No. 23-682

In the

Supreme Court of the United States

STATE OF ALABAMA,

Petitioner,

v.

MARCUS BERNARD WILLIAMS,

Respondent.

REPLY IN SUPPORT OF MOTION TO EXPEDITE BRIEFING ON THE PETITION FOR A WRIT OF CERTIORARI AND OTHER RELIEF

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December 29, 2023

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The standard for establishing prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), is supposed to be "highly demanding." *Shinn v. Kayer*, 592 U.S. 111, 118 (2020). Thus, after the Ninth Circuit issued a decision that "materially weakens" that standard, *Jones v. Ryan*, 52 F.4th 1104, 1154 n.17 (9th Cir. 2022) (Bennett, J., dissenting from denial of rehearing en banc), this Court granted certiorari to review that decision. *See Thornell v. Jones*, No. 22-982 (U.S. certiorari granted Dec. 13, 2023). The Ninth Circuit is not alone. In the decision below, the Eleventh Circuit committed many of the same errors—and some additional errors all its own—to conclude that Marcus Williams was prejudiced when the jury did not hear about his "hypersexuality," though that evidence would have also included evidence of a second violent sex crime committed 18 days after he raped and killed Melanie Rowell. The overlapping errors in the Eleventh Circuit's decision and *Jones* make them natural partners to be considered together this Term, and the differences will allow this Court to provide additional guidance to lower courts, which are repeatedly misapplying *Strickland*'s prejudice standard. A decision in Williams's case will also bring long overdue closure to Melanie Rowell's family, who has waited twenty-seven years for justice. Thus, the State has asked this Court to require Williams to file his brief in opposition in the normal course; consider the petition at the February 16, 2024 conference; and if granted, order expedited briefing so that this case can be heard alongside *Jones* this Term. Williams does not allege any prejudice from that approach. He instead argues that expedition is unnecessary for three reasons, but each argument fails. Williams's brief in opposition should be due January 25, 2024.

1. The State's petition raises two questions. *See* Pet.i. The first arises from a 2015 decision of the Eleventh Circuit, which held that a state-court adjudication on the merits loses its entitlement to AEDPA deference if it is affirmed by a state appellate court on procedural grounds. The second concerns the Eleventh Circuit's 2023 misapplication of *Strickland*'s prejudice prong. Williams argues (at 1-2) that the first question is untimely, but he is wrong. This Court has "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent of the judgments of the Court of Appeals." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 (2001); *see United States v. Dixie Highway Exp., Inc.*, 389 U.S. 409, 411 n.* (1967); *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (statement of Scalia, J., respecting denial of certiorari). Because the State timely sought certiorari from the Eleventh Circuit's recent judgment in this case, the State may also raise the Eleventh Circuit's error from 2015. And even if first question were procedurally barred, that would at most support denying certiorari on that question, not delaying consideration of this case altogether, and especially not delaying consideration of the second question, which tracks the issues the Court will address this Term in *Jones*, No. 22-982.

2. Williams next argues (at 2-9) that *Jones* and this case "are nothing alike." To the contrary, the errors by the Ninth and Eleventh Circuits overlap and should be considered together to give this Court a better chance to assess how *Strickland*'s prejudice prong is being misapplied. The Court will then be positioned to provide more useful guidance to lower courts.

3. The district court's fact findings in this case do not change that analysis because the State is not contesting any fact findings. It is instead contesting mixed questions of fact and law, like the conclusion that "Mr. Williams' case is not highly aggravated." Resp.4 (quoting *Williams v. Alabama*, No. 1:07-CV-1276, 2021 WL 4325693, at *51 (N.D. Ala. Sept. 23, 2021)). If the Eleventh Circuit thought that "reliance on the clear error standard" (Resp. 5) relieved it of its burden "to consider *all* the evidence in evaluating the 'new' mitigation evidence" and "undertake a serious reweighing of the mitigation and aggravation evidence," *Jones*, 52 F.4th at 1155 (Bennett, J., dissenting from denial of rehearing en banc), that error is all the more reason to hear this case alongside *Jones*.

4. Only issues of fact like whether Williams committed a second brutal sex crime after raping and killing Melanie Rowell are subject to clear error review (and that fact is uncontested). But the question whether new evidence of that second sex crime would have helped or hurt Williams's case is a mixed question of fact and law subject to de novo review. *See Williams v. Taylor*, 529 U.S. 362, 398 (2000) (agreeing that "the strength of the prosecution evidence supporting the future dangerousness aggravating circumstance" was "the 'legal part' of [the lower court's] analysis"). As Judge Grant noted in dissent, rejecting Williams's assertion of prejudice "does not in any way conflict with the factual findings made by the district court." Pet.App.34.

5. At bottom, Williams's attempts to drive a wedge between his case and *Jones* underscore why the Court should decide both this Term. As Williams puts it, *Jones* involves a "convoluted procedural history," "multiple aggravated homicides,"

and "substantially more mitigating evidence and aggravated circumstances." Resp.5. On top of that, he argues (at 9) that the question of prejudice is often fact-bound. This Court nevertheless granted plenary review in *Jones*. For the reasons Williams points out, considering the Eleventh Circuit's decision will help ensure that the Court can provide more useful guidance. This case is less "convoluted" than *Jones* and involves a much more straightforward error. Not only did the Eleventh Circuit fail to evaluate and weigh aggravating and mitigating evidence properly as in *Jones*, *see* Pet.App.29-31 (Grant, J., dissenting); it also (and more egregiously) ignored whole categories of evidence in aggravation, such as the attempted rape of Lottie Turner and the impact of Williams's crime on Melanie Rowell's children, *see id.* at 31-34.

6. Williams also argues (at 9-11) that his brief in opposition should not be due at the normal time because even if he obtains a 30-day extension, the petition would be considered at the March 22, 2024 conference, three weeks before a potential argument date in *Jones*. But the State isn't asking that this Court merely consider its petition this Term, but rather that it be considered in time to allow merits briefing and oral argument alongside *Jones*. Mot.2. Under Williams's proposal, the parties would have at most three weeks between certiorari being granted and a likely argument date in *Jones* (Resp.10), whereas the State's proposal gives the parties nearly two months (Mot. 4). Rather than proving that the State's motion should be denied, Williams illustrates the need to require Williams to file his brief in opposition in the normal course and expedite briefing on the merits.

7. Last, Williams does not even attempt to argue that he would be prejudiced in any way by filing his brief in opposition within 30 days of the petition being docketed and, if certiorari is granted, filing his response brief within 30 days of the State's opening brief. He would not be: Those are the default deadlines under this Court's rules. Nor does Williams rebut the obvious prejudice that further delay would cause the State and the victims of Williams's crimes.

8. For almost three decades, Melanie Rowell's family has lived with uncertainty over the fate of the man who raped and murdered her. The Court's decision to review *Jones* is a step toward closure, but this Court should decide that case alongside this one. To make that possible, the State is prepared to brief the case on an expedited timeline while maintaining 30 days for Williams to file his certiorari-stage and merits briefs. Williams won't suffer any harm from filing his brief in the ordinary course. The Court should grant the State's motion. It's been long enough.

Respectfully submitted,

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