No. 22-490

IN THE SUPREME COURT OF THE UNITED STATES

LYDELL CHESTNUT, Deputy Warden,
Petitioner

v.

QUINCY J. ALLEN,
Respondent

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

BRIEF FOR RESPONDENT IN OPPOSITION

Joshua Snow Kendrick
Kendrick & Leonard, P.C.
P.O. Box 6938
Greenville, South Carolina 29606
(864) 760-4000
josh@kendrickleonard.com

E. Charles Grose, Jr.
Grose Law Firm
305 Main Street
Greenwood, South Carolina 29646
(864) 538-4466
charles@groselawfirm.com

Aren Adjoian
Counsel of Record
Federal Community Defender Office
for the Eastern District of Pennsylvania
Curtis Center, Suite 545-West
601 Walnut Street
Philadelphia, PA 19106
(215) 928-0520
aren_adjoian@fd.org

CAPITAL CASE
QUESTION PRESENTED

At Quincy Allen's bench capital sentencing hearing, the trial judge had "abundant evidence before him of Petitioner's horrible, abusive childhood" and about his "erratic behaviors, psychiatric admissions, suicide attempts, mental illness risk factors, and his mental status leading up to the murders." JA42, 65. Some of the evidence of Mr. Allen's lifelong history of mental illness and virtually all of the evidence of Mr. Allen's history of childhood abuse was undisputed.

The trial judge nonetheless found zero mitigating circumstances; he later stated that evidence could be considered mitigating only if it established "that Mr. Allen was so mentally ill throughout the time of his crimes and was so mentally ill at the time of trial, that imposition of the death penalty would violate the Eighth Amendment's ban on cruel and unusual punishment." JA2009.

Applying the Antiterrorism and Effective Death Penalty Act's standard of review, the Fourth Circuit held that the state court's ruling that the trial judge properly considered Mr. Allen's mitigating evidence was unreasonable. Under the trial judge's analysis, "[m]itigators that fall short of proving insanity or incompetency stand no chance of sparing the defendant's life and any aggravators would not matter: The defendant must die essentially as a categorical matter." App. 64. The State now claims that the lower court faulted the trial judge because he "did not explicitly reference Allen's eating disorder." Pet. i. The question presented is:

> Should the Court grant Petitioner's request for error correction where his question presented mischaracterizes and fails to fairly include the basis for the lower court's correct decision?

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A. Introduction

The State's petition satisfies none of this Court's traditional factors governing the grant of certiorari, and the State does not argue otherwise. *See* S. Ct. R. 10. Instead, the State's primary request is for summary reversal based on what it contends are factual errors and the misapplication of properly stated rules of law. *See* Pet. 41. In making this request, the State has mischaracterized the Fourth Circuit's opinion to such a degree that its question presented fails to fairly include the basis for the lower court's correct ruling. The State does not even recognize that this case properly involves a substantive Eighth Amendment claim, rather than a derivative claim of ineffective assistance of counsel under the Sixth Amendment.

The Fourth Circuit did not, under any fair reading of its opinion, hold that Mr. Allen's Eighth Amendment right to have his mitigating evidence considered was violated because the sentencer "did not explicitly reference Allen's eating disorder." Pet. i. The trial judge instead repeatedly and explicitly made clear that he considered the entirety of Mr. Allen's case in mitigation only to determine whether it proved that Mr. Allen was insane at the time of the offense or incompetent to be tried and/or executed. As a result, the trial judge gave no consideration to *any* of Mr. Allen's mitigating evidence—insanity and competence to stand trial ceased to be at issue the moment Mr. Allen pleaded guilty and incompetence to be executed would not ripen into a cognizable question, if ever, until years after the trial judge's sentencing decision was made. The State simply ignores these facts. The petition's failure "to

present with accuracy, brevity, and clarity" the facts and issues necessary to resolve this case is reason alone for the Court to deny certiorari. S. Ct. R. 14.4.

The Fourth Circuit is well aware of how to apply AEDPA and correctly did so in this case. The Fourth Circuit correctly held that the State courts' denial of relief "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." App. 43 (quoting *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017) (per curiam)). The state court decision was also based on an unreasonable determination of the facts in light of the state court record. *See* 28 U.S.C. § 2254(d)(2). Certiorari should be denied.

B. Factual Background

Mr. Allen is incarcerated on South Carolina's death row as a result of convictions for two counts of murder, one count of assault and battery with intent to kill, one count of arson in the second degree, two counts of arson in the third degree, and one count of pointing and presenting a firearm. *State v. Allen*, 687 S.E.2d 21, 22 (S.C. 2009). He is separately serving a North Carolina sentence of life without parole on two counts of first-degree murder and related charges. *See id.* n.2.

Mr. Allen's convictions stem from an extended crime spree in July and August 2002, during which he killed Dale Hall and Jedediah Harr in Richland County, South Carolina, and Richard Hawks and Robert Roush in Surry County, North Carolina. Mr. Allen also committed several additional crimes. He shot and wounded James White, pointed a shotgun at Bucky Michon, and set fire to a house and two cars, among other offenses. He was arrested in Texas following a police chase and immediately confessed to law enforcement officers. *See id.* at 22–23.

In North Carolina, Mr. Allen entered a negotiated plea of guilty to two counts of first-degree murder, two counts of armed robbery, and one count of larceny of an automobile in exchange for a sentence of life in prison without the possibility of parole. Although the North Carolina sentence had been agreed upon, both the State and the defense called multiple witnesses at Mr. Allen's three-day sentencing hearing. Mr. Allen was sentenced to life without parole for the murders of Mr. Roush and Mr. Hawks and terms of years on the remaining charges. *See* JA113–15.[1] The North Carolina trial court found by convincing evidence that Mr. Allen was mentally ill and recommended he receive a psychiatric evaluation, counseling, and treatment upon entering the Department of Corrections. JA115; JA117.

Mr. Allen also pleaded guilty to his South Carolina charges. *Allen*, 687 S.E.2d at 22. The South Carolina plea was not made pursuant to a negotiated agreement with the prosecution, however. By pleading guilty, Mr. Allen waived his right to a jury determination of sentence under South Carolina law, and a lengthy sentencing hearing before the trial judge ensued. *See* S.C. Code Ann. § 16-3-20(B) (capital sentencing must be conducted before the judge following a guilty plea).

At the sentencing hearing, the defense presented considerable evidence about Mr. Allen's background through lay witnesses and also through social worker Deborah Grey. Ms. Grey testified that Mr. Allen was born following an unplanned

[1] The Joint Appendix filed in the Fourth Circuit is cited as JA___.

pregnancy for his parents, whose relationship lasted for only a short time. JA283. Mr. Allen's mother "looked on [him] as a liability." JA284.

When Mr. Allen was nineteen months old, his mother was referred to protective services due to her repeated failure to obtain medication for Mr. Allen for a fever that reached as high as 106 degrees. JA288–89; JA1730. Hospital staff noted in Mr. Allen's medical records that "mother appears unconcerned" about her son's fever, that she "has not had prescription filled or given aspirin because she had other things on her mind," and "is hostile and shows no affection for the child." JA288–89.

Soon thereafter, Mr. Allen's mother married Gralin Manning, who violently abused Mr. Allen and his mother. Mr. Manning once broke Mr. Allen's leg and another time sent Mr. Allen's mother to the emergency room for sutures. JA290–92; JA1865. When Mr. Allen was six years old, his mother "beat him, and then she put him into the trashcan, the big kind with the wheels on it, and slammed the lid shut on it." JA296. Per Ms. Grey, "[t]hat seemed to have made an impression on Quincy because he had seen the garbage trucks drive by and pick those cans up and dump the garbage directly into the garbage vehicle; seemed to have left him feeling afraid." *Id.*

Mr. Allen's mother continued to abuse him throughout elementary school. She beat him with sticks and belts in a locked room. *Id.* She withheld food as a means of punishment, "sometimes for extended periods of time." JA296–97. She left Mr. Allen to watch his younger siblings when he was as young as seven years old. JA297–98. A

neighbor once observed Mr. Allen and his younger siblings drinking rainwater out of the gutter during this timeframe. JA299.

When Mr. Allen was in third grade, his mother would tie his arms to the ends of his bunk bed with extension cords, "kind of like Jesus," and "would whip him either with sticks or belts or whatever. She would leave him hanging there and then come back and do it some more." JA302–03. This "didn't happen just once; it happened a lot." *Id.* In fifth grade, Mr. Allen's mother beat him for an extended period of time, threw him in the closet so that she could rest, and then pulled him back out and "beat him continuously for a long period of time until finally when she was done she threw him in the bathroom where he slept on the floor that night." JA310–11.

Mr. Allen was bullied for his appearance and hygiene in elementary school. This "continued through the years" and "got worse over time." JA309. His siblings and his mother "similarly would tease him and taunt him and call him names based largely on his appearance and his intellect." *Id.*

As Mr. Allen grew during his middle school years, his mother began to discipline him by having him "strip down and take off all of his clothes and hold onto a chair back in his underpants while she would whip him." JA311–12. She also started locking him out of the house. She would "just tell him go out. Or he would go outside and when he'd come back the door would be locked." JA312. This could be while Mr. Allen was "wearing any type of clothing, any time of year, without a coat if it's the winter." *Id.* The exclusions from the home would "occasionally include being

locked out to sleep on the porch overnight," where Mr. Allen feared being attacked by neighborhood dogs while he slept. *Id.*

In seventh grade, Mr. Allen was adjudicated delinquent for bringing a knife to school. JA313–14. He was sent to the South Carolina Reception and Evaluation Center, where he saw a social worker to whom he reported that his mother had:

> thrown a chair at him, violently shoved him against a stove, tried to hit him with a hammer, choked him with his tie until he fainted, made him stay out all night without proper clothing with the temperature in the low 40s, and that she punched him in the mouth the day that they went to court.

JA314–15; *see also* JA1842; JA1848.

The beatings, exclusion from the home, nights spent sleeping in the bathroom, and withholding of food continued into Mr. Allen's high school years. JA323; JA328. Over the course of Mr. Allen's childhood he was, at various points, placed in foster care (JA301–02; JA1840); twice sent to live with his uncle in Rock Hill, South Carolina (JA317–18; JA330–31; JA1896–98; JA1905); sent to live with his father in Stone Mountain, Georgia (JA319); sent to live with his father a second time in Aurora, Colorado (JA325–26); and homeless for a period of time (JA346–47). He was kicked out of his home by his mother on Christmas Eve in 1997, a night on which "it was freezing cold, bitter cold." JA992. That night, he slept in the playground of a McDonald's restaurant. JA974–75.

As a high school student, Mr. Allen was lonely and had poor social skills. JA232–33. He also had very poor hygiene; one of his teachers once observed that "his clothes were crumpley [sic] and he smelled worse than I've ever smelled any other

human being in my life." JA234. In high school, those few people who were close to Mr. Allen started to notice changes in his behavior. He went from being cheerful to sulking a lot. JA977. He began to mumble to himself. JA977–78. And he began to do bizarre things, like burn a smiley face in a neighbor's lawn with chemicals. JA978–79.

The defense also presented substantial testimony and documentary evidence regarding Mr. Allen's mental health problems. Ms. Grey testified that "for many years, maybe even dating back to early childhood, [Mr. Allen] has been regurgitating stomach contents into his mouth and then swallowing them, perhaps many times a day." JA335. A child psychiatrist who treated Mr. Allen as a teenager, Dr. Richard Harding, testified about this disorder in greater detail. Known as rumination, this uncommon disorder is usually a form of self-comfort. JA541. For someone who is "anxious, agitated, fearful and so forth, this mechanism of bringing up food, sloshing it around, so to speak, in their mouth, chewing and re-swallowing is a way of keeping control on emotions, a calming kind of activity that is effective for the people who do it." JA541–42. Mr. Allen was referred to Dr. Harding for treatment of his rumination by a dentist who had noticed his teeth were severely eroded from gastric acid. JA335; JA542–43; JA1838; JA1915.

Ms. Grey testified based on voluminous records about how Mr. Allen was committed for inpatient psychiatric hospitalizations on six separate occasions as a teenager. His first commitment came shortly before his eighteenth birthday after his mother kicked him out of the house and then called the police when he returned and

locked her out of the house. The police found him in the attic eating insulation. JA339. He was transported to the emergency room and then referred to an inpatient psychiatric facility. JA339–41.

He was readmitted to a psychiatric hospital about a week later, after ingesting Tylenol in a Wal-Mart. JA343. When he was first transported to the emergency room, hospital staff contacted his mother, who refused to come to see him. JA268. While he was initially involuntarily committed to the psychiatric hospital, he voluntarily extended his commitment on his eighteenth birthday. JA267–68. He was ultimately "discharged from the hospital with a taxi voucher that basically sent him home, despite the fact that they were aware that his mother would not take him home." JA269. He became homeless at that point. *Id.*

Mr. Allen's third psychiatric hospitalization occurred after he was observed on the maintenance platform of a road sign over the interstate. JA349. Emergency personnel got him down from the platform using a cherry picker; once inside the basket, Mr. Allen refused to exit because he was "comfortable in it." JA349–50. He was taken to the emergency room in the basket and was again committed. JA350.

Mr. Allen's fourth commitment occurred a few months later when he brought himself to the hospital, stating that he was at risk for self-harm and very depressed. JA359–60. During this hospitalization, he threatened staff members, was hostile and agitated, and received the antipsychotic medication Haldol and the antianxiety medication Ativan. JA361–62. A social worker contacted Mr. Allen's mother who

"requested she not be contacted again and that she [did] not want to be involved and that the patient could not come to live with her." JA362.

Mr. Allen was hospitalized a fifth time in September 1998. At the time, Mr. Allen was again homeless. JA363. After finishing his shift at a Kroger grocery store, Mr. Allen was waiting in the video section of the store for a ride. *Id.* The store manager, thinking Mr. Allen was homeless, told him to leave. *Id.* Upon learning that Mr. Allen actually worked there, the manager fired him. JA363–64. Later that night, Mr. Allen was found on top of the store threatening to jump. JA364. The Sheriff's Department called his mother; when she arrived, Mr. Allen used foul language towards her and she "seemed to be amused and walked away." *Id.* He was again committed. Mr. Allen was extremely agitated during this visit and expressed a desire to be a mass murderer and harm his mother. JA374–75; JA378.

Mr. Allen was discharged from this hospital to a different facility, marking his sixth commitment. At the new facility, staff noted his disheveled appearance, and he admitted having visual hallucinations. JA381; JA384. He expressed both suicidal and homicidal thoughts. JA390–91.

After being discharged from this final stay, Mr. Allen was yet again homeless. JA399. Within a matter of days, he was arrested for attempting to steal a car from someone's garage, for which he was convicted and incarcerated. JA399, 402–03. During this period of incarceration, his chronic suicidal and homicidal thoughts coincided with more serious suicide attempts. He initially attempted to ingest soap while he was awaiting trial in the Richland County Detention Center. JA401. The

attempts continued when he moved to the Department of Corrections. Mr. Allen first unsuccessfully attempted to swallow hoarded bleach. JA406. He later attempted to overdose on the antidepressant Zoloft, which he also had been hoarding. JA406–07.

After his release, Mr. Allen returned to live with his mother, enrolled at Midlands Technical College, and began to work a series of jobs through a personnel agency. JA407. Mr. Allen did relatively well for a period of time, until his mother once again threw him out of her house. JA407–09. Mr. Allen then quit his job and became "intensely suicidal." JA409. He again attempted suicide by swallowing ammonia capsules and several Excedrin. JA411. He later swallowed a box of rat poison. *Id.*

The defense also presented several mental health experts. Forensic psychiatrist George Corvin testified that Mr. Allen suffers from schizophrenia, and that "his upbringing caused the expression of his schizophrenia to become dangerous." JA662. Dr. Corvin explained that he "strongly" considered the possibility that Mr. Allen was malingering but concluded that he was not. JA635; JA640.

Forensic psychiatrist Pamela Crawford likewise diagnosed Mr. Allen as schizophrenic. JA757. Dr. Crawford met with Mr. Allen six times in the year leading up to trial, including on the day he pleaded guilty and twice in the week between the guilty plea and the beginning of trial. *Id.* She "absolutely" considered whether Mr. Allen was malingering, JA792, and likewise explained why she concluded he was not. JA792–93; JA803–05; JA832–34; JA837–43.

During Dr. Crawford's testimony, the trial judge provided the first of many indications that he was considering Mr. Allen's mitigating evidence solely to determine whether it proved that Mr. Allen was mentally ill at the time of the crime:

> [State's counsel]: Your Honor, he pled guilty. It's not even an issue of whether he's mentally ill or not. I don't know how that comes in.
>
> The Court: Well, there is a significant issue about mental illness.
>
> [State's counsel]: Not at the time of the crime. Respectfully. We object to hearsay.
>
> The Court: I think that's the ultimate decision in this case.

JA800.

Finally, forensic psychiatrist Donna Schwartz-Watts testified that she evaluated Mr. Allen and diagnosed him with schizophrenia as well. JA1021–22. She noted that he was on "the highest dose of [the antipsychotic medication] Prolixin Decanoate I've ever seen in anybody" and on "the maximum dose of [the antipsychotic medication] Geodon." JA1047.

The State called five mental health experts in rebuttal. These experts primarily opined that Mr. Allen was malingering and did not suffer from a schizophrenic spectrum disorder. But prosecution psychiatrist Dr. Karla deBeck agreed that Mr. Allen suffered "significant" and "horrific" child abuse and that such abuse can impact brain development. JA1352-53; *see also* JA2173 (finding of court-ordered psychiatric evaluator Dr. Richard Frierson during PCR proceedings that Mr. Allen has a "significant childhood history of abuse and neglect"). And prosecution

psychiatrists James Ballenger and Majonna Mirza each discussed the medications Mr. Allen was taking. Dr. Ballenger noted that in 2004, Mr. Allen was "on mountains of antipsychotic medicines at this point which is hard to take and to be very interactive with the rest of the world." JA1125.

At the conclusion of the sentencing hearing, the trial judge sentenced Mr. Allen to death. App. 222. Although he briefly mentioned at the beginning of his sentencing order that he considered a number of factors in rendering the sentence, he immediately made clear that he did so only to determine whether Mr. Allen was insane or incompetent. He asserted that "Mr. Allen raises the issue of mental illness as his reason for avoiding the death penalty," ignoring that much of the evidence and argument in support of a life sentence pertained to Mr. Allen's history of abuse and neglect. App. 210. He then engaged in an extended discussion about Mr. Allen's mental state at the time of the crimes and at trial. App. 210–13. He concluded this discussion by observing that the "fact finder must resolve differences in opinion within the psychiatric profession 'on the basis of the evidence offered by each party' when a defendant's sanity is at issue in a criminal trial." App. 213 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985)).

The trial judge then reviewed what he termed "the current state of death penalty law as pronounced by the United States Supreme Court." *Id.* In conducting this review, he mentioned only three cases: *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), which held that the Eighth Amendment prohibits the execution of intellectually disabled individuals; *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005),

which held that the Eighth Amendment prohibits the execution of juveniles; and *Ford v. Wainwright*, 477 U.S. 399, 401 (1986), which held that the Eighth Amendment prohibits the execution of individuals who are insane at the time of execution. App. 213–16. All three of these cases involve categorical bars to death penalty eligibility that were obviously inapplicable to Mr. Allen's case.

The trial judge next spent time comparing the insanity standard set forth in Justice Powell's concurring opinion in *Ford* with South Carolina's standard and the American Bar Association's model standard. App. 216–17 (noting that South Carolina maintains a two-prong test for competency to be executed set forth in *Singleton v. State*, 437 S.E. 2d 53, 58 (S.C. 1993)). He explained that "in light of the lack of the guiding principles dealing with the imposition of the death penalty on persons with mental illnesses, the Court can only look to the *Singleton* principles as a guide." App. 217. And he then announced that he had "seen nothing in the course of this trial to convince [him] that the defendant cannot meet this [two]-prong test." *Id.*

The trial court next engaged in a discussion of the brutal nature of Mr. Allen's crimes alongside a philosophical discussion about fate. App. 218–20. He concluded by stating that he considered "all relevant facts and circumstances," including the "existence of" unspecified statutory aggravating circumstances and the "claim of" mitigating circumstances. App. 222.

Two weeks after the sentencing, the trial judge submitted a document entitled "Report of the Trial Judge" to the South Carolina Supreme Court. JA1935–48. In it, he made clear that he had found several aggravating factors, but that "[c]onclusive

proof of mitigating circumstances was not found. Numerous psychiatrists and psychologists testified to conflicting diagnoses of the Defendant's mental health." JA1940–43. He did not include any mention of Mr. Allen's severe history of childhood abuse, even though it constituted a significant portion of the defense presentation and despite defense counsel having argued the significance of the life-history evidence at length during closing argument. JA1586–95; *see also* JA1597 ("[T]his all by itself is a reason to sentence Mr. Allen to life. His childhood and background by itself is mitigating in the extreme, and it's undisputed. That's a reason for life.").

Several months later, spurred by an allegation in an affidavit from defense counsel that the trial judge had made a promise to sentence Mr. Allen to life in exchange for his guilty plea during an ex parte meeting immediately before the scheduled start of voir dire, the trial judge produced an (unsolicited) affidavit of his own. While primarily addressed to the issue of the alleged pre-trial promise, the trial judge's affidavit expressly reaffirmed what by that point was clear: to render a life sentence, he would have had to be convinced "that Mr. Allen was so mentally ill throughout the time of his crimes and was so mentally ill at the time of trial, that imposition of the death penalty would violate the Eighth Amendment's ban on cruel and unusual punishment." JA2009.

C. Procedural History

Mr. Allen appealed his death sentence to the South Carolina Supreme Court, which affirmed his convictions and sentences. *Allen*, 687 S.E.2d 21, 26, *cert. denied Allen v. South Carolina*, 560 U.S. 929 (2010). Mr. Allen next filed a state petition for post-conviction relief. In it, he alleged that his attorneys were ineffective for failing

to object to the trial judge's failure to properly consider his mitigating evidence, as required by *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion), and its progeny. The PCR court denied relief on all claims, JA2530–89, and the South Carolina Supreme Court summarily denied relief on appeal, JA2642.

Mr. Allen next filed a federal habeas petition. JA2643–2750 (amended petition). He raised the *Lockett* claim at issue here as both an Eighth Amendment claim and a related Sixth Amendment ineffective assistance of counsel claim. JA2685–97. The State opposed relief but conceded that the claim in its entirety is "available for review because the substance of those allegations have been presented to and passed upon by the [State] circuit and appellate courts with substantially the same factual basis and legal arguments Petitioner presents" in federal court. D.S.C. ECF No. 50 at 25 (State's Return and Mem. of Law in Supp. of Mot. for Summ. J.).

The district court denied relief on all of Mr. Allen's claims but granted a certificate of appealability as to two. JA95. Mr. Allen appealed and moved to expand the COA. 4th Cir. ECF No. 4-1. The Fourth Circuit granted Mr. Allen's motion, including on the issue presented here. 4th Cir. ECF No. 15 at 1–2.

Following briefing and argument, the Fourth Circuit granted relief on Mr. Allen's claim that the trial judge failed to consider virtually all of Mr. Allen's mitigating evidence. It analyzed the claim under AEDPA's standard of review and concluded that the state court decision denying relief constituted both an unreasonable determination of the facts in light of the state court record and an unreasonable application of this Court's clearly established law. *See* App. 42–68. It

then recognized that its "inquiry [was] not over," App. 68 (citation omitted), and determined that the Eighth Amendment error had a substantial and injurious effect on the outcome. App. 68–71. It reversed and remanded the case to the district court with instructions to issue a conditional writ of habeas corpus. App. 72.

Judge Allison Jones Rushing dissented. App. 72–87. She opined that Mr. Allen could not overcome AEDPA's standard of review. App. 75. She believed the majority improperly read into this Court's cases a requirement that a capital sentencer find and credit offered mitigating evidence. App. 80. And she also believed that the majority improperly failed to recognize that the trial judge simply did not find any of Mr. Allen's evidence to be mitigating. *Id.*

The State petitioned for rehearing en banc, 4th Cir. ECF No. 60-1, which the Fourth Circuit denied without any judge requesting a poll. 4th Cir. ECF No. 62. The State then moved to stay the mandate pending a petition for writ of certiorari, 4th Cir. ECF No. 63-1, which requires showing that "the petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(1). The panel denied the motion without noted dissent. 4th Cir. ECF No. 67.

REASONS TO DENY CERTIORARI

I. THE STATE'S PETITION PRESENTS ONLY A NARROW, FACT-CENTERED, RECORD-SPECIFIC ISSUE OF NO GENERAL APPLICABILITY AND IS, IN ADDITION, BASED ON TWO FALSE PREMISES.

The State's question presented is both narrow and fact-specific. Resolution of the question would have no significance to anyone but the parties in this case. The State points to no misstatement of law made by the Fourth Circuit and seeks pure error correction. Granting certiorari on such a basis would "very substantially alter

the Court's practice." *Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (per curiam) (Alito, J., concurring in the judgment).

The State's petition is also based on two false premises: 1) that the Fourth Circuit granted habeas relief because the sentencing judge failed to mention a single item of evidence when imposing sentence; and 2) that the sentencing judge committed no error in the first place because he considered the mitigating evidence but gave it little weight. Certiorari should be denied for this reason alone. *See* S. Ct. R. 14.4.

A. The State Seeks Pure Error Correction.

Unlike "the courts of appeals, [this Court is] not a court of error correction." *Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) (statement of Alito, J., respecting the denial of certiorari); *see also* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Notwithstanding this Court's Rules and practices, the State asks for error correction only. *See, e.g.*, Pet. 23 (introducing reasons for granting certiorari with paragraphs beginning "As to the facts" and "As to the application of law"); Pet. 41 (requesting summary reversal or, in the alternative, plenary review). The Court should refuse the State's invitation to deviate from its longstanding and straightforward practice of refusing to intervene in such circumstances.[2]

[2] Amicus Criminal Justice Legal Foundation's suggestion that Mr. Allen's case is an apt vehicle for reconsideration of *Lockett*—together, presumably with the other precedents of this Court that require capital sentencers to give "a reasoned *moral* response to the defendant's background, character, and crime," *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original)—

B. The Fourth Circuit Did Not Grant Habeas Relief because the Trial Judge "Did not Explicitly Reference Allen's Eating Disorder." Pet. i.

The Fourth Circuit did not grant habeas relief due to the trial judge's failure to mention Mr. Allen's rumination disorder or any other item of evidence. It expressly and repeatedly rejected the idea that a mitigating circumstance must be mentioned to be considered. App. 54 ("[O]f course, that a sentencing order does not refer to some mitigating factors does not mean that such evidence was not considered."); App. 56–57 ("Of course, 'a state court need not refer specifically to each piece of a petitioner's evidence to avoid the accusation that it unreasonably ignored the evidence'") (quoting *Gray v. Zook*, 806 F.3d 783, 791 (4th Cir. 2015)).

Nor did the lower court restrict its focus to the exclusion of Mr. Allen's rumination disorder. The Fourth Circuit granted habeas relief because "it is clear that the sentencing judge considered Allen's disputed schizophrenia diagnosis only and paid no mind to the several uncontroverted mitigators." App. 56. In addition to

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disregards the obvious. The State's submissions to this Court and every court before it not only failed to put anyone on notice that the viability of *Lockett* was at issue in this case; they affirmatively embraced as settled law the requirement of individualized capital sentencing set forth in *Lockett* and its progeny. *See, e.g.*, Pet. 16 n.5 ("Sentencing focus always remains on the defendant's character and crime.") (citing *United States v. Tsarnaev*, 142 S. Ct. 1024, 1043 (2022), and *Lockett*, 438 U.S. at 604); 4th Cir. ECF No. 8-1 at 11 (Opp. to COA) ("It has long been the law that 'a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense' offends the Eight [sic] and Fourteenth Amendments." (quoting *Lockett*, 438 U.S. at 605); 4th Cir. ECF No. 35-1 at 45 (Br. Appellee) (same). The State's argument has been and remains that Mr. Allen cannot satisfy 28 U.S.C. §§ 2254 (d) and (e). This Court does "not generally entertain arguments that were not raised below and are not advanced in this Court by any party." *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 721 (2014).

rumination disorder, the unconsidered evidence included the entirety of Mr. Allen's history of childhood abuse, homelessness, suicide attempts, and inpatient psychiatric hospitalizations while in high school, among other things. *See* App. 70 ("Beyond overlooking the fact that Allen does, in fact, have a serious mental illness uncontested by any psychiatrist testimony, the sentencing judge also failed to consider another major component of Allen's mitigation case—his history of childhood abuse."). The State's question presented is so misleading and flawed that it does not incorporate the actual basis for the Fourth Circuit's ruling.

C. The Trial Judge Did Not Merely Give Mr. Allen's Mitigating Evidence Little Weight.

The second false premise upon which the petition is based is the notion that the trial judge considered Mr. Allen's mitigating evidence but merely assigned it little or no weight. The PCR court's opinion denying relief on this claim is entirely dependent on that idea. *See* App. 301 (finding that the sentencing "order expresses a conclusion that Judge Cooper did not give the evidence of mental illness the weight that Applicant wanted him to give"). The State's argument depends on the same premise. *See* Pet. 33 ("No *weight* is ever necessary—that is for the sentencer to determine") (emphasis in original).

The notion that the trial judge assigned all of Mr. Allen's mitigating evidence little or no weight is simply not true. Neither the State, nor the PCR court, nor the dissenting opinion below has ever pointed to anything resembling a statement to this effect on the part of the trial judge throughout the entire history of this litigation.

The State's argument instead "requires re-writing the sentencing judge's own explanation of the sentence." App. 61.

II. THE FOURTH CIRCUIT KNOWS HOW TO APPLY AEDPA AND PROPERLY DID SO IN THIS CASE.

The Fourth Circuit began its analysis of Mr. Allen's claim with an extended discussion of AEDPA's demanding standard of review and a recital of the relevant clearly established law of this Court. App. 42–49. The State does not identify a single misstatement of law as to either topic; it instead merely offers a series of miscellaneous, disconnected complaints that the Fourth Circuit misapplied AEDPA and this Court's precedents. As discussed below, the State is wrong. Regardless, its request for summary reversal when it has not identified a single legal error is meritless.

The Fourth Circuit is well-aware of the limits AEDPA places on habeas petitioners. It explained that "[i]n order for a state court's decision to be an unreasonable application of [the Supreme] Court's case law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice." App. 43 (quoting *LeBlanc*, 582 U.S. at 94) (alteration in original). This means "that to obtain relief, 'a litigant must show that the state court's ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *LeBlanc*, 582 U.S. at 94).

The Fourth Circuit conducted a detailed examination of the PCR opinion and state court record before determining that, "[a]lthough § 2254(d)(2) imposes a high bar for showing an unreasonable determination of the facts, we conclude that Allen

cleared it." App. 56. It then undertook a similarly detailed analysis as to why Mr. Allen is also able to overcome the bar set out in § 2254(d)(1). App. 60–68.

The trial judge considered Mr. Allen's mitigating evidence only to determine whether it proved insanity or incompetence. *Lockett* "and its progeny are reduced to a hollow promise if a sentencer—*before* hearing aggravating or mitigating evidence—decides that a defendant must surmount the guilt-phase insanity or incompetency hurdle in the context of the sentencing-phase determination of who shall live and who shall die." App. 64 (emphasis in original); *see Eddings v. Oklahoma*, 455 U.S. 104, 113 (1982) ("From these statements it appears that the Court of Criminal Appeals also considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability"); *see also Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (rejecting lower court's holding that evidence was "not relevant mitigating evidence . . . unless the defendant also establishes a nexus to the crime"). The State's contentions about the Fourth Circuit's application of AEDPA lack merit. *See* Pet. 25–37.

A. The Fourth Circuit Properly Applied 28 U.S.C. § 2254(e)(1).

The State first complains that the Fourth Circuit "directly violated 2254(e)(1) by shifting the burden to the State to show evidence in the record to convince a federal court that its fact finding is reasonable." Pet. 27. In theoretical support of this contention, the State quotes a passage that begins: "If the record before the state court shows clearly and convincingly that . . . ." Pet. 28 (quoting App. 49–50). But the quoted language is not even facially burden-shifting. The Fourth Circuit required Mr. Allen to overcome the presumption of correctness while limiting its review of evidence

to that which was before the state courts. *Cf. Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). Lest there be any doubt, the Fourth Circuit also made clear that "[a] state court's factual determinations are presumed correct, and the petitioner must rebut this presumption by clear and convincing evidence[,]" App. 43–44, and that it "f[ound] clear and convincing evidence" that the trial judge did not properly consider Mr. Allen's mitigating evidence. App. 59. The State's contention that the Fourth Circuit improperly applied section 2254(e)(1) is not even minimally credible.[3]

B. The Fourth Circuit Did Not Fail to Presume that State Court Judges Know and Follow Federal Law.

Mr. Allen agrees with the State that federal habeas courts must presume that state courts know and follow federal law. *See* Pet. 30–31. Nothing in the Fourth Circuit's opinion suggests that it ignored this principle. The Fourth Circuit found that the PCR court's denial of this claim was unreasonable under AEDPA only because the trial judge explicitly and repeatedly made clear that he did not follow federal law.

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[3] The State also complains that the trial judge's affidavit was not offered by Mr. Allen and claims that the PCR court "rejected" it. Pet. 28–30 & n.8. The affidavit was submitted both on direct appeal and again in PCR proceedings by the State. *See* JA2028; JA2583. The fact that the PCR court asserted that it did not consider the affidavit "[i]n an abundance of caution," despite 1) noting that it was a part of the direct appeal record, 2) acknowledging that it was admissible in PCR proceedings, and 3) discussing and quoting from it extensively, *see* JA2583–85; JA2583 n.22; JA2584 n.23; JA2584–85 n.24, is of no moment. *Pinholster* requires federal courts to limit their review under 28 U.S.C. § 2254(d)(1) to "the record that was before the state court that adjudicated the claim on the merits." 563 U.S. at 181. It does not preclude them from considering evidence that was in the state court record merely because a state court chooses to ignore it in its analysis.

In other words, it found that Mr. Allen overcame the presumption. *Cf. Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984) ("The presumption favoring judicial review of administrative action is just that–a presumption. This presumption, like all presumptions used in interpreting statutes, may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent.").

C. The Fourth Circuit Did Not Misunderstand this Court's Precedents Regarding Consideration of Mitigating Evidence.

The State argues that the Fourth Circuit opinion "demonstrates a basic misunderstanding of this Court's precedent regarding mitigation." Pet. 32. It acknowledges that the lower court "correctly quotes" from *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263–64 (2007), that "[s]entencers 'must be able to give meaningful consideration and effect to all mitigating evidence' properly admitted." Pet. 32 (quoting App. 47) (internal quotation omitted). But it faults the Fourth Circuit for purportedly reading into *Abdul-Kabir* a requirement that offered mitigating evidence be credited and assigned weight. Pet. 32–33. Not so.

The Fourth Circuit quite explicitly did not do what the State accuses it of doing. It instead acknowledged that the Eighth Amendment does *not* require a capital sentencer to credit any mitigating evidence at all or to assign it any weight: "Yes, a sentencer may consider mitigating evidence and decide that none of that evidence is worthy of weight." App. 60; *see also* App. 67–68 ("A sentencer can assign little to no weight to [mitigating] evidence if the sentencer finds it wanting; but a sentencer may not give it no weight by ignoring or overlooking it."). Rather, the Fourth Circuit correctly ruled that the trial court here, in violation of *Eddings*, refused as a matter

of law to consider virtually all of Mr. Allen's mitigating evidence and the PCR court unreasonably denied Mr. Allen's constitutional claim. *See* App. 68 ("Because assigning no weight to mitigating evidence based on such barriers violates the principles established in *Lockett*, *Eddings*, and its progeny, Allen's death sentence cannot stand.").

With respect to Mr. Allen's history of childhood abuse, "it is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that *as a matter of law* he was unable even to consider the evidence." *Eddings*, 455 U.S. at 113 (emphasis in original). The trial judge conveyed that he believed Mr. Allen suffered terrible child abuse when he expressed his hope that Mr. Allen's death sentence would "make some young mother, single or otherwise, think about the love and care that children need, no matter how tough the circumstances, and would deter that mother from making the same horrible choices made with Quincy Allen." App. 221. But the trial judge improperly failed to consider this as a mitigating circumstance because it did not prove Mr. Allen's insanity or incompetence. *See Hitchcock v. Dugger*, 481 U.S. 393, 398–99 (1987) (finding error under *Lockett* and its progeny because "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances"); *Eddings*, 455 U.S. at 114–15 ("The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.").

Even the dissent below acknowledged that, "[c]onsidered in isolation, the implication of the [trial judge's] affidavit is troubling." App. 86 (quoting trial judge's statement that the defense "would have to trust Dr. Crawford to convince [him] that Mr. Allen was so mentally ill throughout the time of his crimes and was so mentally ill at the time of trial, that imposition of the death penalty would violate the Eighth Amendment's ban on cruel and unusual punishment") (alteration in original). The dissent minimizes this language by saying that "we may not consider it isolated from the judge's explanation for his sentencing decision on the record at the sentencing hearing seven months earlier." *Id.* But no one is suggesting otherwise. The language of the affidavit is consistent with the many statements the trial judge made on the record at the sentencing hearing and in the post-trial report that he failed to properly consider Mr. Allen's mitigating evidence.

D. The State Inaccurately Describes South Carolina Law

The State claims that the Fourth Circuit "essentially" faulted the trial judge "for simply following state law" because South Carolina does not require reported findings regarding mitigating circumstances. Pet. 34. This mischaracterizes the Fourth Circuit's opinion and misconceives South Carolina law. The Fourth Circuit merely pointed to the trial judge's affirmative statements that he did not find the existence of any mitigating circumstances to reject the argument that he simply gave Mr. Allen's evidence little weight. *See* App. 60.

South Carolina law indisputably requires the sentencer to first find the existence of mitigating circumstances before it can afford them significance. *See State v. Bell*, 360 S.E.2d 706, 713 (S.C. 1987) (capital sentencer must "consider the evidence

presented and determine whether the mitigating factors exist and if so, the significance to be afforded those mitigating factors"). Within the trial judge's restricted framework, any consideration of Mr. Allen's mitigation was illusory. The Fourth Circuit's opinion is faithful to South Carolina law. *See* App. 52 ("At bottom, the sentencing judge could not have considered mitigating factors that the sentencing judge swore did not exist."). Regardless, the State's reliance on a supposed misreading of state law only highlights how inappropriate this Court's review would be.

E. The Fourth Circuit Did Not Misread the State Court Record.

The State's final argument about the Fourth Circuit's AEDPA analysis is that the lower court misread the state court record. Pet. 35–37. But its complaints are so trivial as to be frivolous. The State's primary contention is that two of the defense psychiatrists testified that Mr. Allen suffers from rumination disorder by history, but the Fourth Circuit stated that the experts diagnosed him with rumination disorder. Pet. 35–36. This distinction is irrelevant and approaching metaphysical; this Court does not usually reserve space on its limited docket to parse such minutiae.

III. THE STATE INCORRECTLY SUGGESTS THE CLAIM AT ISSUE ARISES UNDER THE SIXTH AMENDMENT.

The State incorrectly maintains that the claim at issue is one of ineffective assistance of counsel under the Sixth Amendment, rather than a *Lockett* claim under the Eighth Amendment. *See* Pet. 38 ("This was a *Strickland* claim"); *see also id.* at 27; 29; 38–39. As the State appears to acknowledge, Mr. Allen has litigated this claim in federal court both as an Eighth Amendment claim and as a related Sixth Amendment claim. *See* Pet. 38 ("Allen argued to the Fourth Circuit that the state

court erred and counsel was ineffective in failing to object"); *see also id.* ("The Fourth Circuit granted a certificate on whether it was error *and* counsel erred in not objecting") (emphasis in original); 4th Cir. ECF No. 35-1 at 45 (Br. Appellee) (acknowledging that "there are two distinct Constitutional components at issue. The first is an asserted right concerning presentation of mitigation" under the Eighth Amendment).

While it is true that the Eighth Amendment claim "arose in the context of an ineffective assistance claim rather than a straight *Lockett* claim" in PCR proceedings, "[t]he State has chosen not to make a procedural default argument in this Court, which is its prerogative." Br. CJLF 4. The State has, in fact, chosen not to make a procedural default argument in any court. It has instead explicitly conceded that the *Lockett* claim is "available for review because the substance of those allegations have been presented to and passed upon by the [State] circuit and appellate courts with substantially the same factual basis and legal arguments Petitioner presents" in federal court. D.S.C. ECF No. 50 at 25 (State's Return and Mem. of Law in Supp. of Mot. for Summ. J.). Even the dissent below, which was broadly critical of the majority opinion, did not find fault on this basis, presumably due to the State's concession that the *Lockett* claim is reviewable on the merits. Whatever the merits of a hypothetical procedural default argument may have been, the State has long since waived the opportunity to raise one.

Certiorari should not be granted to correct an allegedly erroneous ruling on a Sixth Amendment claim, where the claim at issue actually arose under the Eighth

Amendment.[4] The State's confusion regarding this basic aspect of the case makes it even less suitable for certiorari than it already is.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Joshua Snow Kendrick
Kendrick & Leonard, P.C.
P.O. Box 6938
Greenville, South Carolina 29606
(864) 760-4000
josh@kendrickleonard.com

E. Charles Grose, Jr.
Grose Law Firm
305 Main Street
Greenwood, South Carolina 29646
(864) 538-4466
charles@groselawfirm.com

Aren Adjoian
Counsel of Record
Federal Community Defender Office
for the Eastern District of Pennsylvania
Curtis Center, Suite 545-West
601 Walnut Street
Philadelphia, PA 19106
(215) 928-0520
aren_adjoian@fd.org

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[4] The State's allegation that the Fourth Circuit erred by not conducting a *Strickland* prejudice analysis, *see* Pet. 38–39, is thus plainly wrong. The Fourth Circuit correctly determined that the sentencer's failure to properly consider any of Mr. Allen's mitigating evidence "had substantial and injurious effect or influence" on the verdict. App. 68 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).