CAPITAL CASE
No. 20-1084

IN THE

Supreme Court of the United States

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

MATTHEW REEVES,

Respondent.

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

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BRIEF IN OPPOSITION

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INTRODUCTION

The Alabama Court of Criminal Appeals ("CCA") rejected death-row inmate Matthew Reeves's federal ineffective-assistance claim because it ruled that, to prove such a claim, a petitioner "*must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning*." Pet. App. 270a–271a (emphasis in original). It did so after the State urged it to apply that rule. ECF No. 23-29 at 200.[1] It did so despite Reeves's argument that that "there is no requirement that trial counsel testify" in order to succeed on an ineffective-assistance claim. Pet. App. 268a. The CCA's opinion stressed that Reeves's trial counsel had failed to testify, and its analysis of Reeves's ineffective-assistance claim mentioned none of the other evidence demonstrating counsel's deficient performance. To the CCA, "Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel." *Id.* at 272a. That is what the CCA's opinion said over and over again. And that is how the CCA has since characterized its opinion in Reeves's case. See *State* v. *M.D.D.*, CR-19-0652, 2020 WL 6110694, at *8 (Ala. Crim. App. Oct. 16, 2020).

The Eleventh Circuit's ruling before this Court took the CCA at its word. It held that the CCA's rule requiring trial counsel testimony is an unreasonable application of *Strickland* v. *Washington*, 466 U.S. 668 (1984). Accordingly, the Eleventh Circuit reviewed *de novo* Reeves's ineffective-assistance claim, concluding that trial counsel provided ineffective assistance at the sentencing phase. The Court's conclusion rested

[1] All citations to "ECF No." refer to documents electronically filed in *Reeves* v. *Dunn*, No. 1:17-cv-00061-KD-MU (S.D. Ala.).

on trial counsel's failure to hire an expert to evaluate Reeves for intellectual disability, despite representing to the trial court that such an expert was the "only avenue" for presenting compelling mitigation evidence to the jury and petitioning the trial court for funds to hire an expert *twice*. ECF No. 23-1 at 70, 74–75.

The State concedes in *this* Court that a rule requiring trial counsel testimony to establish an ineffective-assistance claim is an unreasonable application of *Strickland*. It asserts, instead, that the Eleventh Circuit has mischaracterized the CCA's ruling, and that allowing it to do so upsets the federal-state balance reflected in 28 U.S.C. § 2254(d). It asks for summary reversal.

This Court should deny the petition. The CCA's opinion, on its face, repeatedly declares that trial counsel's testimony is required. The CCA has since characterized its own opinion in *this case* as requiring trial counsel to testify. Other decisions from the CCA, both before and after its opinion here, have affirmed that trial counsel's testimony is required. See, *e.g.*, *Stallworth* v. *State*, 171 So. 3d 53, 92 (Ala. Crim. App. 2013); *Broadnax* v. *State*, 130 So. 3d 1232, 1255 (Ala. Crim. App. 2013); *M.D.D.*, 2020 WL 6110694, at *8. That the CCA has repeatedly articulated this rule should come as no surprise to the State, which urged the CCA to enforce the trial counsel testimony requirement *in this very case*. See ECF No. 23-29 at 199–200, 202, 206.

Summary reversal here would not vindicate either the requirements or the policy of § 2254(d). To be sure, federal courts should presume that "state courts know and follow the law." *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002). But what the State seeks here is something quite different. It asks this Court to save

the CCA from an admittedly indefensible error on the face of its opinion. Far from showing respect to state-court rulings, the State asks this Court to *imagine* that the CCA ruled differently than it did and then to *revise* the CCA's admittedly unreasonable application of federal law into something that, at least arguably, could have complied with the Constitution. Nothing in § 2254(d) or this Court's opinions authorizes, much less demands, such an approach. No policy recommends it. And such a dramatic change in the law is not what this Court's summary reversal procedure is for.

To bolster its request for summary reversal, the State contends that the Eleventh Circuit's ruling that Reeves's trial counsel was constitutionally ineffective was wrong on the merits. The State does not deny that *if* the CCA's ruling involved an unreasonable application of *Strickland*, then the Eleventh Circuit properly considered Reeves's claim *de novo*. Instead, the State speculates that trial counsel may have made a strategic decision *not* to engage an expert to evaluate Reeves for mental deficiency. But the evidence, most of which the State simply ignores, establishes that Reeves's trial counsel all thought an expert evaluation was necessary and yet failed to engage an expert to do so.

The Eleventh Circuit properly observed how trial counsel knew that Reeves might be intellectually disabled and the significance of that fact to the mitigation phase of his capital trial. It was so important to his sentencing-phase defense that counsel repeatedly and ultimately successfully petitioned the trial court for funds to retain a specific clinical neuropsychologist to evaluate Reeves for intellectual disability. Yet after much effort and repeatedly telling the court that the funds were essential, trial counsel failed to con-

tact the neuropsychologist that they had identified or retain any other expert. Instead, trial counsel presented testimony from a court-appointed psychologist. The psychologist conceded that her only mandate was to assess Reeves's competency to stand trial and mental state at the time of the offense. She had not evaluated Reeves for intellectual disability; and she had not performed a mitigation-phase evaluation of him. In post-conviction proceedings, the court-appointed psychologist also revealed that she had not even talked to trial counsel until the day she testified at Reeves's capital sentencing—at which point trial counsel *knew* it would be too late.

As for prejudice, the Eleventh Circuit noted that changing even one more juror's mind on the propriety of a death sentence would have precluded that punishment; that the trial court had not found any mitigating factors relating to intellectual disability; the powerful testimony that the appointed neuropsychologist would have given; and the damaging testimony that the court-appointed clinical psychologist in fact gave. The Eleventh Circuit carefully reviewed the CCA's opinion and the record, then faithfully applied AEDPA and *Strickland*. That decision warrants no further review from this Court.

COUNTERSTATEMENT

1. In November 1996, Reeves, then 18 years old, was arrested for the robbery and murder of Willie Johnson. Two months later, he was indicted for one count of capital murder in the course of a robbery. *Id.*

After his arrest, the court appointed Blanchard McLeod and Marvin Wiggins to represent Reeves at trial. ECF No. 23-1 at 6. In response to their initial discovery requests, which included a request for all documents relating to Reeves in the possession of the

Dallas County (Alabama) Juvenile Probation Services and Alabama Department of Youth Services, *id.* at 41–42, they received "hundreds of pages of psychological, psychometric and behavioral analysis material" suggesting the need for an intellectual disability evaluation. *Id.* No. 23-30 at 90. Reeves's school records revealed that he had been placed in special education classes, and had failed the first, fourth, and fifth grades. *Id.* No. 23-15 at 135–36. Reeves never advanced beyond middle school and reads at only a third-grade level. *Id.* at 102–03. Reeves's school records also indicated that he had "severe deficiencies in non-verbal social intelligence skills and his ability to see consequences," *id.* No. 23-19 at 1112, and a Department of Mental Health and Mental Retardation Outpatient Forensic Evaluation Report described him as having "below normal intellectual functioning." *Id.* at 988. Additionally, an IQ test administered when Reeves was 14 years old indicated that he had an IQ of 73, and he received other similarly low scores in early school testing. *Id.* No. 23-24 at 45–46; *id.* No. 23-15 at 104; cf. *Atkins* v. *Virginia*, 536 U.S. 304, 309 n.5 (2002) (the cutoff IQ score for the intellectual function prong of the intellectual disability definition is typically "between 70 and 75 or lower").

Aware of the possibility that Reeves was intellectually disabled, and its significance to his mitigation case, McLeod and Wiggins jointly petitioned the trial court twice for funds to hire Dr. John Goff, a clinical neuropsychologist, to evaluate Reeves. ECF No. 23-1 at 70–71, 74–77.

The first motion represented that Dr. Goff's assistance would be "needed in both the guilt and sentencing phase of the trial of this case." *Id.* at 70; *id.* No. 23-3 at 91. At a hearing on the motion, counsel stated that "the amount of material that we have received

through discovery from the school and Department of Youth Services is beyond our ability to deal with." *Id.* No. 23-3 at 91. See also *id.* at 93 (explaining that "we are going to need someone to assist us in the mitigation phase of this case" "because of the tremendous amount of discovery material provided to us"); *id.* at 96 (explaining that the "discovery material in the nature of a psychological and a psychiatric information . . . is going to be exceptionally pertinent at the penalty phase of this proceeding"). In response to a suggestion that hiring an expert could be put off until the start of the sentencing phase, Reeves's counsel explained, "it's going to be a little bit late . . . to worry about then retaining someone to assist with the preparation of the mitigation phase." *Id.* at 93. The trial judge denied the request without explanation. *Id.* No. 23-1 at 73.

Two weeks later, McLeod and Wiggins again jointly sought court approval for funds to hire Dr. Goff. Their motion for reconsideration left no doubt that they knew that Dr. Goff's testimony was essential to persuading the jury or the judge not to impose a death sentence, stating that "a clinical neuropsychologist or a person of like standing and expertise [was] the only avenue open to the defense to compile [information about Reeves' mitigating intellectual disability], . . . interview the client[,] and present this information in an orderly and informative fashion to the jury during the mitigation phase." *Id.* at 74–75.

This time, the trial court granted the request. The trial court's order appointed Dr. Goff "to interview, test, and evaluate [Reeves for intellectual disability], and give trial testimony regarding the same." *Id.* at 81.

Soon after the court approved funds to hire Dr. Goff, McLeod withdrew because he lacked a meaning-

ful working relationship with Reeves. *Id.* at 78. Wiggins, who had a productive relationship with Reeves, stayed on, *id.*, and another attorney, Thomas M. Goggans, was appointed to assist him.

The pair never contacted Dr. Goff. ECF No. 23-24 at 67–68; *id.* No. 23-15 at 96. Nor did they hire any other mental health professional to evaluate Reeves for intellectual disability before trial. In fact, during the sentencing phase, counsel did not call a single witness to testify regarding Reeves's intellectual disability, notwithstanding that it had direct bearing on statutory and non-statutory mitigating factors. See Ala. Code § 13A-5-51(6) (making defendant's "substantially impaired" capacity to appreciate the criminality of his conduct or conform his conduct to the law a mitigating circumstance); Ala. Code § 13A-5-52 ("Mitigating circumstances shall include . . . any other relevant mitigating circumstance which the defendant offers"); *Brownlee* v. *Haley*, 306 F.3d 1043, 1071–73 (11th Cir. 2002) (noting that jury could have found non-statutory mitigating factors based on impaired intellectual functioning and psychiatric disorders).

Instead, at the sentencing phase counsel called a court-appointed clinical psychologist, Dr. Kathleen Ronan. The State omits that counsel did not speak to Dr. Ronan about Reeves *until the day she testified*, ECF No. 23-15 at 10, at a time counsel had previously told the court it would be too late for an expert witness to adequately prepare mitigation testimony, *id.* No. 23-3 at 93–94.

The State mischaracterizes Dr. Ronan as having "helpfully synthesized" the records in trial counsel's possession. Pet. 3. But Dr. Ronan had not been retained by trial counsel and, critically, had not conducted a sentencing-phase evaluation, which she lat-

er explained "would contain different components than those for the trial phase evaluations, and would be more extensive in terms of testing and background investigation." ECF No. 23-15 at 11. She also had not evaluated Reeves for intellectual disability. *Id.* at 10.

Although trial counsel called Dr. Ronan to testify, they had no reason to think Dr. Ronan could offer testimony regarding Reeves's intellectual disability. Two months before they sought funds to hire Dr. Goff, trial counsel had received Dr. Ronan's report containing her opinions. *Id.* No. 23-13 at 58. The report noted that the trial court had appointed Dr. Ronan to evaluate Reeves only for "his competence [sic] to stand trial and his mental state at the time of the alleged offense." *Id.* at 59; see also *id.* No. 23-8 at 133; *id.* No. 23-15 at 8–11. The report further explained that Dr. Ronan had not administered a full IQ test. *Id.* No. 23-13 at 65. Instead, Dr. Ronan administered "only the verbal portions" because those were most relevant to Reeves's competency to stand trial. *Id.* Although trial counsel, after obtaining funds to hire Dr. Goff, later petitioned the trial court for records relating to Dr. Ronan's evaluation of Reeves from her employer, the Taylor Hardin Secure Medical Facility, those records contained no new information on Reeves's intellectual disability and cannot explain or excuse trial counsel's failure to contact Dr. Goff. ECF No. 23-1 at 88.

Before the jury, Dr. Ronan testified regarding the limited scope and purpose of her examination of Reeves. *Id.* No. 23-8 at 133, 144–45. Though Dr. Ronan had not administered a full IQ test nor had she assessed his adaptive skills, both of which are necessary components of an intellectual disability evaluation, *id.* No. 23-25 at 51–52; *id.* No. 23-15 at 11–12, she nevertheless testified on cross-examination that Reeves was not intellectually disabled, stating that

"[h]e was not in a level that they would call . . . mental retardation, no." *Id.* No. 23-8 at 155. Reeves's counsel did not object to the State's question or Dr. Ronan's answer, nor did they attempt to establish on redirect that Dr. Ronan had not performed any of the testing needed to offer that opinion. *Id.* at 158–62.

The jury recommended that Reeves receive the death sentence by a vote of 10-2, the bare minimum under Alabama law. *Id.* at 207–08. Nearly six months later, on July 20, 1998, the trial judge evaluated the trial record and sentenced Reeves to death. *Id.* at 212. Given the scant mitigation evidence presented, the court found only two mitigating factors, Reeves's age at the time of the offense and lack of significant prior criminal history. *Id.* Based on Dr. Ronan's testimony, the court found that Reeves's capacity to appreciate the criminality of his conduct or conform his conduct to law was not "substantially impaired." Ala. Code § 13A-5-51(6).

2. Following an unsuccessful motion for a new trial and appeal of his conviction and sentence, Reeves petitioned for relief under Rule 32 of the Alabama Rules of Criminal Procedure. ECF No. 23-12 at 124. The petition claimed, among other things, that Reeves was denied his Sixth Amendment right to the effective assistance of counsel during the sentencing phase.

Post-conviction counsel retained Dr. Goff, who finally evaluated Reeves in advance of the Rule 32 hearing. Dr. Goff testified that Reeves was intellectually disabled. *Id.* No. 23-24 at 67. Unlike Dr. Ronan, Dr. Goff administered a full-scale IQ test, yielding a score of 71. *Id.* at 42–43. Dr. Goff also assessed Reeves's adaptive functioning, which identified significant deficits in six skill areas (functional academics, work, health and safety, leisure, self-care, and self-direction), more than the two categories required for

a diagnosis of intellectual disability. *Id.* at 25–27, 39, 42–46, 51–63, 76, 78–80; *id.* No. 23-15 at 102. Dr. Goff further testified that, had he been asked to evaluate Reeves and testify at the time of Reeves's trial, he would have performed a similar evaluation and would have reached the same conclusion. *Id.* No. 23-24 at 22–23, 68–69; *id.* No. 23-15 at 105.

At the Rule 32 hearing, post-conviction counsel offered an affidavit from Dr. Ronan. In her affidavit, Dr. Ronan admitted that she had not performed the testing necessary to evaluate Reeves for intellectual disability or investigate the existence of any other mitigating factors. The affidavit explained that Dr. Ronan "was not requested to complete a sentencing phase evaluation" and "had not conducted an extensive clinical evaluation regarding mental retardation as that was not within the scope of [her] evaluation." *Id.* No. 23-15 at 10. She elaborated that an evaluation for capital sentencing would contain different components and be significantly more extensive than one for the trial phase. *Id.* at 11. For example, had Dr. Ronan conducted an intellectual disability evaluation, the entire IQ test "would be required to be given," and further investigation into adaptive functioning would have been necessary. *Id.* Dr. Ronan further testified that the "[a]ttorneys were routinely informed as to the limitations" of her testimony for the capital penalty phase, "in that the original evaluation was not performed for that purpose." *Id.*

The State called its own expert, Dr. Glen King, to testify regarding Reeves's intellectual abilities. Dr. King concluded that Reeves is not intellectually disabled. But Dr. King determined that Reeves's IQ was 68, which Dr. King acknowledged satisfied the IQ element for a diagnosis of intellectual disability. ECF No. 23-25 at 23–24, 35, 57; *id.* No. 23-27 at 185. As

for his assessment of Reeves's adaptive functioning, Dr. King administered the ABS-RC-2 test, despite acknowledging it "does not fit the psychometric criteria . . . for a diagnosis of mental retardation." *Id.* No. 23-25 at 79–80. This is, according to the authoritative text in the field, because the test is normed against the developmentally disabled population (i.e., intellectually disabled and borderline functioning individuals), and thus shows how Reeves's adaptive functioning compares to other developmentally disabled individuals. *Id.* at 74–77. The results of that test nonetheless revealed that, in three categories—prevocational/vocational activity, domestic activity, and self-direction—Reeves functioned in the bottom 25% *of intellectually disabled individuals*. *Id.* at 66–69, 74–81; *id.* No. 23-27 at 186.

In October 2009, the Rule 32 Court rejected Reeves's ineffective-assistance claim because he "failed to call either Goggans or Wiggins in support of [his] claim." Pet. App. 315a. The Rule 32 court repeatedly noted the failure to call trial counsel during the Rule 32 proceedings, citing that fact *six times*, and refused to consider any other evidence. See *id.* (noting that Reeves "failed to call either Goggans or Wiggins in support of [his] claim of ineffective assistance of counsel"); *id.* at 317a (same); *id.* at 318a (same); *id.* at 319a (same); *id.* at 321a (same); *id.* at 322a (same). Reeves appealed that decision to the CCA.

On appeal, Reeves argued, among other things, that there is no "requirement that trial counsel testify" in support of an ineffective assistance claim. *Id.* at 268a. The State disagreed. It argued that the absence of trial counsel testimony was an independent basis to reject Reeves's ineffective-assistance claims. According to the State, "Because Reeves failed to call

his attorneys to testify during the Rule 32 proceedings, [the CCA] should find that Reeves failed to prove deficient performance." ECF No. 23-29 at 200; see *id.* at 202 (same); *id.* at 206 (same).

The CCA rejected Reeves's argument that testimony from trial counsel is unnecessary and affirmed the Rule 32 Court's decision on that basis. The CCA explained that "<u>a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning</u>." Pet. App. 271a (quoting *Stallworth*, 171 So. 3d at 92) (underlining in original). As support for this rule, the CCA relied on its own prior decisions, including in *Stallworth*, 171 So. 3d at 92, and *Broadnax*, 130 So. 3d at 1255, which root its trial-counsel-testimony requirement in the presumption that counsel performed effectively. Pet. App. 270a–271a. That presumption, the court continued, cannot be overcome where the record is "silent as to the reasoning behind counsel's actions," and the record is "silent" on that point unless trial counsel has testified. *Id.* at 269a–270a; see also *id.* at 277a ("[B]ecause Reeves failed to call his counsel to testify, the record is silent . . . ."); *id.* at 281a ("Reeves presented no evidence at the evidentiary hearing regarding what mitigation investigation his trial counsel conducted, because Reeves failed to call trial counsel to testify."). Because "Reeves did not call McLeod, Goggans, or Wiggins to testify," the CCA explained that the "circuit court found that Reeves had failed to prove his claims of ineffective assistance of trial [] counsel." *Id.* at 268a.

Accordingly, the CCA held that "Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel." *Id.* at 272a. Having decided to reject Reeves's claim on that basis, the CCA's analysis of Reeves's *Strickland* claims did not

mention any of the evidence discussed above demonstrating that Reeves's counsel knew the importance of Dr. Goff's evaluation and had persistently and successfully argued for funds to retain him.

The Alabama Supreme Court subsequently denied Reeves's petition for a writ of certiorari. ECF No. 23-32 at 48. This Court denied Reeves's petition for certiorari from the Alabama Rule 32 proceedings. Justice Sotomayor's dissent, joined by Justices Kagan and Ginsburg, observed that it was "plain[]" and "unquestionab[le]" that the CCA had applied a rule that an ineffective-assistance claim cannot succeed without trial-counsel testimony. Pet. App. 179a, 189a.

3. Reeves next petitioned the District Court for the Southern District of Alabama for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, arguing among other things that counsel was constitutionally ineffective during the sentencing phase of his trial. The district court denied his amended petition.

A unanimous panel of the Eleventh Circuit reversed. Pet. App. 22a–45a. First, the Eleventh Circuit observed that the CCA had treated the lack of trial-counsel testimony as a *per se* bar to relief, noting the clear statements in its opinion as well as its failure to mention any of the evidence or explain why that evidence could not establish ineffectiveness. *Id.* 24a. Relying on this Court's decisions, the Eleventh Circuit then reasoned that the CCA's rule represented an unreasonable application of *Strickland*, 466 U.S. 668. *Id.* at 25a–31a.

Accordingly, the Eleventh Circuit reviewed *de novo* the merits of Reeves's *Strickland* claim. *Id.* at 31a. Trial counsel was deficient, the panel explained, because they ended their investigation at an "unreasonable juncture" by not retaining an expert to eval-

uate Reeves for intellectual disability. *Id.* at 31a–32a (quoting *Wiggins* v. *Smith*, 539 U.S. 510, 527–28 (2003)). Specifically, the court pointed to trial counsel's earlier statements that a neuropsychologist was urgently needed and "the only avenue" to compile information about Reeves's intellectual disability, interview Reeves, and then present the information in an orderly and informative fashion to the jury. ECF No. 23-1 at 74–75. Trial counsel's subsequent failure to contact Dr. Goff—despite being given over three months to do so and having petitioned twice for funds to hire him—was "particularly unreasonable and deficient," the Eleventh Circuit continued, "in light of what trial counsel actually knew about the need for an intellectual disability evaluation," Pet. App. 33a, including "hundreds of pages" in their possession concerning Reeves's mental health and school records, his low IQ scores, an outpatient forensic evaluation report, and more, *id.* at 32a–34a.

The Eleventh Circuit further held that trial counsel's reliance on Dr. Ronan instead of Dr. Goff was unreasonable given that she was not a neuropsychologist (as counsel had stressed they needed) but a psychologist who had evaluated Reeves only for competency to stand trial and to determine his mental state at the time of the offense. Dr. Ronan also had not conducted a proper clinical evaluation regarding intellectual disability, and had not spoken with counsel about Reeves until the day she testified. *Id.* at 35a.

The court added that records suggesting that Reeves was in the borderline range of intelligence could not excuse trial counsel's failure to contact Dr. Goff. *Id.* at 36a–37a. Since counsel had other indications that Reeves might be intellectually disabled, were aware that Reeves's intellectual ability was a

critical issue, and had already received the funding for an evaluation from Dr. Goff, counsel should have at least had Reeves's mental capacity evaluated so they could "mak[e] an informed choice among possible defenses." *Id.* (quoting *Wiggins*, 539 U.S. at 525).

On prejudice, the Eleventh Circuit noted that the jury had recommended a death sentence by the narrowest possible margin, and that Reeves was required to establish only "a reasonable probability that at least one juror would have struck a different balance" between life and death. *Wiggins*, 539 U.S. at 537. The record, the Eleventh Circuit concluded, met that standard.

Reeves's mental capacity was relevant to one statutory mitigating circumstance and two non-statutory mitigating circumstances that had not been found. Pet. App. 41a. And the mitigating evidence that trial counsel failed to obtain "was powerful." *Id.* at 42a. Dr. Goff testified that Reeves was "mentally retarded," he read at a third-grade level and spelled at a fifth-grade level, his other academic skills were at a fourth-grade level, and he had throughout his life significant deficits in self-direction, functional academics, work activities, and health and safety. *Id.* Instead of hearing all this, the jury heard Dr. Ronan baselessly opine that Reeves "was not in a level that they would call . . . mental retardation." *Id.* at 43a.

The Eleventh Circuit also noted that the State did not "point to any additional aggravating evidence that would have been introduced had counsel presented testimony" about Reeves's intellectual disability. *Id.* at 44a. For these reasons, the panel held that "the available mitigating evidence, taken as a whole, might well have influenced the jury's [or the trial judge's] appraisal" of Reeves's moral culpability. *Id.* at 44a–45a (quoting *Wiggins*, 539 U.S. at 538).

The State did not request either panel rehearing or rehearing en banc from the Eleventh Circuit.

REASONS FOR DENYING THE PETITION

Summary reversal is appropriate only where a lower court has not only erred, but done so "demonstrably" and "clear[ly]." *Maryland* v. *Dyson*, 527 U.S. 465, 467 n.1 (1999); *CSX Transp., Inc.* v. *Hensley*, 556 U.S. 838, 840 (2009). That standard is not remotely met here. The State strains to create an impression of error by badly mischaracterizing the decision of the CCA and ignoring compelling evidence relied upon by the Eleventh Circuit.

I. THE STATE'S PETITION RELIES ON A CLEAR MISREADING OF THE ALABAMA COURT'S OPINION

A. The Alabama Court's Opinion Leaves No Doubt That It Applied An Unreasonably Incorrect Rule.

The State cannot defend a rule that rejects ineffective-assistance claims for lack of trial-counsel testimony as a reasonable application of *Strickland*. So instead, the State contends that the CCA "consider[ed] all the circumstances" surrounding Reeves's ineffective-assistance claim before rejecting it, notwithstanding that it recited an incorrect legal rule. Pet. 19, 23. That reading cannot be squared with what the CCA actually said.

As the State acknowledges, a federal court must presume that a state court "meant what it wrote." *Id.* at 19. What matters in discerning the CCA's reasoning is the text of its opinion. See, *e.g.*, *Wilson* v. *Sellers*, 138 S. Ct. 1188, 1191 (2018) (Under AEDPA, "when the last state court to decide a prisoner's federal claim explains its decision on the merits in a rea-

soned opinion[,] . . . a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable.").

Here, the CCA's reasoning could not be clearer. The trial court rejected Reeves's ineffective-assistance claim because he did not call trial counsel to testify. See, *e.g.*, Pet. App. 315a. On appeal, Reeves argued that the trial court wrongly denied his ineffective-assistance claim because "there is no requirement that trial counsel testify [to succeed on an ineffective-assistance claim]." *Id.* at 268a. And the CCA rejected that argument. It cited five prior decisions from Alabama courts that hold, "to overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning." *Id.* at 270a–271a (quoting *Stallworth*, 171 So. 3d at 92) (underlining in original). Contrary to the State's suggestion, the Eleventh Circuit did not selectively "pluck[]" this line from the CCA's opinion. Pet. 3, 18. The CCA, not the Eleventh Circuit, emphasized the rule by underlining it. Pet. App. 271a.

The CCA further stated that the presumption of adequacy cannot be overcome where the record is silent as to counsel's reasoning, and that the record is silent unless trial counsel has testified. *Id.* 269a–270a, 277a. For these reasons, the CCA determined that "Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel." *Id.* at 272a. The meaning of these statements is plain; they are not subject to reasonable debate. To extract some *other* rule from the opinion would require ignoring or rewriting those statements.

It is not only what the CCA plainly said that makes clear that Alabama requires trial-counsel testimony. What the CCA did *not* say confirms its view of the

law. The CCA said nary a word about the extensive evidence demonstrating counsel's ineffectiveness. Trial counsel knew that Reeves was quite possibly intellectually disabled and yet failed even to contact Dr. Goff (or any other neuropsychologist) after they had urgently requested, and then been granted, funds for an evaluation. Trial counsel called a psychologist who had not prepared for the mitigation phase and who they had spoken to about Reeves for the first time that day. Ignoring all of this, the CCA simply stated over and over that the record was silent because trial counsel had not testified at the Rule 32 hearing. *Id.* at 200a, 268a, 272a, 277a, 281a.

The opinion, and all of the evidence disregarded by the CCA, fully support, indeed *compel*, the Eleventh Circuit's conclusion that the CCA rejected Reeves's ineffective-assistance claim based on its view that counsel "must" testify. That is, in fact, how the CCA views its own opinion. Just last year, that court confirmed that it held in this case "that [Reeves] had failed to prove his claims of ineffective assistance of trial and appellate counsel because he did not call his trial or appellate counsel to testify at the Rule 32 evidentiary hearing." See *M.D.D.*, 2020 WL 6110694, at *8 (describing *Reeves* v. *State*, 226 So. 3d 711 (Ala. Crim. App. 2016)).

Contrary to the State's petition, acknowledging that the CCA applied a rule requiring trial counsel testimony does not "require[] reading large portions of the opinion as, at best, superfluous." Pet. 19. The State neither cites nor describes the supposedly "superfluous" portions of the CCA's opinion. In fact, the CCA's discussion of Reeves's ineffective-assistance claim provides a background on such claims generally, Pet. App. 261a–267a; notes that Reeves's trial counsel did not testify at the Rule 32 hearing, *id.* at

267a–268a; rejects the argument that trial counsel testimony is not required to prevail on an ineffective-assistance claim, *id.* at 268a–272a; enumerates the specific claims of ineffective assistance that Reeves asserted, *id.* at 272a–274a; and then cursorily denies each one because counsel had not testified at the Rule 32 hearing, *id.* at 274a–282a. None of this is superfluous if, as the CCA repeatedly emphasized, it was applying a rule requiring trial counsel testimony.

All the State has to support its view that Alabama does not require trial counsel testimony is three words: "In this case." See Pet. 16. It is true that the CCA's opinion, at one point, states: "In this case, Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel." *Id.* at 272a. According to the State, the use of "in this case" signals that the CCA in fact undertook an individualized analysis of Reeves's ineffective-assistance claims rather than applied a categorical rule. Pet. 4, 16, 19, 20, 21. Those three words, however, cannot save the CCA's opinion.

Had the words "in this case" been meant to indicate that the failure to present trial-counsel testimony was decisive because of the record, the court would have proceeded to discuss the record. But it did not. It stopped with the failure to present trial counsel testimony because, to the CCA, that was enough.

Read in context, the phrase "in this case" serves a more prosaic purpose. The opinion had just described the relevant law, and was transitioning to discuss Reeves's claim. Pet. App. 269a–272a. The relevant law includes *more than* the rule requiring trial counsel testimony, so the CCA used the phrase "in this case" to indicate the particular reason why Reeves's claim was being rejected. And that reason is, as the rest of the sentence makes clear, because the CCA

requires trial-counsel testimony to prevail on an ineffective-assistance claim. That is exactly how the CCA used the phrase "in this case" three other times in its opinion while discussing various claims covering other substantive areas of law. *Id.* at 251a, 255a (discussing the law applicable to intellectual-disability claims before transitioning with "in this case,"), 287a (discussing the law covering juror-misconduct claims before transitioning with "in this case,").

B. Summary Reversal Here Would Radically Transform Habeas Review.

Because the State acknowledges that a rule requiring trial-counsel testimony is indefensible, the State needs a federal court to treat the CCA's decision as based on some rule other than the one it articulated. But the CCA said exactly what it meant. So what the State is actually asking for is a rule from this Court that federal habeas courts reviewing state-court rulings must *rewrite* those decisions in a manner that *would have* at least arguably comported with the Constitution, if the State offers any argument from the record that *could have* supported such an imagined opinion. The State couches this as a defense of principles of federalism underlying § 2254(d). Pet. 2, 29–30. It is no such thing.

The State's approach begins with the presumption that "state courts know and follow the law." Pet. *i*, 2, 17, 19, 22 (quoting *Woodford*, 537 U.S. at 24). That presumption requires not seizing on occasional mischaracterizations of the law when the opinion, taken as a whole, can reasonably be read to have applied the correct rule. See *Woodford*, 537 U.S. at 22 (holding that the Ninth Circuit erred in concluding the state court had applied a "probability," rather than the correct "reasonable probability," standard on *Strickland*'s prejudice prong where the state opinion

had "painstakingly" described the correct standard but also occasionally used the incorrect formulation). Reeves agrees that it is not the job of federal courts to strain to find violations of federal law.

But it is equally not the job of federal courts to strain to ignore manifest violations of federal law or to rewrite a state court opinion to avoid such a result. And that is what the State needs to prevail here. The State's concept of "deference" is a practice of *supplying supplementary rationales* that the state court never articulated in order to shield its rulings from federal habeas review. But the deference federal habeas courts owe is to state *courts*. See *Cullen* v. *Pinholster*, 563 U.S. 170, 181 (2011). Presuming that a state court knew and followed the law *regardless of what it actually said* is another way of saying that federal habeas relief should be denied in every case where the state's lawyers can think up some *alternative* rationale for the state-court ruling to present before the federal habeas court, no matter how divorced that rationale is from the text of the state-court opinion. The deference the State seeks here is to State lawyers, who, despite having argued for this rule to the state court, see, *e.g.*, ECF No. 23-29 at 199–200, now would have preferred that the state-court's opinion rested on some different, more defensible ground. (In fact, as discussed below, there is no defensible rationale for rejecting Reeves's ineffective-assistance claim.) Nothing in the text of § 2254(d) or the policy motivating it supports the view that federal courts should defer to the arguments of the State's lawyers that are not reflected in the state-court's ruling.

Such a novel heightening of the standard for habeas relief has nothing to recommend it. The State's view would pervert habeas review into a federal court excuse-making machine for state-court violations of

the Constitution. It is true that in *Harrington* v. *Richter*, 562 U.S. 86 (2011), this Court ruled that a federal habeas court reviewing an *un*reasoned state court decision should consider "what arguments or theories . . . could have supported" the state-court decision. *Id.* at 102. But that just means federal courts, in the face of state-court silence, should evaluate potential bases for the court's decision before declaring that it violated clear federal law. What the State seeks here is much more. It wants a rule that even *reasoned* state court decisions should be treated as a blank canvas upon which federal courts can draw any AEDPA-compliant ruling that state lawyers can gin up. It is thus the State that has presented a new, damaging "playbook," Pet. 18, which other states may follow in order to gut federal habeas of any meaningful capacity for relief and make it all but impossible for prisoners to vindicate even clear violations of constitutional rights. The State's novel approach is most certainly not a proper use of this Court's power of summary adjudication, reserved only for "clear misapprehension[s]" of existing doctrine. *Tolan* v. *Cotton*, 572 U.S. 650, 659–60 (2014); *Brosseau* v. *Haugen*, 543 U.S. 194, 197–98 (2004).

Federalism and comity are not respected by ignoring a state court's stated reasons for denying a federal constitutional claim. Respect for state courts requires taking what they say seriously, right or wrong. A state court that insists that an ineffective-assistance claim *must* be supported by trial-counsel testimony is entitled to have a federal court treat its approach as a genuine proposal for how to understand the Sixth Amendment. The State would prefer, in this case, that this Court *not* take the CCA's stated rule and reasoning seriously. The State effectively imagines a federalism that requires federal courts to

defer to a state court's outcome *despite* its reasoning. That is fake federalism. And this Court should reject the invitation to read § 2254(d) to require it.

II. THE ELEVENTH CIRCUIT CORRECTLY HELD THAT TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE

Beyond correctly holding that the CCA unreasonably applied *Strickland*, the Eleventh Circuit also correctly concluded that Reeves's trial counsel violated his right to the effective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) "counsel's performance was deficient," and (2) that counsel's "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 669. Counsel is deficient when their "representation 'fell below an objective standard of reasonableness'" gauged by prevailing professional norms. *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688). There is prejudice when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 534 (quoting *Strickland*, 466 U.S. at 694).

There is no dispute here that *if* the CCA's ruling involved an unreasonable application of *Strickland*, then the federal court should review the deficiency prong of Reeves's 6th Amendment claim without deference. There is likewise no dispute that, under this Court's decisions, the Court must also evaluate prejudice *de novo* because the CCA did not reach that prong of the analysis. *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005).

A. Trial Counsel's Performance Was Constitutionally Deficient.

The Eleventh Circuit correctly held that trial counsel performed deficiently by failing to have Reeves evaluated for intellectual disability, particularly when funds had been approved for that purpose. Pet. App. 31a–39a; see *Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Trial counsel knew that Reeves might be intellectually disabled and the significance of that fact to the mitigation phase; successfully petitioned, on their second try, for funds to have a neuropsychologist evaluate Reeves for intellectual disability; and yet failed to contact the neuropsychologist. Instead, trial counsel relied on Dr. Ronan, a court-appointed psychologist who had not evaluated Reeves for intellectual disability. And they relied on Dr. Ronan, despite not talking to her about Reeves until the day she testified—a point at which trial counsel *knew* it would be too late.

The State's arguments to the contrary are equal parts misleading and unpersuasive. That McLeod was replaced by Goggans after the trial court had authorized funds to retain Dr. Goff, Pet. 23, does not matter. Both McLeod and Wiggins litigated Reeves's original motion to appoint Dr. Goff, ECF No. 23-1 at 70–71, and also his application for reconsideration, *id.* at 74–77. Wiggins, who remained as Reeves's trial counsel, therefore was fully aware of the need for Dr. Goff to evaluate Reeves's intellectual disability and that funding had been secured to hire him. And Goggans too was aware of the need to hire Dr. Goff. He requested psychiatric records from the Taylor Hardin facility and belatedly tried to have an expert testify

by speaking with Dr. Ronan for the first time on the day of her testimony. *Id.* No. 23-8 at 130.

Second, contrary to the State's suggestion, counsel's failure to contact Dr. Goff could not have been strategically motivated to prevent the jury from observing cross-examination of Dr. Goff regarding the "Flynn effect" (an IQ-adjustment method he sometimes employs). Pet. 24. Dr. Goff determined that, even without considering the Flynn effect, Reeves was intellectually disabled. ECF No. 23-24 at 75–76. And Dr. King independently determined that Reeves had an IQ score of 68, and confirmed that Reeves satisfied the IQ prong of the intellectual disability test, *without* applying the Flynn effect. *Id.* No. 23-25 at 24. Regardless, trial counsel never reached out to Dr. Goff, *id.* at 21–22, so they could not have known about whether he would use that adjustment in Reeves's case. In fact, Dr. Goff testified during the Rule 32 hearing that he only began incorporating the Flynn effect into his analyses several years *after* Reeves's 1998 sentencing, and opined that he would have concluded that Reeves was intellectually disabled had he evaluated him at that time. *Id.* at 22–23, 68–69, 75–76; *id.* No. 23-15 at 105.

The State has never before, until this petition, presented this speculation about trial counsel's strategy, and no state court ruling ever suggested it. It also has no basis in the record. So in addition to being wrong, the argument is waived. See *Buck* v. *Davis*, 137 S. Ct. 759, 780 (2017) (holding State waived argument because it was not advanced in the courts below).

The State also hypothesizes that trial counsel strategically picked Dr. Ronan over Dr. Goff during the mitigation phase because, as "a neutral expert employed by the State," Dr. Ronan's presentation of mitigation evidence may have seemed "more trustworthy

than evidence from an expert hired by the defense team." Pet. 24. This is yet another late-arriving theory, advanced for the first time at oral argument before the Eleventh Circuit. The fact that the State keeps inventing new strategic rationales for failing to do the obvious—retain Dr. Goff so the trial team could be informed about how best to present a mitigation defense—is telling. And that none of these new rationales can be squared with the record is dispositive.

Trial counsel *first* spoke with Dr. Ronan *on the day of her testimony*. Trial counsel simply cannot have meaningfully evaluated whether Dr. Ronan's testimony would suffice and make Dr. Goff's testimony superfluous if they had not spoken to *either* of them. Yet trial counsel ultimately called her to the stand knowing that her evaluation of Reeves was inadequate for the mitigation phase. ECF No. 23-13 at 59; *id.* No. 23-15 at 10. And, even if trial counsel had made this choice, it could not have been reasonable. Trial counsel was aware of the limitations of Dr. Ronan's report—because they received it *before* petitioning the court for funds to hire Dr. Goff—yet determined that a neuropsychiatric evaluation was still necessary. *Id.* No. 23-1 at 70. Once trial counsel sought, and obtained, funds to retain Dr. Goff, they at a minimum were required to talk to one of them *before* Reeves's capital sentencing.

The State's view that Dr. Ronan provided the kind of "more than capable" expert testimony that Reeves needed, Pet. 24–25, also fails. Dr. Ronan's original evaluation of Reeves "was not performed for [the] purpose" of capital sentencing, and she had not "conducted an extensive clinical evaluation regarding mental retardation as that was not within the scope of [her] evaluation." ECF No. 23-15 at 10. The deci-

sion to call Dr. Ronan despite these limitations, which the "[a]ttorneys were routinely informed" about, *id.*, not only prevented the jury from hearing expert opinion that Reeves was intellectually disabled, but also caused them to hear Dr. Ronan opine baselessly that Reeves "was not in a level that they would call . . . mental retardation." *Id.* No. 23-8 at 155.

Finally, the State makes much of records from the Taylor Hardin Secure Medical Facility that trial counsel received after Goggans had replaced McLeod. Pet. 7–8, 14, 16, 20, 23. According to the State, those records "suggested that Reeves was not intellectually disabled" and instead was in the borderline range of intellectual functioning. *Id.* at 7. Thus, the argument goes, trial counsel reasonably concluded that an evaluation of mental capacity was unnecessary. *Id.* at 20–21.

The Taylor Hardin records, however, provided trial counsel with no new information. The records were summarized in Dr. Ronan's report about Reeves, ECF No. 23-13 at 59–68, which, as noted, addressed solely his competency to stand trial and mental state at the time of the offense. *Id.* at 59. And, because trial counsel had the summary of these records *before* they decided to seek funds to hire Dr. Goff, they could not have changed trial counsel's mind about the need for a neuropsychological evaluation. The State does not seem to disagree. Despite its emphasis on the Taylor Hardin records, it neither cites nor describes *a single document* from them that could have justified the failure to contact Dr. Goff. That is because trial counsel already had a summary of what those documents contained *before* they decided to seek funds to hire Dr. Goff.

Even if the Taylor Hardin records supported that Reeves was at a borderline level of intelligence, trial counsel had many other indications of Reeves's severe intellectual shortcomings. See*, e.g.*, ECF No. 23-30 at 90. As the Eleventh Circuit noted, given that trial counsel had already obtained the funds to retain Dr. Goff, and given the significance of Reeves's mental capacity to his mitigation case, counsel should have "at least had [Reeves's] mental capacity *evaluated*," Pet. App. 36a, so that they could "mak[e] an informed choice among possible defenses," *id.* at 36a–37a (quoting *Wiggins*, 539 U.S. at 525). See *Strickland*, 466 U.S. at 690–91 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"); *Wiggins*, 539 U.S. at 524 (stating that the failure to hire a forensic social worker when "funds [were] available" amounted to deficient performance); *Ake* v. *Oklahoma*, 470 U.S. 68, 80 (1985) (recognizing the need for expert assistance where the defendant's mental condition is relevant to criminal proceedings); see also *Hinton* v. *Alabama*, 571 U.S. 263, 274 (2014) (holding that the failure to use available funds to secure vital expert testimony was deficient performance). Counsel never learned anything that would have made refusing even to contact Dr. Goff reasonable.

B. Trial Counsel's Performance Prejudiced Reeves.

The Eleventh Circuit also correctly concluded that trial counsel's failure to have Reeves evaluated for intellectual disability resulted in prejudice. To prove prejudice, Reeves "must show that 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. A "reasonable

probability" does not mean that counsel's performance "more likely than not altered the outcome." *Nix* v. *Whiteside*, 475 U.S. 157, 175 (1986). Instead, a "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Trial counsel's performance prejudiced Reeves, given, as the Eleventh Circuit mentioned, that changing even one juror's mind would have precluded a death sentence; that the trial court had not found any mitigating factors relating to intellectual disability; the powerful testimony that Dr. Goff would have given; the damaging testimony that Dr. Ronan gave instead; and the lack of aggravating evidence that could have been introduced had counsel presented testimony on intellectual disability. Pet. App. 41a–45a.

The State nevertheless argues that testimony of Dr. Goff would have "barely [] altered the sentencing profile presented to the sentencing judge." Pet. 26 (quoting *Strickland*, 466 U.S. at 699–700). In the State's eyes, the claim that Reeves suffered from intellectual disability was not meaningfully different than the claim that he "suffered [from] low intelligence," *id.* at. 27.

That's simply not true. For starters, Alabama treats only intellectual disability, not low intelligence, as a statutory mitigating factor. Ala. Code § 13A-5-51(6). The State elicited testimony from Dr. Ronan specifically to rebut any argument that the statutory mitigating factor applied. And Dr. Ronan emphasized before the jury the distinction between low intelligence and intellectual disability, and testified—without basis or objection from counsel—that Reeves was not in the latter category. See *Glenn* v. *Tate*, 71 F.3d 1204, 1205, 1209–11 (6th Cir. 1995) (petitioner was prejudiced by trial counsel's failure to

present evidence of his low mental capacity, particularly since the jury was presented with "uncontradicted expert evidence that the offense was not the product of mental retardation").

The State further argues that Dr. Goff's testimony would have prompted a rebuttal by Dr. King. Pet. 26. But Dr. King offered much evidence that, had it been presented at sentencing, would have supported Dr. Goff's conclusion. Dr. King ultimately concluded that Reeves was not intellectually disabled, but he administered an IQ test on which Reeves scored a 68, which Dr. King acknowledged satisfied the IQ element for a diagnosis of disability. ECF No. 23-25 at 23–24, 35, 57; *id.* No. 23-27 at 185. Dr. King's assessment of Reeves's adaptive functioning showed that, in three categories—prevocational/vocational activity, domestic activity, and self-direction—Reeves functioned in the bottom 25% *of intellectually disabled individuals*. *Id.* No. 23-25 at 66–69, 74–81; *id.* No. 23-27 at 186. Dr. Goff's testimony, supported by some of Dr. King's own findings, creates a "reasonable probability" that the vote of a single juror "would have been different." *Strickland*, 466 U.S. at 669; see also *Porter* v. *McCollum*, 558 U.S. 30, 43 (2009) ("While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or sentencing judge.").

The State next faults the Eleventh Circuit for not "explain[ing] why . . . claims about mental disability would outweigh or undercut the heinousness of Reeves's crimes." Pet. 28. But there was, of course, no need for the Eleventh Circuit to do so because state and federal law make clear that intellectual disability limits an offender's culpability, even for the most hei-

nous crimes. See Ala. Code § 13A-5-51(6) (listing as a mitigating circumstance the defendant's "substantially impaired" capacity to appreciate the criminality of his conduct or conform his conduct to the law); *Brownlee*, 306 F.3d at 1071–73 (mentioning non-statutory mitigating factors relating to intellectual disability); *Atkins*, 536 U.S. at 318 (stating that the "deficiencies" of intellectually disabled people "do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability"). Moreover, the jury was aware of the nature of the crime, and yet multiple jurors voted against the death penalty *even without* hearing evidence on intellectual disability. There is a reasonable probability that at least one more would have followed suit with a constitutionally adequate mitigation defense.

Lastly, the State contends that the jury may have found Dr. Goff's assessment of Reeves's IQ to be "unpersuasive and disingenuous" because Dr. Goff sometimes incorporates the Flynn effect in his analysis. Pet. 24. This argument is illogical. Dr. Goff concluded that Reeves was intellectually disabled, *even without applying the Flynn effect.* And he would have testified at the sentencing phase to the same conclusion both because he was not applying the Flynn effect at the time of sentencing and because intellectual disability requires an IQ score below 75, which Reeves undeniably has. ECF No. 23-24 at 75–76; see *Atkins*, 536 U.S. at 309 n.5. Ultimately, a "reasonable probability . . . [means] only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Smith* v. *Cain*, 565 U.S. 73, 75 (2012) (internal citation omitted). The testimony Dr. Goff would have offered easily clears that bar.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

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