CAPITAL CASE

NO. 17-_____

In the

Supreme Court of the United States

DONNIE CLEVELAND LANCE,

PETITIONER,

v.

ERIC SELLERS, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

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March 29, 2018

CAPITAL CASE

QUESTION PRESENTED

In a series of decisions, this Court has provided guidance to lower courts evaluating an ineffective assistance of counsel claim in a capital case where trial counsel failed to provide effective representation during the sentencing phase. Lower courts have struggled to implement that guidance, especially when evaluating whether, as a result of the inadequate representation, the defendant was denied his constitutional right to an individualized determination of culpability. This petition presents an important question of whether the failure to conduct any investigation or offer any evidence of a capital defendant's significant mental health impairments at the penalty phase can be nonprejudicial. The questions presented are:

1. Whether it was objectively unreasonable for the Georgia Supreme Court to find no prejudice resulted from the failure of defense counsel to conduct any investigation and to present any mitigating evidence, including readily available and undisputed expert testimony that the defendant suffered from significantly diminished mental capacity constituting dementia at the time of the crime, when these failures deprived the jury of mitigating evidence that was essential to an individualized determination of the defendant's culpability.

2. Whether prejudice must be presumed in a death penalty case when defense counsel fails to conduct any investigation of potential mitigating evidence, fails to offer any evidence during the

penalty phase, and fails to subject the state's penalty phase witnesses to any cross-examination, thereby undermining the adversarial system and depriving the defendant and the fact-finder of any meaningful opportunity to conduct an individualized determination of the defendant's culpability.

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of the petition. Petitioner in this Court, Petitioner-Appellant below, is Donnie Cleveland Lance. Respondent in this Court is Eric Sellers, in his official capacity as Warden of the Georgia Diagnostic & Classification Prison.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Donnie Cleveland Lance respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's unpublished per curiam decision is reported at 706 F. App'x 565 and is reproduced in the appendix at Pet. App. 1. The unpublished order denying rehearing is reproduced in the appendix at Pet. App. 77.

The unpublished order of the district court denying habeas relief is reproduced in the appendix at Pet. App. 27.

The opinion of the State habeas court granting Lance a new trial on sentencing as a result of the ineffective assistance of trial counsel is reproduced in the appendix at Pet. App. 101.

The opinion of the Georgia Supreme Court reversing the state habeas court's grant of habeas relief is reported at 286 Ga. 365 (2010) and is reproduced in the appendix at Pet. App. 79.

JURISDICTION

The Eleventh Circuit entered judgment on August 31, 2017. Pet. App. 1. It denied a petition for rehearing and rehearing en banc on October 31, 2018. Pet. App. 77. On January 19, 2018, Justice Thomas extended the time within which to file a petition for writ of certiorari to and including March 30, 2018. *See* No. 17A759. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Donnie Cleveland Lance faces the death penalty because, through actions and omissions of his trial counsel, he was denied his Sixth Amendment right to effective assistance of counsel at the sentencing phase of his trial. Petitioner's sole trial counsel conducted *no* investigation into possible mitigation evidence and, accordingly, did not offer any evidence during the sentencing phase, including readily available evidence that Petitioner suffered from a significantly impaired mental condition amounting to dementia at the time of the crime, and other mitigation evidence. Pet. App. 25. Nor did counsel ask any questions of the State's sentencing phase witnesses. *Id.* As a result, the state's death penalty case was not subjected to meaningful challenge through the adversary process, and Petitioner was denied the individualized determination of his culpability to which he was constitutionally entitled.

A. The Trial

Petitioner was convicted in the Superior Court of Jackson County, Georgia, for the November 1997 murder of his former wife and her boyfriend. The Jackson County Sheriff's Office arrested Petitioner within hours of the crime. Despite the immediate and exclusive focus on Petitioner, the sheriff found no substantial physical evidence connecting him to the murders. Pet. App. 148-149, 235-236, 253-258. No murder weapon was found. And despite the brutal nature of the murders, no blood was found on Petitioner, in the car the State said he drove to the crime, or on any of his clothes. *Id.*

The State identified over 140 potential fact witnesses (many relevant only to other alleged bad acts) and six expert witnesses (to tie together its circumstantial evidence case) for the trial. Pet. App. 4-5, 246-247. Overwhelmed, Petitioner's solo trial counsel asked the trial court to appoint a second counsel to focus on the sentencing phase. Pet. App. 35-36, 272-273. This request was denied. *Id.* Petitioner's trial counsel also sought funds to hire expert witnesses to challenge the multitude of experts hired by the State. *Id.* Except for a small amount of funds used to hire a private investigator, that request was also denied. *Id.*

By his own admission, Petitioner's trial counsel devoted one hundred percent of his time and effort to preparing Petitioner's innocence defense, failing to conduct any investigation for the sentencing phase of trial. Pet. App. 232-233, 238-240, 242-243, 265, 272-273. Trial counsel's shortcomings related to sentencing are undisputed and overwhelming: counsel did not seek *any* assessment of Petitioner's mental condition, despite the red flags showing that he had suffered multiple head traumas in the years before the crime, including being shot in the back of the head; and counsel did not investigate or develop *any* other evidence of mitigating factors from Petitioner's family and friends. Pet. App. 170-171, 238-240. As the federal district court explained, Petitioner's counsel "basically did nothing to prepare for the penalty phase mainly because the trial court had refused to appoint co-counsel." Pet. App. 41.

The jury returned guilty verdicts against Petitioner on the murder charges late in the morning

of June 23, 1999, and the trial court proceeded immediately to the sentencing phase that same day, after a break for lunch. Pet. App. 223-224. In the sentencing phase, the State made an opening statement and called six witnesses to discuss the aggravating factors that it contended supported the death penalty. Pet. App. 220-223. Having conducted no investigation for the sentencing phase, Petitioner's counsel waived his opening statement and conducted no cross-examination of any of the State's witnesses. *Id.* Then, Petitioner's counsel called no witnesses and offered no mental health or mitigation evidence of any kind. Pet. App. 25, 220-223.

In its closing argument in the sentencing phase, the State argued that Petitioner had carefully planned and coldly executed the murders, that he had intentionally covered up the evidence of his involvement, and that he would have gotten away with the brutal murders if the jury, aided by the "unseen hand of God," Pet. App. 225-226, had not seen through his scheme. Having failed to investigate Petitioner's severely diminished mental capacity, which should have been obvious in light of his personal history, Petitioner's counsel had no facts to counteract the State's claims, and therefore offered a simple plea for mercy. The entire sentencing phase—evidence, argument, and charge—lasted approximately two hours. Pet. App. 223-224, 228-229, 220-223.

The jury sentenced Petitioner to death. On appeal, the Georgia Supreme Court affirmed the

guilty verdict and the death penalty imposed on Petitioner. Pet. App. 191.

B. The State Habeas Proceedings and Order for a New Trial on Sentencing

New counsel represented Petitioner at the state habeas proceedings following the denial of his direct appeal. The habeas proceedings focused on whether trial counsel's failure to investigate and present readily available evidence of Petitioner's mental impairments and dementia deprived him of effective assistance of counsel. To demonstrate what could have been available—and to contrast with the abject failure of trial counsel—Petitioner offered testimony from multiple expert witnesses that Petitioner had a borderline IQ and suffered from dementia due to multiple head traumas and alcohol abuse in the years before the crime. Pet. App. 174-176. The State offered testimony from its own expert neuropsychologist, who agreed that Petitioner had a borderline IQ and that his condition met the diagnosis of Dementia due to Multiple Etiologies under DSM-IV-R. *Id.* at 175. As the State's expert explained, if Petitioner "actually did commit the crime for which he was charged, his culpability for that offense would be affected by his brain dysfunction." *Id.* at 176. The State's expert also "acknowledged that evidence regarding a defendant's mental illness, just like the information available, but never presented in [Petitioner's] trial, is routinely provided in capital cases." *Id.*

After an extensive evidentiary hearing, the state habeas court issued a detailed opinion granting Petitioner a new trial on sentencing. *Id.* at 178-79.

The habeas court found that Petitioner's trial counsel "failed to present easily obtainable psychiatric mitigating evidence" that would have shown that Petitioner was "a 'borderline retarded' person who had trouble controlling his impulses, and who had significant cognitive impairments and dementia due to his abuse of alcohol, and head injuries from a gunshot wound, physical altercations, and car wrecks." *Id.* at 166-68. The habeas court found that "there was no strategic reason justifying trial counsel's decision to forego the investigation of the [Petitioner's] mental health" and that "[h]e simply failed to conduct the investigation that reasonable professional norms require." *Id.* at 173. The habeas court noted that "all of the mental health experts, including those employed by [the State], testified that [Petitioner] suffered from mental impairments that render [Petitioner] borderline mentally retarded, and all provided testimony that would have been extremely important for the jury to consider in determining the appropriate sentence." *Id.* at 174. Because the jury sentencing Petitioner had heard none of this evidence, the habeas court ordered a new trial on sentencing.

C. The State's Habeas Appeal

The State appealed the grant of a new trial on sentencing, and the Georgia Supreme Court reversed the state habeas court. Pet. App. 79. The Georgia Supreme Court did not find that any of the habeas court's factual findings were clearly erroneous and conceded that Petitioner's "trial counsel performed well below basic professional standards" by not preparing for the sentencing phase after his request

for co-counsel was denied. Pet. App. 83. But, then, without even discussing the diagnosis of dementia, which both the State and the defense's expert witnesses had agreed upon at the habeas trial, and which was central to the state habeas court's determination, the Georgia Supreme Court re-characterized the habeas court's findings that Petitioner suffered from "significant mental impairments" due to "traumatic brain injuries and alcohol abuse" as "new evidence of subtle neurological impairments." Pet. App. 92. The Georgia Supreme Court held that there was no prejudice from the failure to investigate and present this new evidence "as a matter of law." Pet. App. 83.

Both the district court and the Eleventh Circuit ultimately deferred to the Georgia Supreme Court's determination that there was no prejudice from the failure to adduce mental health evidence at the sentencing phase. The Eleventh Circuit explained that it did not find it "objectively unreasonable" for the Georgia Supreme Court to characterize the agreed-upon diagnosis of dementia as "new evidence of subtle neurological impairments." Pet. App. 17-18. After considering all of the evidence, the Eleventh Circuit found that the "Supreme Court of Georgia reasonably concluded that [Petitioner] did not suffer prejudice when [trial counsel] failed to introduce mental health testimony." Pet. App. 20.

While Judge Martin concurred in the Eleventh Circuit's decision based on the AEDPA deference standard, she did so only after explaining:

> Counsel's performance at the penalty phase of Donnie Lance's capital murder trial

> was unquestionably deficient. Trial counsel conducted no investigation into Mr. Lance's background or mental health. And at trial, counsel offered nothing in mitigation. As a result, the jurors that decided whether Mr. Lance should live or die never learned any facts that gave them a reason not to sentence him to death. The jury never heard that Mr. Lance had suffered from repeated head trauma, including the time he was shot in the head, and was brain-damaged as a result. Neither did the jury learn of his dementia or his borderline intellectual functioning. Because the jury did not know of Mr. Lance's mental impairments, it could not "accurately gauge his moral culpability." *Porter v. McCollum*, 558 U.S. 30, 41, 130 S. Ct. 447, 454 (2009). Had the jury heard the mitigating evidence uncovered during postconviction proceedings, there is, in my view, a "reasonable probability that at least one juror would have struck a different balance" between the aggravating and mitigating factors. *Wiggins v. Smith*, 539 U.S. 510, 537, 123 S. Ct. 2527, 2543 (2003).

Pet. App. 25. Judge Martin explained that the "'primary purpose' of the penalty phase of a capital trial is to ensure that the sentence is individualized 'by focusing on the particularized characteristics of the defendant.'" *Id.* And she noted that this process "doesn't work … when counsel fails to perform a constitutionally adequate mitigation investigation." Pet. App. 25-26. She thus agreed with the state habeas court that Petitioner had been prejudiced by

the failure of his counsel to perform any meaningful investigation or present any evidence. *See id.* But because she concluded that a fair minded judge could disagree, she concluded that AEDPA deference overrode her assessment of the prejudice in the trial.

The Eleventh Circuit denied Petitioner's motion for rehearing and rehearing *en banc*. Pet. App. 77

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Decision Conflicts With Clearly Established Law On Prejudice in Death Penalty Cases.

A. A Grant of Certiorari on this Issue is Warranted.

This case presents an important opportunity for the Court to clarify the prejudice prong of an ineffective assistance of counsel claim in a death penalty case. The Georgia Supreme Court's determination (and, through its deferential analysis, the Eleventh Circuit's) that Petitioner was not prejudiced "as a matter of law" by his counsel's total failure to investigate and present readily available mitigating evidence, including evidence of significant mental impairments, Pet. App. 82-84, was objectively unreasonable under this Court's prior decisions. It also frames a recurring problem in death penalty litigation—the application of *Strickland*'s "prejudice" standard to avoid dealing with the consequences of a failure of trial counsel to prepare and present a readily available mitigation case. *Strickland v. Washington*, 466 U.S. 668 (1984).

B. Counsel's Complete Failure to Investigate or Present Any Evidence of Petitioner's Significant Mental Impairments Deprived Petitioner of the Right to an Individualized Determination of Culpability.

This Court has held that "the Constitution requires that 'the sentencer in capital cases must be permitted to consider any relevant mitigating factor,'" including evidence of a brain abnormality and cognitive defects. *Porter v. McCollum*, 558 U.S. 30, 42–43 (2009) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)). And the Court has explained, as both the state habeas court and Judge Martin noted in her concurrence below, that such evidence can be absolutely essential to the individualized determination of moral culpability to which a death penalty defendant is entitled.

There is no dispute that this right was lost in this case, where the jury heard none of the evidence regarding Petitioner's mental impairments, including the facts that he had a borderline IQ and suffered from dementia due to multiple etiologies at the time of the crime. Pet. App. 172-174. As in *Porter*, the evidence that a reasonable investigation would have revealed, "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test." *Rompilla v. Beard*, 545 U.S. 374, 393 (2005). Instead, as this Court held in *Rompilla*, the test is whether the mitigating evidence "'taken as a whole

might well have influenced the jury's appraisal of [Petitioner's] culpability.'" *Id.* (quoting *Wiggins*, 539 U.S. at 538). A reasonable probability is a probability "'sufficient to undermine confidence in the outcome.'" 545 U.S. at 393 (quoting *Strickland*, 466 U.S. at 694). In the context of counsel's failure to introduce any mitigating evidence, the test is whether "the undiscovered mitigating evidence taken as a whole, might well have influenced the jury's appraisal of [the defendant's] culpability." *Id.* (internal quotation marks omitted).

This case underscores the importance of not allowing the clear and substantial evidence of mitigating factors to be obscured by an after-the-fact determination that the evidence would not have mattered. Similar to the facts in *Williams v. Taylor*, 529 U.S. 362 (2000), the state habeas court's findings here show that the only fact finder who heard the testimony of Petitioner's expert witnesses in this case reached the determination that the "jury was inexcusably deprived of expert testimony regarding Petitioner's psychiatric disorders, history of alcohol abuse, and head trauma which was critical to informed deliberation as to sentence." Pet. App. 167-170. The state habeas court further explained that "all of the mental health experts, including those employed by the [State], testified that Petitioner suffered from mental impairments that render Petitioner borderline mentally retarded, and all provided testimony that would have been extremely important for the jury to consider in determining the appropriate sentence." Pet. App. 174. The state habeas court cited the numerous decisions of this Court, the Eleventh Circuit, and the Georgia

Supreme Court that supported its conclusion that "[i]n light of the strength of the mental health evidence offered at the habeas hearing, the Court further finds that there is a reasonable probability that, but for the deficiencies in trial counsel's performance, the outcome of the proceedings would have been different." Pet. App. 178.

The Georgia Supreme Court sought to avoid this conclusion not by finding that the state habeas court's factual findings were clearly erroneous, but instead by either ignoring or re-characterizing the facts. Most critically, the Georgia Supreme Court ignored that both the State and Petitioner's expert witnesses agreed that Petitioner's mental impairments were sufficient to qualify as Dementia Due to Multiple Etiologies under DSM-IV-R. The Georgia Supreme Court described the expert testimony as "new evidence of subtle neurological impairments," Pet. App. 92, re-characterizing the testimony that the state habeas court had found to be proof of "the significant mental impairments from which [Petitioner] suffers." Pet. App. 172. This re-characterization ignores that, by definition, a diagnosis of Dementia due to Multiple Etiologies is a significant mental impairment. As the state's expert witness confirmed, the diagnosis requires "the development of multiple cognitive deficits," each of which "cause significant impairment in social or occupational functioning and represent a significant decline from a previous level of functioning." Pet. App. 249-251.

For its part, the Eleventh Circuit suggested that the "Supreme Court of Georgia accepted the factual

findings of the superior court, but determined the legal question of prejudice *de novo* … which Georgia law requires." Pet. App. 20. But there is no explanation of how this can be reconciled with the Georgia Supreme Court's re-characterization of the actual mental health evidence as described by the state habeas court.

This problem of using a conclusory "no prejudice" statement as an antiseptic that washes away clearly deficient performance is common in death penalty cases. *See Williams v. Stephens*, 761 F.3d 561 (5th Cir. 2014) (affirming denial of habeas relief because the court found that trial counsel's allegedly defective performance in several respects did not prejudice petitioner); *Williams v. Davis*, 301 F.3d 625, 633 (7th Cir. 2002) (affirming denial of habeas relief because state supreme court's "conclusion that [the defendant] was not prejudiced by trial counsel's deficient performance was not an unreasonable application of *Strickland*"); *Cooks v. Ward*, 165 F.3d 1283, 1296 (10th Cir. 1998) (affirming denial of habeas relief because "counsel's substandard performance did not so undermine the proper functioning of the adversarial process that the sentencing proceeding cannot be relied on as having produced a just result."). It is time for this Court to clarify how the prejudice prong can in fact be applied and how, under the AEDPA, federal courts can evaluate a state court lack-of-prejudice finding in circumstances where trial counsel exhibited constitutionally deficient performance that deprived the jury of any information on which to conduct the individualized determination that the Constitution requires.

II. The Eleventh Circuit's Decision Conflicts with Controlling Supreme Court Law Regarding Presumption of Prejudice When Counsel, Who Failed to Conduct Any Investigation or Present Any Evidence, Was Functionally Absent From A Critical Stage of Trial.

A. The Eleventh Circuit's Ineffective-Assistance Analysis Conflicts With This Court's *Cronic* Decision.

This Court has long recognized that the Sixth Amendment right to effective assistance of counsel includes "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). The nature and extent of the investigation required at the penalty phase is usually measured against an "objective standard of reasonableness;" *Strickland*, 466 U.S. at 687-88, evaluated "under prevailing professional norms." *Id.* at 688*; see Wiggins*, 539 U.S. at 521. That objective standard ordinarily requires a reviewing court to undertake a two-step inquiry — first, whether trial counsel's performance was deficient and, second, whether the deficient performance prejudiced the defense. That is the analysis applied by the Eleventh Circuit and the Georgia Supreme Court in this case.

There are certain instances, however, where the breakdown in the system is so substantial that a prejudice finding is obvious and presumed. This Court has established, for instance, that when counsel abdicates his responsibility at a crucial stage

in the proceeding to subject the prosecution's case to the "crucible" of adversarial testing, the "process loses its character as a confrontation between adversaries [and] the constitutional guarantee is violated." *Cronic*, 466 U.S. at 656-57. In those circumstances, no further specific showing of prejudice is required; it is presumed from the failure of the adversarial system. *Id.* at 659 (relying on *Davis v. Alaska*, 415 U.S. 308, 318 (1974)). This right to a true adversarial process applies at each "critical stage of [a defendant's] trial" and the complete breakdown in the system is inherently prejudicial. *Id.* at 659.

The *Cronic* standard is limited to cases where there is a complete breakdown in the system. For instance, prejudice is not presumed when trial counsel challenges the prosecution's case but, at different points of the proceedings, provides arguably ineffective representation. *Bell v. Cone*, 535 U.S. 685, 697 (2002) (explaining that "unreasonable" tactical choices may cause counsel not to call particular witnesses or offer particular arguments and that *Cronic* does not apply where the challenge is "not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points"). As the Court held in *Bell*, the *Cronic* standard applies only "'if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.'" 535 U.S. at 696-97.

The line between reasonable tactical or strategic judgment and a complete breakdown of the adversarial process has led to confusion in the lower

courts. But, in this case, there can be no dispute that the adversarial process broke down at the critical phase of sentencing. Counsel conducted *no* investigation, offered *no* evidence, and questioned *none* of the State's witnesses during the sentencing phase. Pet. App. 25, 265, 272-273, 220-223. The only participation was through an abbreviated plea for mercy in closing argument that was not informed by any facts. It was as if trial counsel was not there and Petitioner was left entirely without representation. This is a complete breakdown of the sort recognized in *Cronic*. Under these facts, the Eleventh Circuit's decision to defer to the Georgia Supreme Court's finding of no prejudice "as a matter of law" clearly violates the *Cronic* standard.

B. The Eleventh Circuit's Analysis Opens A Conflict With A Decision Of The Sixth Circuit.

The Sixth Circuit recently decided a case with facts strikingly similar to this case, where a defendant's counsel did virtually nothing during the sentencing phase of the case. *Phillips v. White*, 851 F.3d 567 (6th Cir. 2017). Recognizing that "courts have repeatedly recognized that failure to investigate or present mitigating evidence at capital sentencing may constitute deficient performance" under *Williams v. Taylor*," 529 U.S. at 393, the *Phillips* court explained that "'[t]he sentencing phase is likely to be the stage of the proceedings where counsel can do his or her client the most good,'" *id.* at 576 (*quoting Coleman v. Mitchell*, 268 F.3d 417, 452 (6th Cir. 2001)). The Sixth Circuit applied *Cronic* to conclude that prejudice followed from the abdication

of counsel's responsibility to represent the defendant in sentencing.

Like Petitioner, Phillips was convicted of the first-degree murder of two individuals. Like Petitioner's trial counsel, Phillip's trial counsel conducted no investigation into penalty phase issues and presented no evidence at the penalty phase. In conducting the prejudice review, the Sixth Circuit distinguished Phillips' case from others noting that most cases where that court was asked to review ineffective assistance of counsel issues in penalty phase involved failure to investigate or present certain mitigating evidence rather than abdication of the duty. 851 F.3d at 577. Phillips' counsel, like Petitioner's counsel, had not just failed to investigate certain aspects of mitigation, but had abandoned his responsibility at the sentencing phase. As the Sixth Circuit noted, "When [trial counsel] neglected to conduct any mitigation investigation at all or present even existing evidence supporting statutory mitigating factors, he ceased functioning as counsel under the Sixth Amendment." *Id.* at 579.

Faced with these facts, which bear great similarity to the facts in Petitioner's case, the Sixth Circuit determined that the appropriate standard to apply was the *Cronic* presumption of prejudice. "We presume prejudice in this case because [trial counsel's] performance amounted to nonperformance; he essentially ceded the sentencing to the Commonwealth." *Id.* at 581.

Here, as in *Phillips*, Petitioner's trial counsel defaulted on his obligation to conduct any investigation into available mitigation evidence

before the trial, and therefore was in no position to test the prosecution's case. Trial counsel therefore offered no meaningful testing of the prosecution's case. Petitioner's trial counsel waived an opening statement, he put on no evidence, and he conducted no cross-examination of the State's witnesses. His perfunctory plea for mercy in closing argument was essentially unconnected with any evidence in the case, and clearly did not move the jury one iota. Under the test set out in *Cronic*, where "counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." 466 U.S. at 659. That was the case here, but the result reached by the Eleventh Circuit under the traditional two-prong test is in sharp conflict with the Sixth Circuit's result in *Phillips*.

It is critical that this Court address the proper standard to be applied to the "prejudice" prong of analysis in an ineffective assistance case where counsel fails to participate meaningfully in the sentencing phase of a trial due to a failure to investigate readily available facts, and a failure to present readily available mitigating evidence. Stated simply, where the adversarial process breaks down completely and the result is the imposition of the death penalty, prejudice should be presumed.

CONCLUSION

Because Petitioner was denied the individualized determination of culpability to which he was constitutionally entitled, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 29, 2018