personality disorder. (H.T. 157-58). In fact, he was "not too concerned" with such a diagnosis. (H.T. 158.)

[12] See note 4, *supra*.

isolation and multi-generational mental illness in his family that marred his childhood. *Id.* Indeed, Mary McLaughlin, a social worker, did precisely this in the proceedings below, explaining how "[t]he records from [Mr. Ledford's] childhood, the affidavits of his siblings and the interviews [she] personally conducted reveal a family system that was so chaotic and abusive that the Ledford children's basic needs for safety and security were not guaranteed . . . ." *Id*. The fact that Mr. Ledford "was born into a family already mired in poverty, incest and alcoholism" and, "[a]s a result of multiple moves, . . . was not in a position long enough for any protective community factor to reach him . . . . [and] was not given a chance to develop along the normal life pathway that most children are afforded," *ibid*, are precisely the categories of evidence that this Court found mitigating in *Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 539 U.S. 510 (2003). However, Mr. Ledford could have also excluded the prejudicially harmful testimony about psychopathy and antisocial personality disorder. Given the entirely-altered sentencing picture that results, there is a reasonable probability that "at least one juror would have struck a difference balance" and voted to impose a sentence less than death. *Wiggins*, 539 U.S. at 537.[13]

C. Counsel's Ineffectiveness is Illustrated by *Buck v. Davis*

The prejudicially-deficient performance of Mr. Ledford's trial counsel is illustrated by this Court's recent decision in *Buck v. Davis*, 137 S. Ct. 759 (2017). In *Buck*, this Court found that the petitioner's trial counsel had provided ineffective assistance by calling to the stand a psychologist,

[13] There can be no argument that trial counsel calling Ms. Sandra Michaels, their mitigation investigator, as a witness was the equivalent of presenting a forensic social worker. Ms. Michaels was not a social worker and had no training in the field. Further, the only thing she was qualified to testify about was what she did during her investigation. Indeed, all Ms. Michaels testified to was information that laid the foundation for introducing a series of records that she had obtained. (*See* Tr. 6837-6903)

Dr. Walter Quijano, who testified that the petitioner was statistically more likely to act violently in the future because of his race. *Buck*, 137 S. Ct. at 768.

Dr. Quijano, who had been appointed by the presiding judge to evaluate the petitioner, had prepared a report that focused primarily upon his future dangerousness.[14] *Id.* While Dr. Quijano's report reached some conclusions that argued against such a finding, it also concluded that because the petitioner was black, there was an "[i]ncreased probability" of future dangerousness, as "[t]here is an over-representation of Blacks among the violent offenders." *Id.*

Asserting that an immutable characteristic of the petitioner made him more likely to be dangerous was, of course, *per se* aggravating evidence. "Despite knowing Dr. Quijano's view that Buck's race was competent evidence of an increased probability of future violence," however, the petitioner's counsel not only called him to the stand but *expressly elicited* his testimony that "certain factors were 'know[n] to predict future dangerousness' and, consistent with his report, [that] . . . race [w]as one of them." *Id.*; see also *ibid* ("'It's a sad commentary,' he testified, 'that minorities, Hispanics and black people, are over represented in the Criminal Justice System.'") This testimony also allowed the prosecutor to secure Dr. Quijano's agreement on cross-examination "that the race factor, black, increases the future dangerousness for various complicated reasons." *Id.* The State returned to this testimony in its closing argument, emphasizing "the crime's brutal nature and Buck's lack of remorse, along with the inability of

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[14] As this Court noted, "[a]t the time of Buck's trial, a Texas jury could impose the death penalty only if it found—unanimously and beyond a reasonable doubt—'a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.'" *Buck*, 137 S. Ct. at 768 (citing Tex.Code Crim. Proc. Ann., Art. 37.071, § 2(b)(1) (Vernon 1998). "The second issue, to be reached only if the jury found Buck likely to be a future danger, was whether mitigating circumstances nevertheless warranted a sentence of life imprisonment instead of death." *Id.*

Buck's *own experts* to guarantee that he would not act violently in the future—a point it supported by reference to Dr. Quijano's testimony." *Id.* at 769. The jury later requested the "psychology reports" that had been admitted into evidence for its deliberations, after which it returned a sentence of death. *Buck*, 137 S. Ct. at 769.

This Court concluded that "counsel's performance fell outside the bounds of competent representation." *Buck*, 137 S. Ct. at 775. As counsel knew that "Dr. Quijano's report reflected the view that Buck's race disproportionately predisposed him to violent conduct" and that "the principal point of dispute during the trial's penalty phase was whether Buck was likely to act violently in the future," this Court concluded that they had performed deficiently in "nevertheless (1) call[ing] Dr. Quijano to the stand; (2) specifically elicit[ing] testimony about the connection between Buck's race and the likelihood of future violence; and (3) put[ting] into evidence Dr. Quijano's expert report that stated, in reference to factors bearing on future dangerousness, '**Race.** Black: Increased probability.'" *Id.* at 775 (internal citations omitted) (emphasis in original).

It is important to note that the harm from the testimony in *Buck* was more equivocal than that in Mr. Ledford's case. While Dr. Quijano testified that Mr. Buck was statistically more likely to be dangerous in the future, he also testified as to "factors [he] thought favorable to Buck, as well as his ultimate opinion that Buck was unlikely to pose a danger in the future." *Buck*, 137 S. Ct. at 768–69. By contrast, the portrait of Mr. Ledford that emerged from his experts – and his counsel – contained no reassurance whatsoever as to his future dangerousness and incorrigibility.

On the other side of the coin, this Court also found prejudice in *Buck* despite a crime that was more aggravating than Mr. Ledford's. Mr. Buck was convicted of invading the home of his former girlfriend with a rifle and shotgun, shooting and killing his stepsister and wounding another, then pursuing his girlfriend as she fled the house and shooting her to death as her two young

children begged for her life. *Buck*, 137 S. Ct. at 767. A police officer who arrested him "would later testify that Buck was laughing at the scene . . . . [and] remained 'happy' and 'upbeat' as he was driven to the police station, '[s]miling and laughing' in the back of the patrol car." *Id.* at 768. The State also called another former girlfriend who testified that "Buck had routinely hit her and had twice pointed a gun at her" and "introduced evidence of Buck's criminal history, including convictions for delivery of cocaine and unlawfully carrying a weapon." *Id.*

Further, the concerns expressed by this Court as to how such expert evidence might overwhelm the jury's deliberations are present in Mr. Ledford's case as well. As this Court noted, "[d]eciding the key issue of Buck's dangerousness involved [asking] . . . . [t]he jurors . . . not . . . to determine a historical fact concerning Buck's conduct, but to render a predictive judgment inevitably entailing a degree of speculation. Buck, all agreed, had committed acts of terrible violence. Would he do so again?" *Buck*, 137 S. Ct. at 776. Accordingly, this Court feared that expert testimony as to an "immutable characteristic [that] carried with it an increased probability of future violence" would be treated as "hard statistical evidence—from an expert—to guide an otherwise speculative inquiry." *Id.* During Mr. Ledford's penalty phase, the State invited his jury to resolve this same "unusual inquiry" by considering the "immutable characteristic" of his psychopathy. *Id.* In its closing argument, the State expressly relied upon the evidence that Mr. Ledford "is a psychopath" to argue that "[h]e's going to continue to victimize people . . . . [and] [n]obody's going to be safe. He's going to be preying on people to the best of his ability." (Tr. 7501.)[15]

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[15]Indeed, "[p]rosecutors regularly invoke diagnoses of psychopathy or antisocial personality disorder in capital sentencing, likely because both are highly correlated with recidivist violence . . . . [and] courts have specifically permitted both diagnoses to be introduced as evidence of future dangerousness at the sentencing phase of capital trials . . . . [E]ither diagnosis both can

This Court further noted that Dr. Quijano's evidence was "potent" because it "appealed to a powerful racial stereotype." *Buck*, 137 S. Ct. at 776. Similarly, Mr. Ledford's experts "invoke[d] the stereotype of 'unfeeling psychopaths who kill for the sheer please of it, or as dark, anonymous figures who are something less than human." *Deconstructing Antisocial Personality*, 42 HOFLR at 525 *citing*, Craig Haney, Comment, Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases, 37 Golden Gate U. L. Rev. 131, 145 (2006). Indeed, "[t]he term 'psychopath' is used to describe some of society's most feared individuals. Serial killers, mass murderers, individuals who lack a conscience or remorse - - these are people commonly referred to as psychopaths, and believed to be beyond all possibility of reform." Amanda Tufts, 17 LCLR 333, 334 (2013), *Born to be an Offender? Antisocial Personality Disorder and its Implications on Juvenile Transfer to Adult Court in Federal Proceedings*.

Finally, and perhaps most critically, this Court acknowledged the particular harm to Mr. Buck from the fact that this evidence was presented by his own counsel. In rejecting the State's argument that Dr. Quijano's testimony was not prejudicial because "Buck's own counsel, not the prosecution, elicited the offending testimony," this Court stated "[w]e are not convinced." *Buck*, 137 S. Ct. at 777.

> In fact, the distinction could well cut the other way. A prosecutor is seeking a conviction. Jurors understand this and may reasonably be expected to evaluate the government's evidence and arguments in light of its motivations. When a

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have a devastating effect on the defendant's mitigation claims and can create an expectation in jurors' minds "that no rehabilitation is possible and that future criminal violence is inevitable." Snead, O. Carter, *Neuroimaging and the "Complexity" of Capital Punishment*, 82 NYULR 1265, (November 2007) (emphasis added). "Testimony labeling a capital defendant antisocial or psychopathic has one overriding purpose: to obtain and carry out a sentence of death." Wayland, K. And O'Brien, S., *Deconstructing Antisocial Personality Disorder and Psychopathy: A Guidelines-Based Approach to Prejudicial Psychiatric Labels*, 42 HOFLR 519 (Winter 2013).

> defendant's own lawyer puts in the offending evidence, it is in the nature of an *admission against interest, more likely to be taken at face value*.

Id. (emphasis added).

D. Mr. Ledford is Entitled to Relief

As with the petitioner in *Buck*, Mr. Ledford was prejudiced by his trial counsel's unreasonable decision not only to prevent the State from using inherently prejudicial evidence to ensure a sentence of death, but to do the State's work for it by introducing that evidence themselves. There was a readily available alternative to this catastrophic path, but counsel never considered it. As Mr. Ledford's trial counsel provided ineffective assistance, this Court should grant the writ.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari in order to correct the lower court's erroneous determinations of law and fact.

Respectfully submitted,

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No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

MICHAEL LEDFORD,

Petitioner,

-v-

ERIC SELLERS, Warden
Georgia Diagnostic Prison,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic mail on counsel for Respondent at the following address:

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This, the 13th day of November, 2017.

_____
Attorney