No. 21-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2021

JAMES ALLYSON LEE,

Petitioner,

-v-

BENJAMIN FORD, WARDEN
Georgia Diagnostic Prison,

Respondent.

THIS IS A CAPITAL CASE

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED – CAPITAL CASE

From the time James Lee was in diapers, his drug-addled mother routinely assaulted him; on one occasion, for instance, when he was about four, she struck him so hard he flew into the air and crashed on the floor bleeding. As a young boy, he was so deprived of human interaction he learned how to behave from the dog living under the porch and would bark, scratch his ears, and chase after cars – behavior witnesses characterized as bizarre, not child's play. And he was so starved for food he had to beg from his neighbors, who described Lee as a filthy child with rotting teeth, a head full of lice, and tattered clothes. These and other horrifying details of Lee's "dystopic existence"[1] were readily available, had trial counsel conducted a reasonably competent investigation. Yet Lee's jury had heard none of it when they sentenced him to death for a crime he committed as a teenager. Instead, Lee's attorneys presented evidence showing that Lee, like millions of people who have not committed murder, has ADHD; was abandoned by his father as a young boy; and was raised in poverty by a single mother, who admitted to having a problem with prescription drugs, but testified she did her best.

The only trial evidence that Lee suffered any abuse or neglect came from the defense mental health expert, who stated, merely:

> [S]tarting very early in his life, there was deprivation at times, where there wasn't even adequate food in the home, the abandonment by his father, that his father left.
>
> There was a lot of abuse, frequent changing and inconsistent rules or caregivers. You know, he and his mother lived together for a while, and she had a problem with substance abuse and was inconsistent in her behavior. A lot of times, he was left alone. Then, you know, they stayed with his grandparents, and there was some physical abuse as well as neglect.

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[1] Hon. Britt Grant, describing Lee's post-conviction evidence during oral argument. *See* https://www.ca11.uscourts.gov/oral-argument-recordings?title=&field_oar_case_name_value=lee+v.+warden&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D= (last visited Sept. 16, 2021), at 35:17-20.

His account was so inconsequential that neither side even mentioned it in closing.

In stark contrast, in state habeas proceedings, Lee presented evidence detailing shocking, chronic neglect, and brutal assaults he suffered at the hands of his mother (and others) throughout his childhood. The state habeas court granted sentencing relief, finding Lee was prejudiced by counsel's deficient failure to investigate and present evidence of Lee's deplorable childhood and expert testimony regarding the PTSD he developed as a result. The Georgia Supreme Court reversed, concluding Lee was not prejudiced because the new evidence did not demonstrate that Lee's childhood "was so harmful or horrific," given what the jury did hear, and that Lee did not establish a nexus between the new mental health diagnosis and the murder.

In federal habeas proceedings, the Eleventh Circuit recognized that the new evidence provided "graphic and horrifying descriptions of the physical and emotional abuse and neglect Lee endured at his mother's hands – details showing a frequency and severity of abuse that was only hinted at during Lee's trial presentation." Nonetheless, it ruled that the Georgia Supreme Court had reasonably found no prejudice because the new habeas evidence "added to [the] somewhat basic picture" presented at trial and the state court purportedly "conducted [the] exercise" of reweighing all the available mitigation against the evidence in aggravation.

The questions presented are:

1. Where a capital sentencing jury hears only a brief, conclusory, second-hand allusion to childhood abuse and neglect, can detailed, graphic accounts of a capital defendant's horrifying upbringing, "filled with abuse and privation," and a new expert diagnosis of PTSD based on that evidence, reasonably be considered cumulative of the trial evidence and, if so, is the new evidence properly deemed inconsequential in assessing prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984)?

2. Does 28 U.S.C. § 2254(d) allow federal courts to rubberstamp a state court's denial of relief without regard to the state court's unreasonable application of governing Supreme Court law and unreasonably wrong findings of fact?

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Trial and Direct Appeal

State v. Lee, No. 94R-096 (Charlton Cnty. Super. Ct., Jun. 6, 1997)

Lee v. State, No. S98P1498 (Ga. Mar. 1, 1999), *reh'g denied* (Apr. 2, 1999)

Lee v. Georgia, No. 99-6037 (S. Ct. Nov. 25, 1999), *reh'g denied* (Jan. 24, 2000)

State Habeas Proceedings

Lee v. Hall, Warden, No. 2000-V-475 (Butts Cnty. Super. Ct., Mar. 16, 2009)

Hall, Warden v. Lee, Nos. S09A1344, S09X1345 (Ga. Nov. 2, 2009)

Federal Habeas Proceedings

Lee v. Upton, Warden, No. 5:10-CV-17 (S.D. Ga., Waycross Div., Sept. 19, 2017)

Lee v. Warden, Georgia Diagnostic Prison, No. 19-11466 (11th Cir. Feb. 11, 2021), *reh'g denied* (Apr. 19, 2021)

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PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

Petitioner, James Allyson Lee, respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the Eleventh Circuit Court of Appeals, entered in the above case on February 11, 2021. *See* Appendix A.

INTRODUCTION

Trial counsel asked the jury to spare Lee's life because, like millions of other people who have not committed murder, Lee suffers from attention-deficit/hyperactivity disorder ("ADHD") and grew up in a broken home, abandoned by his father and raised by a mother who had "her own problems" but "attempted to raise Jamie the best way she could."[2] Had counsel adequately

[2] D.12-3:59-60 (defense counsel's sentencing summation).

investigated the horrifying neglect and abuse their 19-year-old client suffered virtually his entire life, Lee's jury would have heard a totally different, heartbreaking story of a nightmarish childhood – an account that would likely have led at least one juror to vote for a sentence less than death.

The "tidal wave"[3] of new mitigating evidence included:

- In his infancy, Lee's family used 2 by 4s to turn his crib into a cage so that his drugged-out caretakers would not have to look after him;

- From the time he was in diapers, his mother routinely subjected him to vicious physical and verbal assaults;

- When he was a toddler, he could often be found playing in the road in the middle of the night;

- He frequently talked to his kindergarten teacher about killing himself and would slap and hit himself in the face in front of her;

- His caregivers ignored him to such an extent that he mimicked the dog living under the porch and would bark, scratch his ears, and chase after cars – behavior witnesses found bizarre and disturbing;

- Neighbors described him as a filthy child, with rotting teeth, tattered clothes and a head full of lice, who begged for food for himself and the worms in his belly (circumstances red-flagged in school records counsel possessed);

- Although Lee responded well to the structure and nurture he received for a couple of years at a ranch for troubled youth, his advances evaporated after he was released at 17 into the custody of his mother and step-father, both of whom were incapacitated by pain-pill addictions and, after Lee left this unstable environment, he too began a downward spiral into substance abuse;

- The neglect and abuse Lee suffered was so severe it caused posttraumatic stress disorder ("PTSD"), which negatively impaired his development, functioning, and mental health.

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[3] *Andrus v. Texas*, 140 S. Ct 1875, 1887 (2020) (*per curiam*) (citing Texas trial court).

After considering the abundant new evidence of Lee's brutal childhood and expert testimony about its damaging impact, the state habeas court ruled that trial counsel were prejudicially deficient at sentencing. The Georgia Supreme Court reversed, in a decision riddled with findings unreasonably at odds with both the record and governing Supreme Court law, concluding Lee suffered no prejudice. The federal district and appellate courts, in turn, deferred to that decision, but without meaningful consideration of the numerous unreasonable errors that should have prompted *de novo*, not deferential, review. *See, e.g.*, *Brumfield v. Cain*, 576 U.S. 305, 307 (2015); *Williams v. Taylor*, 529 U.S. 362, 406 (2000) (opinion of O'Connor, J.).

OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals, entered February 11, 2021, affirming the district court's order denying habeas relief, *Lee v. GDCP Warden*, 987 F.3d 1007 (11th Cir. 2021), is attached hereto as Appendix ("App.") 1-12. The Eleventh Circuit's unpublished denial of rehearing and rehearing *en banc*, issued on April 19, 2021, is attached as App. 13-14. The unpublished decision of the district court denying Lee's petition for writ of habeas corpus, entered September 19, 2017, is attached as App. 15-64. The district court's denial of Lee's motion for reconsideration under FRCP 59(e) on March 20, 2019, is attached as App. 65-80. The unpublished state habeas court order granting sentencing relief, entered on March 16, 2009, is attached as App. 81-138. The Georgia Supreme Court's decision vacating the state habeas court's grant of the writ, *Hall v. Lee*, 684 S.E.2d 868 (Ga. 2009), is attached as App. 139-152. The Georgia Supreme Court's decision affirming the conviction and death sentence on direct appeal, *Lee v. State*, 514 S.E.2d 1 (Ga. 1999), is attached as App. 153-58.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit entered judgment on February 11, 2021, and denied rehearing on April 19, 2021. By Order of this Court on March 19, 2020, the time for filing a petition for writ of certiorari under Rule 13 was extended to 150 days, due to the ongoing COVID-19 pandemic.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment guarantee of counsel, applicable against the States through the Fourteenth Amendment's Due Process Clause, and 28 U.S.C. § 2254, which provide, in relevant part, as follows:

U.S. Const. Amend. VI

> In all criminal proceedings, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV

> 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.

28 U.S.C. § 2254

> . . .
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. The Trial.

Nineteen-year-old James Lee and his co-defendant Shannon Yeoman were accused of killing Sharon Chancey, the live-in girlfriend of Lee's father, Johnny Lee, on May 26, 1994, in order to steal his pickup truck.[4] The judge appointed two lawyers with no death penalty experience to defend Lee against capital murder charges, and related non-capital offenses.

Although Lee's actions were put in motion by the lingering effects of a childhood ravaged by unremitting mistreatment by his substance-abusing mother and uniquely severe neglect he suffered throughout his life, Lee's sentencing jury learned virtually nothing about the horrors of his upbringing. Instead, jurors heard only that Lee had ADHD and was raised by a single mother doing her best – a mitigation presentation easily skewered by the prosecution.[5]

The shortfalls in counsel's mitigation presentation were the result of their inadequate investigation and preparation. Counsel knew a capital sentencing phase was almost certain and that Lee's background would be crucial. Nonetheless, their investigator spent just over 40 hours total investigating the entire case (culpability and mitigation), including travel time to and from Florida. D.18-45:54-58. Counsel did even less. Time records show counsel had a very brief

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[4] On May 30, 1997, during Lee's jury selection, Yeoman pleaded guilty to felony murder and was sentenced to life. D.12-9:57-59.

[5] The prosecutor pointed out, for instance, that "there are tons of children, thousands of children in our county, who are hyperactive," the "great majority" of whom "don't … grow up to be cold-blooded killers," and that coming from a broken home "happens every day, but those children don't grow up so. They grow up to have productive lives." D.12-3:32-33. He further observed that "all [defense expert, Dr. Daniel Grant] can come up with is the defendant is hyperactive and he suffers from attention deficit disorder that afflicts, as again, thousand[s] and thousands, maybe millions, of children and adults in this country." D.12-3:34.

interaction with Lee's ex-wife Karen Lee and a 12-minute conversation with his half-sister Christina Smith *before* the State had announced it would seek death, and no contact with them thereafter. *See* D.18-4:30-31.[6] Records further show that, during the three years spanning counsel's appointment to trial, the defense team had a few, often brief conversations with Lee's mother Barbara Lloyd and her husband Melton, *see* D.18-4:33, 39, 46, 48, 56-57; briefly spoke with the Garrisons, Lee's house parents at a residential boys' ranch, shortly after the State noticed its intent to seek death and again on the eve of trial, *id.* at 37, 46; and, a week before trial began, spoke with one of Lee's elementary school teachers, *id.* at 46. Counsel made no effort to interview Lee's father until the middle of trial, when they were unable to meet with him, and as a result, put him on the stand during sentencing without ever having spoken to him. D. 14-5:16; D.18-4:46.

Counsel did not dig deeper even after the State's appointed mental health experts produced a report shortly before trial stating that Lee's "history of having been physically and emotionally abused by both his father and mother," would, if "[i]ndependent[ly] verified . . . be valuable as far as documentation of childhood trauma and the effect which this can have on his subsequent emotional development," circumstances, the experts opined, that "may be considered by the Court as mitigating factors in the disposition phase of this case." D.10-5:80. Counsel, however, took no such steps.

At trial, the State's principal evidence was Lee's statements to law enforcement officers after his arrest.[7] Defense counsel rested without presenting evidence, and the jury found Lee guilty.

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[6] The Georgia Supreme Court relied on these inconsequential contacts to bolster the scope of counsel's pretrial mitigation investigation. App. 143.

[7] Lee admitted to shooting Chancey in the head and putting her body into the bed of his father's truck and then, after driving to a place to dump it, shooting her again in a panic when he thought she had grabbed his arm. *See* D.10-4:1, 7.

At sentencing, the prosecutor presented evidence that Lee pled guilty to a prior theft and burglary for stealing a pickup truck and breaking into a church; stole a car with, and later instigated a severe beating of, a man named Douglas Gregory; and briefly and non-violently escaped from jail while awaiting trial and made threatening statements upon arrest.[8]

The defense presentation was meager, consisting of testimony from six witnesses whose direct examinations cover at best 62 transcript pages: one of Lee's teachers, Denise Smith-Baxley; his father Johnny; his stepfather Melton; his mother Barbara; his "house mother" at the boys' ranch, Mavis Garrison; and psychologist Daniel Grant. *See* D.12-1:128 – 12:2:44. The testimony focused on Lee's ADHD, his placement in a program for behavior-disordered children for a couple of hours a day when he was 7-9 years old and a boys' ranch for troubled youths (where he lived with the Garrisons) at 15-17 years old, and his father's abandoning him as a young child. Johnny testified briefly that he and Barbara fought during the few years they were together, but he did not think he ever hit Barbara when Jamie was around. D.12-1:148. Barbara admitted that she had a problem with prescription drugs and was given Demerol while pregnant with Jamie, but testified that Jamie was always fed and she did the best she could for him on her welfare check. D.12-2:1-2, 5-6. The only suggestion that Lee suffered any abuse or neglect came in a fleeting moment during Grant's testimony:

> [S]tarting very early in his life, there was deprivation at times, where there wasn't even adequate food in the home, the abandonment by his father, that his father left.

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[8] Gregory's testimony was the only evidence of violent behavior by Lee apart from the murder. Counsel did not attempt to impeach it with records they possessed showing that law enforcement officers believed Gregory "was being totally untruthful about the facts leading up to the assault." The Eleventh Circuit denied Lee's efforts to expand the COA to include *inter alia* counsel's ineffectiveness in failing to impeach Gregory's damaging testimony. *See* 11th Circuit Orders dated October 8, 2019, and December 20, 2019. Nonetheless, it relied on Gregory's account of the incident without considering evidence that would have substantially undercut its reliability and aggravated nature. *See* App. 11.

> There was a lot of abuse, frequent changing and inconsistent rules or caregivers. You know, he and his mother lived together for a while, and she had a problem with substance abuse and was inconsistent in her behavior. A lot of times, he was left alone. Then, you know, they stayed with his grandparents, and there was some physical abuse as well as neglect.

D.12-2:40-41.

Additionally, to his attorneys' surprise (undoubtedly traceable to their lack of preparation), Lee elected to testify, incoherently and, at times, contrary to his prior statements. Counsel never asked him about his childhood.[9]

In closing, the prosecutor addressed Lee's mitigation evidence, but notably never mentioned abuse or neglect. Nor did defense counsel, who argued that the case was not highly aggravated and, in a mere three-and-a-half transcript pages, discussed their mitigation case, observing that Lee suffered from his father's abandonment; his mother had done her best but raised him in what "wasn't the most ideal environment"; his stepfather Melton (who state habeas evidence revealed was, like his wife, incapacitated by his drug addiction) was "[p]robably the best influence" on him; Lee might have become accomplished instead of a killer if people like the Garrisons had raised him; and his ADHD made him impulsive and boastful. D.12-3:60.

Following argument, the court charged the jury, but failed to give any instruction on mitigation, even though the prosecutor had pointed out that omission at the charge conference.[10] *Id.* at 69, 71-80. With no guidance on how to consider the little mitigation they heard, the jury

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[9] Lee admitted his involvement in roughing up Gregory (who had testified for the State), but explained that he and others had beaten Gregory for spying on girls in the shower and Gregory had exaggerated the incident. D.12-2:70-71.

[10] Lee's request for a COA to address this error (among others) was denied. *See* 11th Circuit Orders dated October 8, 2019, and December 20, 2019; D.100.

sentenced Lee to death after deliberating just over two hours. D.10-6:4-5, D.12-3:85. Later, in its required report on the death sentence,[11] the trial court identified Lee's lack of a significant history of prior criminal activity, youth, ADHD, polysubstance abuse, and low average IQ as mitigating circumstances "in evidence," but, like the defense and prosecution in their respective summations, made no mention of abuse or neglect. D.10-7:4.[12]

B. State Habeas Proceedings

The state habeas court granted sentencing relief after considering extensive new evidence never heard by Lee's jury vividly depicting the severe abuse his drug-addicted, alcoholic mother inflicted on him most of his young life, and the extreme and chronic neglect he suffered at the hands of his mother and other adults; and new mental health evidence, including trial expert Grant's revised opinion that the brutal mistreatment Lee suffered would have prompted him to diagnose Lee with PTSD and to emphasize that diagnosis at trial, rather than ADHD, had he been aware of it.

1. State habeas evidence showed that Lee suffered severe abuse and neglect throughout his young life.

Lee's state habeas evidence documented a horrifying background of abuse and neglect. Summarized below, this evidence depicts "the kind of troubled history [this Court has] declared

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[11] *See* O.C.G.A. § 17-10-35(a).

[12] Earlier in the report, in a section addressing psychiatric evaluations, the judge noted that Lee's mother "verbally and physically abused him" and that Lee had a history of regular drug use, but this information came from the court-appointed experts' report and was not introduced as evidence at trial and thus was never heard by the jury. D.10-7:1; D:10-5:77-80.

relevant to assessing a defendant's moral culpability."[13] Had the jury heard it, at least one juror would likely have voted to spare Lee's life.

Jamie Lee was born into a family scarred by generations of domestic violence and substance abuse – abuse that directly impacted his mother Barbara Lloyd, who recalled brutal beatings she received from her father while her mother retreated from the violent chaos at home by working all night and sleeping through the day on "nerve" medication. *See, e.g.*, D.14-4:97-98; D.14-5:3, 6, 14-15, 18-19, 59-60, 67-68.

Jamie's parents continued this cycle of substance abuse and violence. Barbara had turned to alcohol, pills, and men to cope with the death of her beloved older brother. D.14-5:21-23. She met Jamie's father, Johnny Lee, at a truck stop and married him less than six months later; Barbara was sixteen while Johnny was in his 20's and on his third marriage. *See id.* at 22-23, 61, 75. Despite Johnny's superficial charm, the marriage soon erupted into violent assaults fueled by alcohol and jealousy. *See, e.g.*, D.14-5:3-4, 13-14, 23-24, 51-52. When Barbara became pregnant with Jamie two years into the marriage, she thought the beatings would stop. *Id.* at 24-25. They did not. "Johnny . . . would come home from his [truck driving] routes, beat me up, say he was sorry and then tell me that he wanted to, as he called it, 'make love.'" *Id.* at 25. Throughout the pregnancy, Barbara had weekly shots of Demerol for tooth pain and drank alcohol daily. *See, e.g.*, *id.* at 25-26, 61.[14]

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[13] *Wiggins v. Smith*, 539 U.S. 510, 535 (2003).

[14] State habeas psychologist Catherine Boyer explained that Jamie's "prenatal exposure to drugs and alcohol most likely impaired his development and contributed to his learning disabilities, severe hyperactivity, distractibility, and impulsivity." D.14-4:8.

After Jamie's birth, Barbara and Johnny continued their substance-fueled violence and, contrary to the evidence presented at trial, Jamie was exposed to much of it. As Barbara described in state habeas, Johnny continued to beat her even when Jamie was in his crib; neither parent would comfort him because they "were both seeing red, and too busy screaming at each other." *Id.* at 26-27. She explained, "[i]t was all I could do to keep Johnny from killing me. I didn't want Jamie to see and hear all that but there was no stopping Johnny." *Id.* On one occasion, Barbara recalled, when Jamie was three, the family was driving in a car and Johnny "out of nowhere, . . . backhanded me . . . right in the nose," causing blood to spurt everywhere; Jamie "climbed into my lap and wiped the blood from my face," while chiding his mother for "mak[ing] daddy mad." *Id.* at 28-29. Another time, in what Barbara called "the last straw," Johnny followed her to a bar, beat her up and then hid in the trunk of her car; later, when she pulled over to check out a sound in her trunk, he jumped out and savagely assaulted her in a drunken rage until bystanders intervened; Johnny then passed out along the road, by his broken-down car, and was run over and hospitalized for a year. *See* D.14-5:14; *id.* at 29-31; D.15-1:60 (Intake Summary dated September 23, 1980, documenting Barbara's report). During Johnny's lengthy hospital stay, Barbara would try to score pain pills from the doctors. D.14-5:14.

Jamie Lee was also a target of his mother's violence. From an early age, he was "hyper as could be," jumping constantly and destroying his cribs, and his behavior triggered furious reactions from Barbara. D.14-4:101. Barbara's older sister, Cathy Owens, described one particular incident when Jamie, then about two, knocked over a coffee cup and "Barbara immediately started hollering about her son, that 'no good motherfucker' and chased after Jamie. She caught him and smacked him hard across the face and left a mark." D.14-5:53. When Owens protested, "Barbara told me to shut up, that she could do her young'un any way she wanted to, that she could 'take him by the

feet and slap him up against the wall if she wanted to'" and "could 'splatter the little mother-fucker's brains everywhere' if she felt like it because he belonged to her and there was nothing I could do about it." *Id.* Johnny recounted an incident when Barbara tried to run him over with a car while he was riding his motorcycle with Jamie sitting between his legs. *Id.* at 13. The two escaped harm only because Johnny outrode her. *Id.* Mary Jane Drury, who had known Barbara her whole life and often looked after Jamie, also described Barbara's constant physical assaults. During one episode, when Jamie was four or five:

> Barbara clenched her fist and gave Jamie a backhand right in the mouth. . . . Jamie's head snapped back, his feet went out from under him and he flew up in the air. His entire body was off the ground and his head came down right on the concrete. . . . Jamie was hysterical and blood was gushing from his mouth.

Id. at 100-01.[15]

Perhaps Barbara's conduct was fueled by her inability to handle her child's hyperactivity, or her intense hatred of his father Johnny,[16] or the nonstop alcohol and drugs,[17] or some combination of all these factors, but Barbara's physical and verbal abuse of Jamie continued and worsened as he got older.[18] Great aunt Mary Akers recalled that "Barbara did nothing but yell at

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[15] Drury's sister Martha Ann Smith corroborated this account. D.14-6:37.

[16] Barbara freely admitted that she "hated Johnny. I'll never forget how much I hated him. Just like back then, I still blame Johnny for what he put me and Jamie through. It still hurts me so bad to think about it." D.14-5:35.

[17] Barbara testified in state habeas that she became addicted to prescription pain pills early in life, an addiction that continued at least up until trial. *See, e.g.*, D.12-2:5; D.14-5:35-36. Numerous witnesses described Barbara's addiction-fueled behavior, including trading sex for drugs. *See, e.g.*, D.14-5:9, D.14-6:2, 34-35. Her second husband, Melton Lloyd, eventually developed his own pill addiction. *See,* D.14-5:44. Bizarrely, trial counsel cast Lloyd as a positive influence and role model for Jamie, presumably because Lloyd had not gotten arrested again after serving time for murder. *See* D.12-3:60, D.14-2:53-54.

[18] Neighbor Gayle Petty testified that Barbara would "punch Jamie in the face, slap him in the back of the head or on his back, take a belt to him, and just plain beat him up" and that it "was

him and call him names like 'little bastard' and 'fuckhead.' It was nothing for her to haul off and smack the boy right across the face. It was really sad to watch." D.14-4:101. According to Barbara's cousin, Jean Davis, "[i]t was common to hear Barbara get up in Jamie's face and call him the ugliest names you can imagine," and she often "saw Barbara slap Jamie silly for no reason. I mean she would haul off and slap him right across the face." D.14-5:6-7. Davis described one event when Jamie was six or seven, when Barbara grabbed him by the hair and yanked him around with it. *Id*. Dorothy Ruis, Lee's sixth grade math teacher during the brief period Lee lived in Florida, testified about seeing Lee in her class with "bruises and welts up and down both of his arms" and "a welt on his face running from his ear to his mouth," which "were horrifying to view." D.14-7:49. She questioned Lee about the injuries and he eventually told her "that his mother 'got on' him'" *Id.* at 50. Ruis reported the abuse to Florida's child protection agency, but "[t]o [her] knowledge, HRS never conducted any kind of investigation." *Id.*

Indeed, Barbara admitted in state habeas that her actions were out of control and went beyond normal punishment:

> Sometimes I just ran out of patience and lashed out at Jamie. *I would lose it and smack him around*. Nothing else worked. Talking to him didn't work. Yelling at him didn't work. *Spanking him didn't work*. There were times I reached the end of my rope with Jamie and treated him in ways I wish I hadn't.

Id. at 34-35 (emphasis added).[19]

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common to see Jamie with bruises." D.14-6:17-18. She recalled an event where "Barbara started hitting on Jamie and after knocking him down, she kicked him right in the head. Stuff like this happened so often, it is hard to remember every specific instance of abuse Jamie suffered at the hands of his mother." *Id.* at 18. Petty observed that "[a]s Jamie got older the beatings got worse." *Id.*

[19] Although Barbara testified at trial, she explained in state habeas that the lawyers "didn't ask too many [questions]" the one time they met with her and Melton Lloyd and, as preparation for her testimony, instructed her "to answer their questions and to cry on the stand," but did not

Jamie also suffered extreme and profoundly disturbing neglect by his mother and his maternal grandparents. By virtually all accounts, he grew up in utter filth, whether living in his grandparents' house (sometimes with Barbara) or elsewhere with Barbara. *See, e.g.*, D.14-4:68, D.14-5:4, 8, 10, 77-78, 91 (witnesses describing Barbara's apartment as "about the dirtiest place I'd ever been in" with "dirty clothes, dishes and garbage all over the place" and roaches and "crusty food all over the place, along with beer and prescription pill bottles," which reeked from the pot and cigarettes Barbara "smoked . . . like a fiend"). Young Jamie complained to his cousin Jean that rats "would scurry around in his bed." D.14-5:10.

Nor did the adults responsible for his care see to Jamie's hygiene, nutrition, and health. Neighbors and relatives recall him as a dirty child wearing filthy rags, with lice in his hair and worms in his belly, his teeth literally rotting in his mouth. *See, e.g.*, *id.* at 66, 72, 88, 95.[20] Childhood friend and neighbor Bradley Chapple recalled that Jamie was perpetually filthy, with "rotten and disgusting" teeth, and described how his own grandmother would check him for lice anytime he had played with Jamie. *Id.* at 88. Chapple's grandmother often fed Jamie sandwiches through the backdoor because he was always hungry. *Id.* at 88-89. Chapple's mother Nancy also recalled how her family often fed Jamie, but barred him from the house because he frequently had lice, which her mother sometimes treated. *Id.* at 95. Despite his "rotted-out teeth," she recalled,

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tell her what she would be asked. *Id.* at 41. Counsel did not ask her about abuse and elicited her testimony that Jamie was always fed and that she did the best she could. D.12-2:6.

[20] In the report of an evaluation conducted when Jamie was six years old, which counsel had in their files, Sandra Henderson, school psychometrist at a local child development center, reported that a drawing test she administered to Jamie "indicated that he was extremely concerned with his teeth and gums, and with food"; while drawing, Jamie had stated "that his teeth 'hurt right here' [and] "pointed to the teeth on his lower left jaw. He also stated that 'I stay hungry all the time. I got worms.'" D.15-1:41.

Jamie "could eat sandwich after sandwich" which, he told her, was "because he had worms." *Id.*[21] Amie McIntyre, a classmate from elementary and middle school, recalled that Jamie came to school daily in clothes so "dirty and smelly" they "looked like they had been washed in sewer water," and he "was teased a lot by other kids in the class for the way he looked and smelled." D.14-5:107.

Instead of caring for Jamie, his caregivers were essentially absent. His family dealt with young Jamie's jumping in his crib "by creating a literal and figurative cage where they could keep him instead of giving him the positive attention, care and time that all children need." D.14-4:75.[22] Longtime acquaintance and babysitter, Mary Jane Drury, recalled "going over to [grandparents] James and Nellie's place ma[n]y times when Barbara was staying there and seeing Jamie all by himself. Nellie would be sleeping, James would be drunk over at the gas station, and Barbara would not be around. Jamie would be outside, by himself, playing with his dog or kicking around

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[21] Teachers also observed the evidence of neglect. *See, e.g.*, Doc 15-1:39, 61 (school record noting Jamie's teeth were rotten and house was a mess). Denise Smith-Baxley, who testified at trial, later described in habeas proceedings Jamie's general appearance as "dirty," observing that "his unkempt and dirty clothes and the smudges he continually had on his face and hands," and his "terrible" dental hygiene and "rotten" teeth "indicated a real lack of care and concern for Jamie's basic needs on the part of his caregivers." D.14-7:57. Smith-Baxley's concern about Jamie's care "only increased when I met his mother," who always looked "tired" and "unkempt," as though she were "recover[ing] from a hard night . . . ." *Id.* At trial, counsel did not ask Smith-Baxley about Jamie's physical condition or her assessment of Barbara's parenting skills.

[22] *See also* D.14-5:52 (Barbara reporting that "Daddy had to nail [Jamie's] crib to the wall so he wouldn't tip it over—Jamie jumped around that much, even as a year-old baby. Mom told me that he went through three or four cribs before they decided to nail it to the wall and strengthen it with 2X4's. By the time Daddy got done fixing it, it was like a cage."); *id.* at 69 (great uncle William Rewis recalling that "[a]s soon as [Jamie] could stand, he was tearing apart his cribs by lunging at them until he tore them up. It got to the point where [Jamie's grandfather] James nailed the crib to the wall and reinforced it with 2 by 4's so that Jamie wouldn't destroy it."). In habeas proceedings, psychologist Catherine Boyer, Ph.D., explained that Jamie's "crib rocking may have been a means of self-stimulation or heightened efforts to get his mother to come." D.14-4:9.

in the dirt." D.14-5:102. Cousin Leo Prevatt reported that Barbara's addictions left her unable to look after Jamie, recalling a time when "the law found Jamie on U.S. 1, out towards Folkston, late at night[,] by himself[,] wearing only a diaper." D.14-5:63. When Prevatt "gave Barbara a piece of my mind and told her that she couldn't raise her boy like that or he was gonna get killed[,] Barbara just looked at me and walked away."[23] *See also, e.g.*, D.14-6:16 (neighbor Gayle Petty reporting that Jamie never had basic things like sheets on his bed or clean clothes and was always dirty; and that Barbara would not take care of him and did not clean because she "would get high on her pills and just lay around the house smoking joints and cigarettes").

The neglect and abuse Jamie endured had palpable effects. When he was brought to the Charlton County Training Center at age five, he was so developmentally impaired the center diagnosed him as mildly mentally retarded, although he actually is low average in functioning. *See* D.14-6:47, 15-1:38-39. Young Jamie was also so starved for companionship that he modeled his behavior on his dog, Deogee (for the letters in "dog"[24]). Jamie, his mother recalled, would "crawl around, bark, bite at people's ankles, and really just act like a dog." *Id.* at 34; *see also id.* at 65 (Prevatt, describing Jamie's dog-like behavior and limited speaking ability as "very troubling"). Childhood friend Chapple, reported, "It wasn't uncommon . . . for Jamie to bark like a dog, scratch his ears like a dog, and chase cars. . . . There were plenty of times when a car would come down the road and Jamie would hide behind a tree. As the car would pass, he would jump out and chase

[23] An Intake Summary documenting an evaluation conducted at the school system's request when Jamie was six years old notes that Jamie "was seen by a psychiatrist when he was 2½ years old. When Mrs. Lee would wake up in the middle of the night and find Jamie playing in the street or crying for days at a time, she knew that she had problems." D.15-1:62. The psychiatrist prescribed Phenobarbital, which Jamie took for 3 weeks. *Id.* Because he appeared to go into trances, his mother stopped giving him the drug. *Id.*

[24] D.14-5:72.

it, barking his head off." *Id.* at 89. Chapple "never thought that it was something he did to be funny because neither one of us would laugh about it." *Id.*; *see also* D.14-6:36-37 (a classmate of Barbara's sister, Martha Ann Smith, reporting that "what I remember the most is how he would act like a dog. Jamie would crawl around and bark and bite me on my ankles. * * * There were even times [when he was three or four] when Jamie would chase cars down the road, while barking, just like his grandmother's dogs."); D.15-1:60 (Jamie's dog-like behavior documented in social worker's Intake Summary when Jamie was six).

In addition to stunting his development, Jamie's mistreatment led him to engage in self-harm at a shockingly young age. His kindergarten teacher Marward Howard testified that Jamie "frequently slap[ped] and hit himself in the face while sitting in class," behavior she had never seen from a child before or since. D.14-7:36. When she attempted to stop him, "[h]is usual response was to say, 'I'm gonna kill myself' and start crying." *Id.* at 37. Neighbor Petty testified that, rather than responding in kind when Barbara beat or screamed at him, Jamie instead "would hurt himself" by "repeatedly bang[ing] his head against the wall." D.14-6:18. Barbara recalled Jamie once as a toddler putting his head under the wheel of her car, as she was about to drive off; the incident prompted her to take him to a mental health clinic, which prescribed Ritalin for his hyperactivity. D.14-5:33. The medication was discontinued a few years later because it appeared to worsen his condition. *Id.* at 33-34; *see also* D.15-1:62 (Intake Summary documenting Barbara's report of this treatment).

Observers also noticed Jamie's deep hatred of his father – hatred he learned from his mother at a young age which continued into young adulthood.[25] Jamie's kindergarten teacher noted

[25] Friends who testified at trial for the prosecution, never interviewed by defense counsel, later recalled how much Jamie hated his father for abandoning him. *See, e.g.*, D.14-5:113 (Gary

that much of his anger "was directed toward his father" for leaving him and his mother "all alone"; Jamie talked "incessantly" about his father's abandonment and how "he hated him for it." D.14-7:37. This is hardly surprising, given the intense hatred Barbara felt for Johnny and redirected towards their son. Barbara often lashed out at Jamie in retribution for the harms she felt Johnny had inflicted on her. If Barbara "wasn't talking about needing more pills, then she was talking about [] how bad her life was since Johnny left and how Jamie was such a rotten kid." D.14-5:62. Cousin Davis recalled entering Barbara's "filthy" apartment with Jamie once and finding Barbara "wasted" and "sprawled out on the couch" surrounded by "five or six men"; seeing Jamie, Barbara began disparaging "her 'goddamned son, the little son of a bitch,'" who was "'a fucker, just like his daddy.'" *Id.* at 8-9. Prevatt similarly recalled that, even around other people, "Barbara was very mean to Jamie" and "called him every name in the book. I can remember plenty of times when Barbara would scream at Jamie and call him names like 'M.F.er' or 's.o.b.'" and "was quick to tell Jamie that he was a no good 's.o.b.' just like his father. . . . I really can't remember Barbara saying nice things to Jamie." *Id.* at 62.[26]

The traumatic impact of this unrelenting abuse and neglect followed Jamie into young adulthood and, in the months leading up to Chancey's murder, his life was spiraling out of control. When he left the Boys Ranch at age 17, in December 1991, Jamie had no stable home to return to. At first, he tried to live at his mother's house, but, by this point, drug addiction had completely

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Montgomery); D.14-6:33 (Charles Sapp). *See also* D.14-6:41 (co-defendant Shannon Yeoman, who did not testify for the prosecution).

[26] Barbara, unsurprisingly, denied such behavior during an intake evaluation in October 1980, instead insisting that she had "never berated her husband in front of Jamie" and did not want him "grow[ing] up hating his father." D.15-1:60. In light of Jamie's young age when his hatred for his father was first observed, Barbara's description was not credible.

crippled both Barbara and her husband Melton. *See id.* at 39, 45. According to Melton, Jamie and Barbara "could not get along" and, because of their constant fighting, "Jamie did not stay with us very long, maybe a month of two" after leaving the Boys Ranch. *Id.* at 45-46. Jamie spent most of the next two years as a homeless, adrift teenager. When he *could* find someone to give him work and a structured caring environment, he responded well. An old family friend, Brenda Morgan, took him in for a while sometime in 1993, after coming across him while driving along the highway, and employed him for a period of time in her cleaning business. D.14-6:4-5. Jamie was honest and competent at work and became "like a member of the family" at home. *Id.* at 5. On another occasion, Morgan's sister and brother-in-law, Sherry and Rick Pope, let Jamie live with them because he had proven himself a "great kid and worker." *Id.* at 23.

However, outside these brief periods of respite, Jamie still wrestled with his past and encountered strife with his family. *See e.g.,* D.14-6:5-6 (Brenda Morgan reporting on witnessing Barbara's continuing mistreatment of Jamie when he was living with Brenda's family). After leaving the Pope household, he was again homeless, staying in campers and "moving . . . from place to place." D.14-5:111, 113; D.14-6:32. He also began abusing drugs and alcohol. *See, e.g.*, *id.* at 24-25 (Rick Pope noting his concern after Jamie "fell in with a rough crowd . . . and was partying a lot"); D.14-5:113 (friend Gary Montgomery testifying that Jamie was using drugs heavily at the time, including acid and cocaine).

When Jamie was arrested for burglary shortly before turning 18, his mother and Melton refused to bail him out of jail. D.14-5:40, 46. Eventually, his father Johnny Lee did. D.14-5:40, 46. Jamie briefly lived with his father and Sharon Chancey, but left there after experiencing more anger and abuse. D.14-5:46, D.14-6:43. Melton and Barbara saw him occasionally as he "drifted around a lot." D.14-5:46.

A couple of months before his arrest for killing Chancey, Jamie contacted Donald Garrison, his cottage father from the Boys Ranch. Jamie "was in terrible shape, . . . high and strung out on drugs [and] also very hungry." D.14-7:25. Garrison helped him out, but told him he could not visit the ranch if he was on drugs. *Id.* Not long thereafter, Jamie – a homeless, drugged-out teen[27] damaged by horrific trauma and neglect – would commit the crime that landed him on death row.

2. Expert testimony presented in habeas proceedings explained how Lee's harsh life damaged his mental health and provided a profoundly mitigating context for understanding how he came to commit his crime.

The state habeas court heard the type of mental health expert testimony that could have been presented at trial had counsel adequately investigated and provided the resulting information to a testifying expert. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 382, 392 (2005).[28] The testimony of Drs. Grant and Boyer provided compelling, non-cumulative mental health mitigating information, which this Court has repeatedly found can alter capital sentencing verdicts "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less

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[27] Indeed, the state habeas evidence shows that on the night of the crime, Lee was strung out on drugs and alcohol, *see, e.g.*, D.14-6:41-42 – evidence Lee has argued was wrongfully suppressed by the State, *see* D.80:161-89. Specifically, the State failed to disclose interviews of Leaundry Carter and co-defendant Yeoman describing the large quantity of drugs and alcohol Lee consumed that night. Lee's efforts to expand the COA to include this claim were unsuccessful. *See* 11th Circuit Orders dated October 8, 2019, and December 20, 2019.

[28] In *Rompilla*, three defense mental health experts evaluated the defendant pretrial and found "nothing useful." 545 U.S. at 382. In habeas proceedings, new mental health experts, provided relevant information trial counsel had unreasonably failed to discover, identified significant mitigating factors in Rompilla's psychiatric profile. *Id.* at 392. This Court found counsel ineffective.

culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (internal citation omitted).

Grant, whose trial testimony had focused on Lee's ADHD, testified that the new material he reviewed in habeas, documenting Lee's background of abuse and neglect, profoundly changed his assessment. As he explained, Jamie's ADHD symptoms, while genuine, assume "a secondary and minor importance when Jamie's life and upbringing is fleshed out. *An ADHD diagnosis is wholly inadequate* to explain or define Jamie's emotional and mental disabilities and how [they] related to the [crime]." D.14-4:55 (emphasis added). Rather, the new evidence, considered together with the results of the Trauma Symptom Inventory he administered, warranted a diagnosis of PTSD "as a result of the trauma [Lee] directly experienced and witnessed as a child and young adult." *Id.* at 56. Had he been provided an accurate account of Lee's background prior to trial, Grant testified, he would have diagnosed Lee with PTSD at the time of trial and "would have also testified to and explained the effect of the chaos and extreme neglect and abuse experienced by Jamie from the time he was a baby and how this abuse and neglect had a clear nexus to the crimes in this case." *Id.* at 59.

Similarly, Boyer, based on the new habeas evidence, offered a compelling account of how Lee's horrific upbringing severely impaired his development and undermined his ability to exercise sound judgment, particularly given his youth and its characteristic impulsivity, up to and including the time of the crime. *See* D.14-4:2-40. As she explained, Lee's crime was deeply rooted in his "abysmal" childhood and upbringing:

> This case clearly shows the destructive, debilitating and long-term effects that severe neglect and abuse can have on an individual. Jamie was significantly impaired emotionally, psychologically, and cognitively, as a direct result of the neglect and abuse. And, unlike most cases, there is a direct relationship between the neglect and abuse, the resulting impairments and the crime. This is not a case

> of random violence or a cold-blooded car-jacking. This is a case which begins and ends as a result of the damage done to Jamie by his mother and father.
>
> * * *
>
> This was a crime born of abuse, abandonment and the emotional and psychological turmoil, impairment and anger [that] severe neglect and abuse causes and fuels.

Id. at 34-35, 38. She opined that Lee's intent to harm his father "was the direct result of the life-long abuse [he] had endured and the significant emotional, psychological and cognitive impairments and intense anger caused by the maltreatment"; as a consequence of these impairments, she doubted Lee had the "capacity . . . to conform his conduct to the requirements of the law" and found he acted "under the influence of extreme mental or emotional disturbance." *Id.* at 39.

3. The State Habeas Order.

The superior court upheld Lee's convictions, but vacated his death sentence on the ground that Lee received ineffective representation at sentencing. App. 81-138. The court found that counsel unreasonably failed to investigate and present both evidence of Lee's background of trauma and neglect, and mental health evidence grounded on that background. It observed: "Lee's early life bears all the hallmarks of a strong mitigation case: a boy whose troubles began before he got out of the womb, he was born into a home rife with abuse, neglect, and trauma at the hands of his addicted caregivers." App. 97. Although "[n]early every aspect of [Lee's] early life was uniquely troubled[,] the State was able to argue credibly to the jury that [he] was like a million other kids with a learning disability and a single mom." *Id*. Despite "[a]mple leads," trial counsel failed to investigate Lee's "horrific childhood." *Id.*

The court found that meaningful investigation of the abuse and privation Lee suffered would have been fully consistent with trial counsel's chosen defense – to show "aspects of [] Lee's life over which he had no control, specifically his mental health and upbringing." App. 94. By not investigating readily available and compelling evidence to support that defense, however, counsel

unreasonably failed to follow through on that plan. The court observed that counsel's planned defense could not be presented "without explaining [] Lee's mother's addiction and its connection to the neglect and abuse she inflicted on [him]." *Id.* Doing so, the court observed, did not require counsel "to 'blame' Barbara for the murder"; moreover, counsel's claimed decision not to "trash" Lee's mother at sentencing was "either a post-hoc rationalization or a decision based on an unreasonable investigation, both of which are proscribed by the Georgia and United States Supreme Courts." App. 94-95.

The state habeas court found prejudice because "the powerful early life mitigation in Lee's case [might] have persuaded one juror to vote for life" and, considering "the totality of the circumstances, . . . the strength of the mitigation omitted from Lee's penalty phase would . . . have swayed at least one juror to vote for life." App. 136.

4. The Georgia Supreme Court's Reversal.

The Georgia Supreme Court reversed the grant of sentencing relief, concluding that Lee had not shown prejudice.[29] App.139-152. Its decision was based on both its unreasonable application of clearly established law and unreasonably wrong factual findings which the record demonstrates were incorrect to a clear and convincing degree. *See* 28 U.S.C. § 2254 (d) and (e)(1).

Among other errors, the court improperly discounted the powerful mitigation case the jury never heard. It characterized Lee's affidavit evidence (which it erroneously impugned as largely inadmissible) as "disturbing" and indicative "that Lee came from a dysfunctional family," but concluded the evidence "fail[ed] to establish that Lee's childhood was so harmful or horrific as to

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[29] The Georgia Supreme Court chose not to address whether the state habeas court erred in finding counsel performed deficiently. App. 145.

create a reasonable probability that it would 'have influenced the jury's appraisal' of [Lee's] moral culpability'" when compared to the facts in *Wiggins* or *Hall v. McPherson*, 663 S.E.2d 659 (Ga. 2008). App. 148. The court further found that the mitigating evidence was "less compelling when considered in light of the strength of the State's case, including Lee's incriminating statements to his companions and to the police." *Id.* In characterizing this single-victim case as "highly aggravated," the court exaggerated the aggravation, while ignoring new evidence that rebutted or mitigated it.

The court also wholly discounted the expert testimony introduced in state habeas proceedings, reasoning that it failed to explain how the new diagnosis of PTSD "was related to the murder" or was appreciably different from the effects of ADHD to which Grant had testified at trial. App. 149-150.

C. Federal Habeas Proceedings

The Eleventh Circuit affirmed the district court's denial of habeas relief on the ground that the state supreme court was not unreasonable in finding that counsel's presumed deficiencies were not prejudicial. App. 1-12. In doing so, it all but ignored Lee's detailed arguments regarding the Georgia Supreme Court's unreasonable application of law and unreasonable determination of facts (and, in fact, replicated many of them), while emphasizing that, under AEDPA, the only question before it was "whether there is any 'possibility fairminded jurists could disagree that the state court's decision conflicts with' relevant Supreme Court's precedents." App. 10 (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)). The court noted that "this is not a case where the

jury had no mitigation evidence to consider at sentencing,"[30] and concluded that "there is, at the very least, room for debate" that the Georgia Supreme Court correctly found no prejudice because while "Lee's trial presentation lacked the vivid detail provided by his habeas witnesses, the jury heard that Lee was disadvantaged, neglected, and abused throughout his childhood." App. 10. It reasoned that the new evidence merely "added to this somewhat basic picture by providing graphic and horrifying descriptions of the physical and emotional abuse and neglect Lee endured at his mother's hands – details showing a frequency and severity of abuse that was only hinted at during Lee's trial presentation." App. 11. Moreover, "[t]he state court also pointed out that Lee's new expert testimony failed to make a convincing connection between the psychological impact of his childhood abuse and his actions on the night of the murder." *Id.* It further found that "the aggravating evidence presented to the jury was substantial," *id.*, without considering any of the evidence rebutting its aggravated nature.[31]

REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Eleventh Circuit's Determination That The Georgia Supreme Court Reasonably Found No Prejudice Because Lee's New Evidence

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[30] This Court "ha[s] never limited the prejudice inquiry under *Strickland* to cases in which there was 'little or no mitigation evidence' presented." *Andrus*, 140 S. Ct. at 1887 (citing *Sears v. Upton*, 561 U.S. 945, 956 (2010) (*per curiam*).

[31] The COA was limited to trial counsel's ineffectiveness in investigating and presenting mitigating and mental health evidence at sentencing. The Eleventh Circuit refused to expand the COA to include additional aspects of counsel's ineffectiveness at sentencing, including counsel's failure to investigate and rebut the State's aggravating evidence or to object to the prosecutor's improper sentencing-phase summation, and failed to consider the impact of those deficiencies when assessing prejudice.

Was Cumulative Of What Jurors Heard At Trial Is Divorced From The Reality Of Lee's Trial And At Odds With *Strickland*'s Prejudice Test.

The Eleventh Circuit deferred to the Georgia Supreme Court's conclusion that Lee was not prejudiced on the factually and legally incorrect ground that the evidence Lee presented in state habeas proceedings simply amplified the mitigation themes counsel presented at trial "that Lee was disadvantaged, neglected, and abused throughout his childhood." App. 10. As an initial matter, the Georgia Supreme Court did not actually make this claim – to the contrary, the court took the position that trial counsel "strategically cho[se] not to focus on Lee's mother's shortcomings at trial based on the information they possessed" – *i.e.*, that counsel intentionally did not present evidence that Lee suffered abuse and neglect at the hands of his mother.[32] App. 145. The Eleventh Circuit thus provided a basis to defer to the Georgia Supreme Court decision which that court had not even adopted (while ignoring the unreasonable grounds actually supporting the Georgia Supreme Court's decision) and which was actually in conflict with the Georgia Supreme Court's analysis. This was improper. *See, e.g.*, *Wilson v. Sellers*, 138 S. Ct. 1188, 1191 (2018) (28 U.S.C. § 2254(d) "requires the federal court to 'train its attention on the particular reasons – both legal and factual – why state courts rejected a state prisoner's federal claims'") (citation omitted).

But, even assuming the Georgia Supreme Court had ruled that the "tidal wave of information"[33] Lee presented in state habeas was merely cumulative of counsel's mitigation presentation at trial, that finding would have been unreasonable.

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[32] As Lee argued in briefing below, the Georgia Supreme Court's finding that counsel had strategically chosen not to attack Lee's mother was clearly erroneous. *See, e.g.*, D.80:101-07.

[33] *Andrus*, 140 S. Ct. at 1789 (quoting Texas trial court).

"Evidence is cumulative when it 'supports a fact established by existing evidence[.]'" *Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000) (quoting Black's Law Dictionary 577 (7th ed. 1999)). *Accord Stewart v. Wolfenbarger*, 468 F.3d 338, 358 (6th Cir. 2006) (quoting *Washington*, 219 F.3d at 634); *Rosario v. Ercole*, 601 F.3d 118, 141 (2d Cir. 2010) (same); *see also Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (rejecting argument that excluded evidence was cumulative when it corroborated evidence "a jury naturally would tend to discount as self-serving"); *United States v. Robertson*, 948 F.3d 912, 917 (8th Cir. 2020) ("Evidence is 'cumulative' when it adds very little to the probative force of the other evidence[.]") (citation omitted); *United States v. Cross*, 308 F.3d 308, 326 (3d Cir. 2002) (same) (citation omitted). Here, defense expert Grant's cursory reference to "abuse" and "neglect," a reference bereft of any detail and mentioned practically in passing without even an attribution, was so inconsequential that neither the prosecutor, nor the defense, nor the trial court ever acknowledged it. Jurors may have heard that Lee was "disadvantaged" in that his father abandoned him, his mother was poor and had a prescription drug problem, and he suffered from ADHD, but that was the sum total of the mitigating evidence. Lee's "nightmarish childhood"[34] of chronic, severe abuse and neglect, far from being an "established fact" supported by "existing evidence," was so lacking in proof or discussion that none of the key trial players even noticed it.

This is *not* a case like *Cullen v. Pinholster*, 563 U.S. 170, 200-01 (2011), where "[t]he 'new' evidence [of childhood abuse] largely duplicated the mitigation evidence at trial" and additional evidence was of questionable mitigating value. Nor is it like the situation presented in *Wong v. Belmontes*, 558 U.S. 15, 21-22 (2009), where trial counsel "put nine witnesses on the

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[34] *Williams*, 529 U.S. at 395.

stand over a span of two days," eliciting compelling evidence of petitioner's "'terrible' childhood," and the new evidence presented in habeas was either "merely cumulative" of the trial evidence or risked the admission of highly damaging evidence of another murder that trial counsel sought to keep out. Here, however, the jury heard nothing remotely bearing on what Lee presented in habeas proceedings – compelling new evidence that was precisely the type of mitigating evidence this Court has, time and again, recognized to be particularly effective in persuading jurors to vote against the death penalty. *See, e.g.*, *Wiggins*, 539 U.S. at 534-35 (new evidence of petitioner's "severe privation and abuse in the first six years of his life while in the custody of his alcoholic absentee mother," the physical and sexual abuse he suffered in foster care, and his "time . . . spent homeless" was "powerful" mitigating evidence of "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability") (citing *Penry*, 492 U.S.at 319; *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).[35]

Moreover, it is questionable whether *Strickland*'s prejudice test countenances an analysis that categorically dismisses "vast tranches of mitigating evidence"[36] simply because some hint of those facts may have been presented at trial and thus the new evidence may arguably be "cumulative." *Strickland* requires courts to determine "whether there is a reasonable probability that, absent the error*s*" (in the plural), "the factfinder would have had a reasonable doubt respecting

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[35] *See also Rompilla*, 545 U.S. at 395 (counsel ineffective in failing to investigate and present evidence of petitioner's abusive upbringing by violent, alcoholic parents, which "would have destroyed the benign conception of [his] upbringing and mental capacity defense"); *Williams*, 529 U.S. at 415 (counsel ineffective in failing to investigate and present evidence of the severe neglect and abuse petitioner's parents inflicted); *Eddings*, 455 U.S. at 104, 115 ("[W]hen the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.").

[36] *Andrus*, 140 S. Ct. at 1881.

guilt," and, in capital cases, whether "absent the error*s*" (in the plural), it is reasonably probable that the sentencer would have concluded that the balance of aggravation and mitigation did not warrant death. *Id.* at 695 (emphases added). At sentencing, courts must reweigh "the totality of the available mitigation evidence – both that adduced at trial and the evidence adduced in the habeas proceeding . . . against the evidence in aggravation." *Williams*, 529 U.S. at 397-98. Here, by belittling the new evidence as merely an expansion of the old, the Eleventh Circuit failed to take into account how the cumulative impact of that evidence, together with the evidence the jury heard, would likely have impacted Lee's sentence. *Cf. Turner v. United States*, 137 S. Ct. 1885, 1895 (2017) (noting in the context of the state's suppression of impeachment evidence that "[w]e of course do not suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence") (citing *Wearry v. Cain*, 136 S. Ct. 1002, 106 (2016) (*per curiam*)).[37]

Lee's jury heard virtually nothing of the powerful, unrebutted evidence of a recent childhood, spent in chronic misery and pain inflicted in the main by Lee's violent, strung-out mother. The Eleventh Circuit was plainly wrong to conclude that Lee's new evidence of abuse and privation merely "added to" the "somewhat basic picture" trial counsel provided and, on that basis, to validate the Georgia Supreme Court's unreasonable determination that Lee was not prejudiced by counsel's failure to investigate and present that compelling evidence.

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[37] The test for the "materiality" of suppressed evidence is modeled on *Strickland*'s prejudice prong. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (citation omitted). Materiality, like prejudice, is determined "collectively, not item by item." *Id.* at 436.

II. The Eleventh Circuit Erred In Ratifying The State Court Decision Without Considering Its Numerous Unreasonable Findings Of Fact And Conclusions Of Governing Law.

The Georgia Supreme Court systematically attacked the mitigating evidence Lee presented in state habeas proceedings on spurious grounds and then, unsurprisingly, found that its presentation would not likely have made a difference. Because the court lacked any legitimate basis to discount that evidence to irrelevance, its undercutting of Lee's compelling evidence was an unreasonable application of *Strickland*. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 42-44 (2009) . The Eleventh Circuit, in turn, paid virtually no heed to Lee's arguments demonstrating the unreasonable nature of the "arguments [and] theories supporting . . . the state court's decision,"[38] on the mistaken ground that its hands were tied by 28 U.S.C. § 2254(d). *See* App. 10. The lower court's misconstruction of its role under the AEDPA requires this Court's intervention in order to prevent the Great Writ from becoming a dead letter in the Eleventh Circuit.[39]

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[38] *Richter*, 562 U.S. at 102.

[39] Since 2000, 28 Georgia state habeas petitioners have secured post-conviction relief from the state habeas court. The Georgia Supreme Court vacated the grant of relief in 13 of those cases – an almost 50% reversal rate. Of those 13 cases, 11 have proceeded to the Eleventh Circuit, which affirmed the denial of relief in all but one case. *See Lee v. GDCP Warden*, 987 F.3d 1007 (11th Cir. 2021); *Nance v. Warden, Ga. Diagnostic Prison*, 922 F.3d 1298 (11th Cir. 2019); *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335 (11th Cir. 2019); *Morrow v. Warden, Ga. Diagnostic Prison*, 886 F.3d 1138 (11th Cir. 2018); *Lance v. Warden, Ga. Diagnostic Prison*, 706 Fed. App'x 565 (11th Cir. 2017); *Terrell v. GDCP Warden*, 744 F.3d 1255 (11th Cir. 2014); *Brannan v. GDCP Warden*, 541 Fed. App'x. 901 (11th Cir. 2013); *Holsey v. Warden*, 694 F.3d 1230 (11th Cir. 2012); *Cook v. Warden, Ga. Diagnostic Prison*, 677 F.3d 1133 (11th Cir. 2012); *Carr v. Schofield*, 364 F.3d 1246 (11th Cir. 2004) (all cases denying relief); *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011) (granting sentencing relief). (Of the remaining two cases that have not been heard by the Eleventh Circuit, one is still pending in federal district court, and one petitioner died of natural causes.)

The last time a Georgia capital defendant received relief of any kind in an AEDPA case in the Eleventh Circuit was in 2011, in *Ferrell*, though the court has heard dozens of Georgia cases in that time period. Although a panel recently granted sentencing relief in an unpublished decision

A. The state court unreasonably misapplied this Court's governing law in trivializing the disturbing evidence of Lee's lifelong suffering and casting aside the expert testimony explaining its harmful impact on his development and moral culpability, while exaggerating the aggravated nature of the crime.

The Georgia Supreme Court whittled the new evidence of Lee's horrifying childhood into oblivion and cast aside the new mental health expert testimony about the impact of Lee's abuse and neglect as irrelevant because it did not explain his crime. Then, having discounted the new evidence to irrelevance, the court overinflated the aggravated nature of the case to conclude that Lee was not prejudiced by counsel's failure to investigate and present the new evidence. The Georgia Supreme Court's attack on the new mitigating evidence and unwarranted inflation of aggravation unreasonably applied *Strickland* and this Court's broad definition of "mitigating" evidence under the Eighth Amendment, and relied on factual findings the record shows to be incorrect by clear and convincing evidence – errors that should have resulted in *de novo* review of Lee's ineffectiveness claim. Instead, the Eleventh Circuit simply rubberstamped the Georgia Supreme Court's unreasonable errors under the mistaken belief its hands were tied by AEDPA.

1. The Georgia Supreme Court unreasonably minimized Lee's nightmarish history of abuse and privation.

The Georgia Supreme Court essentially dismissed the mitigating value of Lee's horrifying background, ignoring the pervasiveness and severity of the abuse and neglect he suffered. *See* App. 147-148. It opened its assessment of the state habeas evidence by dismissing it as largely inadmissible evidence that was properly excluded by the trial court:

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in *Pye v. Warden*, 853 Fed. App'x. 548 (11th Cir. 2021), the Eleventh Circuit's grant of *en banc* review has vacated that decision. *See Pye v. Warden*, No. 18-12147, 2021 U.S. App. LEXIS 26535 (11th Cir. Sept. 1, 2021).

> *b. The mitigating evidence presented in the habeas proceeding.* In reviewing the affidavit testimony that Lee presented in the habeas proceeding, we note that much of it consists of hearsay and speculation that would not have been admissible at trial. . . . The habeas court properly sustained the Warden's Objections to much of this testimony.

App. 147. But the court's opening silo against Lee's mitigating evidence is in fact belied by the record. As Lee explained below, the state habeas court actually overruled most of Respondent's objections to the evidence and the little that was excluded did not diminish from Lee's powerful presentation. *See, e.g.*, D.80:110-11, 191-215. The Eleventh Circuit rejected this challenge to the Georgia Supreme Court's dismissal of the evidence because "Lee has not pointed to any specific relevant evidence that the Georgia Supreme Court discounted or declined to consider on this ground" and the Georgia Supreme Court "made specific references to its review of the new . . . evidence[.]" App. 9. But, it was the Georgia Supreme Court that announced (incorrectly) that much of the affidavit evidence was inadmissible, without identifying what it refused to consider. Notwithstanding its subsequent consideration of the evidence, it is difficult to imagine that the court's initial disparagement of the evidence in the abstract did not negatively impact its assessment of its weight and reliability.

Regardless, however, it is clear that the Georgia Supreme Court viewed the evidence of Lee's abysmal childhood as simply not bad enough to matter, an unreasonable conclusion as a matter of fact and law. As the court construed the affidavit evidence, it consisted mostly of descriptions of Lee's mother "having slapped him, punched him, or pulled him by his hair," and it described only four "specific instances of physical abuse," evidence that, while "disturbing and showing that Lee came from a dysfunctional family," was "not so harmful or horrific as to create a reasonable probability" of a different result, App. 148, a characterization that unreasonably downplayed the "graphic and horrifying descriptions of the physical and emotional abuse and neglect Lee endured at his mother's hands[.]" App. 11. The state court, moreover, concluded that

prejudice could not be shown because Lee's new evidence fell short of what was presented in *Wiggins,* App. 148, although Lee's evidence was (apart from sexual abuse) quite similar to the evidence presented in that case, showing that Lee, like Wiggins, "experienced severe privation and abuse . . . while in the custody of his alcoholic, absentee mother," as well as "physical torment" and "homeless[ness]." *Wiggins*, 539 U.S. at 535.[40]

More to the point, however, "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied" and does not "prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.'" *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (citations omitted)). Lee did not have to show that he suffered identical misery to that suffered by Wiggins in order to demonstrate prejudice. Indeed, as this Court recently noted, "we have never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice." *Andrus*, 140 S. Ct. at 1886 n.6 . The state court unreasonably trivialized Lee's compelling evidence on the ground it was not a carbon copy of the showing in *Wiggins.*

2. The Georgia Supreme Court wholly dismissed the mitigating value of Lee's new mental health evidence in violation of this Court's precedents.

The Georgia Supreme Court wholly discounted the expert testimony introduced in state habeas proceedings. It rejected the mitigating value of trial expert Grant's new diagnosis of PTSD because he failed to "explain how Lee's PTSD was related to the murder." App. 149. And it

[40] The Eleventh Circuit replicated this error, distinguishing *Wiggins* on the grounds this Court "held that the defendant's evidence of torture, severe deprivation, and sexual abuse was reasonably likely to change the outcome at sentencing," App. 11, even though the evidence of parental abuse and neglect in the two cases is in fact very similar and this Court did not use the word "torture" to describe that abuse. *See Wiggins*, 539 U.S. at 516-17.

rejected Boyer's detailed testimony documenting Lee's "abysmal" childhood,[41] its damaging impact on his development and mental health, and its connection to the crime, on the ground that Boyer did not herself diagnose Lee with PTSD, reasoning that "the connection that [she] made between his undiagnosed 'mental impairments' and the crimes is similar to the connection [Grant] made [at trial] between his diagnosis of ADHD and the crimes."[42] App. 150. It further dismissed Boyer's testimony because "'the critical issue' . . . is what the expert consulted at the time of trial 'would have been willing to testify to had [that expert] been provided the materials trial counsel allegedly failed to provide." App. 149-150 (citing *Schofield v. Holsey*, 642 S.E.2d 56, 61 (Ga. 2007)). The state court's "discount[ing] to irrelevance" of the expert testimony was at odds with both *Strickland* and this Court's Eighth Amendment jurisprudence. *Porter*, 558 U.S. at 43.

The Georgia Supreme Court's dismissal of Grant's new PTSD diagnosis was unreasonable as a matter of fact and law. First, it blinks reality to conclude that the new PTSD diagnosis – which underscores the severity of the abuse and neglect Lee suffered – was no more mitigating than Grant's original diagnosis of ADHD, a condition afflicting millions of people who lead crime-free lives. *Compare Andrus*, 140 S. Ct. at 1882 (evidence that "Andrus suffered 'very pronounced trauma' and posttraumatic stress disorder symptoms from . . . 'severe neglect' and exposure to domestic violence, substance abuse, and death in his childhood" was among "the myriad tragic circumstances . . . mark[ing] Andrus' life" that counsel were deficient in failing to investigate);

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[41] D.14-4:27.

[42] Boyer endorsed Grant's state habeas diagnosis of PTSD, but refrained from making the diagnosis herself because she "did not have the benefit of evaluating Jamie closer to the time of the crime . . . ." D.14-4:22. Her testimony in this regard was similar to expert testimony the state court improperly discounted in *Porter*. *See* 558 U.S. at 35 n.4 ("Porter's expert testified that these symptoms would 'easily' warrant a diagnosis of posttraumatic stress disorder (PTSD).").

Porter, 558 U.S. at 35 n.4, 43-44 (state court unreasonably discounted expert testimony that petitioner suffered from symptoms consistent with PTSD) *with Brown v. Ornoski*, 503 F.3d 1006, 1016 (9th Cir. 2007) (noting that attention deficit disorder is a "somewhat common disorder[]" and concluding that while it would "add quantity to the mitigation case, [it] add[s] little in terms of quality")).

Moreover, the state court's myopic focus on whether Lee's PTSD had a causal connection to his crime was an unreasonable application of this Court's governing law. In *Tennard v. Dretke*, 542 U.S. 274, 283 (2004), this Court underscored the broad scope of relevant mitigating evidence the sentencer must consider and denounced the Fifth Circuit's "nexus" test limiting "constitutionally relevant" evidence to evidence showing that the crime "was attributable" to a "uniquely severe permanent handicap with which the defendant was burdened." The Georgia Supreme Court's discounting of the new mental health evidence because it did not meet an improper nexus requirement was thus an unreasonable application of this Court's Eighth Amendment jurisprudence and *Strickland*. *See, e.g.*, *Williams v. Allen*, 542 F.3d 1326, 1343 (11th Cir. 2008) ("[T]he Alabama court's emphasis on the absence of a 'causal relationship' between Williams' mitigating evidence and the statutory aggravator reflects an unreasonable application of *Strickland*."); *Lambright v. Schriro*, 490 F.3d 1103, 1115 (9th Cir. 2007) (finding, in pre-AEDPA ineffectiveness case, that district court's rejection of proffered mitigation because petitioner had not shown a nexus between that evidence and the crime rendered its analysis "fundamentally flawed").

The Georgia Supreme Court then rejected the evidence Lee proffered of the causal link the court wanted from Grant because a new mental health expert had provided it, reasoning that "'the critical issue' . . . is what the expert consulted at the time of trial 'would have been willing to testify

to.'" App. 149-150 (citing *Schofield v. Holsey*, 642 S.E.2d 56, 61 (Ga. 2007)). This standard, cut from whole cloth, has no foundation in this Court's decisions and unreasonably applies *Strickland*. *See, e.g.*, *Rompilla*, 545 U.S. at 392 (granting relief where pretrial mental health experts found "nothing helpful," whereas their "postconviction counterparts, alerted by information from . . . records that trial counsel never saw" tested further and found that petitioner suffered from brain damage and extreme mental disturbance). Moreover, the court's dismissal of Boyer's testimony ignores the fact that counsel themselves testified they would have presented her or a comparable expert had they realized that Lee suffers from PTSD. D.14-2:71.

3. The Georgia Supreme Court's prejudice assessment unreasonably inflated the aggravation in this case.

The Georgia Supreme Court also overinflated the aggravation in this case, concluding that Lee could not show prejudice based on the jury's finding of four aggravating factors and the facts of the crime. App. 148-149; *see* D.10-6:5. But, tragic as Chancey's murder was, it was unreasonable to view the case as highly aggravated.[43] In assessing *Strickland* prejudice, "what matters is not merely the number of aggravating or mitigating factors, but their weight." *Ferrell*, 640 F.3d at 1234 (citation omitted). *See, e.g.*, *Bobby v. Van Hook*, 558 U.S. 4, 13 (2009) (faulting circuit court for "focus[ing] on the *number* of aggravating factors instead of their *weight*") (emphasis original). Moreover, the number of aggravating circumstances here is misleading at

[43] Contrary to the prosecutor's improper assertion in closing, this case was not "one of the worst." D.12-3:43. Nor was Lee, the "worst of the worst." He was 19 years old at the time of the murder, had previously been convicted of a couple of non-violent thefts and a burglary, and had taken part in beating Douglas Gregory (and Lee's trial testimony offered a mitigating reason for the beating, while contemporaneous police reports the jury never saw undermined Gregory's credibility). Moreover, at the time of the crime Lee was intoxicated on alcohol and drugs he had pilfered from his grandmother's medicine cabinet. D.14-5:82-83; D.14-6:41-42. Clearly the powerful mitigation the jury never heard would likely have swayed the vote of at least one juror.

best. The two aggravators based on Lee's commission of kidnapping and armed robbery may, under Georgia law, only be counted once.[44] Similarly, two of the aggravators, that the murder occurred during a robbery and that it was done to obtain money or anything of monetary value, are essentially duplicative. Further, as the prosecutor expressly told the jury, there was no evidence of depravity or torture to support the "outrageously or wantonly vile, horrible or inhuman" aggravator,[45] and its only foundation was aggravated battery to the victim, predicated on the theory that "the bullet wounds to her face" did not result in her death.[46] *See* D.12-32:32. But, it is clear from Lee's custodial statements that he believed Chancey was dead when he placed her body in the truck bed, *see, e.g.*, D.12-8:26 and, more importantly, that the prosecutor himself admitted he could not establish whether Chancey "dr[e]w her last breath" in Pierce or Charlton County," thereby conceding that he could not prove this factor beyond a reasonable doubt. D.11-9:85. *See also* App. 4 (Eleventh Circuit noting that Lee put "Chaney's apparently lifeless body" in the pickup truck bed, but shot her again when dumping the body after she grabbed his hand). Under these

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[44] *See King v. State*, 539 S.E.2d 783, 801 (Ga. 2000) ("O.C.G.A. § 17-10-30(b)(2) sets forth only one statutory aggravating circumstance [where] the offender committed a murder while 'engaged in the commission of either one or more of certain enumerated crimes.") (citation omitted).

[45] The prosecutor explained that two of the three ways to establish this aggravator did not apply: "[T]here is no evidence of [depravity of mind], so you should scratch that one out; torture to the victim prior to the death, . . . there is no evidence . . . and I urge you to scratch that one out." D.12-3:32.

[46] *See Hance v. State*, 268 S.E.2d 339, 346 (Ga. 1980) ("[O]nly facts showing aggravated battery . . ., which are separate from the act causing instantaneous death, will support a finding of . . . aggravated battery."). Due to decomposition, the coroner was unable to determine the order of the wounds (two to Chancey's face and head, and one to her abdomen) or whether any injury was immediately fatal, although the absence of blood in her abdomen indicated she was dead or dying when she received that wound. *See* D.11-11:141-51, 157, 163.

circumstances, this aggravator deserves little weight in this Court's analysis, even assuming the State presented sufficient evidence to establish it.

Nor did the nonstatutory aggravation make this a highly aggravated crime. As the trial judge noted in his report, Lee had "no significant history of prior criminal activity." D.10-7:4. Moreover, in considering Lee's only other violent conduct – his beating of Gregory – the Georgia Supreme Court failed to take into account Lee's testimony that he and others beat Gregory because Gregory was spying on girls in the shower and that trial counsel failed to impeach Gregory with evidence that the police did not believe his account of the beating. *See, e.g.*, 80:146-47.

B. The Eleventh Circuit ratified the state court decision without giving meaningful consideration to the state court's unreasonable applications of law and clearly erroneous findings of fact.

Although Lee identified the Georgia Supreme Court's unreasonable conclusions, the Eleventh Circuit gave them short shrift, saying only:

> Lee argues that [the Georgia Supreme Court's] decision was an unreasonable application of *Strickland* because in reaching its conclusion, the state court unreasonably discounted his new mitigating evidence and overstated the evidence in aggravation. We do not agree – and we reiterate that under AEDPA, the question before any federal court is not whether we would reach the same conclusion as the state court if we were to reweigh the evidence ourselves, but whether there is any 'possibility fairminded jurists could disagree that the state court's decision conflicts with' relevant Supreme Court precedents. If so, then we lack the authority to grant habeas relief.

App. 10. It then replicated and expanded upon those errors, discounting the mitigating value of Lee's new mitigating evidence because "the jury heard the Lee was disadvantaged, neglected, and abused throughout his childhood" and finding that, in light of what the jury did hear, "Lee's witnesses did not establish that his childhood was 'so harmful or horrific' that it might be expected to reduce Lee's moral culpability in the eyes of the jury; that the new mental health evidence "was not meaningfully different from Dr. Grant's trial testimony that people like Lee with ADHD were

impulsive and overactive, had problems with planning and organization, and had difficulty controlling their emotions and behavior"; and that "the aggravating evidence presented to the jury was substantial," including the evidence that Lee "had brutally beaten a man [Gregory] months before the murder because he wanted to 'see blood, a lot of blood[.]'" App. 10-11.

"Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's . . . determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Here, the Eleventh Circuit sloughed off its responsibility to scrutinize what the state court did under the mistaken notion that AEDPA required it to defer to the Georgia Supreme Court's outcome, without consideration of that court's underlying rationale for reaching it. *Richter*, the decision on which the Eleventh Circuit relied, *see* App. at 10, (and later cases) does not stand for that proposition.

In *Richter*, this Court explained how federal courts should apply 28 U.S.C. § 2254(d) when confronted with a state court decision that does not reveal the rationale for its conclusion – and distinguished that approach from the review required when the state court, as here, issued a reasoned decision:

> Under § 2254(d), *a habeas court must determine what arguments or theories supported* or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that *those arguments or theories are inconsistent with the holding in a prior decision of this Court*. The opinion of the Court of Appeals all but ignored "the only question that matters under § 2254(d)(1)."

Id. at 101-02 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003)) (emphasis added).[47] That means, as this Court later explained, that "the federal court [must] 'train its attention on the particular reasons – both legal and factual – why state courts rejected a state prisoner's federal claims[.]'" *Wilson*, 138 S. Ct. at 1190-91 (citation omitted). In this case, however, the Eleventh Circuit simply skipped over "the only question that mattered" – whether the Georgia Supreme Court's *rationale* for reversing the state habeas court was either "contrary to, or an unreasonable application, of clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The Eleventh Circuit eschewed this analysis, affirming instead on the basis of a reason the state court never gave, that the new habeas evidence was cumulative of what jurors heard at trial (whereas the state court in fact unreasonably concluded it was evidence counsel strategically chose not to pursue); and in defiance of such cases as *Tennard* (which prohibits requiring proof of a nexus between the expert mental health evidence and the crime) and *Strickland* (which requires the state and federal courts to assess the totality of the evidence in determining prejudice – an "exercise" that, to date, no court other than the state habeas court has conducted). Lee respectfully submits that the Eleventh Circuit's misconstruction of its role in federal habeas cases merits this Court's review.

CONCLUSION

For the reasons set forth above, Petitioner James Lee respectfully requests that the Court grant his petition for writ of certiorari to review the Eleventh Circuit's decision in his case.

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[47] In *Andrade*, the Court explained that "the only question that matters under § 2254(d)(1)" is "whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law." 538 U.S. at 71.

This 16th day of September, 2021.

Respectfully submitted,

/s/ Marcia A. Widder

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