No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

Arnold Wayne McCartney, *Petitioner*,

v.

Donald Ames, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err in denying the Petitioner a certificate of appealability on his constitutional claim related to structural error and/or ineffective assistance of counsel in the mercy phase of his bifurcated murder trial, when counsel made no argument for mercy on his behalf, and when counsel failed to inform the jury of available mitigating evidence?

PARTIES TO THE PROCEEDINGS BELOW

1.Arnold Wayne McCartney, Petitioner. Mr. McCartney was the Petitioner in the matter on appeal, which was an appeal of the denial of his federal habeas petition by person in state custody, which arose from the series of state habeas and appellate decisions denying relief on his collateral claims following his conviction by jury verdict of first degree murder, without mercy, subsequently affirmed on appeal.

2. Donald Ames, Respondent. Mr. Ames is was, at the time of the relevant decision in West Virginia state court, the superintendent of Mount Olive Correctional Complex and Jail wherein the Petitioner was and remains incarcerated. The current superintendent is Jonathan Frame. The Superintendent of the facility at which a habeas petitioner is incarcerated is the default respondent. The Superintendent of Mount Olive Correctional Complex and Jail has been the respondent in all of the Petitioner's state and federal habeas proceedings.

RELEVANT PROCEEDINGS

1. Felony trial court proceedings in the Circuit Court of Lewis County, West Virginia: *State v. McCartney*, Case No.: 09-F-8.

2. Direct appeal in the Supreme Court of Appeals of West Virginia: *State v. McCartney*, 228 W.Va. 315, 719 S.E.2d 785 (2011).

3. Petition for Writ of Certiorari following direct appeal: *McCartney v. West Virginia*, Docket No. 11-10105 (cert. denied).

4. State post-conviction habeas proceeding in the Circuit Court of Lewis County, West Virginia: *McCartney v. Ames*, Case No.: 13-C-12.

5. State habeas appeal in the Supreme Court of Appeals of West Virginia: *McCartney v. Ames*, No. 20-0242 (W.Va. June 23, 2021) (memorandum decision).

6. Petition for Writ of Habeas Corpus by Person in State Custody in the United States District Court for the Northern District of West Virginia: *McCartney v. Ames*, Case No. 3:22-cv-00103-GMG.

7. Federal Habeas Appeal in the United States Court of Appeals for the Fourth Circuit: *McCartney v. Ames*, Docket No.: 22-6704.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Arnold McCartney, respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, for the reasons stated herein.

CITATIONS OF OPINIONS AND ORDERS

The United States Court of Appeals for the Fourth Circuit issued an unpublished per curiam opinion denying a certificate of appealability (included in the Appendix to this Petition ["App."] at 3-4) on February 18, 2025, which is the subject of the instant petition for writ of certiorari, and which was sustained by the order denying rehearing *en banc* dated March 18, 2025. (App., at 1).

STATEMENT OF JURISDICTION

The denial of the Petitioner's petition filed under 28 U.S. Code § 2254 was affirmed on appeal by the Fourth Circuit on March 18, 2025, in its order denying Petitioner's motion for rehearing *en banc* of the judgment and unpublished per curiam opinion denying a certificate of appealability dated February 18, 2025. This Honorable Court has jurisdiction over final judgments of the United States Courts of Appeal pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. XIV, sec. 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner was indicted for first-degree murder by the Lewis County, West Virginia Grand Jury in 2009. The Petitioner was found guilty at the conclusion of the guilt phase of the bifurcated jury trial. (App., at 127-128). In West Virginia, a bifurcated murder trial separates the question of guilt from the question of whether a person convicted of first degree murder should receive life with or without "mercy." *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996). If, during the "mercy phase," the jury grants mercy, then the defendant will be eligible for parole eligibility in fifteen years. If it withholds mercy, then the defendant will serve life in

prison without the opportunity to ever make parole. W. Va. Code §62-3-15.

The mercy phase of the trial is reproduced as follows, verbatim:

> BY THE COURT: All right. The verdict of the Jury is received by the Court, read and made a part of the record in this case.
>
> Now, ladies and gentlemen, I explained a little something to you awhile ago, but now, listen to this further Instruction. You've not completed your work yet.
>
> Ladies and gentlemen of the jury, you have decided the guilt of the Defendant and have found the Defendant guilty of Murder in the First Degree. Under the laws of the State of West Virginia, the Defendant, having been found guilty of Murder in the First Degree, the Court must sentence him to confinement in the penitentiary for life and he shall not be eligible for parole unless you, in your discretion, further find and add to your verdict a recommendation for mercy. That recommendation of mercy would mean that the Defendant, Arnold Wayne McCartney, could be eligible for parole consideration, after having served a minimum of 15 years.
>
> Now, the parties will now present to you, for your consideration. additional evidence, in addition to that evidence that you have previously heard in this case, which you may consider in arriving at your decision, which is your sole discretion as to whether or not lo recommend mercy as to the charge of First Degree Murder.
>
> Your decision as to whether or not to recommend mercy is in your sole discretion and finally, your decision as to whether or not to recommend mercy in this case, as In all others, must be unanimous. That is to say, you must all agree upon the decision that is reached.
>
> Now, does the State have anything to present with regard to whether or not the Defendant- mercy should be recommended?
>
> MR. MORRIS: May we approach the Bench, Your Honor?
>
> BY THE COURT: You may.
>
> (At the Bench)
>
> MR. MORRIS: I'll present the mother and father of the victim if that's proper. I-
>
> BY THE COURT: Yes.
>
> MR. MORRIS: Okay, that would be the – that's what we'll do then. I'll just ask them some brief questions and let them speak.
>
> BY THE COURT: All right.
>
> (End of Bench Conference.)
>
> MR. MORRIS: Your Honor, we'll have Just one witness.

BY THE COURT: Bring your witness forward. Come around and have a seat, please.

MR. NANNERS: May we approach, Your Honor?

(At the Bench.)

MR. NANNERS: We would object to this witness. The witness was not named in the Jury selection process. It's not been involved with the -

BY THE COURT: This is a different issue.

MR. MORRIS: There's a picture, too.

MR. NANNERS: Judge, the case law in this, in this mercy phase, is the same, there's no lessening of the rules of evidence, everything that applies in a regular trial applies at the mercy stage, and this has not been a witness that's been disclosed, nor has it been a witness who's been named as a potential witness in the trial of this case.

MR. MORRIS: That's true, you know, I mean, I have to say, I did not disclose -

BY THE COURT: Well, I know that, but I'm not sure that applies when it comes to this part of the case.

MR. NANNERS: All I know is that the case law says that everything applies during the mercy stage that during the trial of the case.

BY THE COURT: All right. Let's take a recess.

(End of Bench Conference.)

BY THE COURT: Ladies and gentlemen, I'll ask you to go to your Jury room for a few moments, please.

WHEREUPON, the following proceedings were held out of the hearing and presence of the Jury, to-wit:

BY THE COURT: You may step down. Let's see your case law that you're referring to.

WHEREUPON, at 11:35 a.m., a recess was taken.

February 18, 2010
11:51 a.m.

BY THE COURT: We're back in open Court in the case of State versus Arnold Wayne McCartney, 09-F-08. He's present with his attorneys, Steven Nanners and Dennis Willett. The State's represented by Gary Morris, Prosecuting Attorney. We've been in chambers discussing and researching the law with regard to the-admissibility of certain testimony in the bifurcation stage of these proceedings, after the Defendant having been found guilty of Murder in the First Degree.

I have been Informed by the Prosecuting Attorney that he's not going to put on any witnesses. Is that right, Mr. Morris?

MR. MORRIS: That is right, Your Honor, we're not putting any evidence in.

BY THE COURT: How about the Defendant?

MR. WILLETT: Your Honor, we intend to call Arnold McCartney.

BY THE COURT: Bring on (sic) the jury, please.

WHEREUPON, the following proceedings were held in the hearing and presence of the jury, to-wit:

BY THE COURT: Let the record show that all members of the Jury panel have returned to the Courtroom. Call your first witness.

MR. WILLETT: I call Arnold Wayne McCartney, Your Honor.

BY THE COURT: Hold up your right hand and be sworn, Mr. McCartney. Come around and have a seat, please. Proceed.

MR. WILLETT: Thank you, Your Honor.

WHEREUPON, ARNOLD WAYNE MCCARTNEY, having been first duly sworn, was called upon as a witness herein and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILLETT:

Q. State your name, please.

A. Arnold Wayne McCartney.

Q. And Arnold, I want to take you back to December 20th, 2008, the day that Vickie died. How long had you been with Vickie?

A. About five years.

Q. Okay, you had a child together?

A. Yes.

Q. How old-when was your child born?

A. He was born In August.

Q. In August 2008?

A. Yeah.

Q. Okay. You lived down there on Millstone Road with Vickie.

A. Yes, sir.

Q. Is that the only place that you had lived with her?

A. Yes.

Q. Now, you had been with her for five years. Tell us – tell the jury about your relationship with Vickie.

A. Well, she was the best thing that ever happened to me. I mean – she was my world. I mean, it was – she was everything that I had, besides my kids, though.

Q. Were you planning to get married?

A. Yes, we were going to get married that coming up summer, when that happened.

Q. Now, off the 20th, you staled to the Trooper following this - that evening, the next day, that you had been drinking pretty heavily, correct?

A. Yes.

Q. Okay, do you drink a lot?

A. Yeah.

Q. Before that week, did you drink a lot other days?

A. Some days.

Q. Some days? Where were you employed at that time?

A. For Rick Kincaid Logging.

Q. Okay and you had been working there how long?

A. About a year.

Q. So you plan on getting married the next summer.

A. Yeah.

Q. You just had a baby. And when this happened, you heard your statement to the officer that you did what as soon as the gun went off?

A. I just dropped it and picked her up and started holding her and told her I loved her and kissed her.

Q. You went down to – you were seen later, you had blood on you. Was that from holding her?

A. Yes.

Q. Did you try to revive her or anything?

A. I don't know. That was kind of that – I blacked out, you know, and just – the shot and stuff, I mean. I don't know, I just went hysterical.

Q. Okay. When you had that gun, why – you told the Troopers you intended to scare her. Why did you intend to scare her?

A. Here I thought she was cheating on me with Brian and you know, into drugs and stuff and I just figured, you know, you know, I would scare her, you know and if she was, she wouldn't do it no more. You know she was just fooling around with him.

Q. Did you feel that you were losing your fiancee?

A. Yes.

Q. Okay.

A. Like I said, she was everything, I mean, she's the one that I loved.

Q. Okay. Picking up that gun, do you remember what was in your mind when you picked up that gun?

A. I was losing my wife and I thought, you know, she was cheating on me, and I just picked it up, you know, to scare her. You know, maybe if she was cheating on me, she wouldn't do it no more.

Q. Did you intend to kill her?'

A. No. No. That's the reason I didn't fool with that

shotgun, cause I knowed it was loaded. I didn't want to shoot her.

Q. Do you recall talking to Trooper Morgan the nigh that this happened?

A. Yeah.

Q. And you told him what – best as you could recollect, what went on, correct?

A. Yes.

Q. And you didn't try to hide anything from him?

A. No.

Q. And you talked ot him the next day when you were down at the Regional Jail, correct?

A. Yes.

Q. You knew that you could have a lawyer, you knew that you didn't have to talk, but you went ahead and gave him your statement, correct?

A. Yeah, I told him what happened, I mean, I told him the truth about it and there's no doubt, you know, Brian and them, I mean, they're lying about it, the dope and stuff was there, but I told you the truth and now I'm the one that's paying. You know, I lost my wife, my kids. The only thing that I had was her.

Q. Are you asking this jury to extend you mercy?

A. Yes. Yes, I would ask that they give me mercy.

MR. WILLETT: That's all the questions I have, Your Honor.

BY THE COURT: Mr. Morris?

MR. MORRIS: I just have one question for Mr. McCartney.

CROSS EXAMINATION

BY MR. MORRIS:

Q. Arnold, why didn't you think about your son, your baby, when you were doing all this?

A. Sir, I had a lot to drink that night and I just snapped, I mean I thought I was losing my wife and, you know, and she was the love of my life, you know, and I didn't mean for anybody to get hurt. It was just a stupid mistake and that is all it was.

MR. MORRIS: I don't have any further questions.

WITNESS: I'm going to tell you something else. I would have rather- when the gun went off, I would have rather that it shot me than her.

BY THE COURT: You may step down.

WHEREUPON, the witness stepped aside.

BY THE COURT: Do you have any other witnesses?

MR. WILLETT: No further witnesses, Your Honor.

BY THE COURT: Now, I've not excluded any witnesses, you understand that?

MR. WILLETT: Yes, sir, we have no further witnesses.

> BY THE COURT: Again. I say for the record, I have not excluded you on any other witnesses. You can bring them on if you want to.
>
> MR. WILLETT: I understand, Your Honor. May we have just a minute? Nothing further, Your Honor.

(Trial Tr., at 423-32) (App., at 128-137).

Following this exchange, the Court instructed the jury and sent them to deliberate. No additional witnesses were presented, and no argument was made by either party. Following approximately twelve minutes of deliberation, the jury returned a verdict declining to recommend mercy. (Trial Tr., at 432-35) (App., at 137-140). The Petitioner was, accordingly, sentenced to life in prison without the possibility of parole.

His trial counsel, Steven Nanners, Esq., and Dennis Willett, Esq., undertook a direct appeal on the Petitioner's behalf, in *State v. McCartney*, 228 W.Va. 315, 719 S.E.2d 785 (2011). In that appeal, the Petitioner assigned error to numerous of the Circuit Court's rulings, including the following issue that is relevant to this appeal:

> 5) not affording the petitioner the opportunity to present a closing argument during the "mercy" phase of the trial[.]

Id., 719 S.E.2d at 791. The Supreme Court of Appeals of West Virginia found that, contrary to the Petitioner's assertion on direct appeal, the Petitioner had not been denied argument during the mercy phase of his trial. Instead, he had not sought it. *Id.*, 719 S.E.2d. at 798-99.

Following the resolution of his direct appeal the Petitioner filed a petition for writ of certiorari in this Court, *McCartney v. West Virginia*, at Docket No. 11-10105, which was denied. He then filed a pro se petition for writ of post-conviction habeas corpus, and supporting memorandum and exhibits. (App., at 91-175). The Petitioner asserted several issues including the issue presented herein: that his trial counsel provided ineffective assistance of counsel during the mercy phase of his bifurcated trial. He asserted that it was improper for trial counsel

to fail to call any character witnesses on his behalf; that the line of questioning that trial counsel conducted upon the Petitioner was harmful to him because it simply reiterated the circumstances of the crime rather than any aspect of his character that would tend to mitigate punishment; and that trial counsel failed to present any evidence of Petitioner's beneficial and productive activities while incarcerated. (App., at 101-109). In support of this contention, the Petitioner attached as exhibits to his petition ten letters that were composed by ten individuals who could have testified as character witnesses (App., at 147-161), and numerous certificates showing that he had been enrolled in beneficial classes during his pretrial detention. (App., at 163-175).

Following the submission of the pleadings in the state habeas proceedings, the parties came to an agreement in which the prosecutor recognized that the Petitioner had received substandard representation, and suggested the resolution of the case by modifying the Petitioner's verdict to life with mercy. (App., at 65). However, the Circuit Court refused to do so and directed the parties to proceed to an evidentiary hearing. (App., at 65).

At the first evidentiary hearing on the Petition, an expert forensic psychiatrist, Dr. Bobby Miller, opined concerning the Petitioner's probable mental state at the time of the killing (an issue not specifically germane to the question presented in the instant Petition). At that same hearing, the Petitioner also propounded the testimony of Attorney Jerry Blair, as an expert in criminal defense. He opined in his testimony, *inter alia*, that had trial counsel to obtained a diminished capacity evaluation, there was a reasonable probability that the outcome of the proceeding would be different. He also opined that trial counsel's professional conduct fell below an objective standard of reasonableness. (App., at 65).

A second evidentiary hearing was held on January 25, 2019. At this hearing, the Circuit Court heard the testimony of Mr. Nanners and Mr. Willett, as well as the Petitioner himself.

Trial counsel were asked extensively about their investigation, strategy, and other motivations and circumstances surrounding the preparation for and events of the trial, including testifying concerning a supposed agreement with the prosecutor not to put on any witnesses other than the Petitioner in exchange for the State withholding its own witnesses at the mercy phase. The Petitioner himself testified about the truncated preparation for the mercy phase, and the availability of character witnesses and other mitigating evidence. (App., at 65). Following the submission of briefs, the Circuit Court announced its decision in a written order. (App., at 70-90). The Circuit Court denied relief, finding that neither *Strickland* prong was satisfied regarding the diminished capacity defense, as well as any of the other asserted pretrial and guilt-phase issues. Concerning the mercy phase, the Circuit Court found that:

> … based upon the totality of the circumstances, Trial Counsel's performance during the mercy phase of trial was wholly inadequate. Trial Counsel failed to prepare Petitioner to testify at the mercy phase of trial, failed to prepare any witnesses to testify on Petitioner's behalf, and failed to ask the jury for mercy for their client. Trial counsel claims the decision was made not to give an opening or closing statement based upon their agreement with the Prosecutor that Petitioner would be the only testimony and evidence presented at the mercy phase of trial. This "agreement" was not memorialized in writing or put on the record, leaving the details a mystery. Even if the failure to make an opening or closing statement was by some agreement, this Court concludes that it is not a reasonable strategy to fail to request mercy on behalf of your client.
>
> The second (2nd) prong of *Strickland* requires Petitioner prove "... that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). While this seems an impossible standard for a reviewing court to find, without replacing its judgment for the judgment of the jury, in this case the Court is obliged nonetheless to make an analysis. While the Court in *State ex rel. Shelton v. Painter*, 221 W. Va. 578, 655 S.E.2d. 794 (2007), found ***comments made by counsel*** could prejudice a Defendant with regard to the mercy phase, the Court was silent on Counsel's ***failure to comment.***

> In the present case, there has been no evidence presented that counsels [sic] failure to argue either in opening or closing of the mercy stage would significantly change the outcome of the mercy phase. This Court is unaware of any additional information that would have been adduced at trial in this matter, which could be have been [sic] used as a verbalization of a request for mercy and that would have created a "reasonable probability" of a different outcome in this matter. None was made a part of the Writ of Habeas Corpus in this matter. Much was made of the Petitioner's progress while incarcerated since his conviction and subsequent incarceration, but this is not relevant to this Court's analysis on this issue.
>
> In *State ex rel. Shelton*, the Court concluded "... defense counsel's closing argument contained no meaningful plea for mercy..." and found the second (2nd) prong of Strickland "satisfied" *Id.* At 586, 802. However, the Court in *State ex rel Shelton* looked at the totality of the circumstances above and beyond the lack of a mercy plea to conclude the second (2nd) prong of Strickland satisfied. Here the totality of the circumstances do not weigh as heavily toward satisfying the second (2nd) prong of *Strickland*, therefore this Court **FINDS** the second (2nd) prong of *Strickland* is not satisfied.
>
> Petitioner argued on appeal that he was not permitted the opportunity to give a closing argument, however, the West Virginia Supreme Court of Appeals found that counsel for the Petitioner could have made a closing argument, ***but chose not to*.** *State v. McCartney*, 228 W.Va. at 329, 719 S.E.2d 785 at 799 (2011). Therefore, this Court **FINDS** counsel's failure to address the jury and make a meaningful plea for mercy on Petitioner's behalf to not be grounds for *habeas* relief.

(App., at 85-87 [emphasis in original]).

The Petitioner appealed that order to the Supreme Court of Appeals of West Virginia. That Court dispensed with the Petitioner's mercy phase claims as follows:

> Turning to petitioner's argument that his counsel was ineffective during the mercy phase of his trial, we likewise fail to find that the circuit court erred in denying his writ of habeas corpus. As to this issue, petitioner argued that his counsel were ineffective because they did not call any witnesses and they failed to make a meaningful plea for mercy on his behalf. Due to the overwhelming strength of the evidence presented against petitioner during the guilt phase, it is not reasonably probable that the result would have been different if counsel had called

> witnesses during the mercy phase. Moreover, consistent with the circuit court's order, although petitioner's counsel did not make a plea for mercy, the lack of this argument likewise would not have changed the jury's recommendation of no mercy due to evidence presented at trial as to the circumstances surrounding the murder. Thus, this assignment of error is without merit.

McCartney v. Ames, No. 20-0242 at *6 (W.Va. June 23, 2021) (memorandum decision). (App., at 68). Two justices (Hutchison and Wooton) concurred in the judgment but would have granted oral argument. (App., at 69).

The Petitioner then sought a petition for rehearing, which was denied, but which Justice Hutchison would have granted. The petition for rehearing asserted, *inter alia*, that in the interim since briefing, the Seventh Circuit had held[1] that the failure to advocate in a punishment phase should be assessed under the *Cronic*[2] standard.

The Petitioner then sought federal habeas relief from his conviction in the United States District Court for the Northern District of West Virginia. The Magistrate issued a Report and Recommendation (App., at 16-63), which advised the District Court to dismiss the petition, to which the Petitioner timely objected. Following the receipt of those objections, and the State's response thereto, the District Court entered an order adopting the Report and Recommendation and dismissing the action (App., at 7-15). The Petitioner filed a motion to alter or amend judgment, which requested relief on the merits, and in the form of a grant of a certificate of appealability, and that motion was denied as well (App., at 5). Subsequently, the Petitioner filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit, whereby the Petitioner attempted to obtain a certificate of appealability. The Fourth Circuit denied relief, and the Petitioner now files the instant Petition for Writ of Certiorari to review the judgment denying a certificate of appealability. (App., at 1-4).

1 *Lewis v. Zatecky*, 993 F.3d 994 (7th Cir. 2021).
2 *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

ARGUMENT AMPLIFYING REASON FOR ALLOWANCE OF THE WRIT

Pursuant to Rule 10(c) of the Rules of the Supreme Court of the United States, the Petitioner asserts that the United States Court of Appeals for the Fourth Circuit, has decided an important question of federal law raised in this petition in a manner which is in conflict with relevant decisions of this Court.

The Court of Appeals erred, as the District Court erred, in failing to grant a certificate of appealability on the Petitioner's mercy phase claim. The Petitioner was effectively deprived of a mercy phase by the conduct of his trial counsel. No argument for mercy was made by his counsel whatsoever. Available mitigation evidence and character witnesses were ignored. The Petitioner asserts that the conduct of his counsel constitutes structural error per *Cronic*, but even under the less favorable *Strickland* standard for ineffective assistance claims, only an unreasonable application of federal law to the facts of this case, or an unreasonable interpretation of the factual record, could deprive the Petitioner of relief under either standard. The state courts correctly determined that trial counsel's conduct satisfied the first prong of *Strickland*, yet relied upon specious reasoning to determine that the Petitioner was not prejudiced. The District Court observed that the mitigation evidence that could have been offered may have caused the jury to pause before withholding a recommendation of mercy, but incorrectly determined that the weight of the evidence during the guilt phase obviated any potential prejudice during the mercy phase. This conclusion is apparently without precedent.

In this case, the West Virginia state courts, and by extension the District Court and Court of Appeals, have unreasonably applied the precedent of the Supreme Court of the United States in *Strickland, Cronic*, and *Wiggins v. Smith*, 539 U.S. 510 (2003), by failing to find prejudice or structural error relating to the Petitioner's mercy phase claim of ineffective assistance of

counsel. In addition to the unreasonable application of those cases, the Petitioner has asserted an unreasonable determination of the facts in light of the evidence, depriving the state court judgment of AEDPA deference. *Wood v. Stirling*, 27 F.4th 269, 276 (4th Cir. 2022). This Court should grant a certificate of appealability.

As the Fourth Circuit noted, this Court has described the standard to be applied to federal habeas petitions arising from state court convictions, applying the highly deferential lens mandated by the Antiterrorism and Effective Death Penalty Act ('AEDPA'), 28 U.S.C. § 2254(d):

> As the Supreme Court recently underscored in its unanimous opinion in *Harrington v. Richter*, [562] U.S.[86], 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), AEDPA deference helps to ensure "confidence in the writ and the law it vindicates." Id. at 780. We may grant habeas relief on claims adjudicated on their merits in state court only if that adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Cummings v. Polk*, 475 F.3d 230, 237 (4th Cir.2007) (internal quotation marks omitted).
>
> "A state court's decision is contrary to clearly established federal law 'if the state court arrives at a conclusion opposite to that reached by th[e Supreme] Court on a question of law' or 'confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at' " an opposite result. *Lewis*, 609 F.3d at 300 (alteration in original) (quoting *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). Further, a state court unreasonably applies federal law when it " 'identifies the correct governing legal rule from th[e] Court's cases but unreasonably applies it to the facts of the particular ... case,' " or " 'unreasonably extends a legal principle from [the Court's] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.' " Id. at 300–01 (alteration in original) (quoting *Williams*, 529 U.S. at 407, 120 S.Ct. 1495). Stated differently, to obtain federal habeas relief, "a state prisoner must show that the state court's ruling on the claim being presented

> in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 131 S.Ct. at 786–87.

Decastro v. Branker, 642 F.3d 442, 449 (4th Cir. 2011).

The Petitioner's grounds for relief sound in ineffective assistance of counsel. As this Court has noted:

> To succeed on an ineffective-assistance claim, a petitioner must show that (1) "counsel's performance was deficient"; and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Performance is deficient if it falls below "an objective standard of reasonableness," which is defined by "prevailing professional norms." *Id*. at 688, 104 S.Ct. 2052. Prejudice means there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694, 104 S.Ct. 2052. And a reasonable probability is one "sufficient to undermine confidence in the outcome." *Id*.

Wood 27 F.4th at 276.

The Petitioner also asserts that his mercy phase claim implicates the standard announced in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), concerning which the Fourth Circuit has observed this Court's holdings as follows:

> In *Cronic*, the Court reiterated the general *Strickland* rule and also provided that "[t]here are ... circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658, 104 S.Ct. 2039. The Court identified three distinct situations in which a presumption of prejudice is appropriate: First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." *Id*. at 659, 104 S.Ct. 2039. Second, prejudice is presumed if there has been a constructive denial of counsel. *Id*. This happens when a lawyer "fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." *Id*. Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any

> lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id*. (citing, as an example, *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

United States v. Ragin, 820 F.3d 609, 618 (4th Cir. 2016).

The Fourth Circuit has also correctly cited this Court in articulating the standard relating to the grant of a certificate of appealability:

> A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see *Buck*, 137 S.Ct. at 773. The petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (citation and internal quotation marks omitted), or that "the issues presented are adequate to deserve encouragement to proceed further, " *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Blackwell v. Bishop, No. 22-6155 *18 (4th Cir. April 29, 2022).

The Petitioner asserts that the state courts, and ultimately the District Court and Court of Appeals, unreasonably applied the *Cronic* standard, or in the alternative, the *Strickland* standard, regarding trial counsels' conduct surrounding the mercy phase of the Petitioner's trial. The most clear and obvious deficiency of trial counsel, as asserted in the state courts, is that they did essentially no preparation, either in direct preparation of the Petitioner to testify on his own behalf, nor in assessing potential character witnesses that could testify affirmatively for the Petitioner, during the mercy phase. Moreover, and perhaps most importantly, it is obvious that trial counsel prepared no argument, and made no argument on the Petitioner's behalf. Even if trial counsel's description of the agreement with the State not to present witnesses is to be credited, nothing in the proffered description of the agreement would have limited counsel from making a closing argument. It is clear from the trial record that there was only a sixteen minute

recess between the guilt phase and the mercy phase, some of which was apparently taken up by an off-the-record bench conference. (App., at 130-131). That period of time constitutes the entire probable period of preparation for the Petitioner's testimony.

The underlying record indicates that the mercy phase of the proceeding entailed brief testimony by the Petitioner himself, no character or expert witnesses on his behalf, and no argument whatsoever, followed with the return of a recommendation of no mercy by the jury. (App., at 127-145). The utter brevity of direct examination of the Petitioner, the absence of any character witnesses, and the missing argument on mitigation are again indicative of trial counsel's fatal failure to investigate the circumstances of this case. It is clear from the nature of the Petitioner's testimony that he had not been meaningfully prepared to testify.

It is also clear that under state law, the Petitioner had the right to have the last argument made on his behalf prior to the jury's deliberation. *State v. McLaughlin*, 226 W.Va. 229, 700 S.E.2d 289 (2010). The testimony of Mr. Nanners and Mr. Willett gives no insight into any strategic decision based on an investigation that could justify the decision not to offer argument or evidence in mitigation beyond the Petitioner's own scantly-prepared testimony. Trial counsel's waiver of this right on behalf of the Petitioner cannot be viewed in any other light than a failure to provide competent, professional assistance to the Petitioner when the stakes were highest.

The habeas court, the state Supreme Court by extension, and ultimately the District Court and Fourth Circuit all relied on outright incorrect determinations to deny relief – factual findings that rise to the level of "an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding" pursuant to 28 U.S. Code § 2254(d)(2). First, the Circuit Court found that the Petitioner had not described any information that could have

been offered in mitigation, specifically stating that "[n]one was made a part of the Writ of Habeas Corpus." (App., at 86). This is just flatly wrong because the Petitioner offered written statements of 10 potential character witnesses in his original pro se petition. (App., at 147-161). The Petitioner also offered numerous certificates, as an exhibit to his original pro se petition, showing the beneficial and rehabilitative work that he was undertaking *during pretrial detention*. (App., at 163-175). Yet, wholly incongruously, the Circuit Court stated: "Much was made of the Petitioner's progress while incarcerated since his conviction and subsequent incarceration, but this is not relevant to this Court's analysis on this issue." (App., at 86). The dates on the certificates are easily legible. They are from before the trial, which was held in February of 2010. The certificates are all dated 2009. (App., at 163-175). This is the sort of "factual finding" that is utterly unreasonable in light of the evidence in the state court proceeding.

Furthermore, had trial counsel undertaken more than sixteen or so minutes of preparation for the Petitioner to testify – sixteen minutes which immediately followed him hearing the jury find him guilty of first degree murder – then it would have been possible for the Petitioner to testify about his rehabilitative work in the jail, his family life, his role in the community, his other pursuits; anything at all to present any side of the Petitioner in a mitigating manner.

The Circuit Court was certainly correct to find that the mercy phase conduct of trial counsel satisfied the first prong of *Strickland*. However, the reasoning for withholding relief on the prejudice prong is baffling, as is the state Supreme Court's subsequent failure to afford relief on appeal. The Circuit Court cited to *State ex rel. Shelton v. Painter*, supra, where the West Virginia Supreme Court's relevant holding was "defense counsel's closing argument contained

no meaningful plea for mercy" in finding the prejudice prong satisfied. (App., at 85-86). Then, when examining the instant case, in which counsel made no plea for mercy whatsoever, the Circuit Court took the position that the relevant distinction to be drawn from *Shelton v. Painter*, is that while "***comments made by counsel*** could prejudice a Defendant with regard to the mercy phase, the Court was silent on Counsel's ***failure to comment***." (App., at 86-87). This conclusion strains reason to the absolute breaking point. Every single hypothetical mercy phase in which counsel fails to argue at all falls within the universe of arguments in which no meaningful plea for mercy is made. The Petitioner respectfully requests that this Court decline to ratify the illogical legal conclusion of the state courts.

The state Supreme Court's decision is also "contrary to" or "unreasonably applies" the holding of *Wiggins v. Smith*, 539 U.S. 510 (2003), in which this Court overturned this Court's denial of federal habeas relief when trial counsel had failed to sufficiently investigate mitigation factors that had a reasonable probability of changing the outcome at the penalty phase. In *Wiggins,*[3] trial counsel were shown to have performed an inadequate investigation of mitigating factors for sentencing, including physical and sexual abuse suffered by Wiggins as a child. *Wiggins* is notable in light of the instant case for two significant reasons. First, it is clear that the Petitioner's trial counsel were unprepared for, and had not sufficiently investigated, the Petitioner's potentially mitigating mercy phase evidence. The actual preparation appears to solely entail sixteen minutes between the verdict and the mercy phase. (App., at 130-131). The record reflects that numerous witnesses would testify on his behalf, as well as beneficial rehabilitative actions that the Petitioner had taken while he was in pretrial detention. None of this potentially mitigating evidence was made known to the jury, while the identity of the

3 *Wiggins* is a death penalty case originating in Maryland state courts, and thus the specific mitigating factors assessed by this Court were shaped by the law governing that particular process.

supposed person who might testify against the Petitioner (counsel's proffered justification for the abdication of mercy phase advocacy) could not even be identified.

Wiggins is also relevant because of the light it sheds on the controlling "unreasonable determination" standard. This Court found the Maryland Court of Appeals to have made "an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding" pursuant to 28 U.S. Code § 2254(d)(2) because it incorporated facts that were found subsequently found to be incorrect. *Wiggins*, at 528.

In this case, as discussed above, the Circuit Court predicated its prejudice assessment on a patently untrue factual finding that went entirely unaddressed by the state Supreme Court in its memorandum decision. The Circuit Court claimed that the Petitioner had not described any information that could have been offered in mitigation, specifically stating that "[n]one was made a part of the Writ of Habeas Corpus." (App., at 86). This is, of course, wrong, because in his petition, the Petitioner specifically attached affidavits and certificates of precisely the sort of mitigating evidence that should have been offered at sentencing. (App., at 147-161). The Circuit Court was similarly wrong that the Petitioner was trying to offer evidence relating to his post-conviction rehabilitation (App. Vol. 1, at 184) when, in fact, the information proffered as mercy-phase evidence related to pre-trial incarceration, and would have been available during the mercy phase. (App. Vol. 1, at 163-175).

The Report and Recommendation adopted by the District Court fails to discuss the certificates of rehabilitative programming that were appended to the initial pro se state habeas petition, and accordingly fails to contend with the fact that the habeas court mischaracterized the record by incorrectly stating that the certificates were irrelevant on the grounds that they were earned between trial and the filing of the habeas, when in reality, they were all earned pre-trial.

The Report and Recommendation also discusses the affidavits (also appended to the original *pro se* habeas petition), but mischaracterizes them, and wrongly degrades their importance, as being only from "friends and family" while in reality some of them came from other neutral members of the community, including teachers like Sharon Spaur and Cathy Posey Erler. (App., at 44, 47). The Petitioner is entitled to have his claims judged based on the actual record, and not a misstatement of the record, whether by the state courts or the federal courts.

Another issue regarding which the state courts' holdings were an unreasonable application of *Strickland* (asserted in the alternative to the *Cronic* standard) is the idea that because the evidence during the guilt phase was so overwhelming, prejudice cannot be shown in the mercy phase. This holding conflicts with federal precedent from a variety of circuits, including in *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995); and *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1999), both of which specifically held that the strength of the prosecution's evidence during the guilt phase does not excuse a failure to mitigate at sentencing. In *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), the lawyers representing the defendant "made virtually no attempt to prepare for the sentencing phase of the trial until after the jury returned its verdict of guilty." *Id.*, at 1207. The Sixth Circuit found that "[t]his inaction was objectively unreasonable. To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available." *Id.* Like in *Glenn*, the Petitioner's counsel failed to have a mercy case ready for presentation after the guilty verdict, spending only sixteen minutes preparing the Petitioner for this critical proceeding.

Similarly, in *Austin v. Bell*, 126 F.3d 843 (6th Cir. 1997), the Sixth Circuit held that trial counsel's failure "to investigate and present any mitigating evidence during the sentencing phase so undermined the adversarial process that [his] death sentence was not reliable." *Id.*, ar 848.

In that case, trial counsel did not present any mitigating evidence "because he did not think that it would do any good." *Id.* The Court sustained his claim for ineffective assistance of counsel at the sentencing phase, based, in part on the fact that "given that several of Austin's relatives, friends, death penalty experts, and a minister were available and willing to testify on his behalf, this reasoning does not reflect a strategic decision, but rather an abdication of advocacy." *Id.*, at 849.

Furthermore, the suggestion that the jury had found "malice aforethought" as a reason to think there was no probability of a different outcome in the mercy phase (App., at 42) is illogical, as malice aforethought has by necessity already been found in any case of premeditated murder that proceeds to a mercy phase. This is an unsustainable interpretation of prejudice under *Strickland*, as it would be impossible to ever do anything prejudicial in a mercy phase. Whether or not malice exists is a determination for the guilt phase, not the mercy phase.

The Report and Recommendation adopted by the District Court failed to contend with the Petitioner's argument that the following reasoning of the state courts – in determining that the prejudice prong of *Strickland* was not violated during the mercy phase – was unreasonable and unsustainable. As stated by the habeas court:

> The second (2nd) prong of *Strickland* requires Petitioner prove "... that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Stickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). While this seems an impossible standard for a reviewing court to find, without replacing its judgment for the judgment of the jury, in this case the Court is obliged nonetheless to make an analysis. While the Court in *State ex rel. Shelton v. Painter*, 221 W. Va. 578, 655 S.E.2d. 794 (2007), found ***comments made by counsel*** could prejudice a Defendant with regard to the mercy phase, the Court was silent on Counsel's ***failure to comment***.

(App. Vol. 1, at 183-84).

The actual legal standard in *Shelton* is whether "defense counsel's closing argument contained no meaningful plea for mercy" which clearly encompasses any scenario in which no plea is made whatsoever. It is also clearly within the universe of violations contemplated by *Wiggins*, in which a mere failure to investigate mitigating factors, let alone failure to make any plea for mercy, was deemed prejudicial.

While the Petitioner's state habeas appeal was pending, the Seventh Circuit held that a failure to put on mitigating evidence at sentencing constitutes a violation not under the *Strickland* standard, but under the structural error standard announced in *Cronic*. Under the *Cronic* standard, when a counsel "entirely fails to function as a client's advocate[,]"[4] prejudice is presumed. In *Lewis v. Zatecky*, 993 F.3d 994 (7th Cir. 2021), the Seventh Circuit recited the following fact pattern, in which, as here, counsel entirely failed to argue on behalf of his client at the sentencing phase:

> The problems that bring Lewis before us today arose at the sentencing phase. Here is how the Indiana Court of Appeals described [trial counsel's] assistance to Lewis at that critical point:
>
> "Judge I'm going to defer to Mr. Lewis if he has any comments. I don't have anything to add." Sentencing Transcript at 23–24. This is the sum total of trial cousel's participation at Lewis's sentencing hearing, at which Lewis was being sentenced for two counts of felony murder and faced a maximum sentence of 130 years in prison. The trial court found no mitigating circumstances —none being asserted by the defense—and sentenced Lewis to the maximum aggregate sentence of 130 years in prison.
>
> *Lewis II*, ¶1.

Lewis, at 998.

In finding abandonment under *Cronic* under these facts, the Seventh Circuit concluded that counsel's conduct (or lack thereof) justified a new mercy phase. *Lewis*, at 1006.

4 *Florida v. Nixon*, 543 U.S. 175, 189 (2004).

The unmistakable similarity between the facts of this case and the facts of *Lewis* demonstrate why the Petitioner's case suggests that this Court should adopt a similar conclusion. The Petitioner does not believe that this Court has opined on this specific issue. In both *Lewis* and the Petitioner's case, there was *no* argument for mercy (either from a life sentence, or from an effective life sentence of 130 years). In both the instant case and *Lewis*, the attorney failed to put on, or even to try to put on, any mitigating evidence. In both cases, the attorney invited his client to speak, but failed to prepare his client to do so. Recall that the state habeas court found counsel's conduct at the mercy phase to breach the first *Strickland* prong. If the Seventh Circuit is correct, and *Cronic* is implicated under a fact pattern such as this, then a prejudice analysis does not even come into the picture. Trial counsel's "failure to comment" in favor of mercy noted by the Circuit Court in its final order below (App., at 86) does not somehow obviate a finding of prejudice; it necessitates a finding of prejudice via the structural error it creates.

For the foregoing reasons, this Court should grant the writ of certiorari, grant a certificate of appealability, reverse the judgment of the Court of Appeals, and remand to allow the Petitioner to present an appeal on the merits in the Fourth Circuit, or grant any other relief the Court deems just and proper.

Respectfully Submitted,

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