No. 20-1306
CAPITAL CASE

IN THE
SUPREME COURT OF THE UNITED STATES

ALAN DALE WALKER,
Petitioner

v.

STATE OF MISSISSIPPI,
Respondent

On Petition for a Writ of Certiorari to
the Supreme Court of Mississippi

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

Petitioner was convicted for the capital murder of a teenage girl who he and another man raped, beat, strangled, choked, and drowned before setting her body on fire. Trial counsel's strategy at sentencing was to humanize petitioner. Counsel thus presented testimony that petitioner was a loving father, that he was a good employee liked by his peers, and that he once saved a baby from a burning building. The jury still sentenced petitioner to death. After his direct appeal and one round of post-conviction review failed, petitioner again sought post-conviction relief, contending that his trial counsel should have used a different sentencing strategy, one that would have told the jury about petitioner's childhood and alleged brain impairment. The state post-conviction trial court rejected petitioner's claim under *Strickland v. Washington*, 466 U.S. 668 (1984). The court concluded that petitioner failed to establish that his trial counsel performed deficiently and that, in any event, petitioner was not prejudiced by counsel's performance. The Mississippi Supreme Court affirmed, upholding the conclusion that petitioner failed to establish that trial counsel's performance was deficient. The Mississippi Supreme Court did not address the lower court's finding that petitioner also failed to establish prejudice.

The questions presented are (1) whether the Mississippi Supreme Court erred in upholding the post-conviction court's fact-intensive ruling that trial counsel did not perform deficiently, and (2) whether the Mississippi Supreme Court's judgment is independently correct because, as the post-conviction trial court found, petitioner was not prejudiced by his trial counsel's strategy.

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OPINION BELOW

The opinion of the Mississippi Supreme Court affirming the denial of petitioner's second petition for post-conviction relief (Pet. App. A) is reported at 303 So. 3d 720 (Miss. 2020).

JURISDICTION

The Mississippi Supreme Court entered its judgment on June 25, 2020. On October 8, 2020, the court withdrew its prior opinion, issued a modified opinion, and denied rehearing. Pet. App. A. The petition for a writ of certiorari was filed on March 8, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT

More than 30 years ago, petitioner Alan Dale Walker kidnapped 19-year-old Konya Edwards, repeatedly raped her, hit her in the face again and again, choked her, forced her to put her chin on a log and then stomped the back of her neck seven or eight times, choked her and drowned her, set her body on fire with gasoline, then took her black dress home with him where, 45 minutes after killing her, he was taking photographs with friends and "acting like nothing had happened." *Walker v. State*, 671 So. 2d 581, 590 (Miss. 1995). Petitioner was convicted of murder, rape, and kidnapping, and was sentenced to death. The state courts affirmed his convictions and sentences and denied his first application for post-conviction relief, rejecting in both rounds of review a raft of arguments challenging his convictions and sentence. This Court denied petitions for certiorari seeking review of both the direct-review and first post-conviction-review proceedings. The present petition for certiorari arises from the state courts' rejection of petitioner's second motion for post-conviction relief.

1. On September 8, 1990, Konya Edwards went out for the night after her afternoon shift at a Long Beach, Mississippi restaurant. 671 So. 2d at 588. She went to the Fiesta Club, where she met petitioner and his friend Jason Riser for the first

time. *Id.* She also met Trina Perry, petitioner's girlfriend. *Id.* The four later left the Fiesta Club, and Riser offered to give Edwards a ride home. *See id.* at 589. Eventually Perry broke off from the group, with a plan to meet up later. *See id.*

Petitioner and Riser took Edwards to Crystal Lake. *See id.* At the lake, Riser later testified, petitioner "got out of the truck and said we was gonna rape this girl." *Id.* Petitioner "began 'messing' with Edwards, grabbing her legs and breasts" and "fondling" her. *Id.* Edwards—who was intoxicated and had passed out—"woke up and became loud in her resistance to [petitioner's] fondling." *Id.* Petitioner "hit her in the face several times" then asked her "if she wanted to live or die." *Id.* Petitioner took Edwards toward the lake. *Id.* "Whenever Edwards resisted physically or vocally," petitioner "would hit her and repeatedly say 'live or die.'" *Id.* Petitioner "instructed Edwards to take off all her clothes." *Id.* After she had done so, petitioner "struck her again in the face and told her to lie down on the ground." *Id.* He then "attempted to rape" Edwards, but apparently was unable to do so "right now." *Id.* So petitioner "told Riser to take his turn," and "Riser raped Edwards by vaginal intercourse." *Id.* Petitioner then "struck" Edwards "in the face with his fist while she was still lying down," told her "to perform oral sex on Riser while [petitioner] had anal sex with her," then "forced her to perform oral sex" on him after she said "she couldn't do that." *Id.* Edwards bit petitioner's penis, and "[h]e hit her again with his fist and shook her, telling her she had better cooperate so she wouldn't get hurt." *Id.* Riser reported that "both he and [petitioner] had anal intercourse with Edwards." When petitioner "attempted anal sex" on Edwards, she "told him she couldn't and turned around and slapped him." *Id.* The two struggled, and petitioner "began choking Edwards" while Riser watched. *Id.* Petitioner told Riser that he "would have to kill Edwards." *Id.*

Petitioner asked Edwards "if she wanted to live or die"; "Edwards said she wanted to live." *Id.* After struggling with Edwards more and hitting her again,

petitioner and Riser both dressed, and petitioner "instructed Edwards to lay flat on her stomach and put her chin on a nearby log." *Id.* After checking the log's placement, petitioner "looked down at Edwards then stomped on the back of her neck, seven or eight times." *Id.* (internal quotation marks omitted). "Edwards rolled over, bleeding, and ran to Riser, saying 'help me, Jason, help me, don't let him do this no more.'" *Id.*

Petitioner eventually told Edwards "that they would take her down to the water, clean her off and let her go." *Id.* When they neared the water, petitioner undressed again and went into the water with Edwards. *Id.* He told her to turn around, "then began choking her and pushing her head beneath the water." *Id.* at 589-90. "A lot of splashing was going on, with Edwards surfacing and struggling for about 10 minutes." *Id.* at 590. "Eventually, the splashing stopped." *Id.*

After taking Edwards out of the lake, petitioner and Riser placed her body on the ground. *See id.* Petitioner then "looked around, picked up a stick, and inserted it into [Edwards'] vagina, declaring [that] he had 'always wanted to do that.'" *Id.* Petitioner decided that "Edwards would have to be burned." *Id.* He and Riser left, got gasoline, came back, and poured gasoline on Edwards' body and lit it on fire. *Id.*

Petitioner took Edwards' dress with him and returned to his house trailer. *See id.* Petitioner, Riser, and Perry (who had rejoined them at the trailer) stayed up late that night "talking and taking Polaroid snapshots." *Id.* "As Riser put it, he and [petitioner], some 45 minutes after the killing of Edwards, were 'acting like nothing had happened.'" *Id.* Petitioner later told Perry that he had killed Edwards. *See id.*

A forensic pathologist later testified that most of Edwards' skin had been burned, her lungs and bronchial tubes were filled with bloody fluid, and she had intracranial hemorrhaging, extensive bruised tissue, and a fractured neck. *Id.* The causes of death was "asphyxiation caused by severe pressure to her throat resulting

in a fractured neck bone, and from being held underwater to the point that her lungs filled with fluid. " *Id*. at 590, 598.

2. a. Petitioner was indicted for capital murder, rape, and kidnapping. *Id*. at 587. He confessed to police that he had murdered Edwards (and murdered another young woman about a month before), but his trial counsel successfully moved to suppress the confession because he was intoxicated during the interrogation. Pet. App. 3 (¶ 7); *Walker v. Epps*, No. 1:97-cv-00029-ks (S.D. Miss. March 27, 2012) (Doc. 118 at 2, 4). His trial counsel also successfully moved for a change of venue. *Id*. at 8.

Riser made a deal with the State for life in prison in exchange for his testimony against petitioner. *Id.* at 31. Riser testified, as set forth above, about the assault, murder, and surrounding events. 671 So. 2d. at 588-90. Perry testified that when she rejoined petitioner and Riser at his trailer, petitioner was shirtless and his jeans "had a reddish colored stain on the leg." *Id.* at 598. Two days later, Perry saw Edwards' photograph in a newspaper and realized that she had been murdered after leaving the club with them. *Id*.at 590. She went to authorities and gave a statement that led to a search warrant that was executed on petitioner's home. *Id*. at 590, 598. In the search, officers found Edwards' dress. *Id*. at 588, 599-600.

The jury found petitioner guilty on all counts.

b. At the sentencing phase, petitioner's trial counsel successfully moved to exclude victim-impact testimony and secured an order preventing the State from introducing petitioner's confession at sentencing. *Walker*, No. 1:97-cv-00029-ks (Doc. 118 at 9). In an effort to humanize petitioner to avoid the death penalty, trial counsel presented testimony from several of petitioner's family members and an employer.

Mike Maniscalo, a construction foreman and petitioner's former boss, testified that Petitioner was a good, dependable employee who was liked by his co-workers. *Id*. at 89-90. Petitioner "[n]ever had any problems with anybody on the job." *Id*. at 90.

Leon Frederick, petitioner's half-brother, testified that petitioner took care of him and their younger sister, Amanda Frederick, who were both still in school at the time of the murder, while their mother worked. *Id.* Petitioner watched them at home and drove them to school and other places. *Id.* Leon testified that petitioner also took care of his baby daughter. *Id.* Leon told the jury that his brother should receive the same sentence as Riser (life) because "they were both there." *Id.* Leon also cited petitioner's then-16-month-old daughter as a consideration for the jury's mercy. *Id.*

Amanda testified that petitioner was a nice brother who was never mean to her. *Id.* at 90-91. Amanda, a sixth grader at the time of trial, cried while she told the jury about petitioner's baby daughter. *Id.* at 91. She testified that petitioner asked their mother to take his income-tax refund and spend it on his daughter. *Id.*

Anita Frederick, petitioner's mother, testified to petitioner's background and upbringing. She told the jury that after she and petitioner's father, Ronald Walker, divorced when petitioner was four, she moved with her sons to Mississippi from Florida. *Id.* She testified that when petitioner was a teenager, she worked nights and petitioner took care of Leon and Amanda. *Id.* Petitioner also "worked nearly all the time" and paid his mother rent. *Id.*

Anita also told the jury that petitioner had received a certificate of appreciation for saving a baby from a burning building. *Id.* Petitioner and a friend were driving home when a woman whose house was on fire flagged them down and told them her child was inside. *Id.* Petitioner ran in the burning house, got the baby out of bed, broke out a window, and handed the baby to someone outside. *Id.* His heroic efforts were recognized at a ceremony where he received a certificate of honor and met the child whose life he saved. *Id.* at 94. The certificate was entered into evidence. *Id.*

Anita also told the jury that petitioner had a baby daughter he loved and provided for. *Id*. at 92-93. Like Leon, Anita asked the jury to give petitioner the same sentence Riser received. *Id*. at 94.

Petitioner also addressed the jury and expressed remorse, stating "he wanted to tell the victim's family, Riser's family and especially his own family that he was sorry 'for what has happened.'" *Walker*, 671 So. 2d. at 615.

The sentencing jury sentenced petitioner to death, finding that the State proved the submitted aggravating circumstances—that petitioner killed Edwards while engaged in the commission of sexual battery and that the capital offense was committed for the purpose of avoiding or preventing a lawful arrest—beyond a reasonable doubt and that the aggravating circumstances were not outweighed by mitigating evidence. *Id*. at 611-12, 631.

c. In 1995, the Mississippi Supreme Court affirmed petitioner's convictions and sentences on direct appeal, rejecting twenty-two assignment of error. *Id*. at 587-631. This Court denied certiorari. *Walker v. Mississippi*, No. 96-5259.

In 2003, the Mississippi Supreme Court denied petitioner's first motion for post-conviction relief. *Walker v. State*, 863 So. 2d 1 (Miss. 2003). Among other rulings, the court rejected nine arguments for why petitioner's trial counsel had provided ineffective assistance at the guilt or sentencing phase. *Id*. at 7-8, 10-24. This Court denied certiorari. *Walker v. Mississippi*, No. 03-10649.

In 2012, a federal district court denied petitioner's habeas petition. *Walker v. Epps*, No. 1:97-cv-00029-ks (S.D. Miss. March 27, 2012) (Doc. 118). The court rejected (among other claims) eight arguments of ineffective assistance of trial counsel. *Id*. at 67-104. Among other things, petitioner claimed that trial counsel had been ineffective for "failing to prepare for the possibility that Jason Riser would plead guilty and testify against the Petitioner," and for "failing to investigate and present evidence at

the sentencing phase." *Id.* at 87. Although the district court ruled that the ineffective-assistance claims were procedurally barred because they had not yet been presented to the State's highest court, it also concluded that the claims lacked merit. *Id.* The court found that the record clearly established that trial counsel was adequately prepared to cross-examine Riser. *Id.* at 88. And in analyzing petitioner's claim that trial counsel failed to conduct a mitigation investigation or present mitigating evidence, the court recounted the mitigation evidence presented at the sentencing phase and compared it to the evidence habeas counsel later discovered and claimed should have been discovered and presented by trial counsel. *Id.* at 87-104. The court found that much of the evidence that petitioner offered to support this ineffective-assistance claim did not pertain to petitioner personally. *Id.* at 94. Various "problems of his parents, grandparents, and neighbors were just not particularly relevant," the court observed, because they did not pertain to petitioner personally. *Id.* at 102. As for portions of the family-member affidavits that did pertain to petitioner, the court concluded that the information was either cumulative or double-edged (aggravating and mitigating). *Id.* at 101-102. The court found that evidence about "the general environment in which [petitioner] lived," a "neighborhood [] full of unsavory characters[,] [d]rug and alcohol abuse ... , promiscuity, even at an early age[,] ... little or no supervision of older children or teenagers," "could already have been gleaned by the jurors from the testimony at trial." *Id.* at 102. And evidence about alcohol and drug use and an ex-girlfriend's claim that petitioner had a violent temper could be considered "double edged" by a sentencing jury and may "provide[] an independent basis for moral judgment by the jury." *Id.* at 101-102. The court concluded that trial counsel was not ineffective for not presenting cumulative evidence, double-edged evidence, "possibly harmful" evidence, or evidence that pertained to people other than petitioner at the sentencing phase. *Id.*

3. a. In 2012, petitioner filed a successive motion for post-conviction relief with the Mississippi Supreme Court. That court granted him leave to file his motion in trial court and directed the post-conviction trial court to conduct a hearing to determine "whether [petitioner's] trial counsel was ineffective in searching for and presenting mitigation evidence during the penalty phase of his trial, and whether [petitioner] suffered prejudice from such deficient performance, if any, sufficient to undermine the confidence in the outcome actually reached at sentencing." *Walker v. State*, 131 So. 3d 562, 564 (Miss. 2013). The five-justice majority found that affidavits attached to the successive petition showed that petitioner "potentially" received ineffective assistance from his trial counsel. *Id.* at 564. Four justices dissented.

b. At his post-conviction hearing, petitioner presented testimony from seven family members and a family friend, testimony from lead trial counsel (Earl Stegall), and expert testimony from psychologists Matthew Mendel and Robert Shaffer.

The lay-witness testimony suggested that petitioner had a bad childhood and identified a number of events concerning alleged physical abuse, alleged sexual abuse or impropriety, and a decline in petitioner's behavior over time as he spent more time in his mother's home and less time at his father's.

As to alleged physical abuse: Petitioner's brother Terry recalled that Winfred Frederick, Anita's second husband, was "always drunk," but never abusive.[1] Resp. App. B 209. Terry testified that Anita did whip the kids with a belt as a form of punishment and discipline, which Terry viewed as abusive. *Id.* at 213, 221. Petitioner's father Ronald testified that petitioner never indicated that Anita was abusive. *Id.* at 202. Leon recalled that his father, Winfred, spanked him "once in a

[1] Petitioner's post-conviction counsel tried to refresh Terry's memory with an affidavit that Terry allegedly executed a year before the hearing that said that Winifred had hit him, but Terry said that he had no recollection of that happening. Resp. App. B 209-210, 225. Terry testified that Winifred never hit or "put[] his hands on" him or petitioner. *Id.* at 221-22.

blue moon." *Id.* at 242. Winfred spanked with his hand; Anita spanked with a belt. *Id.* at 242.

As to alleged sexual impropriety: Terry recalled that when Anita and Winifred were married, they lived near the Reyers, who were family members of Winfred. *Id.* at 213-14. Terry testified that the three Reyer sisters, who were "older kids," had inappropriate sexual contact with him and petitioner when they were around 12 and 14 years old. *Id.* at 214-21. The Reyer sisters "would all play with you and suck your penis, do things of sexual—sexual things." *Id.* at 215. Terry did not witness any sexual interactions between petitioner and the Reyer sisters. *Id.* at 220.

One of Anita's former co-workers, Vera Faye Breland, also testified. Petitioner's post-conviction counsel asked Breland whether she saw "any touching between [petitioner] and his mother at your workplace." *Id.* at 252. Breland responded that she saw "him either tickling her or either he pinched her." *Id.* Breland described it as "more of a playful type situation," but also said: "I didn't actually see him actually pinch her inappropriately, other than I thought at the time, and speaking with her, you know, it was like he pinched her on her breast, and I thought was inappropriate." *Id.* Breland added that "when he was interacting with his mother," "I don't know whether they were tickling or playing, you know, and at the same time, his hand was around her up in here, and that's why I thought when she mentioned or talking with her afterwards. That was her words, that actually was not my words." *Id.* at 252-53.

As to petitioner's relationships with his parents and the changes in his behavior over time: Petitioner and Terry stayed with their father in Alaska for one-year stints three or four times in childhood and young adulthood. Resp. App. B 116, 167-68, 184-85. The boys were happy and did well when they stayed with Ronald in Alaska. *Id.* at 168-69. Ronald recalled no behavior problems. *Id.* Terry and petitioner

finished their seventh- and ninth-grade years, respectively, when Terry moved in permanently with his father and petitioner moved back to his mother's home in Mississippi. *Id.* at 117, 207.

Amanda, Anita, and Anita's sister testified that Anita worked long hours at two jobs to support her children and always put them first. *Id.* at 86, 169, 208. But due to her long work hours, petitioner often took care of Leon and Amanda. *Id.* at 86, 208. Anita did not have control over petitioner during his teenage years because she worked so much. *Id.* at 138. Petitioner started "running the roads" and drinking beer and smoking marijuana with friends when he was 15 or 16. *Id.* at 87, 96, 117, 121, 135-137, 170-71, 237.[2] In his upper teens or early twenties, petitioner and some of his neighborhood friends hung around a couple of older men who had children petitioner's age. *Id.* at 89, 150-51, 238. One of the men influenced petitioner and his friends to "steal stuff" for him and the other man grew "his own marijuana" in a closet in his house. *Id.* at 89, 127-29, 150-51. Terry characterized petitioner's Mississippi friends as "corrupt." *Id.* at 217. Anita did not approve of petitioner's friends when he was a teenager and young adult. *Id.* at 158-59.

When 17-year-old petitioner went to stay with his father in Alaska, Ronald noticed he was "[j]ust a little bit different in a stronger will." *Id.* at 188-89. Ronald characterized him as a little rebellious. *Id.* at 189. Ronald tried to "straighten him out and set him on the right road" while petitioner stayed with him. *Id.* at 192. Ronald and his wife took petitioner to church, where he was baptized, and Ronald noticed a positive difference in him. *Id.* at 194. Petitioner last stayed with his father a year or two before he murdered Konya Edwards. *Id.* at 143.

[2] Amanda testified that petitioner smoked marijuana as a teenager, but Leon testified that he never saw petitioner smoke marijuana. Resp. App. B 237-238. Anita also never saw petitioner smoke marijuana but testified she had smelled it on him before. *Id.* at 136.

Anita and Amanda testified that petitioner's trial attorneys did not meet with or speak with them before trial. Resp. App. B 94, 134-135. Both said that had the trial attorneys spoken with them before trial they would have relayed the information they testified to at the evidentiary hearing about petitioner's upbringing. *Id.* at 95, 135. Nellie, Terry, and Ronald testified that trial counsel never contacted them, and they also would have relayed the same information they testified to at the evidentiary hearing. *Id.* at 171, 195, 218-19.

Petitioner's lead trial counsel, Earl Stegall, testified that he suffered a stroke in 2005 and, as a result, had memory problems. Pet. App. 3 (¶ 6). (Petitioner did not call Stegall's co-counsel to testify.) When asked if the stroke "affected [his] ability to testify at this hearing," and whether he had "sufficient recollection of the facts of this case," Stegall responded that after his stroke he "couldn't literally remember" his son's names, yet that over time his memory had "gotten a lot, lot better." Resp. App. B 273. He said that he "still ha[d] problems with memory," however. *Id.* And "throughout his testimony, Stegall exhibited a significant inability to recall past events." Pet. App. 3 (¶ 6). When asked if he had "any real independent recollection of what took place at the time of trial and what [his] decisions were at the time of trial," he said, "I can't answer that direct yes or no. I can say in part this. I can remember certain parts of it perfectly clear. I can't say that I remember all of it that way." Resp. App. B 289-90. Stegall's files were destroyed during Hurricane Katrina. *Id.* at 275.

Stegall testified that he handled "quite a few" capital cases "on a regular basis" over the course of his practice and "won some of them, too." *Id.* at 288-89. Petitioner's was the only capital case Stegall succeeded in getting a confession suppressed. *Id.* at 276. After getting the confession suppressed, Stegall's guilt-phase strategy was going to be that petitioner "didn't do it, [Riser] did." *Id.* at 276. Stegall also thought that petitioner may receive a plea bargain after his confession was suppressed. *Id.* at 278-

79. But that option was walled off when, shortly before trial, Riser agreed to testify against petitioner. *Id.* at 276-78.

Although he could not recall details of his representation of petitioner, Stegall did not testify that he did not conduct a mitigation investigation or prepare for the sentencing phase. Instead, he testified:

> [T]he thing that I was going to do, I remember I was going to have him address the jury rather than have him testify. I think that's exactly what we did. And I wanted to—my thing in death penalty cases was to personalize them. Make them a person, you know. And tell their life history as well as you could so the jury could look at them and think of them as a person and not just somebody sitting there charged as a murderer. And I remember, I don't have an independent recollection of this, but I know I must have done it. We had the mother come and testify, that was the plan, and then a sister or a brother was going to testify. And I don't really have a good independent recollection of what they said or anything to be truthful with you.

Resp. App. B. 279. Stegall testified that he "would say that" it was "very unlikely" that he went to petitioner's family members' homes before trial, but that he "would have talked to them certainly before they took the stand." *Id.* at 279-80. But he lacked a recollection of other events. He testified that he "d[idn't] remember at all whether he met petitioner's mother, sister, or brother "in person until trial"; that he "c[ouldn't] remember at all" whether he met petitioner's "father or brother in Alaska"; and that he "d[idn't] have a memory of" "any contact with family members in Florida." *Id.* at 280. He also "just d[idn't] remember" whether he "file[d] any motions to get an investigator to help with mitigation evidence." *Id.* He did testify that he "would have used his" co-counsel for investigation, though he "c[ouldn't] remember" "what she found." *Id.* at 281. When asked if he had a "strategic reason for not doing more of a mitigation investigation," he said, "I can't say that I did. I wish I could remember better and I could answer your question, but I just can't remember." *Id.* at 285-86.

Stegall also did not recall specifics of petitioner's pretrial psychiatric evaluation by Dr. Henry Maggio, but did recall that "nothing about [petitioner] had given him cause to think to hire a psychologist" and that he would not have wanted the State to have access to any report detailing petitioner's criminal behavior. Pet. App. 4-5 (¶ 9); Resp. App. B 286-87, 295-98. (Dr. Maggio had been appointed to conduct a pretrial competency evaluation, but "but his report provided greater breadth than just opining on competence to stand trial." Resp. App. A 584. The Maggio report also found petitioner had no "defect of intellect, memory or judgment," and found "no major psychiatric diagnosis." *Id*. The Maggio report included petitioner's family, education, and work history; alcohol and drug use; and details about the murder and other criminal activity. *Id*.)

Petitioner also presented expert testimony. Dr. Matthew Mendel, a psychologist, had been retained to "explore the presence of possibly traumatizing factors in [petitioner's] life, and to address the impact of those factors upon him, how they contributed, if at all, to him, to his childhood development, and to becoming the adult he became." Resp. App. B 305. Dr. Mendel's assessment included speaking with petitioner twice and interviewing family members and friends. *Id.* at 306-09. His expert opinion was that petitioner "experienced a wide range of disturbing events that have had a profound impact upon him," and that "traumatizing factors had an impact on [petitioner's] psychological development at the time of the offense." *Id.* at 312. Those "traumatizing factors" included poverty and instability, lack of parental supervision, being undressed by a babysitter, fatherlessness, inappropriate and premature sexual activity, and the use of alcohol and marijuana as a teenager. *Id.* at 314-53. Dr. Robert Shaffer, a forensic psychologist and neuropsychologist, performed a neuropsychological assessment of petitioner. *Id.* at 416. His opinion was that

petitioner's neuropsychological profile "is consistent with that of individuals that have experienced various traumas during their developmental period." *Id.* at 424.

c. The post-conviction trial court denied relief. Applying *Strickland v. Washington*, 466 U.S. 668 (1984), the court concluded that petitioner failed to establish deficient performance or prejudice. Pet. App. 5 (¶ 12).

First, the court found that Stegall's sentencing-phase strategy was reasonable. Resp. App. A 583. The court explained: "Stegall's strategy was to personalize or humanize his client." *Id.* "Consistent with that strategy," he "offered family and friends to provide evidence designed, to the extent it could, to counter the brutality of Konya Edwards' murder." *Id.* "The testimony heard by the jury provided virtually unchallenged evidence that [petitioner] had a supportive family; a young daughter whom he loved; relatives who loved him; he enjoyed respectable employment and had even risked his own life by rushing into a burning house to save a child." *Id.* at 583-84. "That strategy did put forth a humanizing or personalizing premise to the jury." *Id.* at 584. So, the court found, that strategy "cannot be said to be unreasonable." *Id.*

The court added that Dr. Maggio's report supported the reasonableness of Stegall's approach. *Id.* Although "Dr. Maggio was appointed to perform a competency evaluation, ... his report provided greater breadth than just opining on competence to stand trial." *Id.* "Notably, Dr. Maggio did not find any defect of intellect, memory or judgment," and "there was no major psychiatric diagnosis, but [petitioner] appeared to have Antisocial Personality Disorder." *Id.* "A fair reading of the report would have ruled out a [*M'Naghten*] insanity defense and there would be no reason for trial counsel to develop additional psychological or psychiatric evaluations." *Id.* And "[h]ad trial counsel offered the jury the same evidence that [post-conviction] counsel did, the prosecutor would be armed not only with Dr. Maggio's opinions, but the jury would have heard about [petitioner's] other bad and criminal conduct." *Id.* "Stegall testified

at the hearing that he would not have wanted the other evidence of bad and criminal conduct in the hands of the prosecution to use against his client." *Id.* And "he would not have wanted Dr. Maggio's to testify about his evaluation of [petitioner]." *Id.* Thus, although post-conviction-relief counsel "would have advanced a different theory to the jury in mitigation," the court could not "accept what Stegall did as constitutionally deficient." *Id.* at 585. "[T]he strategy to humanize or personalize" petitioner "and its attendant investigation by trial counsel did not represent deficient performance." *Id.*

Second, the court found even if petitioner had proven deficient performance, his ineffective-assistance claim would still fail because he did not suffer prejudice. *Id.* at 585-89. The court concluded that the newly presented evidence "is simply not the type of evidence from which this Court could find that the jury would have reasonably likely opted for a life sentence had it been presented at sentencing." *Id.* at 587. "Much of the lay witness testimony presented at the [post-conviction-relief] hearing did not pertain to [petitioner] personally." *Id.* at 586. And "[t]hat which did revealed that [petitioner] drank beer as a teenager, stole 'stuff' with friends, had teenage and older friends who were bad influences, and that his mother's method of discipline for her children was to spank them with a belt." *Id.* Petitioner's "experts' opinions, much of which are based on unverified information (and in some instances rumor and mere speculation), are that [petitioner] suffered trauma in childhood which left him feeling powerless, helpless, and unsafe." *Id.* at 586-87. The court acknowledged that "[t]he alleged childhood trauma affected [petitioner's] brain functioning." *Id.* at 587. But although "[t]his impaired brain functioning resulted in some type of diminished capacity," it at most "could have influenced" but did not "cause[ ]" petitioner's "actions at the time of the murder." *Id.* As for the sexual-related allegations, the court noted that Dr. Mendel's assertion that petitioner and Terry were sexually abused at the ages of 6 and 8 was "discredited by Terry's testimony that the acts happened when

he was 12, making [petitioner] 14 at the time." *Id.* at 586. The court found that "[e]ngaging in sexual activity by a 14 year old who was running with other teenagers his age and older men would not be out of the question," and that it was "totally speculative that this caused the trauma Dr. Mendel associated with it." *Id.* The court noted, "Dr. Mendel's speculation on sexual matters is further demonstrated by his inclusion of the assertion that [petitioner] had a sexual relationship with his mother, and if offered in the presence of a trial jury would have been excluded." *Id.*

The court concluded that this evidence, "stacked against the brutality of what" petitioner "did to Konya Edwards," "could not have caused the jury to consider a life sentence." Resp. App. A 587. The evidence showed that petitioner repeatedly raped Edwards, hit her in the face repeatedly, choked her, forced her to put her chin on a log and then stomped the back of her neck seven or eight times, did not relent even as Edwards begged and pleaded for her life, and then choked or drowned her to death, before setting her body on fire. *Id.* at 587-88. This evidence supported a finding that petitioner "committed two separate aggravating circumstances": he "committed the capital murder while engaged in the commission of the crime of sexual battery" and he "committed the capital murder for the purpose of avoiding or preventing a lawful arrest." *Id.* at 588. "In reviewing the evidence in aggravation against the totality of the available mitigating evidence," the court concluded, "there is no reasonable probability that the additional evidence ... would have changed the jury's verdict." *Id.* 588. The new evidence "primarily focused on [petitioner's] family life and its effects on him." *Id.* at 588. "Certainly [petitioner] did not have an easy life and it was marred by lifestyle choices of people over whom he had no control. He was exposed at an early age to circumstances and events to which most are not exposed. He committed crimes, used drugs and drank." *Id.* at 588. But these "[u]nfortunate" features were "not

sufficient to disturb the confidence in the jury's verdict." *Id.* at 588-89. "The Court is satisfied that a just result was reached by the trial jury." *Id.* at 589.

d. On June 25, 2020, the Mississippi Supreme Court affirmed the denial of post-conviction relief. Petitioner sought rehearing, arguing that *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (per curiam), issued just after the court's opinion, required reversal.

On October 8, 2020, the Mississippi Supreme Court withdrew its earlier opinion and issued a modified opinion, again affirming and denying rehearing. Pet. App. 1-13. As relevant here, the court upheld the trial court's conclusion that Stegall's trial strategy was reasonable. *Id.* at 13 (¶ 29); *see id.* at 7-12 (¶¶ 15-26). The court explained Stegall's strategy of humanizing petitioner and his efforts to do so at sentencing. *Id.* at 9 (¶ 19). "At most," petitioner's post-conviction counsel "presented an alternative reasonable strategy but failed to show that Stegall's strategy was not reasonable." *Id.* at 10 (¶ 22). The state supreme court noted that petitioner "appears to argue that Stegall's inability to remember interviewing mitigation witnesses means that he did not perform such interviews." *Id.* at 9 (¶ 20). The court disagreed: "Stegall's inability to remember does not weigh in favor of a finding of ineffectiveness," and adding that although petitioner's mother and sister "did testify that defense counsel did not speak to them before sentencing," "their testimony alone does not undermine the trial court's finding that Stegall's personalization strategy was an acceptable trial strategy." *Id.* at 9 (¶ 20). The court also noted the post-conviction trial court's finding that "Dr. Maggio's report provided reasonable grounds for trial counsel to forego additional psychological testing before sentencing." *Id.* at 9-10 (¶ 21). And the court said that "counsel's failure to present testimony from a neuropsychologist that compromised the trial strategy of humanizing" petitioner "did not amount to ineffective assistance of counsel." *Id.* at 10 (¶ 21).

The state supreme court also rejected petitioner's argument that this Court's summary decision in *Andrus v. Texas* showed that the court had "misapprehended *Strickland*'s standard that counsel's strategic decision must be based on an adequate investigation." *Id.* at 10 (¶ 23). *Andrus* held that Mr. Andrus' trial counsel performed deficiently when he failed to thoroughly investigate Andrus' background, then remanded for a determination whether that deficient performance prejudiced Andrus. *Id.* at 1881-87. This Court concluded that, "[t]aken together," three deficiencies in Andrus' counsel's performance "effected an unconstitutional abnegation of prevailing professional norms." *Id.* at 1882. First, "counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence." *Id.* at 1881; *see also id.* at 1882-83. Besides being "barely acquainted with the witnesses who testified during the case in mitigation," counsel "ignored pertinent avenues for investigation of which he should have been aware, and indeed was aware." *Id.* at 1882 (internal quotation marks omitted). Second, "due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case." *Id.* at 1881; *see also id.* at 1883-84. Indeed, counsel introduced "seemingly *aggravating* evidence" and even made statements that suggested "that Andrus was lying." *Id.* at 1883, 1884 (emphasis in original). Third, "counsel failed adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation." *Id.* at 1881-82; *see also id.* at 1884-85. Further investigation could have rebutted the argument that "Andrus presented a future danger to society." *Id.* at 1885. Having concluded that counsel performed deficiently, this Court remanded for the state court to assess prejudice, given the "apparent tidal wave ... of available mitigation evidence taken as a whole." *Id.* at 1887 (internal quotation marks omitted).

The Mississippi Supreme Court concluded that *Andrus* did not call for a different result here. Pet. App. 10-12 (¶¶ 23-26). To start, the court explained, *Andrus* "reaffirmed the deferential standard from *Strickland*" that the state supreme court was applying. *Id.* at 10 (¶ 24). Next, "the circumstances surrounding counsel's deficient performance in *Andrus* are not present here." *Id.* at 11 (¶ 25). "In *Andrus*, counsel did not simply fail to investigate—he overlooked 'vast tranches of mitigating evidence' that were readily apparent to him, and 'would have led a reasonable attorney to investigate further.'" *Id.* (quoting *Andrus*, 140 S. Ct. at 1881, 1883; citation and brackets omitted). "That is not the case here. Stegall did not disregard[ ] ... multiple red flags' with zero justification. *Id.* at 11 (¶ 26) (quoting *Andrus*, 140 S. Ct. at 1883). "Rather, he made very clear that he pursued a tactical decision to humanize [petitioner]." *Id.* And petitioner had not carried his burden to show that petitioner's performance was deficient. *Id.*

Having upheld the trial court's ruling "that Stegall's performance was not deficient," the court did not "address the prejudice" under *Strickland*. *Id.*

In a separate opinion concurring in the result, two justices concluded that petitioner had established deficient performance, but concluded that affirmance was warranted because the post-conviction trial court reasonably concluded that petitioner "failed to meet his burden to prove prejudice." *Id.* at 13 (¶ 31). The separate opinion would have upheld the lower court's finding that, "given the brutality of the crime, no reasonable probability existed that [petitioner's] alleged childhood trauma and impaired brain function would have prompted a jury to impose a life sentence instead of the death penalty." *Id.* at 16 (¶ 35); *see id.* at 23 (¶ 46).

ARGUMENT

Petitioner challenges the Mississippi Supreme Court's decision upholding a fact-intensive determination that his trial counsel performed reasonably at the

sentencing phase of his trial. In particular, petitioner contends that the state supreme court departed from this Court's Sixth Amendment cases and that the court erred in holding that trial counsel performed reasonably. *See* Pet. ii. The petition should be denied. The Mississippi Supreme Court soundly applied *Strickland v. Washington*, 466 U.S. 668 (1984), and reasonably upheld the post-conviction court's determination that trial counsel pursued a reasonable sentencing-phase strategy. The judgment below rests on a fact-intensive assessment of the evidence and does not raise any recurring legal issue warranting this Court's review. Nor does this Court's decision in *Andrus v. Texas*, 140 S. Ct. 1875 (2020), supply a basis for disturbing that judgment. The Mississippi Supreme Court considered *Andrus* and correctly held that it did not call for a different outcome here. None of the remaining traditional criteria for certiorari is satisfied. And review would be particularly unwarranted here, where the judgment below is independently supported by the fact that petitioner was not prejudiced by his counsel's performance. Further review is not warranted.

1. The Mississippi Supreme Court soundly applied this Court's caselaw in upholding the post-conviction trial court's determination that trial counsel pursued a reasonable sentencing-phase strategy.

To prevail on his ineffective-assistance claim, petitioner was required to show that trial counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687. There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and petitioner was required "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation omitted). He had to show that "counsel's representation fell below an objective standard of reasonableness." *Id*. at 688.

The Mississippi Supreme Court invoked these standards (Pet. App. 7-8 (¶¶ 15-16)) and soundly applied them to uphold the post-conviction court's finding that trial counsel's strategy of humanizing and personalizing petitioner was reasonable (*id.* at 8-10 (¶¶ 17-22)).

Trial counsel faced a daunting task at sentencing. The jury had just convicted of capital murder, kidnapping, and rape, after hearing that petitioner repeatedly raped Konya Edwards, hit her in the face time and again, choked her, forced her to put her chin on a log and then stomped the back of her neck seven or eight times, choked her and drowned her, set her body on fire, then took her black dress home with him where, 45 minutes after killing her, he was taking photographs with friends and "acting like nothing had happened." *Walker v. State*, 671 So. 2d 581, 590 (Miss. 1995). Facing that steep uphill battle, trial counsel pursued a sentencing-phrase strategy of humanizing petitioner to counter the brutality of petitioner's acts. Resp. App. A 583, 585. To humanize petitioner to the jury, trial counsel provided the jury with "virtually unchallenged evidence that [petitioner] had a supportive family; a young daughter whom he loved; relatives who loved him; he enjoyed respectable employment and had even risked his own life by rushing into a burning house to save a child." C.P. 583-84; Pet. App. 16. The jury still sentenced petitioner to death.

As the Mississippi Supreme Court concluded, however, petitioner failed to rebut the presumption that trial counsel's sentencing phase strategy of humanizing petitioner was reasonable. Pet. App. 10 (¶ 22). Petitioner presented only "an alternative reasonable strategy" that he thought trial counsel should have employed. *Id.* But as the state supreme court recognized, "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* (quoting *Strickland*, 466 U.S. at 689). And the record showed reasonable grounds for trial counsel not to pursue the

line of attack that petitioner now advocates. Indeed, the alternative strategy that petitioner now advocates would have presented significant risk to him. The pretrial report contained evidence that petitioner expressed no remorse for Edwards' murder, evidence of other criminal conduct, and evidence of substance abuse. Resp. App. A 584. Stegall testified that he would not have wanted to present that type of evidence to the sentencing jury or to put such information in the hands of the prosecution. Pet. App. 17 (¶ 37). This reflected a reasonable strategy. The *Strickland* Court itself found that trial counsel's decision not to seek a psychiatric evaluation in that case was reasonable because it denied the State the opportunity to rebut the mitigation case with its own psychology experts. *Strickland*, 466 U.S. at 677. And in *Wiggins v. Smith*, this Court recognized that when the defendant's history is double edged, a limited mitigation investigation may be justified. 539 U.S. 510, 535 (2003) (citing *Burger v. Kemp*, 483 U.S. 776 (1987); *Darden v. Wainwright*, 477 U.S. 168 (1986)). Indeed, in *Andrus v. Texas*, one of three deficiencies that this Court stressed was counsel's presentation of evidence that "backfired by bolstering the State's aggravation case." 140 S. Ct. 1875, 1881 (2020). Evidence that petitioner now claims trial counsel should have discovered and presented likewise could have backfired by contradicting or diluting the mitigation evidence trial counsel presented to the sentencing jury. The Mississippi Supreme Court thus soundly concluded that Stegall's sentencing strategy was reasonable and obviated the need to pursue a different type of mitigation case, one that could be considered double-edged.

Petitioner's arguments against the state supreme court's decision lack merit.

First, petitioner contends that trial counsel performed deficiently because his mitigation investigation and presentation "left the jury with no basis to vote for a life sentence." Pet. 26; *see also id.* at 26-30. Petitioner suggests that the positive mitigation evidence presented by trial counsel was of little value, and he faults

counsel's short closing argument. *Id.* at 26-29. But the proper measure of counsel's performance under *Strickland* is not the success of the strategy, but whether counsel exercised reasonable professional judgment in employing the particular strategy. *Strickland*, 466 U.S. at 699. Trial counsel's strategic decision to present positive evidence about petitioner's life, rather than negative evidence about petitioner, was reasonable given the brutality of the crime. At bottom, petitioner presents an alternate sentencing strategy that Stegall could have employed. But "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 689. Showing an alternative strategy does not establish a constitutional violation.

Second, petitioner faults his counsel for not investigating his life and background more extensively. *See* Pet. 30-34; *see also, e.g.*, *id.* at 25-26. But the record supports the reasonableness of the sentencing strategy that trial counsel employed, and provides reasonable grounds for trial counsel's not pursuing the line of investigation that petitioner now demands. It bears noting, moreover, that in faulting his trial counsel's investigation, petitioner makes factual assertions that the record does not support and that the state courts did not accept. Petitioner maintains, for example, that petitioner's trial counsel "admitted he did not prepare for a potential capital murder penalty phase." Pet. ii. But this claim relies heavily on Stegall's failure of memory. In making such claims, petitioner "appears to argue," as the Mississippi Supreme Court recognized, "that Stegall's inability to remember interviewing mitigation witnesses means that he did not perform such interviews, but Stegall's inability to remember is at best a nullity." Pet. App. 9 (¶ 20). Stegall's inability to remember the mitigation investigation does not mean that a mitigation investigation was not conducted. And Stegall testified that co-counsel would have been the one who spoke with petitioner's family and otherwise investigated. Resp. App. B 281. And the

sentencing-phase evidence presented shows that Stegall or co-counsel spoke at least with petitioner, his mother, a brother, a sister, and an employer, to discover the positive mitigation evidence he strategically chose to present. *Walker*, No. 1:97-cv-00029-ks (Doc. 118 at 89-94, 96). Stegall also testified that co-counsel would have been responsible for investigating, while Stegall would have reviewed what the investigation uncovered in developing a trial strategy. Pet. App. B 281. Petitioner failed to call co-counsel or otherwise establish that co-counsel did not conduct the investigation petitioner claims was lacking.

This Court has reversed lower-court decisions rejecting ineffective-assistance claims where the record clearly established that trial counsel failed to conduct an adequate mitigation investigation. For instance, in *Rompilla v. Beard*, 545 U.S. 374, 383-86 (2005), the record showed that trial counsel failed to examine Rompilla's "readily available" court file on a prior conviction that counsel was "on notice" the prosecution would use as evidence in aggravation at sentencing and that contained otherwise undiscovered mitigation evidence about petitioner's childhood and mental health. In *Williams v. Taylor*, 529 U.S. 362, 363, 373 (2000), trial counsel testified in state habeas proceedings that he failed to obtain "extensive records graphically describing Williams' nightmarish childhood," not as a tactical decision, but because he erroneously believed that " 'state law didn't permit it.' " In *Wiggins v. Smith*, 539 U.S. 510, 516, 523-24 (2003), "the record demonstrate[d]" that trial counsel unreasonably abandoned their mitigation investigation after obtaining a pre-sentence investigation report and social-service records rather than following the leads contained in the records that would have uncovered evidence of "severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents." And in *Andrus v. Texas*, 140 S. Ct. 1875, 1882 (2020) (per curiam), "[o]ver and over during the habeas hearing, counsel acknowledged that

he did not look into or present the myriad tragic circumstances that marked Andrus' life," including materials prepared by a mitigation expert before trial. No such record evidence exists here to support a finding that trial counsel ignored readily available evidence or failed to pursue obvious leads in their hands.

Not only does the record fail to establish that trial counsel failed to conduct a mitigation investigation, but the mitigation evidence that post-conviction counsel uncovered was not the type of "readily available" evidence as was the case *Rompilla*, *Williams*, *Wiggins*, and *Andrus*. Instead, petitioner's post-conviction counsel had 15 years to uncover and produce the mitigation evidence he faults trial counsel for not discovering and presenting in the ten months he represented petitioner. (Petitioner's habeas counsel, appointed in 1997, is the same counsel that presented mitigation evidence for the first time in state court in 2012 that is the basis of petitioner's claim that trial counsel's mitigation investigation was deficient. *See Walker v. Epps*, No. 1:97-cv-00029-ks (S.D. Miss. March 27, 2012) (Doc. 7); *Walker v. State*, 2012-DR-00102-SCT (docket entry dated Jan. 17, 2012)).

In sum, the state supreme court correctly upheld the post-conviction trial court's finding that petitioner failed to show deficient performance.

2. Besides arguing that this Court's review is warranted because the lower court erred, petitioner also contends that the judgment below conflicts with *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (per curiam). Pet. 10-11, 40. This argument fails too.

Andrus concluded that, "[t]aken together," three deficiencies in Andrus' counsel's performance "effected an unconstitutional abnegation of prevailing professional norms." 140 S. Ct. at 1882. This case does not raise those deficiencies. First, in *Andrus* "counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence." *Id.* at 1881; *see also id.* at 1882-83. Besides being "barely acquainted with the witnesses who testified during the case in

mitigation," counsel "ignored pertinent avenues for investigation of which he should have been aware, and indeed was aware." *Id.* at 1882 (internal quotation marks omitted). Here, by contrast, trial counsel pursued a reasonable strategy and the record discloses sound reasons not to pursue the alternative strategy that petitioner now presses. Further, Andrus' counsel admitted that he did not conduct a mitigation investigation and offered no reason for the failure. *Id*. at 1878, 1882 ("Over and over during the habeas hearing, counsel acknowledged that he did not look into or present the myriad tragic circumstances that marked Andrus' life."). Petitioner did not establish that Stegall failed to conduct a mitigation investigation, relying heavily instead on Stegall's lack of memory to suggest a mitigation investigation was not conducted. Pet. App. 9 (¶ 20). More: unlike the record here, the record in *Andrus* clearly established that trial counsel had extensive, compelling mitigation evidence at his fingertips that he neglected to further explore and present at sentencing. As the Mississippi Supreme Court noted, "In *Andrus*, counsel did not simply fail to investigate—he overlooked 'vast tranches of mitigating evidence' that were readily apparent to him ... and 'would [have] le[d] a reasonable attorney to investigate further.'" *Id.* at 11 (¶ 25) (quoting *Andrus*, 140 S. Ct. at 1881, 1883). That "readily available" evidence included "materials prepared by a mitigation expert well before trial" that counsel seemed unfamiliar with at trial which contained "multiple red flags," that "'would [have] le[d] a reasonable attorney to investigate further.'" *Andrus*, 140 S. Ct at 1878, 1882-83. By contrast, there is no record evidence that the new mitigation evidence that petitioner's post-conviction counsel had 15 years to discover and present in state court was readily available to trial counsel.

Second, in *Andrus*, "due to counsel's failure to investigate compelling mitigating evidence, what little evidence counsel did present backfired by bolstering the State's aggravation case." *Id.* at 1881; *see also id.* at 1883-84. Indeed, counsel

introduced "seemingly *aggravating* evidence" and even made statements that suggested "that Andrus was lying." *Id.* at 1883, 1884 (emphasis in original). Presenting the double-edged evidence petitioner now presses could have also backfired. Petitioner assumes that the new mitigation evidence "would have helped to contextualize the state's case" in a way helpful to petitioner. Pet. 33. But presenting evidence about alcohol and drug use and an ex-girlfriend's claim that petitioner had a violent temper could have defeated trial counsel's strategy of humanizing him.

Third, in *Andrus* "counsel failed adequately to investigate the State's aggravating evidence, thereby forgoing critical opportunities to rebut the case in aggravation." *Id.* at 1881-82; *see also id.* at 1884-85. Further investigation could have rebutted the argument that "Andrus presented a future danger to society." *Id.* at 1885. But the evidence that petitioner faults trial counsel for not presenting would not have rebutted the State's case in aggravation. None of the new evidence pertains to or overcomes the submitted aggravating circumstances—that petitioner killed Edwards while engaged in the commission of sexual battery and that the capital crime was committed for the purpose of avoiding or preventing a lawful arrest.

On top of all this, the readily available mitigation evidence that Andrus' counsel failed to explore is qualitatively different from the mitigation evidence that petitioner claims that Stegall failed to discover and present. Andrus was one of five children his mother had by different fathers, none of whom "stayed as part of the family." *Id.* at 1879. When Andrus was six years old, his mother began selling drugs out of their home and engaging in prostitution. *Id.* at 1877, 1879. Andrus' mother's string of drug-addicted boyfriends abused Andrus' mother in their home and one raped one of Andrus' young siblings. *Id.* at 1879. By the time Andrus was twelve years old, he "assumed responsibility as head of the household for his four siblings, including his older brother with special needs" due to his mother's drug addiction and

frequent absence from the home. *Id*. at 1880. Andrus also had a recorded history of mental illness, beginning with a diagnosis of affective psychosis at age ten or eleven. *Id*. And Andrus began engaging in criminal activity that led to incarceration at age sixteen. *Id*. Available records also showed Andrus' history of "multiple instances of self-harm and threats of suicide." *Id*.

By contrast, as the post-conviction trial court recognized, the mitigation evidence that petitioner claimed that trial counsel should have discovered and presented was mostly unrelated to "[petitioner] personally," and "[t]hat which did revealed that [petitioner] drank beer as a teenager, stole 'stuff' with friends, had teenage and older friends who were bad influences, and that his mother's method of discipline for her children was to spank them with a belt." Resp. App. A 586. That court also found that petitioner's experts' opinions, which were largely "based on unverified information (and in some instances rumor and mere speculation), [were] that [petitioner] suffered trauma in childhood which left him feeling powerless, helpless, and unsafe." *Id.* at 586-87. They opined that the "alleged childhood trauma affected [petitioner's] brain functioning," and the "impaired brain functioning resulted in some type of diminished capacity which could have influenced, but not caused, [petitioner's] actions at the time of the murder." *Id.* at 587. This new mitigation evidence that petitioner's post-conviction counsel presented after 15 years on the case is not the "apparent tidal wave available mitigating evidence" that Andrus' counsel had at the ready but failed to use. *Andrus*, 140 S. Ct. at 1887 (internal quotations omitted).

In short, *Andrus* does not supply a basis for disturbing the judgment below.

3. No other consideration supports a grant of certiorari. Petitioner does not claim that this case presents a recurring question of law that has divided the lower courts. Indeed, petitioner does not even seek plenary review. The petition concludes:

"This Court should grant certiorari and either issue a summary reversal of the Mississippi Supreme Court's judgment, or remand to that Court with instructions to reconsider how its opinion can possibly be reconciled with the substantial precedent summarized by *Andrus*." Pet. 40. For reasons already explained, neither request is sound. The Mississippi Supreme Court was correct, so reversal is not warranted at all—and certainly not summary reversal. And vacatur under *Andrus* is not warranted: the state supreme court already accounted for *Andrus* and soundly held that this case did not call for a different outcome. The petition thus makes no case for plenary review and does not make a sound case for summary review.

4. Finally, there is strong reason to deny review even if this Court had misgivings about trial counsel's performance: This Court's intervention would not affect the outcome of the post-conviction proceeding because, as the post-conviction trial court concluded, petitioner failed to establish that his counsel's performance prejudiced him.

A successful ineffective-assistance-of-counsel claim requires a showing of both deficient performance and prejudice. On prejudice, the defendant must show "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. 668 at 694. Here, petitioner must prove that "absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. Prejudice is not established if "[t]he evidence that" petitioner "says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing [authority]." *Id.* at 699-700.

As the post-conviction trial court concluded, trial counsel's sentencing performance did not prejudice petitioner. Resp. App. A 588-89. That court found that

"[e]vidence of [petitioner's] 'childhood trauma' stacked against the brutality of what he did to Konya Edwards ... could not have caused the jury to consider a life sentence." *Id.* Again: the jury convicted of capital murder, kidnapping, and rape of Konya Edwards, after hearing that petitioner repeatedly raped her, hit her in the face when she resisted, choked her, forced her to put her chin on a log and then stomped the back of her neck seven or eight times, choked her and drowned her, set her body on fire with gasoline, then took her black dress home with him where, 45 minutes after killing her, he was talking photographs with friends and "acting like nothing had happened." *Walker*, 671 So. 2d at 590. After recounting this evidence, *see* Resp. App. A 587-88, the post-conviction trial court weighed it against the mitigation evidence presented at trial and the new mitigation evidence that "revealed that [petitioner] drank beer as a teenager, stole 'stuff' with friends, had teenage and older friends who were bad influences," disclosed "that his mother's method of discipline for her children was to spank them with a belt," and provided speculative testimony of petitioner's expert. *Id*. As the court concluded, "this is simply not the type of evidence from which this Court could find that the jury would have reasonably likely opted for a life sentence had it been presented at sentencing." *Id.* at 586. Given the brutality of the crime, there is no reasonable probability that had Stegall presented a bad-childhood mitigation case, petitioner would not have received the death penalty. The post-conviction trial court's weighing of the aggravating circumstances evidence and the totality of available mitigation evidence is sound and consistent with this Court's precedent. Indeed, even the state supreme court justices who believed that petitioner's counsel performed deficiently concluded that affirmance was appropriate because petitioner had not established prejudice. Pet. App. 13, 23 (¶¶ 31,46).

Petitioner's arguments on prejudice lack merit. First, he emphasizes that the failure to present the evidence that he now identifies was prejudicial because his

crimes "can only be understood with the benefit of this evidence." Pet. 35. He adds: "[t]he limited mitigation presented at trial ... left jurors with the seemingly unanswerable question of how a person with a normal upbringing could one day commit sexual violence." *Id.* But the violence that petitioner inflicted on Konya Edwards before murdering her was so horrible, depraved, and brutal that there is no reasonable probability that the evidence about petitioner's childhood and alleged brain impairment would have changed a juror's mind. Notably, the brutality of Edwards' murder is so overwhelming that petitioner doesn't mention the "kidnapping, rape, sexual battery, and murder of Konya Edwards" until the 40th and final page of the petition.

Second, petitioner maintains that, under several of this Court's cases, not presenting the evidence that he now identifies was prejudicial. Pet. 35-37. But ineffective assistance turns on the facts of each case. *See Williams*, 529 U.S. at 391 (*Strickland* "of necessity requires a case-by-case examination of the evidence"). Still, the undiscovered mitigation evidence in the cases relied on by petitioner was extreme and materially different from the evidence here.

In *Rompilla*, undiscovered mitigation evidence showed that both of Rompilla's parents were "severe alcoholics who drank constantly," including during pregnancy, and Rompilla and his siblings "eventually developed serious drinking problems." 545 U.S. 374 at 391-92. Rompilla's father frequently beat Rompilla and his mother. *Id.* at 392. "His parents fought violently, and on at least one occasion his mother stabbed his father." *Id.* "All of the children lived in terror." *Id.* Rompilla's father locked petitioner and a brother "in a small wire mesh dog pen that was filthy and excrement filled." *Id.* Rompilla's childhood home "had no indoor plumbing" and he "slept in the attic with no heat, and the children were not given clothes and attended school in rags." *Id.* Indeed, the respondent in *Rompilla* "d[id] not even contest the claim of

prejudice." *Id.* at 290. In *Williams*, this Court agreed with the state post-conviction court that there was a reasonable probability that the jury would have reached a different sentence had it been presented with evidence of Williams' "nightmarish childhood," which included the facts that he lived in a filthy home with human waste all over the floor, his father physically abused him, his parents were incarcerated for neglecting him and his siblings, he was placed with an abusive foster family, he was "borderline mentally retarded," and he had entered the juvenile justice system three times between age 11 and 15. 529 U.S. at 395-96. And in *Wiggins*, the new mitigation evidence showed that Wiggins' "chronic alcoholic" mother was physically abusive and left him and his siblings "home alone for days, forcing them to beg for food and to eat paint chips and garbage." 539 U.S. at 517. She once "forced petitioner's hand against a hot stove burner-an incident that led to petitioner's hospitalization." *Id.* His mother "had sex with men while her children slept in the same bed." *Id.* Beginning at age six, Wiggins was placed in a series of foster homes where two foster mothers physically abused him and a foster father "repeatedly molested and raped him"; in another foster home, "the foster mother's sons allegedly gang-raped him on more than one occasion." *Id.* Wiggins was homeless after running away from a foster home at age 16. Later, he was "allegedly sexually abused by [a Job Corps] supervisor." *Id.* at 516-17. The Court found that it was reasonably likely that had the sentencing jury would have reached a different verdict had it been presented with evidence of the "nature and the extent of the abuse" that Wiggins suffered. *Id.* at 535-36.[3]

[3] Petitioner claims that in *Sears v. Upton*, 561 U.S. 945 (2010), this Court found *Strickland* prejudice "in light of evidence of sexual abuse petitioner suffered at the hands of an adolescent male cousin, verbal parental abuse, frontal lobe abnormalities, and substance abuse." Pet. 36. But the Court actually reversed because the state court failed to apply the proper prejudice inquiry (after finding that petitioner showed deficient performance), and remanded to the lower court to "reweigh[] in the first instance" the evidence presented at sentencing and the evidence presented in post-conviction proceedings against the aggravating evidence presented at trial. *Id.* at 956.

The mitigation evidence that trial counsel unreasonably failed to discover and present in *Rompilla*, *Williams*, and *Wiggins* is qualitatively different from the new mitigation evidence that petitioner presented here. Although the petition repeatedly refers to undiscovered evidence of sexual impropriety to which petitioner was exposed and experienced, Pet. 7-12, 15, 18-20, 29, 33-36, the only evidence of sexual impropriety against petitioner himself presented at the evidentiary hearing was that 14-year-old petitioner and his 12-year-old brother had sexual contact with "older kids." Resp. App. B 214-16, 221.[4] Anita did testify that when petitioner was in kindergarten, a babysitter "pulled his pants off or something like that," *id.* at 114-115, but no further evidence established that the encounter was sexual in nature. And despite "a considerable amount of uncertainty," petitioner alleges some unspecified sexual inappropriateness between petitioner and his mother and "the possibility ... that actual sexual activity took place between mother and son." Pet. 10 n. 9. Petitioner did present one witness at the hearing who either saw or did not see petitioner "in a playful type situation," possibly pinch his mother's breast area. Resp. App. B 252-253.[5] But this does not compare to the uncovered evidence in *Rompilla*, *Williams*, and *Wiggins*. The sum of the new mitigation evidence presented at the

[4] Petitioner's expert, Dr. Mendel, claimed that petitioner and Terry were six and eight at the time. Resp. App. B 329. But Terry testified he was around twelve, making petitioner around fourteen, at the time of the sexual encounter. Resp. App. B 216.

[5] Petitioner's sexual-conduct-related evidence that did not involve him included his step-father's sexual relationship with a teenage niece. Resp. App. B 123-24, 214. Petitioner also cites Dr. Mendel's claim that the mother of petitioner's daughter, Robin Saucier Marroy, was "sold at age 11 to a man in his 40s named Leroy Marroy." *Id.* at 332; Pet. 10-11. But Amanda and Anita, who actually knew Robin and Leroy, testified that they married when Robin was 18 and Leroy was "about 40, 50." Resp. App. B 90-91, 132. Terry, on the other hand, said that when he was around twelve, Robin was his next-door neighbor and girlfriend. *Id.* at 218. When asked about her relationship with Leroy Marroy at that time, he replied, "I'm going to tell you there was—I don't think there was a relationship." *Id.* This evidence would not have altered the jury's verdict because it was not "relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535.

evidentiary hearing was that petitioner's family was poor, he drank beer and stole as a teenager, he had older friends who were bad influences, as a young teen he engaged in sex acts with older teens, and his mother's method of discipline for her children was to spank them with a belt. Petitioner's childhood was not like those at issue in *Rompilla*, *Williams*, and *Wiggins*. Nor were the crimes in those cases as brutal as the murder of Konya Edwards. *See Rompilla*, 545 U.S. at 377 (bar owner stabbed to death and body set on fire); *Williams*, 529 U.S. at 367-68 (elderly victim beaten with mattock during robbery); *Wiggins*, 539 U.S. at 514 (elderly victim drowned in bathtub during home invasion). The post-conviction trial court was thus correct when it weighed the totality of available mitigation evidence against the horrific details of petitioner's crime and concluded that no juror would have voted for life had it been presented with the new evidence.

Third, petitioner contends that "a finding of prejudice is not foreclosed by the existence of particularly aggravating circumstances or the shocking nature of a particular crime." Pet. 37; *see also id.* at 37-40. But the post-conviction trial court did not hold otherwise. Rather, that court correctly assessed prejudice by weighing all of the mitigation evidence (that presented at trial and that presented at the post-conviction evidentiary hearing) against the evidence in aggravation. Resp. App. A 586-89. That is what this Court's precedent calls for: "In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534.

This Court has held that the Sixth Amendment requires effective assistance of counsel to ensure the defendant receives a fair trial. *Strickland*, 466 U.S. at 685-86. Petitioner received the effective assistance of counsel and a fair trial. He was not sentenced to death because of his attorneys' deficient performance. He was sentenced to death because of the brutality of the crime. He cannot show that any juror would

have favored a lesser sentence just because petitioner's family was poor, he drank beer and engaged in theft as a teenager, he had older friends who were bad influences, as a young teen he engaged in sex acts with older teens, and his mother's method of discipline for her children was to spank them with a belt. This Court should not take the significant step of disturbing the Mississippi Supreme Court's judgment. The result would be the same on remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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