No. _____

(CAPITAL CASE)

In The

Supreme Court of the United States

Antonio Devoe Jones,

Petitioner,

v.

State of Alabama,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

Steven A. Miller*
REED SMITH LLP
10 South Wacker Drive
Chicago, IL 60606-7507
Telephone: +1 312 207 1000
Facsimile: +1 312 207 6400
samiller@reedsmith.com

**Counsel of Record, Member of Supreme Court Bar, Counsel for Petitioner*

CAPITAL CASE

QUESTIONS PRESENTED

1. Was Petitioner deprived of his constitutional right to effective counsel after his defense lawyers misunderstood controlling Alabama law and mistakenly relied on a legally invalid defense to the death penalty, even though a valid defense was available and not asserted?

2. Was Petitioner deprived of his constitutional right to effective counsel when his attorneys failed to conduct more than a cursory mitigation investigation, failed to present volumes of readily available evidence as to Petitioner's deplorable life history, and failed to prepare mitigation witnesses, resulting in extremely prejudicial and erroneous testimony being elicited against the accused while substantial mitigation evidence was not presented?

PARTIES TO PROCEEDINGS BELOW

Petitioner is Antonio Devoe Jones. Respondent is the State of Alabama. Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

TABLE OF CONTENTS

Page

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioner Antonio Devoe Jones ("Jones") respectfully petitions this Court for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals is unpublished and is in the Appendix at App. 3-92. The order of the Houston County Circuit Court denying Jones's post-conviction relief is unpublished and is in the Appendix at App. 93-165. The order of the Alabama Court of Criminal Appeals denying Jones's application for rehearing is unpublished and is in the Appendix at App. 2. The order of the Supreme Court of Alabama denying Jones's petition for writ of certiorari is unpublished and is in the Appendix at App. 1.

JURISDICTION

The Alabama Court of Criminal Appeals affirmed the denial of Jones's post-conviction petition on November 22, 2019. *Jones v. Alabama*, No. CR-13-1552 (Ala. Crim. App. Nov. 22, 2019). The court denied Jones's timely application for rehearing on all claims on May 22, 2020, and the Alabama Supreme Court denied certiorari as to all claims on September 11, 2020. This Court's Order on March 19, 2020 extended the deadline to file any petition for writ of certiorari due on or after the date of the order by 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial .

. . and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No state shall . . . 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."

INTRODUCTION

This is an Alabama death penalty case in which defense counsel: (1) presented a legally invalid defense because they did not know or learn the elements of the crime of burglary, the underlying offense to the death penalty charge; and (2) failed to adequately investigate and present vast amounts of easily discoverable mitigation evidence establishing a horribly violent, abusive, squalid, and crime-dominated childhood, and due to the woeful failure of preparation of key mitigation witnesses, presented highly prejudicial and erroneous testimony.

Despite an Amended Rule 32 Petition ("Amended Petition") clearly meeting pleading standards under Alabama law and *Strickland*, the Alabama courts summarily dismissed the claims without an evidentiary hearing, misstated claims to the point that they were unrecognizable from those actually asserted and, remarkably, held that defense counsel was effective. The Alabama Court of Criminal Appeals' history in this case is so egregious that, after an earlier decision improperly dismissing the post-conviction appeal on procedural grounds, the Alabama Attorney General refused to defend the ruling, which was reversed by the Alabama Supreme Court. *Ex parte Jones*, No. 1170546, 2019 WL 1873795 (Ala. Apr. 26, 2019).

STATEMENT OF THE CASE

A. Pre-trial Proceedings

In the early evening of December 31, 1999, in Dothan, Alabama, police officers discovered the body of Ruth Kirkland ("Kirkland") lying on the floor of her kitchen. App. 4, 6. Kirkland had been beaten at close range over 80 times with a wooden cane and a chair leg. App. 228, 246-47. Fingerprints were lifted from the bloody crime scene, but none were linked to Jones or to any known individuals. App. 227-28, 253. The only thing missing from Kirkland's home was her car. App. 203.

Later that evening, around 9:00 p.m., the police found 18-year-old Jones driving the victim's car. App. 229. Jones was with his sister, LaKeisha, her young child, and a friend, Acaris Gordon. App. 190, 229. To the police officers' surprise, Jones did not flee, but instead stopped for the police. App. 229. The police took Jones and his companions into custody. *Id.* Through more than seven hours of interrogations, Jones consistently maintained that friends gave him the keys to the car, and he denied assaulting Kirkland. App. 227, 229, 259.

During the interrogations of Jones, the police rammed his head into a door and repeatedly kicked him in the chest. App. 190-92. At about 5:30 a.m., after hours of discussion of the location, victim, and other details of the crime by the police, the police claim Jones "confessed," but only to being present when others assaulted Kirkland. App. 229. The police recorded Jones's earlier repeated denials, but they did not record his alleged admission to being present at the scene. *Id.*

Despite the extremely bloody crime scene, neither Jones nor his clothing were covered in blood. App. 229-230. The police sent his clothing to a state forensic

laboratory, and a State witness claimed she identified dark "pinpoints" on Jones's pants as blood. *Id.* While the State's DNA sample was admittedly contaminated, testimony was that the one sample tested from the pants Jones allegedly wore while in Kirkland's car contained DNA consistent with Kirkland and DNA from another person. App. 230.

B. Trial Proceedings

More than three years after the crime, the trial court appointed attorneys Clark Parker ("Parker") and Thomas Brantley ("Brantley") to represent Jones at trial. App. 169. Parker had never handled a capital case, yet he took the lead in preparing for trial, handled the guilt phase of the trial, and was responsible for the direct appeal. App. 166-69.

Parker based Jones's capital defense on a fundamental misunderstanding of the law. Burglary was the aggravating factor the State alleged as its basis for seeking the death penalty. App. 296-97. Jones's Amended Petition alleged specifically that Parker defended on what he has since admitted was an erroneous belief that a completed theft from a dwelling was needed for a burglary to be committed. App. 295. Much of the defense at trial highlighted evidence centered on this misunderstanding: that cash was left in the house in plain sight, nothing was identified as missing from Kirkland's spilled purse, a change purse in the car still had cash in it, the car was parked away from the house in a carport, and nothing showed the car keys were taken from the house. *Id.* Parker's closing argument relied heavily on this evidence. For example, he told the jury:

Essentially the first thing I want you to look at is the element of what's

> taken – what was taken. Got a Cadillac that was taken . . . . Last time it was seen as far as we know normally it's put in a carport . . . .Part of it [the carport] was used for storing garbage cans and other things and then out to the left was a storage building. That was used for a variety of things. I'm not sure what she had in it. But it wasn't a dwelling area. It wasn't heated or cooled. She slept in the house. Garage was outside. The carport was outside. The outbuilding was out there. The car was taken from there. That's a significant factor.
>
> We have no evidence that any keys were in the house or that the keys were not in the car. There's no evidence that the keys were inside the house. There's no evidence that anything was in the house that was ultimately found outside the house.

Id. The trial court's jury instructions slammed the door shut on this misguided defense when the judge correctly stated the law of Alabama: that theft is not a necessary element of the crime of burglary. App. 295. The prosecutor pointed this out to the jurors. *Id.* Yet, defense counsel persisted in their mistake of law, and they even included that argument as one of only three issues raised on the direct appeal. App. 384.

Parker admitted that only after presenting the legally invalid defense at trial and on appeal did he finally recognize that the law requires only intent and not an actual theft. App. 297. In their post-conviction rulings at issue today, the Alabama courts denied that Parker had made a mistake and ignored his admission of the error by mischaracterizing the facts of Jones's Amended Petition. *See* App. 17 (*Jones v. State*, Case No. CR-13-1552).

C. Sentencing Proceedings

During the penalty phase, counsel's failure to investigate available mitigation evidence and prepare witnesses was manifest. Key defense witnesses were surprised and caught off guard by defense questioning. Overall, counsel presented four

inadequately prepared lay witnesses and one completely unprepared expert witness during Jones's sentencing trial.

For example, counsel called a psychologist, Robert DeFrancisco, Ph.D., to testify. App. 349. Counsel never met with Dr. DeFrancisco to prepare him to testify as a mitigation expert or to advise him of Jones's social history. *Id.* Dr. DeFrancisco had testified in hundreds of other cases during a long career, but this was the one and only instance in which the lawyers calling him as a witness did not meet with him or prepare him for his testimony. *Id.* After this complete lack of preparation, counsel solicited testimony from Dr. DeFrancisco that Jones had the traits of a sociopath, an extremely damaging opinion Dr. DeFrancisco told counsel during the post-conviction proceedings he would not have held had he been apprised of Jones's history.

In a second mitigation phase fiasco, Jones's aunt, Marilyn Walker, was called to testify for the defense, also not having been interviewed or prepared. App. 322. Unaware that Jones had already been convicted before she testified, his aunt testified in response to blind questioning by defense counsel that Jones could not make a positive contribution in prison and if he committed "this crime" he deserved "whatever punishment is given to him". App. 323.

Rather than accurately eliciting the tragic facts of Jones's life, defense counsel portrayed Jones's life through the questioning of Ms. Whitsett, Jones's mother, as essentially normal. App. 313. Counsel's preparation of Ms. Whitsett was perfunctory, lasting an hour. *Id.* Because she was never told what type of evidence

might be relevant in mitigation, she did not volunteer any information that she had about the abuse Jones suffered or his horrific life history. *Id.* Instead, she testified to her general opinion that she provided the best home environment for Jones that she could. *Id.*

Further amplifying counsel's failure to investigate mitigation evidence was the fact that counsel knew the development of Jones's life history was a necessary part of mitigation. Counsel had applied for and secured court funding for a mitigation specialist, who could have put forth some of the available evidence during the post-conviction proceedings. However, despite receiving such funding, counsel never actually retained a mitigation expert to investigate Jones's upbringing. App. 309.

D. Post-Conviction Proceedings

During the post-conviction proceedings, Jones's new counsel easily discovered a plethora of evidence about Jones's horrific childhood that was never introduced to the jury during his sentencing proceedings. In fact, the jury heard none of Jones's story because trial counsel introduced no evidence of the horribly violent, abusive, squalid, and crime-dominated childhood of young Jones. This allowed the prosecutor to argue, in support of a sentence of death, that Jones had a normal childhood. App. 357.

Jones was born into a life of extreme abuse and poverty. Beginning at age five, he was beaten hundreds of times by his mother, stepfather, grandmother, uncles and aunts. App. 318-19. The weapons were belts and extension cords which drew blood and left welts, scars, and bruises. App. 318-19, 324-25, 333. Among his mother's reasons for beating him was that Jones, who suffered from a diagnosed learning

disability and had a low IQ, was unable to correctly recite the 23rd Psalm from memory. App. 318-19.

Ms. Whitsett dropped out of high school in the tenth grade and had five children between the ages of 17 to 22 with four different men. App. 317. She frequently used hard drugs including powder cocaine. App. 329, 333. The household in which Jones was raised was beset by extreme poverty and substance abuse. App. 313-19, 334. From birth until he was eighteen (the year of the offense and his arrest) Jones lived a nomadic life, living in over 25 childhood homes between Dothan, Alabama and Panama City, Florida. App. 317, 339-342. Some of the homes were rat infested. App. 324. During cold winter days and nights the adults would throw pots and pans at the rats to kill them. Assuming they were dead, the rats were tossed into a burning fireplace being used for heat. But sometimes the rats were not dead and would run through the house on fire with people screaming. App. 313-14, 324-27.

At times, there were as many as ten people living in a single home, with as many as five people sleeping in a single room. App. 314. The homes were frequently in disrepair and were located in projects dominated by drugs and prostitution. App. 338. The police conducted drug raids, occasionally ransacking Jones's home. App. 331. Jones sometimes slept under these houses, rather than going inside. App. 328-29. Other times, he ran away, escaping the environment for days at a time. App. 327. Jones and his siblings frequently went hungry. App. 321, 324. Even so, Jones was very protective of his siblings, especially his hearing-impaired sister, LaKeisha.

He frequently protected her from bullies and stayed up at night to watch over her and his other siblings. App. 320, 329.

After Ms. Whitsett met and married a convicted drug dealer named Demetrius Whitsett, Demetrius set up his drug dealing business in the family home. App. 318-19, 324. Demetrius used drugs in the home, in front of the children. App. 322, 324. He gave drugs to Jones and other children. App. 327-28. Demetrius enlisted Jones when he was 15-years-old into his drug business. App. 319. If Jones erred in cutting or bagging drugs, Demetrius beat him. *Id.*

Jones suffered substantial cognitive limitations and mental health problems. When Jones was in third or fourth grade, his physicians diagnosed him with Attention Deficit Hyperactivity Disorder ("ADHD"). The psychiatric medications he was prescribed caused him further mental problems, and the side effects of the medication immobilized him. App. 330-31. Jones attended special education classes, but because the family was constantly on the move, Jones did not receive the services and treatment his condition required. App. 328-29. He dropped out of school completely after ninth grade. App. 228.

When he was 14-years-old, Jones was evaluated by a psychologist, Ann Jacobs. App. 346. Dr. Jacobs observed that in addition to suffering from learning disabilities, he made suicidal statements, exhibited schizoid qualities, would cry, had depressive episodes, and had tenuous contact with reality. Counsel possessed Dr. Jacobs's psychological report, but it was not introduced as evidence of mitigation. App. 308, 334-37, 346-48.

Although counsel had Jones's mother testify, counsel failed to investigate Jones's abusive childhood with any other relatives or explore his upbringing thoroughly with Jones's mother. Instead, counsel spent just one hour with Ms. Whitsett and never explained the type of testimony that would help her son avoid the death penalty. App. 313. Due to her lack of preparation and counsel's failure to investigate Jones's childhood further, his mother mistakenly "believed that only positive information about Mr. Jones' background and upbringing" would avoid the death penalty, *id.*, the opposite of the actual facts that would have helped her son in mitigation. Had she been properly prepared she could have advised counsel of the hundreds of beatings inflicted on her child as well as the other mitigation evidence the jury never heard. She also would have identified numerous other family members who would corroborate her testimony. App. 308.

The abject failure to tell any aspect of Jones's true story was the product of trial counsel's myriad of deficiencies that were specifically and properly alleged in Jones's Amended Rule 32 Petition. The Amended Petition sets forth detailed factual claims in 586 numbered paragraphs covering 231 pages. App. 166-398. The allegations are specific and non-conclusory. The many witnesses who were readily available to present mitigation and expert testimony are named and the details of their missing evidence provided. Facts establishing prejudice from counsel's omissions and errors are clearly identified. Further, distinct evidence of counsel's failure to understand the law of burglary and their presentation of fruitless arguments at trial and on appeal are specifically identified. Yet, despite all of these

well-pleaded facts, the Alabama courts concluded Jones's counsel was effective, contrary to this Court's precedent in *Strickland* and its progeny.

Because Jones alleged facially meritorious and specific claims of ineffective assistance of counsel with respect to his capital trial and appeal in his petition for post-conviction relief, this Court should grant a writ of certiorari and determine that he is entitled to an evidentiary hearing on these claims.

E. Procedural History

On March 12, 2004, after a trial in Houston County, Alabama, Jones was convicted of capital murder. App. 169; *Jones v. Alabama*, No. CR-00-353.60 (Cir. Ct. Houston County, Ala. June 19, 2014). The trial court sentenced Jones to death on June 8, 2004. App. 169. The Alabama Court of Criminal Appeals affirmed his conviction and sentence on direct appeal. *See Jones v. State*, 987 So. 2d 1156 (Ala. Crim. App. 2006) (No. CR-03-1504). The Alabama Supreme Court denied Jones's petition for a writ of certiorari, *Ex parte Jones*, (Ala. Jan. 25, 2006) (No. 1060155), as did this Court on October 6, 2008, *Jones v. Alabama*, 555 U.S. 833 (No. 07-10627).

On January 23, 2009, Jones filed his Petition for Relief from Judgment under Rule 32 of the Alabama Rules of Criminal Procedure in circuit court. On April 4, 2013, Jones filed his Amended Petition for Relief from Judgment under Rule 32 of the Alabama Rules of Criminal Procedure ("Amended Petition"). App. 166. The Amended Petition contains dozens of specific factual claims of ineffective assistance of counsel and the resulting prejudice to meet all the pleading requirements for an evidentiary hearing.

The State submitted a proposed 72-page order of summary dismissal. On June

19, 2014, the circuit court adopted the State's proposed order verbatim (except to correct typographical errors), denied Jones an evidentiary hearing, and dismissed the Amended Petition. *See* App. 94. Jones timely appealed, filing a brief in the Alabama Court of Criminal Appeals on January 20, 2015.

The Court of Criminal Appeals (Case No. CR-13-1552) dismissed the appeal *sua sponte* on December 12, 2017 due to an alleged jurisdictional error. Jones petitioned the Supreme Court of the State of Alabama for a writ of certiorari. The Alabama Attorney General declined to defend the decision of the Court of Criminal Appeals and advised the higher court to appoint counsel if it wanted the decision defended. The Alabama Supreme Court (Case No. 1170546) granted the writ, and on April 26, 2019, unanimously reversed the Court of Criminal Appeals, ordering the case be considered on the merits.

After remand, on November 22, 2019, the Court of Criminal Appeals affirmed the dismissal of Jones's Amended Petition without oral argument. App. 17. Jones petitioned the Alabama Supreme Court seeking a writ of certiorari. The petition was denied on September 11, 2020 (Case No. 1190647), with the Chief Justice dissenting and three justices recused. *See* App. 1. Petitioner now seeks relief in this Court.

REASONS FOR GRANTING THE WRIT

I. Jones was Deprived of Effective Counsel Due to His Counsel's Ignorance of the Law Governing the Death Penalty in Alabama.

A. The Alabama Post-Conviction Decisions Conflict Directly with the Precedent of this Court.

The decision of the Alabama Court of Criminal Appeals ("CCA") regarding Jones's claim of ineffective assistance of counsel directly conflicts with decisions of

this Court. *See* U.S. Sup. Ct. R. 10(c). The Sixth Amendment guarantees that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const., 6th Amend. That means criminal defendants are entitled to an attorney who meets at least a minimal standard of competence. *Strickland v. Washington*, 466 U.S. 668, 685-88 (1984) ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").

The Alabama courts dismissed Jones's claim of ineffective assistance even though his counsel admitted basing his defense to the death penalty on his misunderstanding of the law governing burglary, which was the basis for the death penalty in this case. The rulings conflict with *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."); *Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986); and similar cases.

B. Unable to Refute the Constitutional Argument, the Alabama Courts Instead Denied the Existence of Facts Clearly Pleaded in the Amended Petition.

In the pending case, the Alabama courts have rejected the argument of ineffective assistance of counsel due to ignorance of the law, the constitutional principle recognized by this Court in *Hinton*, and other cases. But in their lengthy opinions, no court discussed the controlling law or any application of that law to the pleaded facts. *See* App. 15-17.

The Amended Petition repeatedly pleaded counsel's admitted lack of knowledge of the law of burglary. App. 176-77, 180, 295-98, 384. But the court below falsely claimed, "Nothing in the record suggests that Jones's counsel did not know the law regarding burglary . . . ." App. 17. This statement formed the sole basis for rejecting one of Jones's strongest legal arguments. The merits were not reached, and the *Hinton* line of cases were never mentioned.

Burglary is the basis for the death penalty in this case. App. 296-97; S*ee also Jones*, 987 So. 2d at 1166. Jones's defense was fundamentally flawed and grossly ineffective because his trial attorneys misunderstood the law that governed his life or death. A powerful and legally valid defense was ignored, as the attorneys emphasized the legally bogus defense that no burglary was committed because nothing was taken from the house. App. 180, 195-96.

The questioning of witnesses, arguments at trial, and brief on direct appeal all show counsel asserting this baseless argument. App. 180, 295-97, 384. Those allegations of circumstantial evidence of ignorance of the law are more than sufficient to establish a claim that counsel misunderstood the law of burglary. *See, e.g.*, *Velazquez v. Superintendent Fayette SCI*, 937 F.3d 151, 161 (3rd Cir. 2019) (circumstantial evidence of ignorance of Pennsylvania law); *United States v. Bui*, 795 F.3d 363, 367 (3rd Cir. 2017) (lack of familiarity with precedent and erroneous advice fell below norms required by *Strickland*).

The Amended Petition, however, contains much more to show that counsel did not know the law. Parker handled the questioning and arguments on the issue of

burglary. He made the mistake of assuming burglary required a theft. This was not some kind of strategy. Parker has flat-out admitted he misunderstood the law. App. 180.

As expressly alleged in the Amended Petition, "Mr. Parker has admitted that it was only after making this argument that he later found out the law only requires intent and not an actual theft." App. 297. The Amended Petition also specifically alleges, "Mr. Parker was under the mistaken impression that a completed theft was needed in order for a burglary to be committed." App. 295.

It is difficult to plead more directly that Parker "did not know the law" at the time of trial and direct appeal. This is not a case where trial counsel denied his mistake. But, because Petitioner was never allowed a hearing, the court was deprived of the opportunity to hear the powerful testimony of trial counsel. That is precisely why, in addressing the adequacy of the pleading, the court was obligated to accept the pleaded facts as true. *See, e.g., Ex Parte Coleman*, 71 So. 3d 627, 632 (Ala. 2010). Instead, the CCA denied that the pleading exists, i.e., falsely asserting that there is "nothing in the record" to support this claim. App. 17.

There is no explanation for the courts below missing the allegations in the Amended Petition. The two express assertions quoted above appear in the very section raising the issue of ignorance of the law of burglary. That section is less than four full pages long. App. 295-98.

The same facts also are alleged several other places in the Amended Petition. It describes Jones's brief on direct appeal as "inadequate, raising only three issues on

appeal, one of which was based on Parker's since admitted misunderstanding of the elements of burglary." App. 176-77 (referencing Amended Petition, Sec. II.Q.). Elsewhere it is alleged, "Mr. Parker later admitted that he had simply misunderstood the elements of the crime of burglary." App. 180.

This Court should grant review to address the Alabama courts' failure at all levels to confront the constitutional issues that are presented once the facts alleged are accepted as true. Jones has a constitutional right to be represented by counsel who knows or learns the controlling law. *See Hinton,* 571 U.S. at 263, 276.

C. The CCA Previously Concluded Jones's Counsel Did Not Know the Law of Burglary.

It is especially stunning that the Alabama appellate court found "nothing in the record" to suggest ignorance of the law of burglary, App. 17, where the same court previously ruled in the direct appeal that counsel did not know the law:

> **Contrary to Jones's contention, the law does not require that the crime - in this case, theft - be completed**. Rather, the accused must merely unlawfully enter a dwelling with the intent to commit a crime. As the Alabama Supreme Court noted in *Ex parte Dixon*, 804 So. 2d 1075, 1079 (Ala. 2000), "Burglary in the first degree does not require that the defendant act during the commission of a theft."

Jones, 987 So. 2d at 1168 (emphasis added).

The Alabama appellate court pointedly told Jones's counsel, "Indeed, this Court has long held that "'[t]o constitute burglary, it is not necessary that a theft be actually committed.'" *Id.* (quoting *McGullion v. State*, 477 So. 2d 477, 484 (Ala. Crim. App. 1985)).

D. Applying the Controlling Constitutional Law to the Pleaded Facts Establishes Ineffective Assistance of Counsel Due to Ignorance of the Law.

No one has yet attempted to refute this argument on the merits: not the State of Alabama, not the trial court, not the CCA, not the Alabama Supreme Court. It cannot be refuted. What is alleged to have happened here requires a new trial.

As this Court has held, "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton*, 571 U.S. at 274.

Hinton does not stand alone but is simply the most recent in a well-established line of Sixth Amendment authority. In *Williams*, this Court found deficient performance where counsel failed to discover extensive records that could have been used as mitigation evidence in a death penalty case, "not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." 529 U.S. at 395. Counsel was also held to be constitutionally ineffective in *Kimmelman*, 477 U.S. at 365. There, a failure to conduct pretrial discovery "was not based on 'strategy,' but on counsel's mistaken belie[f] that the State was obliged to take the initiative and turn over all its inculpatory evidence to the defense . . . ." *Id.* at 385.

Where the defense is based on a misunderstanding of the law, any presumption of a valid strategy is overcome. "[A] mistake of law is deficient performance." *Cates v. United States*, 882 F.3d 731, 736 (7th Cir. 2018) (ineffective assistance where misunderstanding law meant difference between life in prison and one-year

maximum). *See also Marshall v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1277, 1295 (11th Cir. 2016) ("decisions made based on a lawyer's unreasonable mistake of law constitute deficient performance.").

There can be no doubt that counsel's mistake of law, due to his fundamental lack of knowledge of first-year criminal law, was not strategic. This performance fails the test of "reasonableness under prevailing professional norms" and clearly constitutes ineffective assistance. *Strickland,* 466 U.S. at 688.

E. Asserting a Legally Invalid Defense, when a Valid Defense was Available, is Prejudicial.

The availability and viability of an unused defense to the death penalty, the felony-murder defense, precludes any finding the mistake was not prejudicial. Under *Strickland,* a petitioner "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 at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*.

There can be no confidence in the outcome where the asserted defense was invalid as a matter of law. It was contradicted and defeated by the instructions given to the jury by the trial court. App. 295-96. If counsel had enlightened the jury regarding the valid felony-murder defense to the death penalty, there is a very "reasonable probability" that the verdict would have been different. The facts presented by the prosecution are consistent with the defense that Jones was, at most, a bystander to murder by another. App. 227-30.

In Alabama, "no defendant is guilty of a capital offense unless he had an intent

to kill, and that intent to kill cannot be supplied by the felony murder doctrine." *Brown v. State*, 72 So. 3d 712, 715 (Ala. Crim. App. 2010) (quoting *Beck v. State*, 396 So. 2d 645, 662 (Ala. 1981)). One "who does not personally commit the act of killing" will not be guilty of capital murder unless complicit in the murder itself. Ala. Code § 13A-5-40(c). To be "complicit" one must be proven to have promoted or assisted in the murder, not just the underlying felony. Derivative liability is insufficient to qualify for the death penalty in Alabama. Ala. Code § 13A-2-23.

Trial counsel never raised the argument that the death penalty cannot be based on bystander or felony-murder involvement. No such jury instruction was requested. The jury was never told of this viable legal defense. App. 227, 231-32.

The CCA quoted, with approval, the circuit court's opinion belittling Jones's *Hinton* argument by claiming the no-theft defense was merely "an argument that ultimately did not work":

> Jones cites no authority for his allegation that trial counsel is constitutionally deficient for pursuing an argument that ultimately did not work. Trial counsel's decision to highlight that nothing within the victim's home was taken was entirely consistent with the defense's theory that Jones may have been at the murder scene but did not murder the victim.

App. 16 (quoting *Jones v. Alabama*, No. CR-00-353.60). This analysis is rife with illogic. Even if the jury were convinced nothing was taken from the house, we would never know. The jury instructions informed the jury that no taking was required to determine whether a burglary occurred. Contrary to the CCA's flawed reasoning, whether or not something was missing from the house is certainly not probative on the issue of who did the killing. The court's reference to the argument that Jones

could have been at the scene as a bystander simply highlights the missed opportunity caused by counsel's failure to raise the legal argument or request instructions explaining that a finding of felony murder would preclude the death penalty.

The consequences of the misunderstanding of the law in this case are more fundamental than that in *Hinton* or similar cases. Trial counsel's mistake undermined the entire death penalty defense. The valid defense to the death penalty was not presented. Instead, the bogus defense asserted was based on an error of law, was inconsistent with the jury instructions at trial, and was eviscerated by the appellate court in the direct appeal.

Since *Hinton* was decided, its holding has been cited and followed in numerous cases regarding ineffective assistance. But none seem to involve as monumental an error of law as the present case. Examples include *Buhs v. Sec'y, Fla. Dep't of Corr.*, 809 F. App'x 619, 631 (11th Cir. 2020) (remand for hearing where evidence indicated counsel did not know law governing "prescription defense" to drug trafficking); *Velazquez*, 937 F.3d at 163 ("ineffective assistance" due to ignorance of Pennsylvania procedure regarding plea of "guilty but mentally ill" even though correct plea may not have reduced sentence); and *Bui*, 795 F.3d at 367-68 (incorrect advice regarding availability of sentencing reduction due to lack of familiarity with eighteen-year-old precedent).

Ignorance of the law in the pending case is more prejudicial than the misunderstanding about availability of a sleep test in *Liao v. Junious*, 817 F.3d 678, 694 (9th Cir. 2016) (prejudice established when "counsel's error left the defense with

weaknesses that were exploited by the prosecution"), or the law regarding the weight of drugs affecting the sentencing guidelines in *Griffith v. United States*, 871 F.3d 1321, 1338-39 (11th Cir. 2017) (prejudice where "reasonable probability of a different result" from applying higher guidelines range), or the failure to object to an erroneous jury instruction in *Cates*, 882 F.3d at 737-38 ("error was prejudicial under the *Strickland* standard" where length of sentence was affected). In contrast, the mistake of law in Jones's case is a matter of life or death.

The wanton disregard by the State of Alabama of Jones's constitutional right to counsel should not remain unchecked. This Court should grant a writ of certiorari to defend the law as set forth in *Hinton*, *Williams, Kimmelman, Strickland*, and the Sixth and Fourteenth Amendments to the United States Constitution, which has been wholly disregarded by the Alabama courts. Alabama should not be allowed to thumb its nose at this Court's rulings by concluding that counsel's death-penalty defense based upon an admitted misunderstanding of the law was merely a defense that "did not work" and is consistent with effective assistance of counsel.

II. Jones was Deprived of Effective Counsel When His Counsel Failed to Conduct a Sufficient Investigation into Mitigating Evidence and Presented Both Erroneous and Misleading Evidence During the Penalty Phase of His Trial.

A. The Alabama Post-Conviction Rulings Conflict with this Court's Precedent Setting Minimal Standards Regarding Counsel's Presentation of Available Mitigation Evidence.

Jones was denied his Sixth Amendment right to the effective assistance of counsel at the penalty phase because his trial counsel failed miserably, both in their search for potential mitigating evidence and the presentation of what little mitigation

evidence they found. Their efforts did not rise to the level of performance required by this Court, and Petitioner was prejudiced as a result. The Sixth Amendment to the United States Constitution guarantees the effective assistance of trial counsel during capital sentencing proceedings. *Strickland*, 466 U.S. at 686-87. Under the familiar standard, "[a]n ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

In a capital sentencing proceeding, "individualized consideration of mitigating factors [is] required by the Eighth and Fourteenth Amendments." *Lockett v. Ohio*, 438 U.S. 586, 606 (1978). In Alabama, jurors, as part of the penalty phase regime, are required to consider "any . . . mitigating circumstances which defendant offers as a basis for a sentence of life imprisonment without parole instead of death . . . ." §13A-5-52 Ala. Criminal Code. Therefore, counsel has an "obligation to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396; *accord Rompilla v. Beard*, 545 U.S. 374, 385-86 (2005). This obligation is fulfilled only after counsel has conducted an investigation sufficient to support a reasonable belief that further investigation "would be fruitless or even harmful." *Strickland*, 466 U.S. at 691; *see also Wiggins*, 539 U.S. at 525.

Deficient performance is prejudicial where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Williams*, 529 U.S. at 391 (quoting *Strickland*, 466 U.S. at 694). Satisfying the reasonable probability standard "do[es] not require a defendant to

show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding . . . ." *Porter v. Mccollum*, 558 U.S. 30, 44 (2009) (quoting *Strickland*, 466 U.S. at 693).

B. Trial Counsel's Failure to Investigate and Present Critical Mitigating Evidence Constituted Deficient Performance.

Numerous decisions of this Court have found that a capital defendant's counsel fails to meet the constitutional standard of performance if they fail "to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396; *see also Porter*, 558 U.S. at 39; *Rompilla*, 545 U.S. at 387; *Wiggins*, 539 U.S. at 522; American Bar Association Standards for Criminal Justice, 4-4.1 (2nd 1982 Supp.) (duty of the lawyer "is to . . . explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction"). In *Wiggins*, for example, this Court concluded that trial counsel were deficient after they failed to pursue information contained in a municipal social services report indicating that "Petitioner's mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while there; he had frequent lengthy absences from school; and, on at least one occasion, his mother left him and his siblings alone for days without food." 539 U.S. at 525. Moreover, "counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless . . . ." *Id.* Under these circumstances, "any reasonably competent attorney would have realized that pursuing these leads was necessary to the mitigation case." *Id.*

Here, the mitigation evidence that was not presented is precisely "the kind of troubled history [this Court] ha[s] declared relevant to assessing a defendant's moral culpability," *Wiggins*, 539 U.S. at 535. Trial counsel failed to conduct the appropriate investigation needed to show that Jones had grown up in extreme poverty, was beaten on numerous occasions, was forced to sell drugs, and frequently went without enough food to eat. Counsel only met with Jones's mother and sister, each meeting lasting less than an hour. Counsel never explained to Jones's mother or sister what type of evidence would be most useful in mitigation, and, despite evidence of abuse, poverty, a low mental IQ, and mental health problems, counsel never followed up with any of Jones's other family members to learn more about the circumstances of his childhood. Had counsel performed an adequate investigation, they would have learned the many tragic life circumstances described above.

Applying this Court's precedent, trial counsel performed deficiently. There is no meaningful difference between trial counsel's inadequate investigation here, and the constitutionally deficient investigation of trial counsel in *Porter*, who "had only one short meeting with" the defendant and failed to "interview any members of [defendant's] family." 558 U.S. at 39; *see also Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328 (11th Cir. 2001) (finding inadequate an investigation where trial counsel interviewed the defendant, his mother, and a clinical psychologist, but not the defendant's siblings, elementary school principal or ex-girlfriend, all of whom would have corroborated the extensive abuse the defendant had received from his father).

Jones's counsel "abandoned their investigation of [defendant's] background

after having acquired only rudimentary knowledge of his history from a narrow set of sources[,]" thereby making the investigation itself unreasonable. *Wiggins*, 539 U.S. at 524. Furthermore, because they failed to conduct a minimally adequate mitigation investigation, Jones's counsel "were not in a position to make a reasonable strategic choice as to whether to" conduct further investigation, *id.* at 536, or whether further investigation "would be fruitless or even harmful." *Strickland*, 466 U.S. at 691. Trial counsel's inactivity in this case is strategically indefensible.

C. Jones Was Prejudiced by Trial Counsel's Failure to Investigate and Present Compelling Mitigating Evidence While Instead Presenting Misleading Evidence From Unprepared Witnesses.

1. Jones Was Prejudiced by Counsel's Failure to Investigate and Present Mitigating Evidence.

This Court has concluded repeatedly that a failure to conduct a mitigation investigation is prejudicial under circumstances where, as here, such an investigation would have uncovered an "excruciating life history," replete with evidence of extreme physical abuse, intra-family violence, low mental IQ, substance abuse, poverty and neglect. *Wiggins*, 539 U.S. at 537; *see also Rompilla*, 545 U.S. at 391-92; *Williams*, 529 U.S. at 395-96.

Evidence of this nature is relevant because "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quotation omitted). Social history evidence of this sort "ha[s] particular salience for a jury[,]" therefore, its omission from capital sentencing proceedings is especially prejudicial. *Porter*, 558 U.S. at 43; *see also*

Rompilla, 545 U.S. at 391-93; *Wiggins*, 539 U.S. at 535; *Williams*, 529 U.S. at 398.

The allegations in the Amended Petition, which the Alabama courts were required to treat as true, establish a reasonable probability – as in *Williams*, *Wiggins*, *Rompilla* and *Porter* – that but for trial counsel's failure to investigate, the outcome of the proceedings would have been different. Indeed, despite trial counsel's deficient performance, the jury did not vote unanimously to impose the death penalty on Jones; the vote was 11-1. App. 169. Under Alabama law, had two additional jurors voted for a sentence of life without parole, the sentencing jury could not have recommended death. Ala. Code § 13A-5-46(f).

The sheer volume and compelling nature of the mitigating evidence that counsel failed to discover and present creates a reasonable probability that additional jurors would have not voted for the death penalty had counsel's performance not been deficient. *Porter*, 558 U.S. at 41-42 (because the sentencing jury "heard almost nothing that would humanize [the defendant] or allow them to accurately gauge his moral culpability[,] . . . there is clearly a reasonable probability that the advisory jury—and the sentencing judge—'would have struck a different balance'" had they heard the mitigating evidence (quoting *Wiggins*, 539 U.S. at 537). Individually, the history of Jones's extreme physical abuse as a child, *Wiggins*, 539 U.S. at 535, witnessing his stepfather physically abuse his mother and siblings frequently, *Rompilla*, 545 U.S. at 392, or his borderline IQ scores, *Williams*, 529 U.S. at 396, may well have altered Jones's sentence. Together, they present an overwhelming case of materiality.

The CCA's decision that counsel made a strategic decision in failing to investigate or present additional mitigation evidence is contrary to well-established law of this Court. The CCA assumed that because some mitigation evidence was presented, counsel had fulfilled their duties, stating: "This is not a case where counsel conducted no investigation into mitigation or where no mitigation evidence was presented." App. 68. This ignores this Court's decision in *Sears v. Upton*, 561 U.S. 945 (2010), *Wiggins*, *Williams*, *Rompilla*, and *Porter*. As explained in *Sears*, this Court "ha[s] never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." 561 U.S. at 955. In fact, this Court has repeatedly held that *Strickland* requires "precisely the type of probing and fact-specific analysis" that the Alabama courts here failed to undertake. *Id.*

2. Jones Was Prejudiced by Counsel Failing to Prepare Mitigation Witnesses Who Presented Misleading Evidence of Jones's Background.

That counsel elicited *some* meager, and misleading, evidence of Jones's troubled childhood does not render counsel's deficient performance non-prejudicial. In the penalty phase of the trial, counsel presented four inadequately prepared lay witnesses and one completely unprepared expert witness. App. 169. As in *Andrus v. Texas*, "although counsel nominally put on a case in mitigation in that counsel in fact called witnesses[,] . . . the record leaves no doubt that counsel's investigation to support the case was an empty exercise." 140 S. Ct. 1875, 1882 (2020). This Court's observation in *Andrus* applies equally here: "No doubt due to counsel's failure to investigate the case in mitigation, much of the so-called mitigating evidence he

offered unwittingly aided the State's case in aggravation." *Id.* at 1883. And like *Porter*, "[w]hat little evidence counsel did present backfired . . . ." Counsel called multiple mitigation witnesses whom they failed to prepare, including Dr. DeFrancisco, Jones's aunt, and Jones's mother. In each case, because of the failure of preparation, counsel failed to elicit available mitigation evidence and, instead, elicited testimony that harmed Jones.

Prejudice is further established by the prosecutor's own words, when he took full advantage of defense counsel's feeble and utterly inaccurate mitigation presentation to use it against the accused in his argument for a death verdict. He told the jury that Jones deserved the death penalty because even Jones's own mother and aunt testified "he didn't have a bad life." App. 357 (quoting the prosecutor).

Repeatedly, this Court has held that mitigating evidence like that available here "might well have influenced the jury's appraisal of [defendant's] culpability[,]" *Williams*, 529 U.S. at 398, and "likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *Rompilla*, 545 U.S. at 393 (quoting *Strickland*, 466 U.S. at 694).

D. The State Court's Rejection of Jones's Ineffectiveness Claim was Unreasonable.

1. The State Court Repeatedly Mischaracterized the Actual Claims.

The CCA failed to properly consider the mitigation evidence as asserted in Jones's Amended Petition. Under Alabama Rule 32, a petitioner has the burden to allege facts, which if true, entitle him to relief, but all that is required is a "clear and specific statement of the grounds upon which relief is sought, including full disclosure

of the factual basis of those grounds." Rule 32.3, 32.6, Ala. R. Crim P.; *Boyd v. State*, 913 So. 2d 1113, 1125 (Ala. Crim Ap. 2003). Once those facts are pleaded "the petitioner is then entitled to an opportunity . . . to present evidence proving those alleged facts." *Id.; see also Ex parte Boatwright*, 471 So. 2d 1257, 1258 (Ala. 1985). The Amended Petition easily met Alabama requirements for an evidentiary hearing and the claims set forth in it are at least equal to those held sufficient to state a claim and/or merit relief under *Strickland*, *Williams*, *Wiggins*, *Rompilla*, *Porter*, *Sears,* and *Andrus.*

Despite this, the Houston County Circuit Court denied Jones an evidentiary hearing and granted summary dismissal. *See* App. 94. The circuit court's opinion was identical to the 72-page draft order of dismissal tendered by the State, the only changes being the correction of a few typographical errors. Aware that it was reviewing a "carbon copy" of the State's draft dismissal order, and despite the Amended Petition easily meeting all *Strickland* pleading requirements, the CCA nonetheless affirmed.

The CCA also repeatedly mischaracterized the actual claims and then exploited mischaracterizations of its own creation to deny relief. For example, the Amended Petition alleged that defense counsel was ineffective for having ***failed to retain*** a mitigation specialist whose funding was approved by the trial court, which led to powerful mitigation evidence never being presented. App. 309. But the CCA ignored the actual ***failure to retain claim*** – writing instead, with approval, that "[t]he record from Jones's direct appeal also reflects that counsel requested and

received funds for an investigator to, among other things" search for mitigation evidence such as "Jones's . . . family and social history . . . ." App. 68.

As another example, Jones alleged in his Amended Petition that Dr. DeFrancisco and Marilyn Walker had never been interviewed or prepared, which led them to testify to misleading facts. App. 322-24, 349-50. The CCA ignored these facts and instead focused its entire evaluation of this claim to observing that "[c]ounsel also requested and received funds to secure 'expert psychiatric and psychological assistance[,]'" while completely omitting any mention of the lack of preparation of Dr. DeFrancisco or Ms. Walker. App. 68.

In addition to these specific instances, the CCA dramatically downplayed the wealth of available, but unused, potential mitigation evidence set forth in the Amended Petition. The CCA minimized the sordid story of Petitioner's upbringing as follows:

> petitioner was reared in a single parent home with no relationship with his father; had hyperactivity as a child; there were visits by DHR; Petitioner did not resist arrest; he had learning disabilities; was in special education; was reared in 'lower end of socio-economic scale' and had suffered emotional and psychological problems[.]

App. 62. That was it. Based on this sanitized characterization of the pleadings, and contrary to the facts specified in the petition, the CCA concluded:

> The great majority of mitigation evidence that Jones alleged in his amended petition should have been, but was not, presented by counsel was, in fact, presented at the penalty phase of Jones trial. We, like the circuit court, are confident that the alleged omitted mitigation evidence would have had no impact on the verdict in this case. Therefore, summary dismissal of this claim was proper.

App. 72. Remarkably, despite defense counsel incompetently eliciting horribly

prejudicial testimony against their own client (from DeFrancisco and Walker), the CCA also found "[t]he mitigation evidence presented during the penalty phase was the kind of evidence typically presented during the penalty phase of a capital murder trial." App. 62 (quoting *Jones v. Alabama*, No. CR-00-353.60).

These quotations not only mischaracterize the facts alleged in the Amended Petition, the CCA's conclusions are in contravention of the law. This Court has held the type of undiscovered mitigation evidence available but unused here is of "the kind of troubled history [this Court] ha[s] declared relevant to assessing a defendant's moral culpability," *Wiggins*, 539 U.S. at 535. If counsel had discovered this evidence and presented it effectively, there is a reasonable probability that the outcome of the sentencing proceedings would have been different. *See Porter*, 558 U.S. at 41 (where sentencing jury "heard almost nothing that would humanize [the defendant] or allow them to accurately gauge his moral culpability[,] . . . there is clearly a reasonable probability that the advisory jury—and the sentencing judge 'would have struck a different balance'" had they heard the mitigating evidence (quoting *Wiggins*, 539 U.S. at 537)).

This Court should grant a writ of certiorari to defend the law, as set forth in *Strickland, Williams, Wiggins, Porter, Rompilla, Sears,* and most recently, *Andrus*, as well as the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, which have been wholly disregarded by the Alabama courts. Alabama courts should not be permitted to summarily dismiss Jones's well-pleaded claims of ineffective assistance of counsel that clearly demonstrate counsel's failure to

investigate and present meaningful mitigation evidence.

CONCLUSION

Given the extensive and well-pleaded claims of Jones's Amended Petition, this Court should grant the petition for certiorari. In the alternative, this Court should *per curiam* reverse the decision of the Alabama Court of Criminal Appeals with directions for the court to grant an evidentiary hearing on the Amended Petition.

Respectfully submitted,

/s/ Steven A. Miller
REED SMITH LLP
10 South Wacker Drive
Chicago, IL 60606-7507
Telephone: +1 312 207 1000
Facsimile: +1 312 207 6400
samiller@reedsmith.com
Counsel of Record, Counsel for Petitioner

Date submitted: February 8, 2021