No. 20-7804

In the
Supreme Court of the United States

Michael William Ledford,
Petitioner,

v.

Benjamin Ford, Warden,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined, on AEDPA review, that the state court did not unreasonably apply *J.E.B. v. Alabama*, 511 U.S. 127 (1994), in concluding that petitioner's reference to a statistical disparity between the percentage of women in the jury pool (42%) and those struck using the State's peremptory strikes (75%) did not establish a prima facie case of gender discrimination.

2. Whether the court of appeals correctly determined, on AEDPA review, that the state court did not unreasonably apply *Strickland v. Washington*, 466 U.S. 668 (1984), in concluding that trial counsel's strategy of presenting evidence of petitioner's antisocial personality disorder as mitigating evidence was not unconstitutionally deficient performance.

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The decision of the Georgia Supreme Court affirming Ledford's convictions and death sentence is published at *Ledford v. State,* 289 Ga. 70 (2011). Pet. App. 6.

The Superior Court of Butts County denied Ledford's state habeas corpus petition. Pet. App. 4.

The Georgia Supreme Court denied Ledford's application for a certificate of probable cause to appeal the state habeas court's denial of relief. Pet. App. 5.

The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of 28 U.S.C. § 2254 habeas corpus relief is published at *Ledford v. Warden, Ga. Diagnostic Prison*, 975 F.3d 1145 (11th Cir. 2020). Pet. App. 1.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a … trial, by an impartial jury…and to have the Assistance of Counsel for his defence.

The Eighth Amendment of the United States Constitution provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment, Section I, of the United States Constitution provides in relevant part:

> No State . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

A. Factual Background

Petitioner Michael Ledford was convicted by a Georgia jury of malice murder, felony murder, aggravated battery, aggravated sodomy, kidnapping with bodily injury, and aggravated assault. The facts of the crimes are as follows. On July 25, 2006, Michael Ledford pretended to go to work but, instead, bought beer and drank it near the Silver Comet Trial, a recreational trail used for biking, running, and other activities. Pet. App. 6 at 152. Ledford knocked Jennifer Ewing from her bicycle as she rode by his location. *Id.* He dragged her a distance off the trail to a location shielded from view by vegetation. *Id.* He stripped off all of her clothing from the waist down, and he pulled her shirt up part way, exposing her breasts. *Id.* She suffered bruises throughout her body in the struggle. *Id.* When Ledford forced his penis into her mouth, she bit his penis and severely wounded it. *Id.* Enraged by her resistance, Ledford unleashed a shocking attack during which he stomped on her face and nose, her larynx, and her ribs. *Id.* Ms. Ewing gradually succumbed to asphyxiation caused by her wounds and the resulting bleeding into her lungs. *Id.*

B. Relevant Proceedings Below

1. Voir Dire

During voir dire, the prosecution used nine of its twelve peremptory strikes to remove females, who made up 15 of the 36 (or 42% of the) venire members. Pet. App. 1 at 7. This resulted in the prosecution using 75% of its

strikes against women, with the jury ultimately comprised of 25% women (two on the panel, and two in the four-juror alternate pool). *Id.* at 10. The prosecution also accepted 6 female jurors, including the very first prospective female juror, and three female alternate jurors. *Id.* at 11.

Ledford challenged the jury selection under *J.E.B. v. Alabama*, 511 U.S. 127 (1994). The trial court determined that he had not made a prima facie showing of gender-based discrimination, as he had not shown that the totality of the relevant facts gave rise to an inference of a discriminatory purpose, and denied the challenge. Pet. App. 6 at 159. Because no prima facie case had been made, the prosecution was not required to offer gender-neutral reasons for the peremptory strikes. *Id.*

2. Trial Proceedings

At trial, Ledford was represented by two experienced death penalty attorneys: Thomas West and Jimmy Berry. Pet. App. 4 at 14-15. Counsel retained two private investigators and a mitigation investigator to work on the case, and all avenues of Ledford's background were thoroughly investigated, including his family, upbringing, medical history, mental health history, and substance abuse history. *Id.* at 16. The defense team interviewed numerous witnesses, procured countless documents, and marshalled all evidence into an organized system. *Id.*

Counsel thoroughly investigated Ledford's mental-health history, which revealed a fall from a tree at the age of nine, resulting in brain damage. *Id.* at 18-19. Counsel hired numerous mental health experts, including a forensic psychiatrist, a forensic neuropsychiatrist, a clinical psychologist, and a pharmacologist. *Id.* at 18-22. Counsel's trial strategy included front-loading

mitigation evidence during the guilt-innocence phase to start preparing the jury for the mitigation presentation they would offer if a sentencing trial was necessary. *Id.* at 22.

Trial counsel's primary sentencing-phase strategy was to show the jury that Ledford had suffered voluntary and involuntary brain damage, which diminished his frontal-lobe capacity and prevented him from controlling his impulses. *Id.* This brain-damage component of their mitigation presentation was an attempt to explain to the jury how someone could commit a crime so heinous. *Id.* at 25. Counsel also intended to use these experts to show that Ledford's psychiatric issues were based in large part on his upbringing and family history of alcohol and substance abuse and mental illness. *Id.* Trial counsel also incorporated Ledford's family members into the mitigation defense to show the jury there were people who cared about Ledford. *Id.*

During counsel's opening statements at the sentencing phase, they laid out their main mitigation theory: Ledford had a horrible upbringing as a child, which included abuse, dysfunction, and a childhood brain injury. Pet. App. 1 at 7. Counsel told the jury that Ledford did not choose to be brain-damaged, did not choose an abusive upbringing, and did not even choose to be an alcoholic—a condition that allegedly exacerbated the brain damage. *Id.* Counsel didn't mention anything about Ledford having antisocial personality disorder ("ASPD") or psychopathy during opening arguments. *Id.*

Trial counsel presented evidence at the sentencing phase to support their brain-damage mitigation theory. *Id.* Trial counsel presented 15 witnesses in total at the sentencing phase of trial, including 8 members of Ledford's family. *Id.* at 26. These family members were able to inform the jury of the family's history, which included the family's transient existence during

Ledford's childhood; an alcoholic, abusive biological father; a mother who was committed to a mental hospital; a childhood head injury sustained when Ledford fell from a tree at his grandparents' house; alcoholic siblings and family members who would frequently get into fights; no focus on education; and evidence of Ledford's younger sister being placed in state care and being sexually abused. *Id.* at 26-32.

Most notably, testimony from Ledford's brother, Donald, described Ledford's fall from a tree at the age of 8 or 9. Pet. App. 1 at 7. Donald testified that Ledford spent a month in the hospital after the fall and wore an upper-body case for a month after being released from the hospital. *Id.* Donald also informed the jury that Ledford's overall demeanor changed after his injury and that Ledford began suffering severe migraines. *Id.*

Counsel also called various expert witnesses during the sentencing phase of trial in support of their mitigation theory. Pet. App. 1 at 7. Counsel presented their mitigation investigator and a social worker as witnesses at the sentencing phase of trial, who corroborated through records and interviews, the personal stories of Ledford's family members concerning his history of mental health problems and alcohol and substance abuse. Pet. App. 4 at 32-35, 41-42.

Counsel also presented expert witnesses who informed the jury of the deleterious effects alcohol and drugs had on Petitioner's brain over the years. *Id.* at 35-41. Counsel presented forensic psychiatrists who conducted an MRI on Ledford. *Id.* at 42. Dr. Thomas Sachy testified that Ledford's cerebellum had shrunk, which was consistent with long-term alcohol abuse. *Id.* The MRI also revealed damaged neurons in Ledford's brain and that Ledford suffered from mesial temporal sclerosis. *Id.* at 42-43. Dr. Sachy testified that these

conditions adversely affected Ledford's impulse control and his ability for empathy. *Id.* at 43.

Counsel presented another expert witness who explained the adverse effects of Ledford's childhood and prior abuse on his mental condition as an adult. *Id.* at 45-50. Counsel presented a clinical psychologist who had conducted a battery of tests on Ledford and determined Ledford suffered from frontal-lobe brain damage, which adversely affected his impulse control and ability to make moral judgments. *Id.* at 51-52.

All of this evidence offered in mitigation was in furtherance of counsel's sentencing phase theory that Ledford's childhood injury and substance abuse had damaged his brain, making him mentally unwell, and that this confluence of events was not his fault. Pet. App. 1 at 7-8. It was during expert testimony, mainly during cross-examination by the prosecution, that that evidence of ASPD and psychopathy came up. *Id.* at 8. To further explain this to the jury, Dr. Sachy testified that people with brain scans like Ledford's have impaired moral judgment and are prone to rage. *Id.* Another defense mental-health expert, Dr. Robert Shaffer, testified that someone with brain damage like Ledford's would lack empathy and lack a feeling of consequences for their actions. *Id.* Dr. Shaffer testified that psychopathy is not a choice and, on cross, said that Ledford's prior rape conviction was consistent with sexual sadism. *Id.* Dr. Shaffer also noted that Ledford's pattern of lying to cover his crimes was "very characteristic of what we call psychopathic behavior." *Id.*

Following the sentencing phase of trial, on May 22, 2009, the jury recommended a death sentence for Ledford's brutal murder of Jennifer Ewing, and the trial court imposed a death sentence. Pet. App. 6 at 164.

3. Direct Appeal Proceedings

Ledford appealed his convictions and death sentence to the Georgia Supreme Court, where he raised, among other claims, a claim under *J.E.B.* that the prosecution engaged in gender-based discrimination based on its exercise of peremptory strikes during voir dire. Pet. App. at 159. The Georgia Supreme Court upheld the trial court's determination that Ledford failed to make a prima facie showing of discrimination. Ledford's convictions and death sentence were affirmed on March 25, 2011. Pet. App. 6. This Court denied certiorari review on November 7, 2011. *Ledford v. Georgia*, 565 U.S. 1017 (2011).

4. State Habeas Corpus Proceedings

Ledford pursued state habeas corpus relief in Butts County, Georgia. In his state habeas corpus petition, Ledford alleged, *inter alia*, that he received ineffective assistance of counsel under the Sixth Amendment at the sentencing phase of his capital trial when counsel presented evidence of his mental health history, which included ASPD and psychopathy, opening the door for the prosecution to present its own mental-health rebuttal evidence. Pet. App. 4. Following an evidentiary hearing, the state habeas court denied relief in a final order and determined that, under *Strickland*, counsel did not render prejudicially deficient performance based on their presentation of mental health evidence following a thorough investigation. *Id.* at 128. As for counsel's decision to elicit testimony from Ledford's mental health experts that he was antisocial and a psychopath, the state habeas court determined that it was a reasonably calculated risk to preempt the prosecution's effort to present the same in rebuttal. *Id.* at 130. The state habeas court further determined that "the majority of [Ledford's] evidence presented in habeas

was cumulative of the evidence presented at [ ] trial" and, likewise, contained evidence of his ASPD. *Id.* at 130, 135-36.

Ledford subsequently applied for a certificate of probable cause to appeal with the Georgia Supreme Court, which was summarily denied on August 14, 2017. Pet. App. 5. Ledford then petitioned this Court for certiorari review claiming that, in light of *Buck v. Davis*, 137 S. Ct. 759 (2017), trial counsel were ineffective for their mental health presentation of ASPD and psychopathy—diagnoses which were allegedly per se aggravating as a matter of law. This Court denied Ledford's petition on February 20, 2018. *Ledford v. Sellers*, 138 S. Ct. 983 (2018).

5. Federal Habeas Corpus Proceedings

Ledford pursued federal habeas corpus relief, which was denied by the district court on December 31, 2018. Pet. App. 3. The district court granted a certificate of appealability on the following claims: (1) allegations of ineffective assistance of counsel during the sentencing phase; (2) alleged juror misconduct; and (3) alleged gender-based discrimination by the State during jury selection. The Eleventh Circuit Court of Appeals affirmed the district court's denial of relief on these three issues on September 15, 2020. Pet. App. 1. On the gender-based discrimination claim, the Eleventh Circuit determined that Ledford relied solely on unconvincing statistical disparities and presented no additional facts, and that he had not shown that the Georgia Supreme Court's determination that he failed to make a prima facie case was an unreasonable application of this Court's precedent under 28 U.S.C. § 2254(d). On the ineffective assistance of counsel claim, the Eleventh Circuit also determined that Ledford had not shown that the state court's

decision that counsel's actions were not constitutionally deficient under *Strickland* was unreasonable under § 2254(d).

REASONS FOR DENYING THE PETITION

In his first question, Ledford asks this Court to review the Eleventh Circuit's decision concerning the state courts' adjudication of his claim that the prosecution engaged in gender-based discrimination during voir dire. Ledford argues that the Eleventh Circuit's decision conflicts with the manner in which other circuit courts of appeals and state courts evaluate the first prong of the test set out in in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B.* to evaluate whether a party used its peremptory strikes in a discriminatory manner, i.e., whether a prima facie case was made showing that the totality of the relevant facts gives rise to a discriminatory purpose. This Court should deny the petition on this question because:
(1) there is no circuit split, or conflict among the states, on the question of how trial courts should properly determine whether a party has established a prima facie case of a discriminatory purpose during voir dire; and (2) the Eleventh Circuit's decision was correct, in that it properly afforded deference to the state court's decision under § 2254(d).

In his second question, Ledford asks this Court to review the Eleventh Circuit's decision concerning the state courts' adjudication of his ineffective assistance of counsel claim under *Strickland*. Ledford argues that counsel rendered constitutionally deficient performance in their decision to present evidence of Ledford's mental health background, which included some portions that could arguably be aggravating. This Court should deny the petition on this question because: (1) Ledford's request for certiorari review is

a request for factbound error correction, which is not worthy of this Court's review; (2) the lower court's decision was correct; and (3) this case is not an appropriate vehicle to decide this question because an independent and unchallenged basis for the judgment exists: Ledford failed to show that he was prejudiced by counsel's conduct.

I. The court of appeals' conclusion that the state court did not unreasonably apply *J.E.B.* in concluding that Ledford failed to establish a prima facie case of gender discrimination does not warrant certiorari review.

To succeed on a claim of gender discrimination in jury selection, a defendant must first make out a prime facie case of discrimination, i.e., he must show that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *Johnson v. California*, 545 U.S. 162, 168 (2005). Only after a defendant makes such a prima facie showing does the burden shift to the prosecution to offer permissible race-neutral reasons for the strikes, after which, the trial court decides whether purposeful discrimination has occurred. *Id. at* 168. However, when a state court has already determined that such a prima facie case of discrimination was not made, that decision should be afforded deference under 28 U.S.C. § 2254(d) if the state court reasonably applied this Court's precedent in adjudicating the claim. *See Presley v. Allen*, 274 Fed. Appx. 800, 804 (11th Cir. 2008).

Here, because the state courts reasonably determined that Ledford did not make out a prima facie case of discrimination, the lower courts' analysis properly ended there. Ledford argues that the lower courts erred when they determined that he failed to make a prima face case because he offered nothing more than statistics, i.e., he only showed that the prosecution used nine of its twelve peremptory strikes to remove females, who made up 15 of

the 36 (or 42% of) venire members, whereas the record also showed that the prosecution accepted 6 female jurors, including the very first prospective female juror, and three female alternate jurors. Pet. App. 1 at 10-12. This question does not warrant review. First, there is no genuine conflict among the circuits, or the states, concerning the manner in which trial courts decide whether a prima facie case of gender-based discriminatory strikes has been made. And second, the Eleventh Circuit's conclusion, that the state courts did not unreasonably apply this Court's precedent in deciding no prima facie case was made here, was correct.

A. There is no split among the federal or state courts regarding the prima facie showing required for a gender-based discrimination claim under *J.E.B.*

Ledford asserts that the Eleventh Circuit and the Georgia Supreme Court have improperly adopted a heavier burden than required in *J.E.B.* to make out a prima facie case of gender-based discrimination. Pet. at 10. Ledford argues that those courts require a pattern of strikes and additional facts to make out a prima facie case of purposeful discrimination, in conflict with decisions from other circuit courts and other states, which allow for a prima facie case to be made on statistics alone. *Id.* at 10-14. But in fact, the Eleventh Circuit follows this Court's clear guidance in applying the first step of the three step process delineated in *Batson, J.E.B.,* and *Johnson*: a defendant must show that the sum of the proffered facts gives rise to an inference of discriminatory purpose. *Johnson,* 545 U.S. at 169. And its application of that standard here is not in conflict with the other circuits or states.

While acknowledging that the states have flexibility in formulating appropriate procedures to comply with *Batson* and *J.E.B.*, this Court has fully and clearly articulated "the standards for assessing a prima facie case in the context of discriminatory selection of the venire[.]" *Batson*, 476 U.S. at 96 (citing *Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977); *Washington v. Davis*, 426 U.S. 229, 241-42 (1976); *Alexander v. Louisiana*, 405 U.S. 625, 629-31 (1972)). In *Batson*, this Court applied those standards to support its holding that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial, i.e., showing a pattern from other trials was not required. *Batson*, 476 U.S. at 96. To make such a prima facie case under *J.E.B.*, a defendant must show that the relevant circumstances raise an inference that the prosecutor used peremptory challenges to remove female jurors based on their gender. *J.E.B.*, 511 U.S. at 144; *Batson*, 476 U.S. at 96.

"In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances." *Batson*, 476 U.S. at 96. A pattern of strikes against women included in the venire and the prosecutor's statements or questions during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. *Id.* at 97. However, such examples are only illustrative, as this Court has expressed "confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against [women]." *Id.* The Eleventh Circuit correctly applied that approach when it determined that the Georgia Supreme Court had reasonably applied

the *J.E.B.* standard concerning Ledford's failure to establish a prima facie case for gender-based discrimination during voir dire. Pet. App. 1 at 10-12.

This approach is not in conflict with other circuits, as Ledford suggests. Ledford asserts that some circuits have held that numbers or statistics alone may suffice to make out a prima facie case, whereas other circuits and states have held that statistics alone cannot establish a prima facie case. Pet. at 10-14. However, none of the cases Ledford cites indicate that circuits take conflicting approaches to deciding what qualifies as a prima facie case for gender-based discrimination under *J.E.B.* Instead, the cases reflect only fact-specific applications of whether a prima facie case was made based on the totality of relevant facts offered. *See, e.g., Allen v. Lee*, 366 F.3d 319, 329 (4th Cir. 2004) (the only pattern the court could discern from the raw statistics offered by the defendant was that the State had not exercised its strikes based on race); *United States v. Baxter*, 778 Fed. Appx. 617, 619 (8th Cir. 2019) (striking two out of three African Americans on the venire, on its own, did not establish a prima facie case for discrimination, but when coupled with the racial undertones of the underlying case and other factors, did establish a prima facie case); *United States v. Saylor*, 626 Fed. Appx. 802, 807 (11th Cir. 2015) (no prima facie case was established when all that was shown was that the government used all seven of its peremptory strikes against whites, five of which were white men); *United States v. Hill*, 643 F.3d 807, 838 (11th Cir. 2011) (the percentages of strikes of African Americans compared to the percentage of African Americans on the venire was examined, and "these statistics, *without more*, [did] not establish a prima facie case") (emphasis added); *Williams v. Beard*, 637 F.3d 195, 214 (3rd Cir. 2011) (a strike rate of 87.5% of African Americans compared to 12.5% for whites was sufficient to

support a prima facie case); *Williams v. Runnels*, 432 F.3d 1102, 1107 (9th Cir. 2006) (statistical disparities can support a prima facie case but other relevant circumstances could either support or refute such an inference of discrimination); *United States v. Stephens*, 421 F.3d 503, 512 (7th Cir. 2005) (statistics, coupled with other factors, constituted a prime facie case); *United States v. Alvarado*, 923 F.2d 253, 255-56 (2nd Cir. 1991) (a significant rate of striking minority veniremen may establish a prima facie case).

Ledford has also failed to show that any state courts of last resort have entered decisions that conflict with other state courts of law resort or with the circuit courts. *See* S. Ct. R. 10(a), (b). Instead, Ledford again cites cases that reflect only fact-specific applications of whether a prima facie case was made. *See, e.g., Luong v. State*, 199 So.3d 173, 190 (2015) (defendant failed to make a prima facie case for gender discrimination based only on the fact that the prosecution used 33 strikes to remove women and 13 strikes to remove men); *Livingston v. State*, 271 Ga. 714, 718 (1999) (defendant failed to make a prima facie case of discrimination based solely on the prosecution using two of its six peremptory strikes against black jurors, as numbers alone *may not* establish a prima facie case); *State v. Dorsey,* 74 So.3d 603, 616-17 (2011) (defendant's reliance on statistics alone in this case did not support a prima facie case of discrimination, as the prosecution used roughly the same number of strikes to excuse white and black jurors); *Johnson v. State*, 72 Ark. App. 175, 182 (2000) (evidence that 100% of the black impaneled jurors were peremptorily struck by the prosecution should have been considered by the trial court in deciding whether a prima facie case was made).

A statistical pattern of strikes against women is just one of the relevant circumstances a trial court may consider in determining whether a prima

facie case of gender-based discrimination was made. *See Batson*, 476 U.S. at 96. This Court has recognized that trial courts, experienced in supervising voir dire, will be able to decide if the totality of the circumstances surrounding a prosecutor's use of peremptory challenges creates a prima face case of discrimination. *Batson*, 476 U.S. at 97. There is no split among the circuits, or states, concerning a defendant's burden in showing a prima facie case of discrimination based on the prosecution's use of peremptory strikes against women, as an examination of the cases cited by Ledford show a consistent application of this Courts precedent on the subject. In short, a closer look at these cases reveals the true nature of Ledford's argument: a factbound claim that the Eleventh Circuit erred in its determination that the state courts properly determined that he had not made a prima facie case for gender-based discrimination. This is not a ground for certiorari review. S. Ct. R. 10.

B. The decision below is correct.

The Eleventh Circuit properly determined that Ledford had failed to make a prima facie case of gender discrimination during jury selection. Because the Eleventh Circuit was examining the state court's decision under the deferential lens of 28 U.S.C. § 2254(d) (AEDPA), it properly determined that it could not conclude that "no fairminded jurist could agree with the state court's determination or conclusion."[1] Pet. App. 1 at 11 (citing *Sealey v. Warden, Georgia Diagnostic Prison*, 954 F.3d 1338, 1354 (11th Cir. 2020).

[1] The Eleventh Circuit alternatively held that "[e]ven if we were to review the state courts' decisions de novo, our precedent would counsel affirmance." Pet. App. 1 at 12.

The Eleventh Circuit determined that Ledford relied on statistical disparities alone in seeking to make out a prima facie case. Pet. App. 1 at 11. Ledford argues that these statistical disparities were enough to make out a prima facie case, but the Eleventh Circuit analyzed those basic statistics carefully and determined the state court had not unreasonably applied *J.E.B.* when it held Ledford failed to meet his burden. *Id.* Ledford argued that the prosecution used 9 of its 12 peremptory strikes against women jurors, and that women made up 15 of the 36 prospective jurors. *Id.* Ledford also argued that while women made up 42% of the venire, the prosecution used 75% of its peremptory strikes against women, which resulted in a jury of only two female jurors and two female alternate jurors. *Id.* The Eleventh Circuit pointed out that the prosecution did not challenge all female jurors and accepted six female jurors in total and three female alternate jurors. Pet. App. 1 at 12. Ledford also struck four female jurors and one female alternate juror. *Id.* No other additional facts or evidence was ever offered by Ledford to show a prima facie case had been made. *Id.*

The Eleventh Circuit did not wholly discount the statistical disparities offered by Ledford, but instead properly held that "not just any statistical disparities will suffice to demonstrate a prima facie case of discrimination." *Id.* (citing *Hill*, 643 F.3d at 838) ("Under our precedent these statistics, *without more*, do not establish a prima facie case.") (emphasis added). The Eleventh Circuit did not hold that statistical disparities alone will never be enough to make out a prima facie case. The Eleventh Circuit held that "the overall pattern belies an intent to discriminate, and the burden to make out a prima facie case lies with the party claiming discrimination"—a burden

Ledford failed to meet. Pet. App. 1 at 12. The Eleventh Circuit's decision on this question was correct and not in conflict with this Court's precedent.

II. The Eleventh Circuit's denial of Ledford's factbound *Strickland* claim does not warrant review.

To succeed on an ineffective assistance of counsel claim, a petitioner must show two things: (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688. "Unless a defendant makes both showings, it cannot be said that the [ ] death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687. Ledford does not argue that the Eleventh Circuit failed to apply these well-established legal standards, and he alleges no conflict among state or federal courts. Instead, Ledford only contends that the Eleventh Circuit erred in rejecting his *Strickland* claim because counsel's strategic choices in presenting mitigation evidence in this case were unreasonable and prejudicial under *Strickland's* well-established standards. This Court previously denied Ledford certiorari review based on this same question, *see Ledford v. Sellers*, 138 S. Ct. 983 (2018), and it still does not warrant review for three reasons. First, Ledford fails to allege any conflict among the federal or state courts on this question, so his question reduces to a request for factbound error correction. Second, the Eleventh Circuit's correctly concluded that the state courts reasonably applied *Strickland* under § 2254(d) in determining that counsel had not been constitutionally deficient in their sentencing phase presentation. Third, this case is not an appropriate vehicle to decide this question because an independent and unchallenged

basis for the judgment exists: Ledford also failed to show that he was prejudiced by counsel's conduct.

A. Ledford's second question challenges application of well-settled law to the facts of his case.

Ledford does not argue that the Eleventh Circuit failed to apply the well-established legal standards from *Strickland* and he alleges no conflict among state or federal courts. Instead, Ledford contends that the Eleventh Circuit erred in rejecting his *Strickland* claim because counsel's strategic choices in presenting mitigation evidence in this case were unreasonable and prejudicial under *Strickland's* well-established standards. An argument that a lower court erred in applying *Strickland* to the facts of a particular case is a paradigmatic plea for factbound error correction that presents no general question of law and does not warrant this Court's review.

Ledford contends that *Buck v. Davis*, 137 S. Ct. 759 (2017), demonstrates why trial counsel's assistance was ineffective in this case. However, in *Buck* the petitioner was prejudiced during his sentencing phase when his trial counsel presented evidence of future dangerousness and a propensity for violence on the basis of race—a constitutionally immutable characteristic. *Buck*, 137 S. Ct. at 777-78. This Court pointed out it would be "patently unconstitutional" for the State to introduce such "potent evidence" against the defendant on "the central question at sentencing" which "coincided precisely with a particularly noxious strain of racial prejudice." *Id.* at 776-77. This "unusual confluence of factors" led the Court to deem counsel's performance prejudicially deficient for having elicited the testimony. *Id.* at 777. In simplest terms, trial counsel unconstitutionally made Buck's race a factor for consideration by the jury. *Id.*

Here, Ledford fails to show how the subjective diagnoses of ASPD and psychopathy are constitutionally immutable characteristics that were improper for a jury to consider during sentencing. His argument by analogy of race to mental state falls short of rational persuasion. *Buck* neither controls this case nor conflicts with the decision below.

B. The Eleventh Circuit's decision was correct and was not in conflict with this Court's precedent.

Ledford argues that the Eleventh Circuit erred when it determined that counsel at the sentencing phase of trial had not provided deficient performance when they offered evidence of his mental health history that contained potentially aggravating components. The crux of Ledford's argument is that the ASPD and psychopathy components of his mental health history are per se aggravating evidence and, therefore, trial counsel performed deficiently by offering any evidence of Ledford's mental health and opening the door for inclusion of these components. But the Eleventh Circuit's decision was correct, as Ledford cannot show an unreasonable application of *clearly established Supreme Court precedent*, as AEDPA requires for any grant of § 2254(d) habeas relief.

The Eleventh Circuit properly determined that competent trial counsel could have reasonably concluded that presenting the theory that childhood brain injuries gave Ledford ASPD was worth opening the door to additional psychopathy evidence. Pet. App. 1 at 13. As the Eleventh Circuit explained, Ledford's crime was particularly heinous, and defense counsel "could have reasonably concluded that brain damage, no matter how proven, might provide an avenue for escape that no amount of childhood abuse or suffering alone could provide—an excuse that could, in the minds of jurors, eliminate

Ledford's responsibility for his appalling crime." *Id.* Strategic choices made after thorough investigation of law and facts relevant to plausible options are "virtually unchallengeable." *Strickland*, 466 U.S. at 690. The Eleventh Circuit's decision that the state courts had reasonably applied *Strickland* on this question was correct.

C. This is a poor vehicle to address a question of ineffectiveness because Ledford's failure to prove prejudice is an independent ground for denying habeas relief.

To prevail on an ineffectiveness claim under *Strickland*, a petitioner must not only show that counsel performed unreasonably, but he must also show actual prejudice, i.e., a reasonable probability exists that, but for counsel's errors, the result of the trial would have been different. *Strickland*, 466 U.S. at 688. The state habeas court reasonably concluded that Ledford failed to show prejudice under *Strickland*. However, the Eleventh Circuit, after deciding that Ledford had not shown that the state habeas court unreasonably applied the performance prong of *Strickland*, determined that "we have no need to consider whether counsel's actions prejudiced Ledford's defense." Pet. App. 1 at 14. Ledford makes no attempt to show how the state habeas court unreasonably applied the prejudice standard of *Strickland* under the AEDPA; thus, an independent and unchallenged basis for the Eleventh Circuit's decision exists, making this case a poor vehicle for answering this question presented.

Even if counsel's performance had somehow been deficient, the state habeas court reasonably applied the prejudice analysis required under *Strickland* and determined that the mitigating evidence offered by Ledford in state habeas would not have created a reasonable probability of a different

sentence. Much of Ledford's evidence presented in state habeas was either cumulative or weak, and under such circumstances, it was reasonable for the state habeas court to find no prejudice. *Pinholster*, 563 U.S. at 199-201; *Belmontes*, 558 U.S. at 22-24 (holding that it is reasonable for a state court to find no prejudice when the evidence is either weak or cumulative of the testimony at trial). Pet. App. 4 at 66-69. The primary expert witness offered in state habeas was a social worker, Mary McLaughlin, who relied on some of the same mental health records from trial that showed Ledford suffered from ASPD. *Id.* at 67.

When assessing prejudice for a challenge to a death sentence, "the question is whether there is a reasonable probability, that absent the errors, the sentencer … would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. "A verdict or conclusion with overwhelming record support is less likely to have been affected by errors." *Id.* Here, after evaluating "the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – and reweigh[ing] it against the evidence in aggravation[,]" there is no reasonable probability that the outcome of Ledford's sentencing trial would have been different. The aggravating nature of Ledford's horrific sexual assault and consequent brutal beating death of Ms. Ewing, coupled with his life history of sexual assaults, including a past conviction for rape, makes it reasonable for the state habeas court to have concluded he had not shown the requisite prejudice. Pet. App. 3 at 26-27; Pet. App. 4 at 26, 69. Had counsel neglected to present the mental health component of their mitigation defense, "the jury would have been left without

any plausible explanation for [Ledford's] crimes, or his deviant behavior while awaiting trial in the correctional center." Pet. App. 4 at 66.

Because an independent and unchallenged basis for the Eleventh Circuit's decision exists, Ledford's second question is an inappropriate vehicle for granting certiorari.

CONCLUSION

This Court should deny the petition.

Respectfully submitted.

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