No. 21-5753

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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REPLY BRIEF OF PETITIONER

This case raises important questions about the proper assessment of new mitigating evidence supporting a capital defendant's claim that counsel provided ineffective representation at sentencing under *Strickland v. Washington*, 466 U.S. 668 (1984). In this case, the state habeas court granted sentencing relief, concluding that Lee was prejudiced by his trial counsel's failure to investigate and present abundant proof detailing Lee's horrifying childhood, as well as expert testimony explaining its devastating impact. As Lee has argued here and below, the Georgia Supreme Court's reversal of that ruling was based on its unreasonable dismissal of Lee's compelling evidence and other unreasonable errors.

Conspicuously absent from Respondent's Brief in Opposition ("BIO") is any meaningful challenge to the new evidence Lee presented. This is because, with the exception of a single two-page affidavit Respondent submitted in state habeas proceedings but never thereafter mentioned (by a cousin claiming that Lee was a spoiled brat), D.19-1:6-7, the State presented *no* evidence refuting Lee's compelling proof. Indeed, the State's own mental health experts at trial (who were not called to testify by either party) noted in their report the mitigating significance of Lee's background of abuse and privation, D.10-5:85, though Lee's trial attorneys failed to utilize or develop their helpful observations.

Instead, Respondent casts empty aspersions on Lee for purportedly "misrepresenting the mitigation evidence presented at trial," BIO at 2; "improperly invit[ing] this Court to grant his petition . . . to examine a factbound *Strickland* claim based upon his erroneous version of 28 U.S. § 2254 review," "without identifying any conflict with this Court's precedent," BIO 23, 31, 32; advancing a "self-serving rendition of his crimes" to counter the "substantial" nature of the State's

aggravation, BIO 26; and "[b]orrowing the descriptors penned by this Court and a Texas trial court describing facts in another case [*i.e.*, quoting case law with appropriate citation]," BIO 27.

But Respondent fails to back up his criticisms with any substance and, indeed, often refutes them. He claims, for instance, that "[n]owhere does Lee argue that the court of appeals decision is in conflict with this Court or another federal court," BIO 2-3, but later admits that "[t]he Eleventh Circuit disagrees" with decision law from this Court and several circuit courts of appeals regarding the definition of "cumulative evidence,"[1] BIO 28-29 (citing Pet. 27). Likewise, Respondent chides Lee for engaging in a "detailed dissection" of the state court decision, given that "[t]he purpose of AEDPA review is not to redline a state court's decision," but then asserts that this Court's decision in *Shinn v. Kayer*, 141 S. Ct. 517 (2020), requires Lee to demonstrate that "*each* ground supporting the state court decision is examined and found to be unreasonable," a requirement that would require Lee to "dissect" the state court's opinion. BIO 23 (quoting *Kayer*, 141 S. Ct. at 524 (emphasis original); *see also* BIO 24, 40 (same).

As set forth below, Respondent's efforts to discourage this Court's consideration of Lee's case rely on misrepresentations of the record and, like the Eleventh Circuit, continued parroting of the state court's stated reasons for denying relief, without any effort to rebut Lee's well-supported challenge to their reasonableness. This Court should grant Lee's petition for certiorari review.

I. Lacking contrary evidence, Respondent seeks to minimize the force of Lee's state habeas showing by resurrecting the baseless claim that "only a handful"

[1] Respondent pitches this as the Eleventh Circuit's disagreement with "*Lee's* definition of 'cumulative,'" BIO 30 (emphasis added), but Lee presented definitions of "cumulative" provided by five circuit courts of appeals, as well as *dictum* from this Court – i.e., the question of what constitutes "cumulative evidence" is very much a classic "circuit split" appropriate for this Court's resolution. *See* Sup. Ct. Rule 10.

of Lee's postconviction affidavits were from lay witnesses with first-hand knowledge of Lee's horrific childhood whom trial counsel did not contact.

Respondent attempts to undermine the strength of Lee's state habeas presentation with a false assertion he made in the Eleventh Circuit. According to Respondent:

> [*O]nly a handful* of [the "68"] affidavits [Lee presented in state habeas] 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.

BIO 21 (emphasis added).[2] As Lee argued below, the record refutes Respondent's claim.

While the inadequacy of counsel's work is not determined solely by the number of witnesses they failed to contact,[3] Respondent's math nonetheless does not add up. Of the 69 (not "68") affidavits Lee presented in state habeas, 27 related to his now-moot challenge to execution by electrocution. *See* D.14-7:82 – D.14-10:98. The remaining 42 affidavits, all of which bear on Lee's sentencing-phase IAC claim, include the affidavits of three experts and his two trial attorneys. *See* D.14-4:2-96; D.14-7:68-81. That leaves 37 affidavits from witnesses with first-hand knowledge of Lee's background, only seven of whom, at best, were contacted by the defense team prior to trial. *See* D.14-5:17-42 (Lee's mother); *id.* at 43-47 (Lee's stepfather); *id.* at 82-85 (friend and pawn-shop burglary co-conspirator Leaundry Carter[4]); D.14-6:40-45 (co-defendant Shannon

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[2] The Eleventh Circuit did not credit Respondent's attacks on the breadth and power of Lee's state habeas evidence. Instead, it recognized that Lee's new evidence "provid[ed] graphic and horrifying descriptions of the physical and emotional abuse and neglect Lee endured at his mother's hands" and expert opinions about its damaging effect. App. 11. It denied relief on the mistaken ground that this evidence added details to a story the jury had already heard at trial. *Id.*

[3] *See, e.g.*, *Chatom v. White*, 858 F.2d 1479, 1485 (11th Cir. 1988).

[4] Carter and trial counsel testified that the defense never contacted Carter prior to trial. D.14-5:85; D.14-7:71. The investigator's time records, however, indicate he spent 1.25 hours

Yeoman); D.14-7:25-26 (Boys Ranch house father Donald Garrison); *id.* at 26-34 (Boys Ranch house mother Mavis Garrison); *id.* at 52-62 (elementary teacher Denise Smith-Baxley).

The remaining 30 affidavits (*i.e.*, far more than "a handful") were from individuals who had "first-hand information regarding Lee's background," but were never contacted by the defense prior to trial. *See* D.14-4:97 – D.14-5:1-2 (great-aunt Mary Lee Akers); *id.* at 3-11 (cousin Jean Davis); *id.* at 12-16 (father Johnny Lee); *id.* at 48-57 (aunt Catherine Owens); *id.* at 58-66 (cousin Leo Prevatt); *id.* at 67-73 (great uncle William Rewis); *id.* at 74-81 (cousin Dianne Woolard); *id.* at 86-90 (friend and neighbor Bradley Chapple); *id.* at 91-97 (Bradley's mother and Barbara's friend, Nancy Chapple); *id.* at 98-105 (family friend Mary Jane "Bill" Drury); *id.* at 106-10 (classmate Amy McIntyre); *id.* at 111-12 (friend and guilt-phase State witness Kevin McNabb); *id.* at 113-14 (friend and guilt-phase State witness Gary Montgomery); *id.* at 115 – D.14-6:1-8 (family friend Brenda Morgan); *id.* at 9-14 (neighbor Penny Morgan); *id.* at 15-21 (neighbor Gayle Petty); *id.* at 22-26 (employer and brother-in-law of family friend Brenda Morgan); *id.* at 27-31 (neighbor Sharon Rewis); *id.* at 32-33 (friend and guilt-phase State witness Charles Sapp); *id.* at 34-39 (family friend Martha Ann Smith); *id.* at 46-51 (Charlton County Training Center evaluator/instructor Rose Bailey); *id.* at 52-55 (Boys Ranch Resident Director Roger Bouchard); *id.* at 56-59 (elementary teacher Erma Cue); D.14-7:2-4 (Boys Ranch farm manager Danny Driver); *id.* at 5-17 (Boys Ranch social worker William Frye); *id.* at 18-24 (Boys Ranch social worker Suanne Funk); *id.* at 35-40 (kindergarten teacher Marward Howard); *id.* at 41-47 (school

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locating and interviewing "Andre Carter" and reporting on the interview to trial counsel. D.18-4:58.

superintendent Alexander McQueen)[5]; *id.* at 48-51 (sixth grade math teacher Dorothy Ruis); *id.* at 63-67 (first grade teacher daVana Wilhelm).

The compelling accounts of the deprivations and cruelty Lee endured set forth in these affidavits were the driving force behind the state habeas court's determination that trial counsel's inadequate investigation prejudiced Lee at sentencing. While the Georgia Supreme Court unreasonably credited counsel's claim that they would not have called such witnesses because "the jury would have known the people from the area that gave those affidavits to Lee's habeas counsel" and "the affiants were not the type of people that counsel wanted to place in front of a jury," App. 144, the consistent and mutually corroborating nature of the evidence belies this excuse. Indeed, the state habeas witnesses included numerous educators whose first-hand knowledge would have informed and corroborated the testimony of the family, friends, and neighbors trial counsel insinuated were of dubious credibility.[6] Having never spoken to the witnesses about Lee's

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[5] McQueen testified that he was not contacted by the defense team prior to trial. D.14-7:46-47. Trial counsel, however, recalled talking to him about Lee. D.14-2:100. As trial counsel explained, "these were just conversations we would have, you know, when we would see people," while out and about in the community, for instance "in a restaurant" or "at a Hospital Authority meeting." *Id.* at 100-01. While counsel may have believed that spur-of-the-moment inquiries taking place during happenstance community encounters constituted "investigation," it likely did not register with McQueen that such a casual exchange, if it occurred, was a legal interview about a pending capital case.

[6] For instance, sixth grade math teacher Dorothy Ruis's account of suspicious injuries Lee suffered, which she reported to Florida's child services agency after Lee attributed them to his mother, were mitigating in their own right and would have bolstered the first-hand accounts describing Barbara's physical abuse of her son. *See* D.14-7:49-50 (Ruis describing "bruises and welts up and down both of [Lee's] arms" and "a welt on his face running from his ear to his mouth," which were "horrifying to view"; after questioning Lee, "[h]e told me that his mother 'got on' him," and Ruis, in consultation with the school principal, contacted HRS to report the abuse. "To [Ruis's] knowledge, HRS never conducted any kind of investigation" and she never heard back from the agency).

nightmarish childhood, counsel were in no position to make strategic decisions about presenting their testimony.

Respondent also endorses the Georgia Supreme Court's unreasonable determination that "much of [Lee's affidavit testimony] consists of hearsay and speculation that would not have been admissible at trial" and was "properly" ruled inadmissible by the state habeas court. App. 148. *See* BIO 32. In support, Respondent claims that Lee's challenge to that finding asks this Court "to weigh in on the purely state law matter of evidentiary rulings" and criticizes Lee for referring the Court to his briefing on the issue rather than the state habeas court's ruling. BIO at 32. Both suggestions are completely unfounded. As Lee has explained here and below, the state court's finding that the habeas court had excluded much of the affidavit testimony as inadmissible was an unreasonable determination of the facts, because the state habeas court in fact overruled most of Respondent's objections to the evidence. That observation – a matter of fact, not law – certainly does not ask this Court to assess the admissibility of the evidence under Georgia law. Moreover, Lee properly referred the Court to the detailed summary of the state habeas court's evidentiary rulings he provided to the district court in his merits brief. *See* Pet. 32 (citing D.80:110-11, 191-215). Respondent's attacks on the quality and scope of Lee's state habeas evidence are meritless distractions from the issues presented here.

II. The Eleventh Circuit's erroneous determination that Lee's new mitigating evidence was cumulative of evidence trial counsel presented to the jury and thus of no value was central to its denial of relief.

Respondent fully embraces the view that Lee's jury "was informed that . . . Lee's mother was neglectful and, at times abusive," and thus, while "Lee's affidavit evidence provided more detail, [] contrary to Lee's assertions, it did not tell an entirely different story." BIO 30. Nonetheless, Respondent urges that Lee "incorrectly reads the court of appeals' decision" in

arguing that the Eleventh Circuit relied on this same conclusion, that Lee's new evidence "simply amplified the mitigation themes counsel presented at trial "that Lee was disadvantaged, neglected, and abused throughout his childhood." BIO 24 (quoting Pet. 26). But that is precisely what the Eleventh Circuit expressly stated as a key basis for its ruling:

> We do not agree [that the state court unreasonably discounted his new mitigation.]
>
> * * *
>
> Here there is, at the very least, room for debate. To begin, this is not a case where the jury had no mitigation evidence to consider at sentencing. Although 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*. They learned that Lee's parents drank heavily and fought violently when he was little, and that *Lee's mother abused prescription drugs, smoked marijuana, and neglected Lee to the point that he didn't always have enough to eat*. . . . [Defense psychologist] Dr. Grant testified that Lee endured "a lot of abuse," including physical abuse as well as neglect, and that his emotional and behavioral problems were made much worse by his home environment.
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> * * *
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> The affidavit testimony submitted to the state habeas court *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. 10-11 (emphasis added).

The record makes clear this conclusion is wrong: The jury heard virtually nothing about any abuse or neglect Lee suffered, and was given no basis to infer that it was inflicted by Lee's mother, the woman who, in defense counsel's words, "tried the best she could" to be a decent mother. D.12-3:60. Contrary to the Eleventh Circuit's conclusion, the jury did not hear that Lee's mother neglected him to the point of starvation – to the contrary, Lee's mother testified that, despite her ongoing problem with prescription drugs, Lee never went hungry; that she "hoped" she was able to be "a good mother" to him; and that she did the best she could for him on her welfare check. D.12-2:5-6. Defense expert Grant, in turn, stated, merely, that "there was deprivation at times,

where there wasn't even adequate food in the home," a remark that did not indicate that "neglect," rather than poverty, was to blame for occasional deprivation, and did not implicate Lee's mother in any misconduct. D.12-2:40. Lee's father, who left when Lee was around three, testified that, while he and Barbara had "fights," he "never hit [Lee's mother] in front of Jamie, as I can remember." D.12-1:148; 12-2:2.[7] And defense expert Grant's use of the words "neglect" and "abuse," D.12-2:40-41, on three occasions in the span of a few sentences, uttered without description or attribution, did not implicate Lee's mother.[8] Indeed, Grant's vague comments about abuse and neglect were so inconsequential that defense counsel, the prosecutor, and the trial court never mentioned them.[9]

The state habeas evidence demonstrating the physical and emotional brutality, and wholesale neglect Lee suffered at the hands of his mother was hardly an elaboration of the evidence jurors received at trial. It was an entirely new species of information. The Eleventh Circuit's

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[7] Lee's mother Barbara did not testify about domestic violence at all. She indicated that Lee's father was never much of a father, left Lee's life at an early age, and never provided financial support for Lee. D.12-2:2-3, 6.

[8] The totality of trial "evidence" of abuse and neglect, submitted solely through Grant, was the following: "There was a lot of abuse, frequent changing and inconsistent rules or caregivers. . . . Then, you know, they stayed with his grandparents, and there was some physical abuse as well as neglect." D.12-2:40-41.

[9] Defense counsel told the jury in closing:

> We brought in his mother. The mother, when Jamie was born, was a 19-year-old welfare mother. She had her own problems, she had a lot of them. She attempted to raise Jamie the best way she could. I think she tried and failed when it came to giving him a nurturing, enriching home. She failed to give him any kind of discipline or any kind of structure at an early age, but she tried the best she could, and I'm not here to belittle his mama, but it wasn't the most ideal environment, but it was what happened.

D.12-3:60.

dismissal of that compelling evidence as cumulative of a story that jurors never heard warrants this Court's review

III. Respondent overstates this Court's precedent in suggesting that a habeas petitioner can only succeed by demonstrating that every aspect of the state court opinion was unreasonable.

Respondent places a lot of stock in this Court's observation that a federal court "may not disturb the judgments of state courts unless '*each* ground supporting the state court decision is examined and found to be unreasonable." BIO 23 (emphasis original) (quoting *Kayer*, 141 S. Ct. at 524). *See also* BIO 24, 40 (same). Respondent insinuates that Lee can only prevail under § 2254(d) if each and every legal or factual finding the state court made was unreasonable. But *Kayer* hardly supports such a near-impossible burden.[10]

In *Kayer*, this Court's observation that "each ground" supporting a state court decision must be unreasonable under § 2254 arose in the context of assessing a state court's rejection of a *Strickland* ineffective-assistance claim. *Kayer*, 141 S. Ct. at 524 (quoting *Wetzel v. Lambert*, 565 U.S. 520, 525 (2012) (*per curiam*)). Because the state court made alternative rulings – that counsel had not performed deficiently or, alternatively, that any deficiencies were not prejudicial – this Court unsurprisingly observed that relief could be granted only if both findings were unreasonable. *Kayer*, 141 S. Ct. at 524. This Court found that the circuit court erred in granting relief because the state court's prejudice determination was not unreasonable. *Id.* at 524-26. And, in *Lambert*, this Court likewise observed that "each" of the state court's alternative rulings must be

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[10] Respondent's position would mean, for instance, that a state court opinion applying an unreasonably incorrect standard for assessing prejudice, *see, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 391-92 (2000), would be insulated from review if the court also reasonably observed that a 32-year-old defendant's age was not mitigating. Such an absurd result is surely not contemplated by either § 2254(d) or this Court's decisions regarding its proper application.

unreasonable in order for a federal court to grant habeas relief. 565 U.S. at 525. Because the court of appeals had failed to address whether the state court unreasonably found that suppressed evidence was not material (a necessary element of a claim under *Brady v. Maryland*, 373 U.S. 83 (1963)), the Court remanded for further proceedings. *Id.* at 526.

These cases do not stand for the proposition that every statement made by a state court must be unreasonable before a federal court may grant habeas relief. *See, e.g.*, *Long v. Hooks*, 972 F.3d 442, 459 (4th Cir. 2020) (*en banc*) (rejecting similar argument made by dissenting judges and noting, in the context of a *Brady* claim that the state court's conclusion that suppressed evidence could have "no impact" was inextricably linked to its unreasonable application of *Brady* and, accordingly, did not have to be independently found to be unreasonable). To the contrary, this Court's post-AEDPA cases refute Respondent's efforts to impose such a high burden. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 528 (2003) ("This *partial reliance* on an erroneous factual finding further highlights the unreasonableness of the state court's decision.") (emphasis added); *Williams*, 529 U.S. at 397 ("The Virginia Supreme Court's own analysis of prejudice . . . was thus unreasonable *in at least two respects*.") (emphasis added).

In this case, the state court made only one ruling – that Lee was not prejudiced by any deficiencies in counsel's performance. *See* App. 145. Lee has throughout federal habeas proceedings identified numerous ways in which that ruling relied on unreasonable applications of this Court's governing precedent (such as discounting Lee's compelling evidence to irrelevance) and clearly erroneous factual determinations (such as the state habeas court's purported exclusion of much of the evidence on hearsay grounds). *See, e.g.*, Brief of Appellant (11th Cir.) at 65-75 (discussing state court's unreasonable application of Supreme Court law and unreasonable factual findings). The Eleventh Circuit paid no heed to these errors, even though they are precisely what

28 U.S.C. § 2254(d) and this Court's precedents demanded it review. *See, e.g.*, *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018) (28 U.S.C. § 2254(d) "requires the federal habeas court to 'train its attention on the particular reasons – both legal and factual – why state courts rejected a state prisoner's claims,' . . . and to give appropriate deference to that decision") (citations omitted). The lower court thus bypassed the very analysis it was required to undertake, instead ratifying the state court's denial of relief on the basis of a rationale the state court did not endorse, namely that Lee's new evidence was cumulative of what the jury heard at trial, and ignoring the unreasonable grounds on which the state court relied to justify its ruling. *See* Pet. 31-38.

IV. Respondent's claim that the state court gave due consideration to Lee's new expert testimony is flatly contradicted by the state court's opinion.

Respondent takes issue with Lee's argument that the state court unreasonably discounted Lee's new expert evidence to irrelevance because (1) trial expert Grant did not explain how his new diagnosis of PTSD explained the crime (an improper nexus requirement) and (2) state habeas expert Boyer was not the original trial expert and, moreover, did not herself diagnose Lee as having PTSD as a result of the extensive physical and mental abuse, and profound neglect he experienced.[11] BIO 36-38. Contrary to Respondent's verbal foot-stomping, this is precisely what the Georgia Supreme Court explained when concluding the new evidence was entitled to virtually no weight. According to that court, Dr. Grant's new diagnosis of PTSD (based on Lee's new mitigating evidence and Grant's pretrial evaluation of Lee) was inconsequential because Grant "did not explain how Lee's PTSD was related to the murder" and "did not claim that, at the time

[11] Boyer explained she could not make that determination retroactively, but that Grant's corrected diagnosis of PTSD, based on his past evaluations of Lee and consideration of the new habeas evidence, was consistent with Lee's horrific background and symptoms. *See* D.14-4:22-26.

of the murder, Lee was experiencing a flashback or was in a dissociative state as a result of his PTSD." App. 149. And, the court continued, Dr. Boyer's extensive testimony about the damaging effects of the brutality and neglect Lee suffered throughout his childhood was inconsequential because she was not the original trial expert (the "critical issue" in the Georgia Supreme Court's view) and, regardless, had not herself diagnosed Lee with PTSD. App. 149-150.

These findings clearly demonstrated that the Georgia Supreme Court accorded little to no weight to the new expert testimony, in direct contravention of this Court's decisions in such cases as *Porter v. McCollum*, 558 U.S. 30 (2009). The Georgia Supreme Court did not need to state that it was ignoring the evidence in order to show that it had improperly discounted it. In *Porter*, this Court found the state court had unreasonably discounted expert and lay testimony "to irrelevance," *id.* at 43, even though the state court had stated that the evidence simply did not deserve much weight. *See Porter v. State*, 788 So. 2d 917, 925 (Fla. 2001) (finding that expert testimony "was entitled to little weight in light of conflicting expert testimony" and "that additional nonstatutory mitigation [was] lacking in weight because of the specific facts presented").

Respondent insists that Lee has misrepresented the record in arguing "that the Georgia Supreme Court 'dismissed his diagnosis of PTSD as 'no more mitigating than Grant's original diagnosis of ADHD,'" on the ground that the court purported to "evaluate[] the totality of the evidence – 'both that adduced as trial and the evidence adduced in the habeas proceeding[.]'" BIO 37. But, the state court's own words, once again, belie Respondent's claim. As the Georgia Supreme Court explained, there was no possibility that Lee's new expert testimony would lead to a different result because "[h]ere, Lee's trial expert failed to connect his new diagnosis of PTSD to the crimes, and the connection that his habeas expert made between his undiagnosed 'mental

impairments' and the crimes is similar to the connection his trial expert made between his diagnosis of ADHD and the crimes." App. 150.

The state court's dismissal of Boyer's testimony because it was "similar" to Grant's trial testimony regarding Lee's diagnosis of ADHD, was also unreasonable. Grant's testimony that Lee, like millions of others who have not committed murder, suffered from ADHD had virtually no mitigating value and was an easy target for the prosecutor's derision at closing.[12] Boyer's testimony, on the other hand, detailed the profound suffering Lee endured throughout his childhood and its devastating impact on Lee's mental health, the near total absence of any protective factors in his life, and the congruence of Lee's history and symptoms with Grant's new diagnosis of PTSD. *See* D.14-4:2-40. To equate her compelling testimony with Grant's weak trial testimony regarding Lee's ADHD was both an unreasonable application of the law and an unreasonable determination of the facts.[13]

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[12] Respondent criticizes Lee for citing the prosecutor's effective attack on Grant's ADHD diagnosis in closing, contending the prosecutor was just doing his job and that "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[.]" BIO 37 n.16. But prejudice is assessed in light of the "totality of the evidence." *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017) (citing *Williams*, 529 U.S. at 391; *Strickland*, 466 U.S. at 695). The ease with which the prosecutor could skewer Grant's testimony is relevant to measuring the prejudice caused by counsel's inadequate investigation. *See, e.g.*, *Hinton v. Alabama*, 571 U.S. 263, 369 (2014) (highlighting that the prosecutor "badly discredited" unqualified defense expert in finding counsel deficient for not seeking funds for a qualified expert); *relief granted on remand by Hinton v. State*, 172 So.3d 355 (Ala. Crim. App. 2014); *Sears v. Upton*, 561 U.S. 945, 947 (2010) (noting that prosecutor "ultimately used the evidence of Sears' purportedly stable and advantaged upbringing against him during the State's closing argument"). Far from creating a "new standard" for assessing prejudice, Lee's discussion of the prosecutor's summation simply honed in on one aspect of the harm caused by counsel's deficient performance.

[13] *Compare Littlejohn v. Royal*, 875 F.3d 548, 561 (10th Cir. 2017) (noting that "evidence of attention deficit disorder does not favor a finding of prejudice" and citing "our sister circuits [that] have reached similar conclusions), *with United States v. Barrett*, 985 F.3d 1203, 1227 (10th Cir. 2021) (granting sentencing relief due to ineffective representation and noting that, despite government's contrary expert testimony, new expert testimony that the defendant "displayed symptoms 'consistent [with] [PTSD],'" as a likely result of childhood abuse, could reasonably

The state court also improperly rejected Boyer's testimony because Boyer was not "the expert consulted at the time of trial" – a requirement it cut from whole cloth – and had not personally diagnosed Lee with PTSD. App. 149-50. As *Porter* explains, this too was unreasonable. *Porter*, 558 U.S. at 43 ("While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or sentencing judge.").

The Georgia Supreme Court, moreover, improperly disregarded Grant's state habeas testimony because he did not offer a causal nexus between his new PTSD diagnosis and the crime – a requirement unreasonably inconsistent with the Eighth Amendment. *See, e.g.*, *Tennard v. Dretke*, 542 U.S. 274 (2004) (circuit court imposed an improper "nexus" test in assessing mitigating evidence); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentence refuse to consider, *as a matter of law*, any relevant mitigating evidence."); *McKinney*, 813 F.3d at 823 (state court erred in dismissing "important mitigating evidence" that defendant "suffer[ed] from PTSD as a result of his horrific childhood" because it did not provide an explanation for the crime).[14]

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influenced at least one juror's sentencing decision); *McKinney v. Ryan*, 813 F.3d 798, 823 (9th Cir. 2015) (*en banc*) ("McKinney's evidence of PTSD resulting from sustained, severe childhood abuse would have had a substantial impact on a capital sentencer who was permitted to evaluate and give appropriate [mitigating] weight to it[.]"); *Bond v. Beard*, 539 F.3d 256, 291 (3rd Cir. 2008) (counsel provided ineffective representation at sentencing in failing to present evidence that the defendant "grew up in an extraordinarily dysfunctional environment rife with abuse and neglect" and expert testimony about its damaging impact, despite trial counsel's presentation of evidence "suggest[ing] some difficulties during [defendant's] youth").

[14] Curiously, Respondent argues that "[n]owhere in the state court's opinion does it hold that there 'must be a "nexus" between a mental health diagnosis and the crime for it to be considered mitigating evidence," but then immediately argues that the court properly gave the PTSD evidence no weight because "Lee's experts never gave a cogent explanation of how his

V. The Court should hold this case pending its adjudication of two cases raising related claims that are before the Court on petitions for writ of certiorari.

In the event this Court does not grant Lee's petition outright, he respectfully submits that the Court should hold his petition pending its adjudication of two cases raising important questions regarding the appropriate assessment of *Strickland* prejudice due to counsel's failure to investigate and present mitigating evidence in a capital case. The first, *Canales v. Lumpkin*, Sup. Ct. No. 20-7065, raises the question of whether the Court of Appeals for the Fifth Circuit imposed an improper, overly burdensome standard for determining sentencing prejudice under 28 U.S.C. § 2254(d) and is relevant to Lee's argument that the Eleventh Circuit failed to follow this Court's precedents in this regard. *Canales* is fully briefed and has been relisted multiple times since it was first scheduled for conference on May 13, 2021. The second, *Andrus v. Texas*, Sup. Ct. No. 21-6001, seeks review of the Texas Court of Criminal Appeals' denial of relief, following this Court's remand in *Andrus v. Texas*, 140 S. Ct. 1875 (2020), with instructions to address *Strickland*'s prejudice prong. Lee relied on this Court's decision in *Andrus*, and the Court's further consideration of the case has relevance to the issues presented here.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, 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. Alternatively, he asks that the Court hold his petition pending the Court's adjudication of the certiorari petitions pending in *Canales* and *Andrus*.

This 9th day of November, 2021.

PTSD caused him" to commit the crime, the question "every jury wants to hear answered, not the amorphous explanation Lee provided in state habeas. BIO 38.

Respectfully submitted,

/s/ Marcia A. Widder

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