No. 21-5753

In the
# Supreme Court of the United States

James Allyson Lee,
*Petitioner,*

v.

Benjamin Ford, Warden,
Georgia Diagnostic and Classification Prison
*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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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied 28 U.S.C. § 2254(d) when it reviewed the state court's reasons for denying the prejudice prong of Lee's ineffective-assistance claim.

2. Whether the state court unreasonably applied *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), when it determined there was no reasonable probability of a different outcome at the sentencing phase of trial after reweighing the mitigating and aggravating evidence.

## TABLE OF CONTENTS

**Page**

## TABLE OF CONTENTS
(continued)

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**



**Statutes**

## OPINIONS BELOW

The decision of the Georgia Supreme Court in the criminal direct appeal is published at 270 Ga. 798, 514 S.E.2d 1 (1999) and is included in Petitioner's Appendix at 153-58.

The decision of the Butts County Superior Court granting state habeas relief is unpublished and is included in Petitioner's Appendix at 81-138.

The decision of the Georgia Supreme Court reversing the grant of state habeas relief is published at 286 Ga. 79, 684 S.E.2d 868 (2009) and is included in Petitioner's Appendix at 139-52.

The decision of the district court denying federal habeas relief is unpublished and is included in Petitioner's Appendix at 15-64.

The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of relief is published at 987 F.3d 1007 (11th Cir. 2021) and is included in Petitioner's Appendix at 1-12. The order of the Eleventh Circuit Court of Appeals denying rehearing and rehearing en banc is unpublished and is included in Petitioner's Appendix at 13.

## JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment in this case on February 11, 2021. Pet. Pet. App. at 1-12. A petition for writ of certiorari was timely filed in this Court on September 16, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (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 … have the Assistance of Counsel for his defence.

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 … .

28 U.S.C. § 2254(d) provides:

> 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.

## INTRODUCTION

Petitioner James Allyson Lee begins his arguments to this Court as if his *Strickland* claim was under de novo review in federal court and had only one component—what he alleges trial counsel did wrong based upon his rendition of the record. Pet. 1-3. He follows this by largely misrepresenting the mitigation evidence presented at trial and the Georgia Supreme Court's determination that he failed to prove prejudice. Nowhere does Lee argue

that the court of appeals' decision is in conflict with this Court or another federal court. Most importantly, he never shows that the state court "managed to blunder so badly that every fairminded jurist would disagree." *Mays v. Hines*, ___ U.S. ___, 141 S. Ct. 1145, 1149 (2021). All of this leads to the inevitable conclusion that Lee is merely asking this Court for factbound error correction of the state court's *Strickland* prejudice determination. Consequently, Lee has failed to present an issue worthy of this Court's certiorari review.

## STATEMENT

### A. Facts of the Crimes

On the evening of May 25, 1994, Lee and an accomplice stole several handguns from a gun shop "including a ten millimeter Glock pistol." Pet. App. at 155.[1] Afterwards, Lee drove around with his girlfriend Shannon Yeoman, and the pair "decided to drive to Pierce County to kill Lee's father and steal his father's Chevrolet Silverado pickup truck." *Id.* The plan was to have Yeoman lure Lee's father to a designated location under the pretense of a broken down car. *Id.*; D11-13:103.[2]

Lee instructed Yeoman to go to his father's home and lure him out. D11-13:103-04. When Yeoman did not arrive after two hours at the designated location, Lee drove back to Yeoman and learned his father's girlfriend, Sharon Chancey, was at his father's home but his father was not.

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[1] The court of appeals also provides a summary of the facts of the crimes at Pet. App. at 3-4.

[2] Citations to the record refer to the Electronic Court Filing (ECF) number associated with the document followed by the page number given at the bottom of the page.

*Id.* at 104. Lee told Yeoman to go back to the home and "insist" that Chancey help him. *Id.* After this second attempt failed, Lee escorted Yeoman to the home, and waited out of eyesight until Chancey finally agreed to help. *Id.* at 105. However, as noted by the court of appeals, Chancey "left her home in panties and a nightshirt, barefoot and without her dentures, and it opened the door to the prosecutor's argument that she did not go voluntarily." Pet. App. at 11. Lee drove back to the predetermined location and waited. *Id.*

When Chancey arrived, she exited the truck and walked over to the passenger side of Yeoman's car. *Id.* at 106. Lee in a "cold-blooded and brutal" manner "walked up behind Ms. Chancey and shot her one time" in the head with the stolen Glock. Pet. App. at 11, 155; D11-13:106. Lee "threw" Chancey in the back of his father's truck and drove to a secluded area in Charlton County, Georgia. Pet. App. at 155; D11-13:107. "After dragging [] Chancey into the woods, Lee reached down to strip two rings from her," but Chancey was still alive and "grabbed" Lee. Pet. App. at 155; D11-13:108. "Lee responded by shooting her two [or three] more times and kill[ed] her." Pet. App. at 155; D11-13:108. Lee then removed Chancey's rings and nightshirt and left her bare body—with the exception of her panties—in the woods. D11-13:108.

That same night, Lee and Yeoman drove the stolen truck to Florida and, over the next day, Lee admitted to several individuals that he killed Chancey—at one point calling Chancy a "dead bitch." Pet. App. at 155; D11-12:25-31, 37, 47-48, 64.

Around 10:30 p.m. on May 26, Lee, who was driving the stolen truck and had two other passengers with him, was pulled over by a Florida Highway Patrol Officer. D11-12:48. Once stopped, Lee "yanked" the passenger from

the middle seat and "put him into the driver's seat." *Id.* at 66. This passenger exited the vehicle and spoke with the officer. *Id.* During that time, Lee cocked the stolen Glock, tossed it into the lap of the other passenger, and told him to "shoot the cop." *Id.* at 67. The other passenger refused and Lee was taken into custody when the officer learned the truck was stolen. *Id.* at 68; D11-11:51.

Shortly after Lee's apprehension, Florida law enforcement became aware of the missing person report on Chancey by Lee's father and questioned Lee about Chancey. D11-11:77. Lee was *Mirandized,* waived his right to counsel, and voluntarily informed investigators that "he had to kill her." *Id.* at 74-78. Additionally, law enforcement recovered the stolen Glock and Chancey's purse containing her driver's license from the stolen truck Lee was driving. D11-10:1; D11-11:58-62, 172-80; D11-12:1-5.

Around sunset on May 26, Chancey's body was discovered by a local resident who was hiking with his dog. D11-9:106-11. The next day, Lee was interviewed by Georgia law enforcement officials and he again waived his right to counsel and admitted to shooting Chancey. D11-13:93-115. On June 1, 1994, Lee gave a videotaped confession. Pet. App. at 155.

### B. Proceedings Below

#### 1. Trial Proceedings

On June 4, 1997, following a jury trial, Lee was convicted of malice murder, felony murder, armed robbery and possession of a firearm during the

commission of a crime.[3] Pet. App. at 155 n.1. Following the sentencing phase of trial, the jury found that the following statutory aggravating circumstances existed: a) that Lee committed the murder while engaged in the commission of armed robbery and kidnapping with bodily injury; b) that Lee committed the murder for himself or another for the purpose of receiving money or any other thing of monetary value; and c) that the offense of murder was outrageously or wantonly vile, horrible or inhuman, in that it involved an aggravated battery to the victim before death. *Id.* at 155. The jury recommended a sentence of death, and the trial court sentenced accordingly. *Id.* The trial court also sentenced Lee to life imprisonment for armed robbery and a consecutive five year sentence for possession of a firearm during the commission of a felony. *Id.* at 155 n.1. Lee's motion for new trial was denied on April 15, 1998. *Id.*

a. Defense Team Experience

John B. Adams, who was lead counsel, "had been practicing law in Charlton County for almost 20 years" and "was experienced in criminal litigation"; however, "Lee's case was his first death penalty case."[4] Pet. App. at 142. "[J. Kelly] Brooks, Adams' law partner and a Charlton County native, was appointed as co-counsel." *Id.* Brooks also had "never tried a capital

[3] Pursuant to Lee's motion, the trial court directed verdicts of acquittal for kidnapping with bodily injury and theft by taking, and the State dismissed a charge of possession of a firearm by a convicted felon. D11-13:138-47.

[4] In appointing Adams, the trial court noted that he was a "very experienced attorney" and "he's honest and he's trustworthy, and will do you as good a job as is possible." D10-8:6-7.

case" but he had "considerable criminal defense experience" and had previously represented a client charged with murder. *Id.*; D14-7:77.

b. Defense Team Mitigation Investigation

*(1) Records Gathered by the Defense Team*

The Georgia Supreme Court reviewed the records gathered by trial counsel and noted significant information. To begin its review, the court acknowledged that the defense team gathered "Lee's school records from Charlton County and Nassau County, Florida, and his records from the Boys Ranch." Pet. App. at 143; *see also* D14-2:76; D14-7:72; D18-4:54. Brooks testified that he "was on the Board of Education at the time" he represented Lee and thought counsel received "all the [school] records." D14-2:130. The records covered Lee's life from the time he was a toddler until he was a teenager. Pet. App. at 143; *see also* D14-2:76; D14-7:72; D18-4:54. In summarizing certain information from the records, the court recognized that they contained both positive and negative accounts of Lee's background.[5] For example, the court pointed out that there was a report of Lee's mother abusing alcohol but also reports that she was concerned about Lee's behavior since infancy and sought help for him several times over the years. Pet. App. at 144. The Georgia Supreme Court also found that there was "no evidence that counsel discovered any public records that concluded that Lee had been severely abused or neglected." *Id.* at 143.

[5] The Georgia Supreme Court did not find that the information in the records was accurate but merely considered it "as an indication of the information known to defense counsel at the time they made their decision regarding mitigation strategy." Pet. App. at 144-45 n.3.

*(2) Defense Team Interviews*

Trial counsel testified that they "interviewed [Lee] extensively." D14-2:130; *see also* D18-4:30-31, 33, 37-39, 42, 46 (trial counsel's billing records). The Georgia Supreme Court noted that trial counsel also spoke "at a minimum"[6] "with Lee's elementary school special education teacher, his elementary school principal, his father, his half-sister, his ex-wife, his co-defendant who was also his former girlfriend, his current girlfriend, and his cottage parents at the [] Ranch." Pet. App. at 143. Additionally, "the defense investigator spoke with the unit director [at the Ranch], the farm manager [at the Ranch], and the family social worker assigned to Lee's case at the Boys Ranch and other 'family or family friends' and reported back to counsel." *Id.*; *see also* D14-2:53-54, 56-57, 63, 65, 8-84, 94, 126, 133, 137; D18-4:54, 56.[7]

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[6] Trial counsel testified that they did not keep notes of everyone they spoke with about Lee on informal occasions when they were out and about in the community. D14-2:100-01. For example, Adams explained that he noticed Lee had obtained an affidavit from Alexander Steve McQueen in state habeas and, despite McQueen's statement to the contrary in his affidavit, Adams "remembered talking to him about [] Lee." *Id.* at 100.

[7] Lee implies the Georgia Supreme Court's notation of whom trial counsel "spoke" with was an unreasonable determination of fact because trial counsel's notes and billing records do not prove in-depth interviews. But the court did not comment on the substantive nature of the interviews, merely that the record showed counsel "spoke" with these individuals. As there is fair support in the record for the state court's findings, to the extent these notations represent factual findings, Lee's argument fails. Moreover, Lee's absence of evidence argument is in direct contravention of *Strickland*'s presumption of effective performance.

*(3) Mental Health Investigation*

(a) Dr. Daniel Grant

As noted by the Georgia Supreme Court, "[t]rial counsel obtained funds from the trial court to have Lee evaluated for mitigating mental health evidence and hired Dr. Daniel Grant, a psychologist whom Adams had previously retained to assist him on another criminal case." [8] Pet. App. at 143; D14-2:53-54. Adams testified that trial counsel asked "Dr. Grant, …to find out what made [] Lee do this; how do you take a boy who was in [] Lee's position and turn him into a killer; …what happened to him to make this transition; …what influences, …came upon him; and whether …he had any control over it?" D14-2:56.

Trial counsel provided Dr. Grant with the records they had gathered from the Charlton and Nassau County schools and the Ranch. D14-2:56, 131-32. Adams testified that counsel "gave [Dr. Grant] a lot of records to begin with," he did not recall Dr. Grant asking for more records, and counsel "certainly would have [gathered more information] had [Dr. Grant] done that." D14-2:56. When asked whether counsel provided all background information they had gathered, Brooks testified that counsel tried "to be an open record to Dr. Grant …And we consulted him, …with respect to the type of information he desired." *Id.* at 131. Counsel also did not recall Dr. Grant requesting to interview any of Lee's family and would have facilitated that

[8] The *ex parte* hearing for funds for Dr. Grant occurred on December 27, 1994 (D10-12:3)—approximately six months after Lee committed the crime. Pet. App. at 155 n.1.

request if made.[9] *Id.* at 56, 129. In sum, counsel testified that "Dr. Grant never came to us and said, look, we need some more information, we need you to do this, we need you to do that. We would have had no reason not to get whatever he wanted." *Id.* at 72.

Dr. Grant evaluated Lee on February 9 and April 13 of 1995 and May 17 and May 18 of 1997, for a total of about seventeen to eighteen hours. D12-2:31, 44-46; D19-12:35. During his evaluation, Dr. Grant administered approximately two dozen psychological tests and "one or two, personality tests." D12-232-33. The record also indicates that Dr. Grant had Lee's mother complete a behavior rating skill. D19-12:18. In addition to these tests, Dr. Grant reviewed Lee's school records and records from the Ranch that he received from trial counsel. D14-7:73; D19-4:101-D19-9:55; D19-12:35. Following his evaluation, Dr. Grant diagnosed Lee with attention deficit hyperactivity disorder (ADHD) and polysubstance abuse.[10] D12-2:34.

(b) State Evaluation

A little less than two months before trial, counsel announced their intention to use "expert psychological testimony" during the sentencing phase. D10-15:45. The trial court ordered a State evaluation and Lee was examined by Dr. Nic D'Alesandro and Dr. Gordon Ifill at Georgia Regional Hospital eight days before trial. D10-3:46-47; D10-5:77. Adams was present during the evaluation. D10-5:77. A report was issued on May 22, six days

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[9] Indeed, Dr. Grant testified during his deposition in state habeas that he did not remember requesting interviews with Lee's family and did not remember asking for more information. D19-1:122, 126.

[10] Trial counsel testified Dr. Grant informed counsel that he could fill the role of a social worker by "bridging the gap" between Lee's "diagnosis" and "behavior." D14-2:128.

before trial. *Id.* at 77-80. The psychiatric "interview took place over a two hour period" but no "psychometric testing" was administered. *Id.* at 77-78. Additionally, the evaluation "consisted of a review of records" but given the "limited" nature of the examination, the records did not include school or any other background records. *Id.*

The "personal history" section of the report noted the following: Lee's father was "absent" and had "no input during most of his upbringing"; Lee was primarily raised by his mother and maternal grandmother; the home environment was unstable; Lee's mother abused alcohol and drugs and was verbally and physically abusive—physical abuse[11] included "slapping him, pulling his hair and throwing him out of the house"; at times there was "significant childhood deprivation" and Lee's mother would deny herself food so "he got something to eat"; Lee "attended special education classes pretty much throughout his school career"; Lee went to a "boys ranch" as a teenager, did well, but was asked to leave "because of behavior difficulties in school in the community" and; Lee "described himself as a daily marijuana smoker" since age 17 and a frequent abuser of alcohol and "LSD." *Id.* at 78-79.

Lee was diagnosed with "Poly-Substance Dependence" and "Attention Deficit Hyperactivity Disorder." *Id.* at 79. The examiners found no evidence that Lee "suffered from any delusional thought processes" or was "under the influence of a delusional compulsion which overmastered his will during the time frame that the alleged acts were committed." *Id.* Additionally, the examiners informed the trial court that "[d]istractability and impulsivity characterize" the hyperactivity disorder and also that the physical and

[11] The report does not state at what age this abuse occurred. *Id.* at 78.

emotional abuse Lee stated he suffered as a child may be "considered by the Court as mitigating factors." *Id.* at 80.

Adams testified that directly after the evaluation, he "had lunch with [Dr. Grant] and discussed with him right there what, you know, what had happened at the interview" because counsel "wanted to let [Dr. Grant] know everything that [they] knew about [] Lee." D14-2:61. Trial counsel also received the report of Dr. Ifill and Dr. D'Alesandro and Adams testified that Dr. Grant "was somewhat buoyed by that report in that it reached basically the same conclusion that he did, that the problem here was with hyperactivity. And as you notice in there, it is the diagnosis that the State gives." *Id.* at 104.

c. Sentencing Phase Strategy

Trial counsel stated that the sentencing phase strategy was generally, "to engender sympathy for [Lee], to show that [Lee] was a victim of things that he had no control over, and that [Lee], generally, deep down inside, is a good person, a person that should be saved, a person that is not dangerous." D14-2:53. The Georgia Supreme Court also pointed out that trial counsel's strategy was to show that "Lee, who was 19 years old at the time of the crimes, was angry with his father for his abandonment of Lee and his mother when Lee was very young and for the chaotic, difficult life that Lee and his mother endured as a result." Pet. App. at 143. Also, "that Lee had no control over and was a victim of his ADHD, which impacted not only his behavior on the night of the crimes but also led him to make damaging statements to police. *Id.* Finally, that "Lee's history at the Boys Ranch showed that he

could succeed in a structured environment, and, thus, that life in prison, not death, was the appropriate sentence for Lee." *Id.*

d. Defense Sentencing Phase Presentation

*(1) Denise Baxley-Teacher*

Trial counsel testified that they chose teacher Denise Baxley because she was "well known in Charlton County," "[s]poke very well, very concerned" and counsel chose not to present other teachers because their testimony would have been cumulative. D14-2:66. Baxley testified that she worked at the Harrell Psycho-Educational Center teaching "severely emotionally disturbed" students and taught Lee from age seven to age nine. D12-1:128-30, 132. Baxley described Lee as impulsive and hyperactive. *Id.* at 129, 131.

As part of her teaching duties, Baxley periodically visited Lee's homes over the years. D12-1:132. Baxley initially visited Lee and his mother at his maternal grandmother's residence, which was in a state of "[d]isarray." *Id.* at 133. Subsequent home visits were made to an apartment where Lee and his mother lived, which was also unkempt. *Id.* at 133-34.

Baxley testified that Lee's mother was cooperative "[t]o the best of her ability." D12-1:134. Lee's mother tried to cooperate, but she failed to follow-up on specific suggestions—e.g. she failed to place Lee in afterschool activities. *Id.* Based upon her observations, Baxley determined that Lee's mother was not an authority figure in his life. *Id.* During home visits, Lee's mother showed Baxley evidence of Lee's destructive behavior which included destroyed toys and damaged walls. *Id.*

In the classroom, Baxley never observed any cruel behavior by Lee toward other students. D12-1:134-35. Lee made progress in her classroom

and was able to transition back into in a regular classroom with the assistance of the "specific brain disabilities class." *Id.* at 135. Finally, Baxley indicated that Lee's crimes were inconsistent with the person that she taught. *Id.*

*(2) Johnny Lee-Biological Father*

Johnny Lee testified that he had been divorced six times and was on his seventh marriage. D12-1:138-44. In addition to the numerous marriages, Johnny had six children. *Id.* One of those children was born while Johnny was still married to Lee's mother. *Id.* at 145.

Johnny testified that during his marriage to Barbara there were arguments and alcohol and drug abuse. D12-1:148-50. Johnny admitted to engaging in fights with Barbara, but denied striking her in the presence of Lee. *Id.* at 148-49. Following the divorce, Barbara was awarded custody of Lee, Johnny was required to pay child support, did not pay all of the required child support, and abandoned Lee. *Id.* at 145-47. In concluding his testimony, Johnny admitted that he was unable to provide any "good qualities" of Lee because he did not know him. *Id.* at 150-51.

*(3) Melton Lloyd-Stepfather*

Melton Lloyd married Lee's mother in 1987, and they had one son together. D12-1:156-57, 159-60. Melton testified that Lee and his stepbrother had a loving relationship, and Lee helped take care of his stepbrother. *Id.* at 160. Prior to meeting Barbara, Melton explained that he served twelve years in prison for second degree murder, which he committed when he was seventeen years old. *Id.* at 158-59. Since released from prison, Melton stayed out of trouble and was a successful farmer. *Id.* at 157-59.

When asked, Melton agreed that Lee had a "good side" and asked the jury to spare Lee's life. *Id.* at 160.

*(4) Barbara Lloyd-Mother*

Barbara testified that she was married to Lee's biological father when she gave birth to Lee at the age of nineteen. D12-1:164. She admitted that during her pregnancy with Lee she frequently took Demerol that was prescribed by a doctor who was incarcerated at the time of Lee's trial. D12-2:1. Barbara testified that Johnny was in and out of Lee's life from the beginning, and Johnny finally abandoned the family when Lee was three years old. *Id.* at 2. As a result, Barbara was forced to use welfare to support herself and Lee. *Id.*

After Johnny left, Barbara and Lee lived with her parents until Lee was about six years old. *Id.* at 3. At that time, Barbara moved to Gainesville, Florida and she lived with a boyfriend for about two years. *Id.* Lee stayed with his grandparents and did not move to Florida until the last six months of Barbara's relationship with her boyfriend. *Id.* at 3-4. After, Barbara and Lee moved to an apartment in Folkston, Georgia for about four years. *Id.* at 4-5.

Barbara admitted that she had an ongoing battle with prescription medication. *Id.* at 5. As a result of her addiction, Barbara did not know if she was a good mother to Lee. *Id.* at 5-6. When questioned, Barbara agreed that there was "always enough food to eat" for her and Lee. *Id.* at 6. However, when questioned about adequate clothing, Barbara testified that this was a "hard question to answer" because she only received "$160 a month." *Id.* Barbara explained that she tried her best to provide for Lee on

this limited income—which did not include any child support from Johnny. *Id.*

Barbara testified Lee was "extremely hyperactive" and was placed on Ritalin at age three. *Id.* at 2-3, 7. When Lee started school, he was placed in special education due to his hyperactivity. *Id.* at 6-7. Barbara explained that Lee was unable to sit still or concentrate, "rocked incessantly," did not talk, and barked like a dog. *Id.* at 7. After receiving assistance at school, Lee was able to talk by age six. *Id.* At age seven, Lee stopped taking Ritalin because Ware County Mental Health no longer thought it was necessary. *Id.* at 7-8.

Growing up, Lee had few friends. *Id.* at 10. Barbara explained that it was difficult for Lee to get close to people, and he wanted approval from others. *Id.* at 10-11. Barbara testified that she contacted the Ranch when Lee was thirteen years old, and he spent two years at the Ranch. *Id.* at 8-9. After the Ranch, Lee did not go to school and just hung out around the house. *Id.* at 9. Barbara testified that Lee was unable to hold down a job for any length of time. *Id.*

At the end of direct examination, Barbara was "crying" and she asked the jury to spare Lee's life as he was a good person and had never before acted in a violent manner. *Id.* at 10-11.

*(5) Mavis Garrison-Cottage Parent*

Trial counsel also brought Mavis Garrison— Lee's cottage parent at the Ranch—from Wisconsin to testify. D12-2:16. Trial counsel felt Garrison was "attached" to Lee and that "Walt Disney couldn't have created a better house mom." D14-2:67. Garrison testified that Lee was referred to the Ranch because of problems at home and school. D12-2:17, 20. Garrison felt that

many of Lee's problems came from the home, which included a problem with authority and anger towards his mother and father. *Id.* at 20-21. Garrison testified that Lee was angry at his father for abandoning him at a young age, and Lee felt his mother rejected him for his stepfather. *Id.* at 21. In addition, Lee talked to Garrison about alcohol and drug abuse by his mother. *Id.* Garrison testified, becoming "emotional," that Lee told her several times "that I had been more like a mother to him than anyone ever had." *Id.* at 22.

Garrison explained that the Ranch was a "very structured" environment, and Lee did well at the Ranch. *Id.* Lee's responsibilities at the Ranch were going to school, completing household chores, and working at the farm. *Id.* at 17-18. Lee performed well on his chores and received an award for having the best room. *Id.* at 18-19. Lee also worked well on the farm and developed a close relationship with members of the farm staff. *Id.* at 19. In addition to the award for best room, Lee received the "Tweed Award," which was reserved for boys who performed well in several areas. *Id.* at 19-20.

Garrison testified that she never feared Lee, they "cried many tears together," and Lee always came back to "reconcile" with Garrison if they had "differences." *Id.* at 22. Garrison testified that Lee had a "very good side" and was a "loving and caring person." *Id.* at 24. Garrison asked the jury to spare Lee's life as it was "very much worth saving." *Id.*

*(6) Dr. Daniel Grant-Psychologist*

Dr. Grant testified that his evaluation included the following: several interviews with Lee that totaled seventeen to eighteen hours; review of records; and the administration of extensive testing. D12-2:31-33. The testing revealed that Lee was in the low average range of intellectual

functioning, his reading and comprehension skills were at a seventh grade level, his math skills were at an eighth grade level, and he had mild problems in planning and organization. *Id.* at 33-34.

Dr. Grant diagnosed Lee with "attention deficit disorder with hyperactivity" and "polysubstance abuse." *Id.* at 34. Dr. Grant explained that the characteristics of ADHD include: impulsivity; significant amount of body movement; inability to complete a task before starting another task; poor planning; disorganization; difficulty with self-regulation of behavior and emotions; and a sense of restlessness. *Id.* at 34-35. Dr. Grant also explained that there was a high rate of alcohol and drug abuse, conduct disorder, and depression in adults with ADHD. *Id.* at 36. Additionally, an individual with ADHD would adjust well to a structured environment.[12] *Id.* at 38-39.

Dr. Grant explained that Lee was not responsible for the ADHD because he was born with the disorder and his childhood environment worsened his ADHD. *Id.* at 36, 40. In his early life, Lee was subjected to deprivation due to inadequate food and abandonment by his father. *Id.* at 40. Dr. Grant opined that the abandonment by Lee's father had a "very powerful negative impact on his development." *Id.* at 41. There was also evidence of physical abuse, neglect, and inconsistent rules of his caregivers. *Id.* at 40-41. Dr. Grant testified that Lee was frequently left alone, his mother had substance abuse problem, and was inconsistent in her behavior. *Id.* at 40.

Dr. Grant testified that about ninety percent of the ADHD population responded well to medication as a form of treatment. *Id.* at 37. At age three, Lee was taken to a psychiatrist and was prescribed Ritalin, but his family

[12] At the end of his testimony of direct examination, Dr. Grant explained in detail the structured nature of prison. *Id.* at 43-44.

discontinued using Ritalin when Lee was seven, and "for some reason or other, he received no more treatment after that." *Id.* at 38. Dr. Grant testified that Lee should have continued with treatment. *Id.*

Dr. Grant explained that a person with ADHD tended to have a low self-concept and would oftentimes "project an image of toughness or bravado …as a temporary cover-up to mask these fears of insecurity and fear of, in this case, I think, abandonment or rejection." *Id.* at 39. There was evidence that Lee frequently engaged in boasting and bravado but there was as no evidence that Lee was ever malicious or aggressive towards other people. *Id.* at 40.

Dr. Grant explained Lee still suffered from ADHD as an adult and that research showed that ADHD was more likely to continue into adulthood and to be severe when the onset occurred at an early age. *Id.* at 37-38, 41-42. In addition, a person with ADHD was more likely to develop other disorders, especially when they were not receiving treatment. *Id.* at 42. Dr. Grant testified that Lee's ADHD did not excuse his role in the crime but noted that it was a major part of his personality. *Id.* at 41.

*(7) Lee*

The final witness presented by trial counsel was Lee. During his testimony, Lee confirmed that his confession was true in that he lured the victim out of her home and shot the victim in the back of the head on the side of the highway in Blackshear, Georgia. D12-2:56-57. However, Lee denied many of the aggravating facts surrounding Chancey's murder, his subsequent arrest, and his escape from jail. *Id.* at 57-67.

Lee, who became emotional, testified that he shot the victim because he was upset with his father over "the things that he had done to me when I was

small and the things that he had done to my mother." *Id.* at 58. Lee explained that he was upset and hurt "and when she got there and it wasn't him, I still had those emotions and those feelings going, and they control me." *Id.* Lee further testified that he had not planned on murdering the victim, and he was sorry for his actions. *Id.* In apologizing for the victim's murder, Lee stated that his life had "changed dramatically" following his baptism in jail on August 8, 1996. *Id.* at 58-59.

In concluding his testimony, Lee again apologized for murdering the victim, asked the jury for mercy, and asserted that he was "redeemable." *Id.* at 71-72.

e. State's Presentation in Aggravation

In addition to the aggravating nature of the crimes, the State also presented additional non-statutory aggravating evidence. The Georgia Supreme Court fairly summarized this evidence. *See* Pet. App. at 148-49. Briefly, the non-statutory aggravating evidence included a prior conviction for burglary and theft by taking, "viciously" beating a man "because [Lee] 'wanted to see blood, a lot of blood,'" and an escape from jail. *Id.*

**2. Direct Appeal Proceedings**

The Georgia Supreme Court affirmed Lee's convictions and sentences on March 1, 1999. Pet. App. at 155. Thereafter, Lee filed a petition for writ of certiorari in this Court, which was denied on November 15, 1999. *Lee v. Georgia*, 528 U.S. 1006, 120 S. Ct. 503 (1999), *rehearing denied,* 528 U.S. 1125 (2000).

### 3. State Habeas Proceedings

Lee filed a state habeas corpus petition in the Superior Court of Butts County, Georgia on August 4, 2000, and an amended petition on April 16, 2001. D13-5; D13-11. An evidentiary hearing was conducted on August 17, 2001. D14-2 thru D20-1.

Lee presented the state habeas court with 68 affidavits, however, only a handful of those affidavits were from lay witnesses that trial counsel did not speak with that had any first-hand information regarding Lee's background. With the exception of Lee's maternal aunt, the lay witnesses which Lee alleges trial counsel did not speak with are: two cousins; a great aunt; a great uncle; a few neighbors; a childhood friend of Lee's; and, a few friends of Lee's mother. *See generally* D14-4 thru D14-9. This affiant testimony alleged that Lee was verbally and physically abused by his mother and lived in a state of poverty. In addition, to the lay affiant testimony, all of this "new" information was given to Dr. Grant and he, without conducting another in-person evaluation, opined that Lee also suffered from posttraumatic stress disorder (PTSD).

Nearly eight years later, the state habeas court erroneously granted relief regarding Lee's sentence of death. D20-16. The court incorrectly determined that trial counsel's sentencing phase investigation and presentation of mitigating evidence was deficient and Lee was prejudiced.[13] *Id*.

Following briefing and oral argument, (D20-20; D20-23; D20-25; D20-26; D20-27), the Georgia Supreme Court reversed the state habeas court's

[13] The order signed by the state habeas court was drafted by counsel for Lee. *See* D20-16.

erroneous grant of relief, finding Lee was not prejudiced by trial counsel's performance and reinstated Lee's death sentence. Pet. App. at 139. In doing so, the court assumed for the sake of argument that trial counsel's performance regarding the mitigation investigation was deficient but ultimately held: "Considering the combined effect of the deficiencies assumed in the discussion above, we conclude that those deficiencies would not in all reasonable probability have changed the outcome of the sentencing phase of Lee's trial." Pet. App. at 155.

Lee did not seek certiorari review from this Court following the Georgia Supreme Court's denial of state habeas relief.

#### 4. Federal Habeas Proceedings

Lee filed his initial federal petition for writ of habeas corpus on February 5, 2010, and his amended petition for writ of habeas corpus on September 16, 2010. D29. The court denied relief in September of 2017, and denied Lee's motion to alter and amend its final judgment on March 3, 2019. D98; D125. The district court granted a certificate of appealability on Lee's claim that trial counsel were ineffective during the sentencing phase for failing to investigate and present mitigating evidence. D125:15-16.

The court of appeals affirmed the district court's denial of relief. Pet. App. at 1-12. The court of appeals thoroughly reviewed the claim, set out the record in detail, analyzed the state court's legal determination regarding the prejudice prong of Lee's *Strickland* claim, and held the decision was reasonable under § 2254 review. *Id.*

## REASONS FOR DENYING THE PETITION

### I. The court of appeals 28 U.S.C. § 2254 review does not conflict with this Court's precedent.

The court of appeals detailed Lee's mitigation evidence—both that presented at trial and in state habeas—and the evidence in aggravation. Pet. App. at 3-9. The *possible* weight of each set of evidence was considered separately and cumulatively and the court of appeals concluded that the Georgia Supreme Court's *Strickland* prejudice determination was not unreasonable. *Id.* at 9-11. Lee argues the court of appeals erred because it ignored the reasons given by the state court and invented other reasons to support the state court decision. Pet. 26. On each issue, Lee improperly invites this Court to grant his petition for writ of certiorari to examine a factbound *Strickland* claim based upon his erroneous version of 28 U.S.C. § 2254 review. Moreover, Lee fails to prove the court of appeals' application of federal law is either in conflict with this Court's precedent or another circuit court of appeals. Consequently, certiorari review should be denied.

#### A. The court of appeals did not supplant the state court's prejudice analysis with its own.

"Federal courts may not disturb the judgments of state courts unless '*each* ground supporting the state court decision is examined and found to be unreasonable.'" *Shinn v. Kayer*, ___ U.S. ___, 141 S. Ct. 517, 524 (2020) (emphasis in original) (quoting *Wetzel v. Lambert*, 565 U. S. 520, 525, 132 S. Ct. 1195 (2012) (per curiam)). When assessing *Strickland* prejudice, the "inquiry asks 'whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the

balance of aggravating and mitigating circumstances did not warrant death.'" *Kayer*, 141 S. Ct. at 523 (quoting *Strickland*, 466 U.S. at 695). "All that mattered was whether the [Georgia] court, notwithstanding its substantial 'latitude to reasonably determine that a defendant has not [shown prejudice],' still managed to blunder so badly that every fairminded jurist would disagree." *Mays v. Hines*, ___ U.S. ___, 141 S. Ct. 1145, 1149 (2021) (quoting *Knowles v. Mirzayance*, 556 U. S. 111, 123, 129 S. Ct. 1411 (2009)). This is precisely the standard used by the court of appeals in assessing the Georgia Supreme Court's prejudice analysis.

Lee does not argue this standard but instead claims the court of appeals erroneously determined the state court's prejudice decision was reasonable based upon a finding the state court did not make. Specifically, Lee claims the court of appeals "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.'" Pet. 26 (quoting Pet. App. at 10). Lee incorrectly reads the court of appeals' decision and does not heed this Court's requirement that "[f]ederal courts may not disturb the judgments of state courts unless '*each* ground supporting the state court decision is examined and found to be unreasonable.'" *Shinn,* 141 S. Ct. at 524 (quoting *Lambert*, 565 U. S. at 525).

The court of appeals did not hold that Georgia's prejudice determination rested predominately on a finding that the evidence presented in state habeas was cumulative of the evidence presented at trial. Instead, the court first reiterated that Lee argued that the state court's prejudice determination

"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." Pet. App. at 10. Next, the court reminded Lee that its function under the AEDPA was not "to reweigh the evidence ourselves." *Id.* Rather it was to determine if there was "room for debate" on the question of *Strickland* prejudice. *Id.* The court of appeals then analyzed the reasons in support of the state court's decision—which relied in part on the similarity of mitigation evidence presented at trial and in state habeas, but not in total. *See id.* at 10-11.

Specifically, the court of appeals examined the three major categories of findings by the state court that encompasses its prejudice determination—background, mental health, and aggravating evidence.[14] *Id.* Regarding background, the court of appeals pointed out, as had the state court, that while the jury was not provided the "vivid detail" given by his state habeas affiants, they still "learned": that "Lee's parents drank heavily and fought violently when he was little"; "that Lee's mother abused prescription drugs, smoked marijuana, and neglected Lee to the point that he didn't always have enough to eat"; that Lee was placed "in a class for severely emotionally disturbed children, his basic security issues, and his behavioral problems"; and that "Lee endured 'a lot of abuse,' including physical abuse as well as neglect." *Id.* at 10.

The court also considered the state court's analysis of the mental health evidence. The court pointed out the mental health evidence presented at trial, and acknowledged by the state habeas court, which included testimony

[14] Lee's more pointed disagreements with the Georgia Supreme Court's factual and legal determinations will be addressed in Section II.

from his mental health expert Dr. Grant that Lee suffered from ADHD, and his "emotional and behavioral problems were made much worse by his home environment" and "that people with Lee's condition tended to be boastful, and had difficulty controlling their emotions and behavior." *Id.* at 10. The court of appeals reviewed Lee's new diagnosis of PTSD from Dr. Grant and determined that the state habeas court did not unreasonably find Grant "never actually provided" an "explanation" of the "connection between Lee's PTSD and his crimes." Pet. App. at 11. Moreover, the court of appeals agreed with the state court's finding that the testimony from Lee's new mental health expert, Dr. Boyer, "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." *Id.*

Finally, the court of appeals examined the statutory and non-statutory aggravating evidence in determining the reasonableness of the state court's prejudice decision. *Id.* Contrary to Lee's self-serving rendition of his crimes, the court of appeals determined the "aggravating evidence presented to the jury" to be "substantial." *Id.* Going through the evidence of the crimes, the court pointed out that when Lee realized his intended target—his father—was not home, he had no problem substituting his father's girlfriend "despite her past kindness to him." *Id.* The court explained that the evidence Chancey was lured from the home instead of being forcibly taken was suspect given that she left behind her dentures and was only in her night shirt and panties when she left her home. *Id.* The court however concluded that no matter how Chancey left her home, the "murder itself was cold-blooded and brutal." *Id.* "Lee shot [Chancey] in the face, drove her wounded and bleeding

to the middle of nowhere, dumped her in the woods, and shot her again when she grabbed his hand." *Id.*

Additionally, the court took note of the non-statutory aggravating evidence. *Id.* Specifically that Lee showed "no remorse" for the murder, instead bragging of killing "the bitch" to his friends. *Id.* Lee had also taken part in "brutally beat[ing] a man months before the murder because he wanted to 'see blood, a lot of blood.'" *Id.* And "he had tried to convince one of his friends to shoot a state trooper after the murder, that he said he would have shot at the police *after his escape from jail* if he had had a gun, and that he threatened to kill his father and the officers who investigated Chancey's murder if he ever had the chance." *Id.* (emphasis added).

The court of appeals applied the correct standard in reviewing the state court's decision and did not contrive any reason not supported by the state court's opinion.

### B. Lee improperly asks this Court to grant certiorari review to define cumulative for a *Strickland* prejudice analysis.

Even if the state court and the court of appeals had more strongly emphasized the cumulative nature of Lee's new evidence, this would not be in conflict with this Court's precedent. Borrowing the descriptors penned by this Court and a Texas trial court describing facts in another case, Lee claims both the state court and the court of appeals ignored a "'tidal wave of information'" and "dismiss[ed] 'vast tranches of mitigating evidence.'" Pet. 26, 28 (quoting *Andrus v. Texas*, 140 S. Ct. 1875, 1879, 1881 (2020)).

To start with, both the court of appeals and the Georgia Supreme Court rejected Lee's mischaracterization of the mitigating evidence at trial as depicting "virtually nothing" of Lee's troubled background. Pet. 5, 29. Lee

attempts to capitalize on a cold trial record essentially arguing that the jury heard a few words here and there about his childhood. In doing so, Lee ignores the bigger picture that the jury did not hear testimony of a healthy childhood but instead heard from his mother, his father, his stepfather, his teacher, his cottage mother, and Dr. Grant about Lee's difficult childhood. For example, Lee paints his mother as lifelong addict, and if this were true, then the jury would have seen that with their own eyes. D12-1:164 thru D12-2:1-11. They did see the callousness of his father who testified that he did not even know his own son well enough to say something nice about him. D12-1:50-51. They saw the tears of Lee's cottage mother at the Boys' Ranch when she testified that Lee told her she was more of a mother to him than his own. D12-2:22. And they heard from a mental health expert that not only was Lee abused but that it had a detrimental effect on his mental health and his ability to control his actions. *Id.* at 36-41. The force and content of the trial evidence cannot be undone by Lee's reference to it as a bit of words floating in the ether. More importantly, it was not unreasonable for the state or federal court to reject the picture Lee painted of the evidence presented at trial and see a different one.

This brings the argument to Lee's other complaint—perhaps his main complaint—his disagreement with the court of appeals' definition of cumulative evidence when evaluating the prejudice prong of a *Strickland* claim. Generally, Lee argues that where there is new evidence that presents a demonstrably clearer picture of the evidence that was presented at trial, the new evidence cannot be cumulative. Pet. 27. The Eleventh Circuit disagrees and has explained that "'evidence presented in postconviction proceedings is 'cumulative' or 'largely cumulative' to or 'duplicative' of that

presented at trial when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury.'" *Tanzi v. Sec'y, Fla. Dep't of Corr.*, 772 F.3d 644, 660 (11th Cir. 2014) (quoting *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1260-61 (11th Cir. 2012) (quotation marks omitted)).

The court of appeals rested its definition of cumulative on this Court's clearly established federal law. As explained by the court of appeals, in *Cullen v. Pinholster*, this Court noted that "'[t]he mitigating evidence [at trial] consisted primarily of the penalty-phase testimony of [the petitioner's mother]' who testified, among other things, that the petitioner's stepfather was 'abusive, or nearly so.'" *Holsey*, 694 F.3d at 1266 (quoting *Cullen v. Pinholster*, 563 U.S. 170, 199, 131 S. Ct. 1388, 1408-09 (2011)) (brackets in original). However, "[d]eclarations of the petitioner's siblings submitted during postconviction proceedings provided new and graphic details about that abuse, including that the petitioner's 'stepfather beat him several times a week' with his fists, belts, and 'at least once with a two-by-four board.'" *Id.* (quoting *Pinholster*, *supra* at 226 (Sotomayor, J., dissenting). Yet this Court still "held that the 'new evidence' of the abuse suffered by the petitioner 'largely duplicated the mitigation evidence [of abuse] at trial' because it 'support[ed] his mother's testimony that his stepfather was abusive and explain[ed] that [the petitioner] was beaten with fists, belts, and even wooden boards.'" *Id.* (quoting *Pinholster*, *supra* at 200-01) (brackets in original) (quotation marks omitted)).

Lee argues "[t]his is *not* a case like [] *Pinholster* [], where '[t]he 'new' evidence [of childhood abuse] largely duplicated the mitigation evidence at trial.'" Pet. 27. But this sentence, devoid of any explanation, does not show that

the court of appeals wrongly reported the evidence in question in *Pinholster*. Nor does it show the court of appeals' definition of cumulative based on the facts and holding in *Pinholster* was unreasonable. Rather it shows that Lee has chosen to ignore the specifics of a case where it does not suit his purpose.

Here, the jury was informed that: Lee was poor and did not have enough to eat; Lee came from a dysfunctional family; Lee's mother was neglectful and, at times abusive; Lee's father abandoned him; and, this background exacerbated Lee's mental condition that impaired his ability to control his actions. Lee's affidavit evidence provided more detail, but contrary to Lee's assertions, it did not tell an entirely different story. Neither the court of appeals nor the Georgia Supreme Court was required to employ Lee's definition of "cumulative."

Lee's failure to identify a conflict with this Court's precedent reveals no issue for this Court to grant certiorari review.

## II. Lee asks the Court to engage in factbound error correction of the Georgia Supreme Court's *Strickland* prejudice determination.

Repeating this argument that the mitigating evidence outweighed the aggravating evidence, Lee asks this Court to conduct factbound error review of the Georgia Supreme Court's determination that he failed to prove a reasonable probability of a different outcome at the sentencing phase of his trial. Lee argues that the district court and the court of appeals paid no heed to his detailed dissection and complaints he made about the Georgia Supreme Court's decision. Yet it is Lee who pays no heed to this Court's repeated explanations of § 2254 review. The purpose of AEDPA review is not to redline a state court's decision but to determine whether "fairminded

jurists could disagree on the correctness of the state court's decision" based upon the state court's reasoning. *Shinn*, 141 S. Ct. at 524. In other words, as stated by the court of appeals, if there is "room for debate" about the reasonableness of a state court decision then § 2254 relief is not warranted. Pet. App. at 10. Rather than applying this standard, Lee asks this Court for factbound error review of the state court's decision without identifying any conflict with this Court's precedent. Certiorari review should be denied.

As an initial matter, Lee makes the overall argument that the Eleventh Circuit's application of § 2254 is too draconian and points out in a footnote that the court of appeals has only granted habeas relief under AEDPA review in one death penalty case in Georgia since 2000. Pet 10 n.39. Lee's argument also omits this Court's precedent that removal of AEDPA deference of a state court opinion only occurs in "rare case." *Johnson v. Williams*, 568 U.S. 289, 303, 133 S. Ct. 1088, 1097 (2013). And, as stated by this Court, "If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 786 (2011). Finally, this Court recently reversed the Eleventh Circuit's grant of federal habeas relief in a death penalty case because it misapplied § 2254 and "went astray in its 'readiness to attribute error'" to a state court's opinion. *Dunn v. Reeves*, ___ U.S. ___, 141 S. Ct. 2405, 2407 (2021) (per curiam) (quoting *Woodford v. Visciotti*, 537 U. S. 19, 24, 123 S. Ct. 357 (2002) (per curiam)). The court of appeals did not make that mistake in this case, but instead faithfully applied § 2254 and this Court's precedent.

### A. The Georgia Supreme Court's factbound review of Lee's background mitigation issue presents nothing for review.

As stated in Section I, Lee's attack on the Georgia Supreme Court's prejudice determination falls into three main categories—background, mental health, and aggravating evidence. For each category, Lee uses the "readiness to attribute error" rubric to the state court's decision and seeks factbound error correction, neither of which identifies an issue worthy of this Court's review.

To begin, Lee's claims the Georgia Supreme Court "dismissed" his affidavit evidence detailing his alleged "horrifying background" because the court pointed out that the lower state court "properly sustained the Warden's objections to much of this testimony." Pet. 31; Pet. App. at 147. Lee first argues the Georgia Supreme Court made an unreasonable determination of fact because "the state habeas court actually overruled most of Respondent's objections." Pet. 32. Not only is Lee's argument premised upon an improper request to make factbound error corrections but it also asks this Court to weigh in on the purely state law matter of evidentiary rulings. Moreover, Lee's argument is wrong. In reviewing Lee's affidavit evidence, the Georgia Supreme Court first "note[d] that much of it consists of hearsay and speculation that would not have been admissible at trial." Pet. App. at 147. The court then pointed out that the lower court had also "properly sustained the Warden's objections to much of this [affidavit] testimony." *Id.* Lee argues this was an unreasonable finding by the Georgia Supreme Court because the lower state court "actually overruled most of Respondent's objections." Pet. 31. In support, Lee cites to his final merits brief (D80) filed in the district court instead of the state habeas court's actual order ruling on the Warden's evidentiary objections (D20-9). While the court did overrule many of the

Warden's objections, it also "granted" or "sustained" many of them—to include many hearsay objections. *See* D20-9:1-36. Lee has not shown there was no "reasonable basis" for the Georgia Supreme Court's comment.

More to the point, Lee's argument amounts to nothing when the rest of the Georgia Supreme Court's opinion is considered. Immediately after pointing out that the lower state court had made evidentiary rulings in the Warden's favor, the Georgia Supreme Court also acknowledged that "in some instances, the habeas court cited and relied upon testimony it had previously ruled inadmissible to support its findings." *Id.* at 148. Regardless, there is no statement by the Georgia Supreme Court suggesting it did not consider the majority of Lee's mitigation evidence provided by his affiants. *See id.*

Lee admits as much in his brief to this Court, but complains that Georgia Supreme Court's comments on the admissibility of the affidavit evidence proves its prejudice determination was based on an unreasonable application of federal law. The Georgia Supreme Court does not detail what specific affidavit evidence was inadmissible, but more to the point, as correctly noted by the court of appeals, Lee fails to show the Georgia Supreme Court failed to consider any admissible evidence. Instead, as found by the district court, the Georgia Supreme Court simply did not give it the weight Lee argues it deserves. The Georgia Supreme Court was under no obligation under clearly established federal law to uncritically accept Lee's affidavit evidence. This is especially true given the fact that despite the copious public background records documenting Lee's upbringing gathered by trial counsel, none "concluded that Lee had been severely abused or neglected." Pet. App. at 143.

Lee also disagrees with the Georgia Supreme Court's determination that Lee's "additional testimony" about his difficult childhood, "fails to establish that Lee's childhood was so harmful or horrific as to create a reasonable probability that it would 'have influenced the jury's appraisal' of [Lee's] moral culpability.'" Pet. App. at 148 (quoting *Wiggins v. Smith*, 539 U.S. 510, 538, 123 S. Ct. 2527 (2003)) (brackets in original) (quotation marks omitted). Lee disagrees and asserts his childhood and that of Wiggins was similar enough to warrant relief. But the question is, could reasonable minds disagree on this point. For example, as pointed out by the Georgia Supreme Court, "[Wiggins'] mother left the petitioner and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage," "she beat [Wiggins] for breaking into the kitchen, which she kept locked," "she forced his hand against a hot burner, for which he was hospitalized, "she had sex with men while he slept in the same bed," and "[Wiggins] was placed in foster care at age six, during which he suffered physical torment, sexual molestation, and repeated rape." Pet. App. at 148. Here, there was no evidence that Lee was hospitalized due to parental abuse, nor was there any evidence that his mother was ever found by any government entity to have abused him, much less lost custody of him, and there was no evidence he was ever sexually abused.

Whether Lee wants to admit it, there are substantial differences in the abuse this Court found Wiggins suffered and the abuse Lee's friends and family alleged in their state habeas affidavits. To be clear, and contrary to Lee's assertions, the Georgia Supreme Court did not state that his evidence of abuse had to be identical to that found in *Wiggins*. The Georgia Supreme Court's parenthetical reference to *Wiggins* was merely part and parcel of its

overall prejudice determination. Additionally, Lee's argument that the Georgia Supreme Court improperly discounted his affidavit evidence is at odds with the court's statement that "[t]he additional evidence presented in the habeas court is disturbing and certainly shows that came from a dysfunctional family." Pet. App. at 148. It was not that the court discounted, dismissed, or ignored, his evidence, the state court simply did not agree that it carried enough weight to change the outcome of his trial—"particularly in light of the mitigating evidence the jury did hear." *Id.*

On this fact-specific *Strickland* claim, Lee fails to prove that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" or that the court of appeals decision was in conflict with this Court's precedent. *Harrington*, 562 U.S. at 103.

### B. The Georgia Supreme Court's factbound review of Lee's mental health issue presents nothing for review.

Lee also argues that the Georgia Supreme Court unreasonably, in both fact and law, determined that his new mental health evidence would not have created a reasonable probability of a different outcome. Again, the state court thoroughly went over Lee's evidence, both old and new, and determined it was not the tide changer Lee argued. Pet. App. at 147, 149-50. As previously stated, the crux of Dr. Grant's testimony during the penalty phase was to reveal that Lee suffered from ADHD and to describe the effect this disorder had upon Lee's mental state. D14-2:53, 57, 61. Counsel brought out through Dr. Grant's testimony that Lee's actions and statements of bravado were due to his lack of control created by this disorder. *Id.* at 68. Dr. Grant also testified that Lee's dysfunctional childhood exacerbated his problems.

D12-2:40. Testimony by Dr. Grant was also used to rationalize Lee's statements and actions in order to diminish the idea that Lee was a future threat to society. D14-2:68-69. Lee's new evidence from Dr. Catherine Boyer[15] and Dr. Grant was simply more evidence of the same theme—i.e. Lee endured a dysfunctional childhood that had a negative effect on his mental health—with an added diagnosis of PTSD. Lee's disagreement with the court's prejudice determination on this issue reveals nothing more than a request for factbound error correction with no conflict among the courts even suggested. Moreover, the court of appeals did not wrongly decide that the state court, "notwithstanding its substantial 'latitude to reasonably determine that a defendant has not [shown prejudice],' still managed to blunder so badly that every fairminded jurist would disagree." *Hines*, 141 S. Ct. at 1149 (quoting *Knowles*, 556 U. S. at 123).

First Lee argues that the Georgia Supreme Court made an unreasonable finding of fact when it "rejected" Dr. Boyer's testimony because it was similar to that presented at trial by Dr. Grant. Pet. 33-34. Clearly the court did not "reject" Dr. Boyer's testimony but analyzed it and found it did not tip the scale in Lee's favor. The court noted that Dr. Boyer "made no diagnosis of Lee's mental condition at the time of her interview or at the time of the crimes and, in fact, conducted no psychological testing of Lee." Pet. App. at 150. Yet despite these glaring omissions, which Lee admits (*see* Pet.

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[15] Lee also complains that the Georgia Supreme Court created a new standard when it stated that "the critical issue in a case such as this 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." Pet. App. at 149-50 (quotation marks omitted). But that is in line with *Strickland*'s mandate not to employ "hindsight" consideration to counsel's effectiveness.

34, n.42), the state court still considered Dr. Boyer's testimony, it simply did not find it added an overly quantifiable amount to Dr. Grant's testimony. The court of appeals pointed this fact out in examining the reasonableness of the state court's decision (Pet. App. at 11), and Lee has failed to show there was no reasonable basis for the state court's similarity finding.

Lee also complains that the Georgia Supreme Court "dismissed" his diagnosis of PTSD as "no more mitigating than Grant's original diagnosis of ADHD." Pet. 34. Again, Lee misrepresents the state court's decision. The state court pointed out that Lee argued that his PTSD diagnosis was more "compelling" than his ADHD diagnosis. Pet. App. at 150. In response, the court stated "in determining prejudice, this Court evaluates the totality of the evidence - 'both that adduced at trial, and the evidence adduced in the habeas proceeding[.]'" *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 397, 120 S. Ct. 1495, 1515 (2000)) (brackets in original). And after looking at the evidence as a whole, the state court did not determine he had proven prejudice.[16] *Id.*

Additionally, Lee argues that the state court unreasonably held there must be a "nexus" between his mental health evidence and the crimes before the court would consider it mitigating. Pet. 35. Yet when viewed in context, it again reasonably follows that the court was responding to Lee's arguments, the state habeas court's findings, and the statements by Lee's experts that

[16] Lee complains about the prosecutor's closing argument which disparages Lee's diagnosis of ADHD. Pet. 1-2. The prosecutor was standing on the other side of this case and it was his job to argue what was best for his case; however, that does not make his disparaging remarks true or false. Lee is attempting to create a new standard wherein trial counsel can only be effective if the prosecutor is unable to poke holes in his evidence, however, death penalty cases are not tried in a vacuum and such a standard has never been announced by this Court.

his PTSD caused the crimes. Pet. App. at 150. Nowhere in the state court's opinion does it hold there *must be* a "nexus" between a mental health diagnosis and the crimes for it to be considered mitigating evidence. Instead, once again, the state court was performing the weighing required by *Strickland*. While Lee's PTSD may have affected his overall mental health, Lee's experts never gave a cogent explanation of how his PTSD caused him to spend hours luring a woman out of her home in the middle of the night so that he could murder her to steal a truck. And *this* is the question the every jury wants to hear answered, not the amorphous explanation Lee provided in state habeas. Consequently, the Georgia Supreme Court's analysis was reasonable because it considered Lee's evidence—the court just did not give it the weight Lee wanted.

Again, Lee is requesting this Court grant certiorari review for a factbound application of *Strickland*, where there is no conflict, and he has not shown the state court "blunder[ed] so badly that every fairminded jurist would disagree." *Hines*, 141 S. Ct. at 1149.

### A. The Georgia Supreme Court's factbound review of Lee's aggravating evidence issue presents nothing for review.

Finally, Lee argues that the Georgia Supreme Court "unreasonably inflated the aggravation in this case" and his case is not the "highly aggravated." Pet. 36-37. Lee puts his own spin on his crimes and the non-statutory aggravating evidence presented at trial to support this contention. But again Lee misses the point of § 2254 review. His view of the evidence may or may not be reasonable, but he does not prove that the state court's view was so unreasonable there was no "possibility for fairminded disagreement" *Harrington*, 562 U.S. at 103.

Lee argues that the facts of his crimes were not that aggravated because there was only one victim and it was reasonable to infer from his testimony that she died when he first shot her, not when he dumped her naked body miles away. Pet. 36-37. The Georgia Supreme Court disagreed with Lee's view, as did the court of appeals when it noted the crimes were "cold-blooded" and "brutal." Pet. App. at 11. He lured a helpless woman out of her home in the middle of the night and, without mercy, shot her in the face to steal a truck. And there was evidence, from his own lips, and through his own actions, suggesting the victim suffered through a ride in the bed of a truck before being dumped in the woods and shot again—her body stripped of its nightshirt and her fingers stripped of their rings. Maybe not to Lee, but for most reasonable people, this would be a particularly aggravated way to die. Consequently, Lee does not prove that there is no room for debate on the aggravated nature of his crimes.

Lee also argues that the non-statutory evidence is not that aggravating because he did not harm anyone when he escaped jail and because the Georgia Supreme Court did not consider that the man he beat and put in the hospital was "spying on girls in the shower." Pet. 38. First, whether he harmed anyone while escaping jail does not change the fact that he felt he was above-the-law and should evade judgment for his crimes. Second, the law does not allow someone to brutally beat another person for an alleged crime—i.e. it was not up to Lee to act as judge, jury, and executioner when he thought someone else had broken the law. The state court was under no obligation to swallow whole Lee's self-serving version of his other crimes.

* * * *

In analyzing Lee's ineffective-assistance claim, the Georgia Supreme Court recounts in detail Lee's new evidence in mitigation and thoroughly assesses the prejudicial nature of this evidence had it been presented at trial. Pet. App. at 141-52. Lee fails to argue that "'*each* ground supporting the state court decision [was] examined and found to be unreasonable.'" *Shinn,* 141 S. Ct. at 524 (quoting *Lambert*, 565 U. S. at 525) (emphasis in original). Instead, he asks this Court to conduct a factbound error review of his *Strickland* claim. This is not an issue worthy of this Court's jurisdiction.

## CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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## CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2021, I served this brief on all parties required to be served by mailing a copy of the brief to be delivered via email, addressed as follows:

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