No. 23-682

In the

Supreme Court of the United States

STATE OF ALABAMA,

Petitioner,

v.

MARCUS BERNARD WILLIAMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY BRIEF

The court below found that evidence of Marcus Williams's propensity to rape diminished his moral culpability for murdering Melanie Rowell, a 20-year-old single mother of two. Could a jury see it differently? The majority opinion never grappled with that question. It held, in effect, that "hyperaggression" and "hypersexuality" are *purely mitigating*. *Contra Cullen v. Pinholster*, 563 U.S. 170, 201 (2011) (doubting the "mitigating value" of evidence that the defendant is "beyond rehabilitation").

Worse, the majority's reasoning was utterly unaffected by Williams's second heinous sex crime. How would a jury react to *that*? Again, the majority did not say. It did not mention the second crime or the second victim, Lottie Turner. *Contra Wong v. Belmontes*, 558 U.S. 15, 26 (2009) (considering the effect of "bad evidence [that] would have come in" too).

Either the court below ignored these downsides to Williams's mitigation, or it weighed them improperly (without explanation). Either way, the decision ran afoul of this Court's precedent. Williams's brief in opposition never explains how his violent tendencies could be purely mitigating in the jury's eyes. As to the second crime, he latches on to the district court's preposterous rationale—that the digital rape of Lottie Turner was "entirely consistent with the portrait of [Williams's] psychological unraveling, stemming from his childhood sexual abuse." App.166. In other words, Williams's second violent sex crime was *good* for his defense because it corroborated his expert testimony

that would "have cast his sex-related crimes in a 'different light'" for the jury. *Id.* (citation omitted).

Williams's claim should have failed even under *de novo* review, but the Eleventh Circuit never should have conducted a *de novo* review in the first place. As *amici* observe, Williams's "claim was, quite literally, 'adjudicated on the merits in State court proceedings.'" Br. of Va. & 17 Other States (*Amici* Br.) at 15 (quoting 28 U.S.C. §2254(d)). By the plain text of AEDPA (not to mention its purpose to protect state convictions from federal interference), a state court's views on the merits deserve deference. Here, those views remained intact and entitled to deference, notwithstanding that the appellate court found a simpler path to the same result. The circuit split over these issues is damaging, persistent, "and belongs on the Supreme Court's plate," *Thomas v. Clements*, 797 F.3d 445, 446 (7th Cir. 2015) (Easterbrook, J., concurring).

I. The Eleventh Circuit Nullified A State-Court Merits Adjudication In Violation Of AEDPA.

A. The decision below "seriously harms state court practice and procedure." *Amici* Br.17. Congress enacted AEDPA to ensure that state-court convictions receive respect and deference. *See Williams v. Taylor*, 529 U.S. 420, 436 (2000). But the Eleventh Circuit turned that promise on its head—claiming that "respect" for Alabama courts meant ignoring a state-court decision on the merits (en route to vacating the sentence of a confessed rapist-murderer). Why? Because a state appellate court found an easier way to dismiss Williams's meritless claims. App.236. But real "[r]espect for the state judiciary requires considering

both" the trial and appellate decisions. *Thomas*, 797 F.3d at 446 (Easterbrook, J., concurring).

Williams does not seriously defend the Eleventh Circuit's reasoning. His argument is primarily contained in two footnotes describing the decision. *See* BIO.15 nn.10 & 11. From what can be gathered, Williams seems to think that *Harrington v. Richter*, 562 U.S. 86 (2011), was "central[]" to the judgment below and that Alabama failed to "cite[,] let alone discuss" that case. BIO.14-16. Wrong on both counts. First, the Eleventh Circuit cited *Richter* once for the proposition that a state-procedural ground is not a merits ground. *Compare* BIO.14-16 *with* App.233 & *et seq*. True but irrelevant to the question whether a procedural affirmance strips a merits decision of its entitlement to AEDPA deference. Second, as argued in the Petition, *e.g.*, Pet.26, Alabama's position is more consistent with *Richter*'s teaching that state-court silence is presumed to be an adjudication on the merits. Just as this Court declined to saddle state courts with the duty to specify whether their grounds are procedural, *Richter*, 562 U.S. at 99, it should reverse the Eleventh Circuit's presumption that a procedural affirmance "disagree[s] with" the trial court's merits decision. App.234.

B. The holding below worsened an enduring "divide[]" over "[w]hether the first in a sequence of state-court decisions should be ignored" for AEDPA purposes. *Thomas*, 797 F.3d at 446 (Easterbrook, J., concurring). Some circuits seem to ignore state-trial decisions altogether. Others, like the Eleventh, ignore them when they are affirmed on procedural grounds. At least nineteen States agree that these various

atextual exceptions to AEDPA are due to be resolved. *See Amici* Br.14.

Williams's response is misguided. BIO.13 (charging that the split is "exceedingly misleading"). He says that the split stems from a "lone Fifth Circuit case," *Loden v. McCarty*, 778 F.3d 484 (2015), which is somehow misleading because *Loden* cites decisions of the Seventh Circuit and Eleventh Circuit, courts the petition located on the other side of the split. BIO.12-13.

But the split does not stem solely from *Loden*. *See* Pet.22-24. The Third, Fifth, and Eleventh Circuits have held that lower state-court decisions receive AEDPA deference. Pet.22-23. The Sixth, Seventh, and Ninth Circuits have held that only the last reasoned opinion receives AEDPA deference. Pet.23-24. The Third and the Eleventh apply an exception; in cases like this one, they refuse AEDPA deference and land on the wrong side of the split. *Id.* at 22-23. If this Court grants certiorari and reverses on the ground that the trial court's merits adjudication was entitled to deference, it would resolve the larger divide over whether such decisions can receive deference at all.

It was not "misleading" to omit *Loden*'s citations to two other decisions. BIO.12-13. Those decisions aid the State's argument that the split has worsened since 2015 when *Loden* was decided. The Fifth Circuit cited *Atkins v. Zenk*, 667 F.3d 939 (7th Cir. 2012), which the Seventh Circuit later repudiated in adopting its current incorrect view of how AEDPA works in these cases. *See Thomas v. Clements*, 789 F.3d 760, 767 (7th Cir. 2015). And the Fifth Circuit cited *Hammond v. Hall*, 586 F.3d 1289 (11th Cir. 2009), which the

Eleventh Circuit overcame to craft the exception at issue here, *see* App.235-36. What *Loden*'s citations reveal is that two other circuits have not consistently followed their own AEDPA caselaw.

Like the Fifth Circuit, the State expected that the Eleventh Circuit's general rule would require AEDPA deference in a case like this one. It did not, so now the Eleventh Circuit will waffle between the right and wrong sides of the split. But the fact that the Eleventh is wrong only sometimes is no less reason to grant certiorari and resolve the split.

C. Williams's jurisdictional argument against certiorari (BIO.8-11) is foreclosed by a century of precedent. *See, e.g.*, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). 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." *MLB Players Ass'n v. Garvey*, 532 U.S. 504, 508 (2001); *see also* Eugene Gressman et. al., Supreme Court Practice 82-83, 398 (9th ed. 2007); Wright & Miller, 17 Federal Practice & Procedure §4036 n.76 (3d ed.). As Williams admits, such authority is well "settled." BIO.10. Just this term, the Court granted certiorari (over a similar objection) to address a question raised in a prior appeal. *See* Petitioner's Reply 10-11, *FBI v. Fikre*, No. 22-1178 (U.S. filed Sept. 5, 2023; granted Sep. 29, 2023). This Court has not misunderstood its appellate jurisdiction for over 100 years.

D. Williams's abandonment argument (BIO.13-14) is similarly meritless. The State raised AEDPA in the initial appeal, so the Eleventh Circuit cases where

a party *never* raised an issue do not govern. Nor does the review-not-first-view principle have any purchase here—the parties fully litigated the first question presented, and the Eleventh Circuit decided it. *See* App.233-236. In the subsequent appeal, the State was not required to "demand overruling of a squarely applicable, recent circuit precedent" in the same case. *United States v. Williams*, 504 U.S. 36, 44 (1992). The State raised AEDPA once again at the appropriate time in its petition for rehearing en banc. The issue is now properly before this Court.

II. The Eleventh Circuit's Decision Cannot Be Squared With *Pinholster* And *Belmontes.*

Williams rewrites the State's question presented because the answer is obvious: No, it was not proper to ignore that Williams's "hypersexuality" evidence was double-edged and that it would have opened the door to evidence of a second attempted rape.

A. The panel was required to consider whether Williams's proffered mitigation, including his *compulsion to rape and murder*, was in fact mitigating. Or whether "the jury might have concluded that [Williams] was simply beyond rehabilitation." *Pinholster*, 563 U.S. at 201.

So too the panel was required to ask how the jury would have reacted to the State's rebuttal evidence. Would his "hypersexuality" theory have backfired by inviting proof that Williams had indeed tried to rape again? *See Belmontes*, 558 U.S. at 20.

The panel did not ask or answer these questions. Nothing in the decision below reflects an

understanding of *Pinholster* and *Belmontes*, let alone any attempt to apply them. *See* Pet.App.3-27. Instead, the panel weighed "all of the mitigating circumstances that we now know" against *the original aggravator*—that Williams murdered during a rape. App.25.

Williams's brief commits the exact same error. Trying to recast the question presented as a "case-specific, fact-bound" issue, BIO.27-28, Williams just repeats his new mitigation evidence. According to his expert, Williams raped and killed as an adult because of what happened when he was four. *See* BIO.i, 1, 6-7, 21, 28. To be sure, Dr. Mendel's incredible statement could count as mitigation. It purports to excuse both Williams's strangulation of Melanie Rowell and his digital rape of Lottie Turner. But it's a red herring.

The question is not whether Williams had new mitigation after the federal courts negated AEDPA and gave him a new hearing. Of course he did. The question is whether that new mitigation would have made a difference. And to answer "that question, it is necessary to consider *all* the relevant evidence that the jury would have had before it if [counsel] had pursued the different path." *Belmontes*, 558 U.S. at 20. This Court could not have been clearer when it unanimously held that "*all* the relevant evidence" means "not just the [new] mitigation evidence …, but also the [new aggravating] evidence that almost certainly would have come in with it." *Id.*

In *Pinholster*, the Court took the defendant's *family's* crimes to be the kind of "'two-edged sword' that juries might find to show future dangerousness." 563 U.S. at 201. Here, the "hypersexuality" theory directly

accentuated *Williams's* dangerousness. No inference needed: Williams's own expert testified to his "tendencies towards violence or sexual violence" and "hypermasculine aggression," which "we see tragically here how harmful it can be." Doc. 93:62, 82. If Pinholster's evidence was "of questionable mitigating value," then Williams's evidence was even worse. 563 U.S. at 201. The panel ignored that possibility.

In *Belmontes*, expert testimony about the defendant's mental state, 558 U.S. at 34, would have exposed him to rebuttal evidence that he committed *another* homicide. *Id.* Likewise here, "the worst kind of bad evidence"—proof of *another* sex crime—"would have come in" alongside Williams's new mitigation. *Id.* at 26. Again, the panel spoke only to the "power" of Williams's new mitigation in a vacuum, App.21, as if the Lottie Turner attack never happened. That was error.

B. Williams's brief strains to read the decision below in a way that does not blatantly disregard this Court's *Strickland* precedents. Williams first finds a *Pinholster–Belmontes* analysis hidden in the panel's assurances that it "reviewed the record" and "reweighed all the available evidence." BIO.17. But it's one thing to read charitably, another to suppose the court performed crucial analysis *sub silentio*. That implausible assumption is the basis on which Williams both accuses the State of misrepresentation, BIO.16-18, and asserts that the court "thoroughly considered all the good and bad evidence," BIO.22.

Williams cannot quote a single line from the opinion below about the new aggravation. There isn't one. Nor did the majority "directly respond[] to the

dissent's concerns about new aggravating evidence." BIO.22.[1] Notably, Williams concedes that the new aggravation was "not explicitly mentioned," BIO.18, yet balks when the State says the majority "ignored" or "failed to consider" it, BIO.16-17 (citing Pet.28-30). Semantics aside, the bottom line is that the panel majority either ignored or misunderstood the weight of Williams's propensity to violence and second rape attempt. Either way, the decision was wrong.

The best Williams can muster on the merits is that his "commission of an attempted rape just 18 days after the murder was 'entirely consistent with the portrait of [his] psychological unraveling, stemming from his childhood sexual abuse." BIO.21 (quoting App.166). In his telling, the jury would have seen his *multiple* "sex-related crimes in a different light" after hearing his expert opine about "hypersexualization." App.166 (cleaned up). This Court unanimously rejected the same argument in *Belmontes*: "[E]xpert testimony discussing Belmontes' mental state, seeking to explain his behavior, or putting it in some favorable context would have exposed Belmontes to the Howard evidence [of a second homicide]." 558 U.S. at 24. Williams's expert evidence, designed to elicit sympathy, would have led to the rejoinder, "Is such sympathy equally appropriate for someone who committed a second" sexual assault just 18 days later? *Id.*

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[1] In the cited passage, the majority addressed the dissent's "emphasis on the facts of the underlying murder" and its "brutality," App.26, but never acknowledged Williams's *second* violent sex crime or the two-sidedness of his "hypersexuality"—*i.e.*, the rest of the dissenting opinion, *see* App.31-34.

Would the jury look kindly on Williams after hearing about another crime so "eerily similar to the rape and murder of Ms. Rowell"? App.216.

Williams and the Eleventh Circuit answer: Yes, *more sexual assault is more mitigating*. That flies in the face of the experience of every prosecutor and the very existence of the violent-felony aggravator, Ala. Code §13A-5-49(2). And if that were persuasive, the Court was wrong in *Belmontes* to rely on the "elephant in the courtroom," the evidence of a second murder. 558 U.S. at 26. Like Williams, Belmontes had an expert who explained "the relationship between [his] traumas … and his subsequent criminal conduct." *Belmontes v. Ayers*, 529 F.3d 834, 876 (9th Cir. 2008). A second murder might have been "entirely consistent with" that theory too. BIO.21 (quoting App.166). But this Court was unmoved by that strategy to "humanize" Belmontes, 558 U.S. at 22, and a similar approach here would not likely have changed the jury's view of Williams as "an unrepentant murderer and serial home invader," App.33 (Grant, J., dissenting).[2]

Finally, Williams fails to distinguish the Eleventh Circuit's mistakes from those of the Ninth Circuit in *Jones v. Ryan*, 52 F.4th 1104 (9th Cir. 2022), *cert. granted sub. nom. Thornell v. Jones*, No. 22-982 (U.S. Dec. 13, 2023). Once again, he relies on the guarantees

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[2] The sole reason the district court reversed itself was that its initial dangerousness analysis apparently did not consider that absent the death penalty, Williams would serve life in prison. Doc. 102:5. But that too was the kind of fact the Ninth Circuit erroneously relied upon in *Belmontes*. 529 F.3d at 874-75 (citing "prospects for behaving in a non-violent manner in [prison]").

of the courts below that they "considered the totality" of the evidence, "reweighed it," and "correctly applied *Strickland*." BIO.20-22. But the Ninth Circuit promised the same thing; its recitation of the proper standard was no barrier to review. And at least that court paid lip service its duty to consider "the good and the bad" under *Pinholster* and *Belmontes*. *See Jones*, 52 at 1116. In contrast, the Eleventh Circuit demonstrated no awareness of "the bad" for Williams, "all the counterevidence" it was required to analyze. *Id.* at 1148 (Bennett, J., dissenting from denial of rehearing en banc).[3] Failure to conduct "that mandatory reweighing" was legal error, Pet.27, *Thornell v. Jones*, No. 22-982 (U.S. filed Apr. 6, 2023), regardless of whether the appellate court identified clear error among the district court's factual findings, *see* App.34 (Grant, J., dissenting).

Next Williams claims that Jones's crime was "highly aggravated," and his was not. BIO.20, 25. Imagine telling the jury that when Williams climbed over the baby gate, checked on Melanie's sleeping toddlers, strangled their mother to death, and raped her, it could have been worse. There could have been *two* victims—as in *Jones*. Of course, Melanie was not the only victim of Williams's crime. And it wasn't his only crime: Lottie Turner, who does not appear in the opinion below, was likewise unmentioned by the district court when it said that "Williams' case is *not* highly

[3] Contrary to Williams's representations, the Eleventh Circuit did not address his *Pinholster–Belmontes* problem when it rejected an unrelated "re-weighing" argument (BIO.21) or when it "declined to 'minimize the brutality of [the murder]'" (BIO.22).

aggravated." App.169-70. That too was error. *See* App.33-34 (Grant, J., dissenting).

The bulk of Williams's argument is dedicated to reading between the lines of the opinion below—trying to find some semblance of an argument that would explain the result. But it's inexplicable. The petition thus does not complain that the court below failed "to satisfy certain unstated content rules." BIO.31. The petition seeks reversal because it is not true that the "jury and judge … *heard almost nothing* that would allow them to 'accurately gauge [Williams's] moral culpability.'" App.170 (emphasis added). They heard that Williams choked the life out of an innocent young mother. And what they didn't hear—proof of another rape, betraying the murderer's feigned remorse—"would have made a difference, but in the wrong direction" for Williams. *Belmontes*, 558 U.S. at 22.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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