No. 20-1125
CAPITAL CASE

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**In the SUPREME COURT of the UNITED STATES**

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ANTONIO DEVOE JONES,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

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On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals

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# BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 16, 2021

## CAPITAL CASE

## QUESTION PRESENTED

Antonio Devoe Jones was convicted of capital murder after entering Ruth Kirkland's home, beating her to death with her walking cane and a broken chair leg, and then fleeing in Kirkland's Cadillac. At trial, counsel unsuccessfully attacked the sufficiency of the State's evidence, arguing that the evidence presented was not sufficient to show Jones intended to commit a crime inside Kirkland's home as charged in the indictment. During the penalty phase, trial counsel presented mitigation evidence regarding Jones's family and socioeconomic background, as well as evidence regarding his good character. In postconviction proceedings, Jones challenged trial counsel's decision to challenge the sufficiency of the evidence and counsel's presentation of mitigation evidence.

The question presented in Jones's petition:

Did the Alabama Court of Criminal Appeals correctly apply Strickland v. Washington, 466 U.S. 668 (1984), when it affirmed the circuit court's decision to summarily dismiss Jones's postconviction claims that he received ineffective assistance of counsel during the guilt and penalty phases of his trial?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Statutes**



**Rules**

## STATEMENT OF THE CASE

During Antonio Jones's trial for the murder of Ruth Kirkland, Jones's trial challenged the State's evidence on the ground that it was insufficient to sustain a conviction because there was insufficient evidence that Jones, as alleged in the indictment, intended to steal anything from within Kirkland's home. Jones now argues that counsel's approach was not strategic but instead was based on a misunderstanding of law.

Additionally, during the penalty phase, counsel presented evidence to show the jury that Jones was a good person who supported his family, as well as presented evidence of his family history and background growing up. Jones argues here that trial counsel's mitigation evidence was "inadequate" because further evidence could have been presented regarding his family history and financial background.

Neither claim, however, has merit and both represent the sort of fact-bound requests for error correction that do not merit certiorari review. The Alabama Court of Criminal Appeals correctly determined that the trial court properly summarily dismissed Jones's claims during the postconviction proceeding because neither claim, on the face of the petition, demonstrated that trial counsel's performance was deficient or that such deficiency prejudiced Jones's case.

## A. The Proceedings Below

In 1999, Jones entered the home of eighty-year-old Ruth Kirkland, beat her to death, and absconded with her white Cadillac. He was subsequently indicted for one count of capital murder committed during the course of a first-degree burglary in violation of Section 13A-5-40(a)(4) of the Code of Alabama (1975). (DA C. 11.)[1] The jury found Jones guilty as charged in the indictment and recommended he be sentenced to death by a vote of 11 to 1. (DA C. 285, 287.) The trial court determined three aggravating factors existed: (1) the capital offense was committed during the commission of a first-degree burglary; (2) Jones committed the capital offense while under a sentence of imprisonment; and (3) the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses. (DA C. 315.) The trial court found one statutory mitigating factor and seven non-statutory mitigating factors were applicable. (DA C. 316-17.) After determining the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Jones to death. (DA C. 317.) The Alabama Court of Criminal Appeals affirmed Jones's capital murder convictions and his death sentence. Jones v. State, 987 So. 2d 1156 (Ala. Crim. App. 2006). Jones's subsequent petitions for writ of

1. 'DA C." refers to the clerk's record on direct appeal, "DA R." refers to the transcript on direct appeal, "C." refers to the clerk's record during Jones's postconviction proceeding, and "R." refers to the transcript from Jones's postconviction proceeding.

certiorari to the Alabama Supreme Court and this Court were denied. See Jones v. Alabama, 555 U.S. 833 (2008) (mem); Jones, 987 So. 2d at 1156.

In 2009, Jones filed a postconviction Rule 32 petition, which was later amended in 2013. (C. 11-99, 426-954.) In 2014, the circuit court summarily dismissed Jones's amended petition. The Alabama Court of Criminal Appeals affirmed the circuit court's decision. Jones v. State, CR-13-1552, 2019 WL 6243057 (Ala. Crim. App. Nov. 22, 2019). Jones's petition for writ of certiorari to the Alabama Supreme Court was denied. Ex parte Jones, No. 1190647 (Ala. May 2020).

### B. Statement of the Facts

#### 1. Facts Elicited During Jones's Trial

At trial, evidence showed that, after suffering a stroke, eighty-year-old widower Kirkland had a limp and weakened right arm causing her to use a walker or cane. Jones, 987 So 2d at 1158. One night, Jones arrived at her home, turned off the circuit breakers outside, and entered her home. Id. Once inside, "Jones beat and kicked Mrs. Kirkland as she attempted to defend herself," breaking her wrists, and using her "walking canes and a broken chair leg to savagely beat" her. Id. After ransacking her purse and home for money, Jones fled in Kirkland's white Cadillac, which he was later found driving when arrested by police. Id. at 1158-59.

During the penalty phase, trial counsel presented testimony from Jones's mother, Jill Witsett, his sister, Lakeisha Jones, Jones's maternal aunt, Marilyn

Walker, former teacher Edwina Culp, and clinical forensic psychologist Dr. DeFrancisco.

Jones's mother testified that, aside from moving to Panama City, Florida, when Jones was around eight or nine years old, she and her children lived in Houston County, Alabama, until Jones was about sixteen. (DA R. 1348-49.) Jones did not have a relationship with his father, and there was no father-figure in the household. (DA R. 1349.) Witsett stated that she had a tenth-grade education and worked primarily jobs in the fast-food industry and as a motel maid. (DA R. 1349.) She testified that her family did not have a great deal of money and received food stamps. (DA R. 1350.) Her family interacted with people "with the same background" and the same work as Witsett. (DA R. 1351.) Witsett acknowledged that the Department of Human Resources had visited her home regarding allegations that she was abusing her children. (DA R. 1352.) She denied using alcohol or drugs and testified that the home environment she provided Jones "was the best [she] had." (DA R. 1352.)

Regarding Jones, Witsett testified that he was placed in special education classes around first grade and had individual education plans. (DA R. 1356-57.) Witsett testified that Jones was diagnosed as hyperactive and placed on medication, which was covered under Medicaid. (DA R. 1354-55, 1370.) The medication "calm[ed]" Jones. (DA R. 1356.) When Jones did not take the medication, she would receive calls from his school "every day saying that he had got into a fight or he had

got mad because he didn't have his way with things[.]" (DA R. 1355.) On redirect, however, Witsett testified that she "took [Jones] off" his medication "way before" the murder because Jones was having difficulties sleeping at night. (DA R. 1368-69.)

On cross-examination, Witsett confirmed that there was no family medical history of psychiatric disorders. (DA R. 1359.) She acknowledged that Jones would leave school without permission and that he would stay at his maternal grandmother's home often. (DA R. 1360.) She also conceded that Jones stole his grandmother's car on one occasion. (DA R. 1361.) Witsett further admitted that Department of Human Resources had visited her home multiple times. (DA R. 1362.) She testified that of Jones's three siblings, only one had been in any trouble. (DA R. 1361-62.) Though Witsett acknowledged that Jones was in fights at the schools he attended, she testified Jones "always f[ou]ght for [her] daughter." (DA R. 1363.) She noted that Jones refused to return to the doctor because "he was trying to make [Jones] feel like he was crazy." (DA R. 1363.) Witsett testified that her son had a learning disability, that he was able to complete class work, that he completed the eleventh grade, and that he had been employed. (DA R. 1364.) Jones was not employed at the time he murdered Kirkland. (DA R. 1367-68.)

Counsel also presented testimony from Edwina Culp, who knew Jones when he attended Alfred Saliba Family Services Center for GED classes. (DA R. 1374-

75.) He tested at a sixth through eighth grade level, which was not "unusual" in her classes. (DA R. 1387.) She noted that, though he advanced past the easy and middle level courses to the difficult and advance courses, his scores "fluctuated," and he returned to the easy and middle level courses. (DA R. 1376.) She opined that his hyperactivity "would play heavily" on his success. (DA R. 1377.) Culp acknowledged that she was not an expert on IQ scores, but opined that, if Jones's IQ was 81, he "probably could not retain a lot of information and that he might not be a very good candidate for the GED." (DA R. 1378.) Culp also testified that, in class, Jones appeared "kind," "meek," "not aggressive," "cooperat[ive]," and "stayed to himself pretty much." (DA R. 1379.)

Jones's maternal aunt, Marilyn Walker, also testified that, when Wittset returned from Panama City, she and her children lived with Walker and her husband. (DA R. 1390.) She testified that Jones was "a good person as long as" he took his medication and that she never had any problems with him. (DA R. 1392, 1398.) Walker confirmed that DHR had conducted home visits multiple times; however, there were no indications of anything wrong. (DA R. 1396.) She also testified that Jones's siblings had not had any problems. (DA R. 1396.) She stated that she believed society would benefit best if Jones "[s]pen[t] the rest of his life in prison" and that "[m]aybe he c[ould] set an example for those" already in prison. (DA R. 1391-92.)

His sister, Lakeisha Jones, testified that Jones was a good brother who always helped her. (DA R. 1401.) Lakeisha noted that Jones became "agitated" and "upset" when he did not take his medication. (DA R. 1402.)

Finally, Dr. DeFrancisco testified that testing revealed Jones had an IQ of 81 (DA R. 1430.) He referred to someone within this range as a "gap" child because he is "too smart to be in special ed, but . . . too slow to be in a regular class." (DA R. 1432.) As such children grow older, they "never catch up" when placed in regular classes, which often leads to behavioral problems. (DA R. 1433.) Dr. DeFrancisco further noted that Jones had no father figure, that his mother was a "drunk and a drug addict," that he "basically raised himself," and that Jones had an admitted drug addiction. (DA R. 1436.) He also noted that Jones had a "horrible childhood." (DA R. 1438.) Dr. DeFrancisco opined that Jones had "sociopathic traits and trends[.]" (DA R. 1440.) He also noted that Jones had "border line anti-social characteristics." (DA R. 1453.) He further explained that Jones's hyperactivity and low IQ affected his ability to regulate his emotions and contributed to his substance abuse. (DA R. 1442.)

**2. Jones's Postconviction Proceedings**

During postconviction proceedings, Jones alleged, among other claims, that trial counsel provided ineffective assistance during the guilt and penalty phases of trial. Specifically, he argued that trial counsel based his theory of defense

challenging the State's evidence on a misunderstanding of basic criminal law, see Jones, 2019 WL 6243057, at *5, and that trial counsel inadequately developed mitigation evidence regarding Jones's family history, substance abuse problems, and the physical abuse he suffered from his mother and grandmother. Id. at *22.

Regarding Jones's challenge to trial counsel's challenge to the State's evidence, the circuit court found the claim was not "facially meritorious." (C. 1244.) Specifically, the court held:

> 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 theory that Jones may have been at the murder scene, but did not murder the victim.

(C. 1244.) See also Jones, 2019 WL 6243057, *5.

On appeal, Jones argued that the circuit court erred when it summarily dismissed his ineffective assistance of counsel claim regarding counsel's alleged reliance on a "legally invalid defense." Jones v. State, CR-13-1552, 2019 WL 6243057, at *5 (Ala. Crim. App. Nov. 22, 2019). Specifically, Jones asserted that trial counsel had proceeded under the assumption that the State needed to prove that a theft occurred in Mrs. Kirkland's home when, in fact, the State needed to prove only an intent to commit a theft. The Alabama Court of Criminal Appeals held that:

> The record from Jones's direct appeal indicates that counsel moved for a judgment of acquittal, in part, on the ground that the State had presented no evidence indicating that Jones had the intent to commit a

> theft in Kirkland's residence, as was charged in the indictment. During closing argument, counsel argued that there was no evidence that anything had been taken from Kirkland's house or that Jones had even been in Kirkland's house because Jones's fingerprints were not found in the house. Nothing in the record suggests that Jones's counsel did not know the law regarding burglary, and the arguments made by counsel were consistent with Jones's statements to police that he did not participate in the events that resulted in the victim's murder.

Jones, 2019 WL 6243057, at *5.

Similarly, the circuit court found Jones's second claim challenging trial counsel's presentation of mitigation evidence was not "facially meritorious." Id. at 22. That court determined that, even assuming Jones was "subjected to corporal punishment and that he lived in houses with pest problems, along with all of the other mitigating evidence that was not presented," when balanced against the serious aggravating circumstances, "there is no reasonable probability that the outcome of Jones's trial would have been different had trial counsel presented the additional mitigating evidence Jones discusses in his amended Rule 32 petition." Id. at *23. The court noted that :

> The trial court found the existence of three aggravating circumstances: (1) the capital offense was committed during a burglary; (2) the capital offense was especially heinous, atrocious, or cruel ('HAC') compared to other capital offenses; and (3) Jones was under a sentence of imprisonment when he committed the capital offense. With regard to the HAC aggravator, the trial court specifically noted in the sentencing order that 'Dr. [Alfredo] Paredes testified that an 80 year old disabled women was brutally beaten. He established that these injuries were painful and most preceded her death. This type of cruelty was

> unnecessary given the age and physical infirmities experienced by the victim.'

Id.

After reviewing the mitigation evidence presented during the penalty phase, the Alabama Court of Criminal Appeals found that the "great majority of mitigation evidence that Jones alleged . . . should have been presented . . . was, in fact presented at the penalty phase of Jones's trial." Id. at 26. The appellate court agreed that "the alleged omitted mitigation evidence would have had no impact on the verdict in this case." Id.

## REASONS FOR DENYING THE PETITION

Jones's petition raises only fact-bound assertions that the state courts' misapplied Strickland v. Washington, 466 U.S. 668 (1984), when they denied his ineffective assistance of counsel claims. That is reason enough to deny the petition, *see* Sup. Ct. R. 10, but the Court should also deny the petition because there was no error. Under Strickland, a defendant must establish that trial counsel's performance was deficient, and that the deficiency resulted in actual prejudice. 466 U.S. at 688. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689; see also Bell v. Thompson, 545 U.S. 794, 810 (2005) ("This

strategic calculation, while ultimately unsuccessful, was based on a reasonable investigation into [the defendant's] background."); Smith v. Murray, 477 U.S. 527, 534 (1986) ("D]efense counsel may not make a tactical decision to forgo a procedural opportunity-for instance, to object at trial or to raise an issue on appeal-and then when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court."). In this case, the claims alleged in Jones's postconviction petition did not overcome the presumption that trial counsel's actions were anything other than sound trial strategy. Further, Jones has not shown that, but for counsel's actions, there was a reasonable probability that the results of his trial could have been different. Strickland, 466 U.S. at 694. Consequently, Jones's petition should be denied.

**A. Trial counsel made the strategic decision to challenge the sufficiency of the evidence presented based on language charged in Jones's indictment.**

Jones challenges trial counsel's theory of defense, which was to argue that the State presented insufficient evidence based on an inconsistency between the evidence presented at trial and facts alleged in the indictment. He attempts to persuade this Court to grant certiorari by arguing that the state courts' decision conflicted with this Court's decision in Hinton v. Alabama, 571 U.S. 263 (2014), because, according to Jones, counsel admitted the theory was based on a

misunderstanding of the law. (Pet. 13.) This argument is faulty for at least two reasons.

First, there is nothing in the record to support a finding that trial counsel misunderstood the law. In fact, Jones does not cite, nor does the record reflect, that trial counsel admitted he misunderstood the law in this case. In an effort to bolster his assertion, Jones quotes a snippet from the Alabama Court of Criminal Appeals's decision on direct appeal, which affirmed that the State presented sufficient evidence to establish Jones entered Mrs. Kirkland's house with the intent to commit a theft. He argues that the appellate court "ruled . . . that [trial] counsel did not know the law." (Pet. 16.) Yet, as the state appellate court recognized, Jones's direct appeal counsel was not arguing based on a mistaken premise of law; but rather was challenging the sufficiency of the evidence presented in relation to the offense charged in the indictment.[2] See Jones v. State, 987 So. 2d 1156, 1166 (Ala. Crim. App. 2006) ("The gist of Jones's argument is that first-degree burglary, *as alleged in the indictment*, would require the theft of something from inside Mrs. Kirkland's dwelling.") (emphasis added). Therefore, it was not, as Jones suggests here, a finding

2. The indictment charged Jones with "intentionally caus[ing] the death of Ruth Kirkland by striking her with a cane and a wooden chair and . . . caus[ing] said death during the time that he knowingly and unlawfully entered the residence . . . with the *intent to commit the crime of theft therein*[.]" (DA C. 11) (emphasis added).

that trial counsel "did not know the law" or in contradiction to the appellate court's subsequent finding on appeal from Jones's postconviction proceeding.

Further the record and Jones's brief on direct appeal support the state courts' findings. At the close of the State's case, Jones argued that the State "failed to prove a prima facie case of capital murder alleging a burglary, specifically the indictment - - tracking the indictment it says . . . it was the unlawful entering or remaining in the reside . . . with intent to commit a theft, commit a crime therein, specifically, a theft." (DA R. 1098.) He argued there was no evidence anything was stolen from inside the case and noted that money remained inside the residence. (DA R. 1098-99.) Maintaining this argument on direct appeal, Jones argued in his Appellant Brief that "the State indicted [] Jones using the stated theory that he entered [Mrs. Kirkland's] dwelling unlawfully with the intent to commit a theft therein," but "there was not one scintilla of evidence of a theft from within the house." (Appellant's Br. 69.) Jones's brief noted that, instead, "there [wa]s more evidence that a theft was not intended or committed in this case because the most obvious object of theft would be cash and cash was left in the victim's [home], in plain view." (Id.) Accordingly, Jones has not shown that trial counsel's decision to advance this defense – that the evidence presented at trial was inconsistent with the facts alleged in the indictment – was unfounded in law and could not be characterized as sound trial strategy.

Second, the Hinton decision is distinguishable. In Hinton, at an evidentiary hearing, trial counsel testified that he was unaware that Alabama law no longer imposed specific funding limitations. 571 U.S. at 267-68. This Court held that "trial counsel's failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance." Id. 274. As noted, contrary to Hinton, there is nothing in this case to suggest that trial counsel had a mistaken belief regarding the law. Rather, as the state courts noted, counsel attempted to challenge the sufficiency of the State's case by alleging an inconsistency between the evidence presented and the facts alleged in the indictment. After all, if nothing within Mrs. Kirkland's home was stolen, that would be at least some evidence that no one had intent to commit a theft inside her home on the night of her murder. That trial counsel's strategy did not prevail does not mean that counsel's performance was unconstitutionally deficient.

Moreover, not only did Jones fail to show that the facts alleged in his petition demonstrated deficient performance, but he also failed to allege facts sufficient to show that actual prejudice resulted. In his postconviction petition, Jones asserted that trial counsel's theory of defense "essentially conceded [Jones's] presence at the murder scene, and seemed to also concede that he committed the murder." (App.

297.) But, in his second statement[3] to police, which was presented to the jury, Jones conceded his presence at the scene, admitting that he was "present at Mrs. Kirkland's house during the murder." Jones, 987 So. 2d at 1160. Though he denied committing the murder, there was evidence presented that Mrs. Kirkland's blood was found on the clothing Jones was wearing when he was stopped in the stolen Cadillac and taken into custody. Id. Thus, he has not shown a likelihood that any alleged error resulting from trial counsel's theory of defense affected the outcome of his case. Given this, Jones's petition should be denied.

**B. Trial counsel was not ineffective for failing to present cumulative mitigation evidence.**

Jones also asserts that trial counsel provided ineffective assistance when counsel failed to adequately investigate and present mitigation evidence – specifically, evidence that Jones lived in extreme poverty, was "beaten on numerous

3. Initially, Jones volunteered to help police locate "bloody clothes" disposed of by the "true killers"; however, a search of the area identified by Jones revealed no such evidence. Jones, 987 So. 2d at 1159. Jones then told police that "three other men" murdered Mrs. Kirkland, denied being present when she was murdered, told police that the Cadillac belonged to his grandfather, and explained that "the blood on his clothes came from being around the three killers." Id. In his final statement, he admitted to being present during the murder, maintained that three other men entered her house, that "one of the three men [beat] her with a walking cane," and that Jones took away the cane before calling 911 for help. Id. at 1160. Notably, there were "no 911 emergency calls . . . received from Mrs. Kirkland's home that night." Id.

occasions, was forced to sell drugs and frequently went without enough food to eat."[4] (Pet. 24.) This Court has held that to establish ineffective assistance of counsel in this context, a defendant must show that, not only did counsel acted deficiently, but he must show "'a reasonable probability that a competent attorney, aware of [the available mitigating evidence], would have introduced it at sentencing,' and 'that had the jury been confronted with this . . . mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.'" Wong v. Belmontes, 558 U.S. 15, 19–20 (2009) (quoting Wiggins v. Smith, 539 U.S. 510, 535, (2003)). Jones has not done so here.

As the Alabama Court of Criminal Appeals found, multiple witnesses testified on Jones's behalf during the penalty phase. Jones, 2019 WL 6243057, at *23. The evidence presented included testimony that:

> Jones never had a relationship with his father; that there was no father at home for Jones; that [his mother] and the family were on welfare and food stamps; that the Department of Human Resources visited [the] house "from time to time" when Jones was growing up; that [his mother] had been accused of child abuse in Houston County; that [his mother] had a child born with syphilis who died; that Jones had been diagnosed as hyperactive when he was young; that Jones had been seen by a psychiatrist and a psychologist; that Jones was placed on the

4. Though Jones asserts that counsel should have followed-up with other family members to "learn more about the circumstances of [Jones's] childhood," (Pet. 24), he does not indicate who counsel should have contacted or what additional specific information counsel would have discovered. Similarly, though he notes counsel should have prepared mitigation witnesses to "elicit available mitigation evidence," Jones does not identify specific facts counsel would have been elicited from each witness. (See Pet. 27-28.)

> medications Prozac, Tenex, Ritalin, and Zoloft; that Jones's behavior improved with the medication; that Jones became calmer with the medication; that the school told her that Jones needed to be placed in a special class because he was "dumb" and that Jones was placed in special-education classes.

Id. at *23. Additionally, testimony from the clinical forensic psychologist Dr. Robert DeFrancisco noted that Jones had an IQ of 81, that he was hyperactive and had previously received medication for it, that he had no father, a mother with substance abuse problems, no role models, "no mental help at home, [and had a] . . . drug abuse [problem] by his own admission[.]" Id. at *24 (quoting (DA R. 1437)).

Thus, as the state courts found, additional evidence of Jones's impoverished childhood and that he was potentially subjected to child abuse would have been cumulative to evidence already before the jury; and, as such, the failure to present it would not amount to ineffective assistance of counsel. See Wong, 558 U.S. at 23 ("Additional [cumulative] evidence about appellant's [difficult childhood and "positive traits"] would have offered an insignificant benefit, if any at all."). As such, he has not shown that counsel's investigation and presentation of mitigation evidence was deficient or shown that, but for counsel's actions, the outcome of his trial would have been different. Accordingly, this Court should deny Jones's petition.

## CONCLUSION

For the reasons set forth above, this Court should deny Jones's petition for writ of certiorari.

Respectfully submitted,

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