

No. 17-1382

**In The
Supreme Court of the United States**

—◆—
DONNIE CLEVELAND LANCE,

Petitioner,

v.

ERIC SELLERS, WARDEN,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

—◆—
BRIEF IN OPPOSITION
—◆—

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**CAPITAL CASE
QUESTIONS PRESENTED**

1. In analyzing a claim under *Strickland v. Washington*, 466 U.S. 668 (1984), a court must “consider all the relevant evidence that the jury would have before it” – aggravating as well as mitigating. *Wong v. Belmontes*, 558 U.S. 15, 20 (2009). Did the Eleventh Circuit err in determining that the Georgia Supreme Court’s finding that Lance had failed to establish prejudice was a reasonable application of *Strickland* when the new evidence submitted in the state habeas proceedings was “not necessarily mitigating” and the aggravating evidence was “substantial”?
2. Should this Court grant certiorari to review a claim that was not raised or addressed by the federal court below; or alternatively, should this Court grant certiorari to review a holding that properly applied the *Strickland* standard instead of the standard announced in *United States v. Cronin*, 466 U.S. 648 (1984), given that counsel actively represented Lance’s interests throughout the trial?

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The decision of the Georgia Supreme Court in the criminal direct appeal is published at 275 Ga. 11 (2002) and is Petitioner's Appendix F.

The decision of the state habeas court is not published, but is included in Petitioner's Appendix E.

The decision of the Georgia Supreme Court reinstating Lance's death sentence is published at 286 Ga. 365 (2010) and is included in Petitioner's Appendix D.

The decision of the federal district court is not published, but is included in Petitioner's Appendix B.

The decision of the Eleventh Circuit Court of Appeals is unpublished but reported at 706 Fed. Appx. 565 (2017) and is included in Petitioner's Appendix A.



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in relevant part:

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

The Fourteenth Amendment, Section I, of the United States Constitution provides in relevant part:

No State . . . shall 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.

28 U.S.C. § 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

- (1) 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
- (2) 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.



INTRODUCTION

Petitioner, Donnie Cleveland Lance, presents two questions arising out of the Eleventh Circuit Court of Appeals' denial under 28 U.S.C. § 2254(d) of his claim that he received ineffective assistance of counsel at the sentencing phase of his death-penalty trial.

Lance's first question asks for error-correction on a factbound claim. He identifies no conflict of authority with respect to the Eleventh Circuit's application of *Strickland* under AEDPA, and disagreement with the Eleventh Circuit's conclusion that the Georgia

Supreme Court reasonably applied *Strickland* in holding that Lance had not established prejudice does not warrant this Court's review. Further, the Eleventh Circuit's decision is correct. Applying § 2254, the Eleventh Circuit rightly concluded that the Georgia Supreme Court's holding that Lance failed to show that he was prejudiced by trial counsel not presenting weak mitigating evidence in the sentencing phase of trial, particularly in light of the presence of strong aggravating evidence, was not contrary to clearly established precedent of this Court or based on an unreasonable determination of the facts.

Lance's second question is whether the Eleventh Circuit should have applied *United States v. Cronic*, 466 U.S. 648 (1984), and presumed prejudice when Lance's attorney did not present weak evidence in mitigation at the sentencing phase of trial. He also argues that the state court's failure to apply *United States v. Cronic*, 466 U.S. 648 (1984), creates a conflict among the circuits. This *Cronic* claim was not raised below and is not properly before the Court for review. In any event, *Cronic* does not apply because this is not a case "where the accused has effectively been denied counsel altogether" or "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." Instead, trial counsel made strategic decisions to prevent the introduction of additional aggravating evidence, made various objections, and argued against imposition of the death sentence in closing argument. The Georgia Supreme Court and the Eleventh Circuit

thus applied the correct legal standard, which is set forth in *Strickland*, not *Cronic*.

Lance fails to show how the Eleventh Circuit's denial of habeas relief conflicts with this Court's precedent or raises any other ground for certiorari review. The petition should therefore be denied.

◆

STATEMENT OF THE CASE

1. *Lance's crimes.* During the night of November 8, 1997, Petitioner Donnie Cleveland Lance began looking for his ex-wife Joy Lance. Pet. App. 28. Lance called Joy's father but was told that "Joy was not at home." *Id.* Very soon after, Lance left his home and headed towards the home of Butch Wood, Joy Lance's boyfriend. Pet. App. 3. Lance arrived at Wood's home, kicked in the front door, shot Wood twice with a shotgun, and then beat Joy to death. Pet. App. 80. Joy's face was "utterly unrecognizable." *Id.* Hours later, on the morning of November 9, 1997, Lance told a friend, Joe Moore, "both Joy Lance and Butch Wood were dead." Pet. App. 81. It was not until later in the day that Joy and Wood were found dead at Wood's home, killed "sometime between midnight and 5:00 am." Pet. App. 28.

In a search of Lance's shop, the police discovered boot prints matching "the imprint on Butch Wood's door" and an empty shoebox previously containing "shoes of the same type and size as those that made the imprints on Wood's door." Pet. App. 28-29. Police

also collected “an unspent shotgun shell that matched the ammunition used in Wood’s murder.” *Id.*

2. *Trial and direct appeal.* Lance was represented at trial by Richardson Brannon, an attorney with extensive capital litigation experience. Pet. App. 134. Brannon had the assistance of three paralegals, including one with capital litigation experience (*id.*), and an investigator who also had extensive law enforcement and death penalty investigation experience (*id.*).

In the guilt phase, counsel presented a defense focused on innocence. Pet. App. 6. Counsel presented an expert witness and “extensively cross-examined” the State’s expert witnesses. *Id.* Counsel also presented testimony by Lance’s uncle who told the jury he was with Lance during the time of the crime and testimony of other witnesses who corroborated Lance’s timeline. *Id.*

The State presented evidence of Lance’s “long history of horrific abuse against Joy,” which included “kidnapping, beatings with his fists, a belt, and a handgun, strangulation, electrocution or the threat of electrocution, the threat of burning with a flammable liquid and of death by a handgun and with a chainsaw, the firing of a handgun at or near her, and other forms of physical abuse.” Pet. App. 194. A number of witnesses testified that Lance “repeatedly threatened to kill Joy if she divorced him or was romantically involved with Butch, and that Lance had also beaten and threatened to kill Butch’s wife and several other persons related to Joy.”

Id. Testimony established that “Lance once inquired how much it would cost to ‘do away with’ Joy and Butch.” *Id.*

The State also introduced evidence from Towana Wood, Butch’s former wife, and Joe Moore concerning a prior and very similar invasion “of Butch’s home committed by Joe Moore and [Lance] in 1993.” Pet. App. 194-95. Lance invaded Wood’s home based, in part, on his belief “that Butch was romantically involved with Joy.” Pet. App. 195. In the prior incident, Lance, along with Joe Moore, “kicked in a door to the home, entered carrying a sawed-off shotgun, and loaded the chamber of the shotgun, and then fled only after a child in the home identified and spoke to Joe Moore.” *Id.*

Lance was convicted of “two counts of malice murder, two counts of felony murder, one count of burglary and one count of possession of a firearm during the commission of a crime.” Pet. App. 105.

For the sentencing phase of trial, counsel objected to potential jury charges, the form of the verdict, the admission of a prior conviction, and the admission of victim impact evidence, Resp. App. 3-17, 28, 34, 40, 45-47, and he “objected on hearsay grounds to the introduction of two letters written by Joy’s son after her death.” Pet. App. 214. Counsel chose not to cross-examine witnesses, and although trial counsel had an excellent rapport with Lance and his family, he strategically chose not to present witnesses to testify about Lance’s character. Brannon informed the trial court:

We're not going to call in the family members for the reason that if we put them on the stand and they tell about Donnie, he's a good guy, and the things that they know about him and then subject to cross-examination the specific bad acts that would be allowed, we'd be all afternoon hearing the same negative similar transaction and prior difficulty hearing that we've heard for three days. So, I'm not going to call family members to the stand.

Pet. App. 182.

In closing argument, trial counsel reasserted Lance's innocence and pleaded for Lance's life on behalf of his family and his children. Res. App. 62-69. He begged the jury not to leave the children without either parent (*id.*); he argued that he and Lance's family still believed in his innocence (*id.*); and that Lance's family and his children loved him (*id.*). After deliberations, the jury recommended a death sentence, and based on that binding recommendation, the trial court sentenced Lance to death. Pet. App. 7.

On direct appeal, Brannon continued representing Lance. Pet. App. 131. The Georgia Supreme Court affirmed the convictions and sentences, Pet. App. 217, and this Court denied certiorari review. Pet. App. 7.

3. *State habeas proceeding.* Lance filed his state habeas petition in 2003, represented by new counsel. Lance alleged, among other things, that trial counsel was ineffective in investigating and not presenting evidence of Lance's mental impairments during the sentencing phase of trial. Pet. App. 165-86. The state

habeas court concluded that Lance had established both prongs of *Strickland*, that he received ineffective assistance during the penalty phase, and vacated Lance's death sentence. Pet. App. 189.

4. *Georgia Supreme Court appeal.* On appeal, the Georgia Supreme Court "reversed and reinstated Lance's death sentence." Pet. App. 80.

The court agreed with state habeas court that counsel rendered deficient performance in failing to investigate Lance's background, but the court concluded that Lance failed to establish *Strickland* prejudice because there was not a reasonable probability of a different outcome even if counsel had investigated Lance's background and presented the mental health evidence presented in the state habeas court. Pet. App. 82, 84. The court first reasoned that the mental health evidence available to counsel at the time of the trial would not have led the trial court to grant funds for an "in-depth and extensive mental health evaluation." Second, the court determined that, even if trial counsel obtained this type of extensive examination, the "new evidence of subtle neurological impairments" would not have affected jury deliberations. Pet. App. 84, 92.

Starting with the question of whether the mental health information available to trial counsel would have "led reasonable counsel to seek a psychological evaluation," the court found "it doubtful" due to the "reasonableness of trial counsel's stated desire to prioritize his requests for funds for various experts." Pet. App. 85. The court also found that the trial court would

not have abused its discretion by denying the request for a psychological evaluation. *Id.* The court reasoned that the trial court could have made a determination that the information found from a psychological exam would fail “to show that the assistance of a psychologist was critical to Lance’s defense.” *Id.* The court stated, “Lance had already been examined in a psychological hospital and yet no obvious symptoms of impairment were noted other than Lance’s alcohol abuse and his failure to adjust to his divorce.” *Id.*

The Georgia Supreme Court further held that, even if the trial court had ordered a psychological examination, it would have been “extremely appropriate” for the trial court to first order “a general psychological screening rather than the extensive neuropsychological examination” Lance had in the state habeas proceedings. Pet. App. 85-86. “The absence of any reference to neuropsychological difficulties” in Lance’s hospital psychological exam and “the relatively mild nature of Lance’s mental neurological deficits” would have made it “unlikely that the trial court would have been informed through a general psychological examination of any possible significant neurological deficits.” Pet. App. 86. The court noted a psychological exam would have included an assessment of Lance’s intelligence; “however, none of the experts ha[ve] diagnosed Lance as falling within the generally-accepted definition of mental retardation.” *Id.* The Georgia Supreme Court ultimately concluded:

Given the multiple levels of unlikelihood at issue here – that reasonable counsel would seek

an evaluation, that the trial court would grant the request, that the initial evaluation would give any suggestion of a need for a full neuropsychological examination, and that the trial court would have ordered a full neuropsychological examination – we conclude that there is no reasonable probability that a reasonable investigation of Lance’s background by counsel would have led to his having access to the type of specialized neuropsychological testimony that Lance has presented in the habeas court.

Id.

The Georgia Supreme Court then conducted an alternative prejudice analysis that addressed whether presenting the additional mental health evidence would have, in reasonably probability, changed the outcome of the sentencing phase of trial. Pet. App. 87. Looking at “the most-favorable aspects of the evidence,” the court found the evidence was “somewhat mitigating,” weak, and showed that “when sober” Lance functioned “in the lower range of normal intelligence.” Pet. App. 91-92. The court also noted that Lance suffered from depression related to his divorce, had “some memory problems,” “had some difficulty in planning and problem solving,” was “somewhat impulsive” and “that his functional intelligence, unsurprisingly, became more impaired when he was drunk.” Pet. App. 91.

The court analyzed the probability of a different outcome by looking at Lance’s new evidence and

weighing it against the extensive aggravating evidence. *Id.* Specifically, the court referenced Lance’s “history of horrific abuse against Joy,” his “previous attempt to murder Butch Wood” in a very similar manner, the evidence from the night of the murders, and Lance’s “demeanor and conduct after the murder.” *Id.* The court concluded the new neurological evidence, “even when considered together with the other mitigating evidence,” would not have reasonably changed the outcome of the sentencing phase. Pet. App. 92.

The court concluded that “Lance functioned normally in society apart from his criminal behavior” and “Lance’s moderate slowness would not have had a significant effect on the jury’s sentencing phase deliberations.” Pet. App. 87.

Ultimately, the Georgia Supreme Court found no significant prejudicial effect from the individual deficiencies, both found and assumed, of trial counsel. Pet. App. 97. Even looking at counsel’s deficiencies in the aggregate, the Georgia Supreme Court found that the absence of the combined effect of counsel’s deficiencies “would not in reasonable probability have affected the verdict at either phase of Lance’s trial. *Id.*”

The Georgia Supreme Court reversed the state habeas court’s grant of relief and reinstated his death sentence.

5. *Federal habeas proceedings.* The federal district court denied the petition for writ of habeas corpus, concluding that Lance “failed to demonstrate that [the Georgia Supreme Court] reached an unreasonable

result.” Pet. App. 41. The court concluded “that evidence of [Lance’s] purported deficiencies are just as likely to be off-putting to the jury” as mitigating. Pet. App. 54. The court held “[t]he fact that [Lance] had trouble planning and acted impulsively because he was an alcoholic who got into physical confrontations and car wrecks is not strong mitigating evidence.” *Id.*

6. *The Eleventh Circuit’s decision.* Applying 28 U.S.C. § 2254 and *Strickland*, the Eleventh Circuit Court of Appeals held, the Georgia Supreme Court had concluded, Lance did not suffer prejudice by trial counsel’s failure to present mental health testimony. Pet. App. 16. The Eleventh Circuit recounted the mental health evidence listed by the Georgia Supreme Court and determined that the Georgia Supreme Court’s conclusion “was not unreasonable” because the evidence “was not necessarily mitigating.” Pet. App. 17. Lance argued that the Georgia Supreme Court mischaracterized the new evidence by not using the term “dementia” in the decision, but the Eleventh Circuit disagreed and concluded the Georgia Supreme Court’s characterization “was not objectively unreasonable.” Pet. App. 18.

To assess prejudice, the Eleventh Circuit analyzed Lance’s aggravating factors in conjunction with the mitigating factors. Pet. App. 18. The court held that “the aggravating factors of Lance’s crime are substantial.” Pet. App. 19. “[Lance] had a long history of abusing Joy Lance, he beat her during the crime until her face was “utterly unrecognizable,” he made derogatory statements about her and Butch Wood, and Lance

showed little remorse after the crime.” *Id.* The court ultimately concluded that “Lance’s new mitigating evidence fails to convince us” that the Georgia Supreme Court made an unreasonable prejudice determination. *Id.*

Lance further contended that the Supreme Court of Georgia applied an incorrect prejudice standard and “improperly ‘brushed aside’ the factual findings of the [state habeas] court.” Pet. App. 20. The Eleventh Circuit disagreed, holding that the Supreme Court of Georgia had applied the proper prejudice standard and properly accepted the superior court’s factual findings. *Id.* The court affirmed the denial of relief and held that “[t]he Supreme Court of Georgia reasonably concluded that Lance did not suffer prejudice when [trial counsel] failed to introduce mental health testimony.” *Id.*



REASONS FOR DENYING THE PETITION

I. Lance’s claim that the Eleventh Circuit erred in applying *Strickland* under the AEDPA standard does not warrant review.

A. This question asks for mere error correction.

Lance’s first question presented is a transparent plea for error correction. He asks this Court to grant review “to clarify the prejudice prong of an ineffective assistance of counsel claim in a death penalty case,” Pet. 9, on the basis that the Eleventh Circuit allegedly erred in concluding that the Georgia Supreme Court

unreasonably applied *Strickland* when it determined that Lance had failed to establish prejudice. *Id.* With no apparent circuit conflict or any legal question beyond disagreement with the Eleventh Circuit's AEDPA review of the Georgia Supreme Court's application of the well-established *Strickland* standard to the facts of his case, this claim does not warrant certiorari review.

B. The decision below was correct.

To establish his ineffectiveness claim under *Strickland*, Lance had to establish that counsel's performance was deficient and "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. This analysis is the same for any case and, contrary to Lance's suggestion, there are no specialized standards for ineffectiveness claims in capital cases.

To establish prejudice, Lance had to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694. In analyzing prejudice, courts must "consider all the relevant evidence that the jury would have before it if [counsel] had pursued the different path – not just the mitigation evidence [counsel] could have presented, but also the [aggravating evidence] that almost certainly would have come in with it." *Wong v. Belmontes*, 558 U.S. 15, 205 (2009).

In a § 2254 proceeding, the "pivotal question" "is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). Federal habeas courts thus

must take “a ‘highly deferential’ look at counsel’s performance [under *Strickland*] . . . through the ‘deferential lens’ of § 2254(d). . .” *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011). Accordingly, the question “is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Richter*, 562 U.S. at 105.

Lance contends that the Georgia Supreme Court unreasonably applied this Court’s precedents when it concluded that he had not proven that trial counsel was ineffective in the sentencing phase of trial for not introducing mental health evidence like that later submitted in the state habeas proceedings. Lance asserts that he showed the requisite prejudice by showing that trial counsel did not investigate and present what could be considered aggravating evidence: that he had trouble controlling his impulses; could not conform his actions to the law; and had cognitive impairments based on his abuse of alcohol, fighting, and car wrecks. The Georgia Supreme Court reviewed the entirety of Lance’s newly presented evidence and found that, while trial counsel performed deficiently under *Strickland* in failing to investigate mental health, Lance had not established the requisite *Strickland* prejudice.

The question then before us is whether trial counsel’s deficient performance in failing to adequately investigate issues beyond guilt and innocence, when considered together with any other deficiencies in trial counsel’s performance at trial, in reasonable probability

changed the outcome of Lance's trial. We hold as a matter of law that it did not.

Pet. App. 83.

As determined by the Eleventh Circuit, the Georgia Supreme Court performed alternate prejudice analyses: one including mental health evidence that was "likely available" had an investigation been conducted; and one that included mental health evidence that was "conceivably available." Pet. App. 12, 17. As to the evidence that was "conceivably available," which was the evidence and expert testimony submitted in the state habeas proceedings, the Georgia Supreme Court found that even if it had been presented at trial, there was no reasonable probability of a different outcome in sentencing. Pet. App. 92. The Eleventh Circuit focused its review on this latter analysis and concluded the findings of the Georgia Supreme Court were "not unreasonable." Pet. App. 17.

The Eleventh Circuit noted that the Georgia Supreme Court's latter prejudice holding rested on the basis "that the evidence presented on habeas review 'showed merely that Lance functioned, when sober, in the lower range of normal intelligence'; had memory issues; suffered from mild depression; was 'somewhat impulsive'; and had some trouble problem solving." Pet. App. 17. The Eleventh Circuit correctly determined that this conclusion by the state supreme court was "not unreasonable because much of the evidence that Lance introduced in the superior court of his mental impairments [alcohol abuse and impulsive behavior] was not necessarily mitigating." *Id.* This conclusion is

consistent with this Court’s acknowledgement in *Pinholster* that evidence of alcohol or drug abuse may have little mitigating value and can do as much or more harm than good in the eyes of the jury. *See Pinholster*, 563 U.S. at 201 (“The new evidence relating to Pinholster’s family – their more serious substance abuse, mental illness, and criminal problems, [] is also by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation.”).

The unpersuasive nature of the supposed mitigating evidence is also firmly established in the Georgia Supreme Court’s findings. As to mental impairments, the Georgia Supreme Court explained that, although Lance’s experts testified he had frontal-lobe dysfunction, cross-examination revealed that Lance was given an “extensive neurological examination,” Pet. App. 85, and dysfunction was not found in the frontal lobes on 99 out of 100 tests. Pet. App. 87. And although the crux of Lance’s experts’ opinion was that he was unlikely able to plan and commit the crimes because of frontal-lobe dysfunction, those opinions inexplicably failed to account for Lance’s prior attack on Wood, which was almost identical to the later attack that ultimately resulted in Wood’s murder.

Moreover, the Georgia Supreme Court pointed out that this “somewhat mitigating evidence” had to be weighed against:

- “Lance’s long history of horrific abuse against Joy Lance, including multiple threats to kill her and at least one

previous attempt to murder Butch Wood in a manner that was very similar to the manner in which he eventually succeeded in murdering him and Joy Lance”;

- the evidence “about the night of the murders, which showed that Lance armed himself with a shotgun, traveled to the home where the victims were staying, kicked in the door, and systematically murdered them”; and,
- “the evidence about Lance’s demeanor and conduct after the murder, including” referring to Joy in a “derogatory manner,” stating Wood was in Hell, “[l]ament[ing]” that he acted foolishly by calling Joy’s father immediately prior to committing the murders; and “boast[ing] to an inmate that ‘he hit Joy so hard that one of her eyeballs stuck to the wall.’”

Pet. App. 91-92.

The Georgia Supreme Court concluded that, given these facts and “[g]iven Lance’s long history of contemplating the murder of Joy Lance and Butch Wood, the manner in which he finally carried out their murders, and his utter disregard for their suffering and deaths afterward,” there was no reasonable probability of different outcome in the sentencing phase if the new mental health evidence had been presented at trial. Pet. App. 92. That conclusion was not an unreasonable application of this Court’s precedents. *See, e.g., Wong*, 558 U.S. at 25 (“[T]he cold, calculated nature of the

[previous] murder and Belmontes' subsequent bragging about it would have served as a powerful counterpoint' to any evidence that he had acted impulsively when he killed the victim.”).

The court also addressed Lance's suggestion that the Supreme Court of Georgia unreasonably determined the facts because it “never even mentioned the word ‘dementia’ in its decision.” Pet. App. 18. The Eleventh Circuit noted that “the Georgia Supreme Court did acknowledge ‘new evidence of subtle neurological impairments’” and that [t]his characterization of the evidence was not objectively unreasonable.” Pet. App. 18. In characterizing the neurological impairments as subtle, the Georgia Supreme Court reviewed all the evidence, including the testimony of the Warden's expert who found Lance's frontal lobe weaknesses “have to do with a tendency to perseverate,” but that he had no problems with impulsivity or planning the murders. Pet. App. 90. The Georgia Supreme Court noted that the Warden's expert found that “Lance's symptoms were so subtle that a typical court-ordered evaluation might not have given any indication of problems” and “[Lance's diagnosis was] not significant to the crime.” *Id.*

Lance argued to the Eleventh Circuit, as he does to this Court, that his case is like *Porter v. McCollum*, 558 U.S. 30 (2009), in that the mitigation evidence presented in state habeas “bears no relation” to the pleas of mercy presented at trial. (Petition 10). The Eleventh Circuit correctly concluded that the *Porter* decision “involved undiscovered evidence that is substantially

more mitigating than the evidence Lance introduced on state habeas review.” Pet. App. 19. Specifically, Porter suffered egregious physical abuse as an adolescent, which included his father shooting at him, brutally beating him and his mother, and the abuse was corroborated by Porter’s siblings. *Porter*, 558 U.S. at 33. Porter had also fought in the Korean War, had witnessed many of his fellow soldiers die while coming under repeated enemy fire, and left the military a decorated war hero. *Porter*, 558 U.S. at 34-35. Juxtaposed against Porter’s horrific family history, Lance had a “fairly normal upbringing from an intact family, no major history of dysfunction, no history of child abuse, neglect, things of that nature, no history of significant mental illness in the family.” Pet. App. 88. Also, in direct contrast to Porter, Lance was not a war hero and the only violence he had seen was that which he meted out upon others.

Like the Georgia Supreme Court, the Eleventh Circuit reviewed the evidence as a whole as required by *Wong*, 558 U.S. at 20, and the court concluded:

“the totality of mitigating evidence . . . pales when compared to the brutal nature and extent of the aggravating evidence.” . . . the aggravating factors of Lance’s crime are substantial. He had a long history of abusing Joy Lance, he beat her during the crime until her face was “utterly unrecognizable,” he made derogatory statements about her and Butch Wood, and Lance showed little remorse after the crime. *Lance II*, 687 S.E.2d at 811. And Lance’s new mitigating evidence fails to convince us that the Georgia Supreme Court

unreasonably determined that Lance was not prejudiced by his defense counsel's performance.

Pet. App. 18-19. This holding comports with the well-established precedent of this Court, and the fact-specific application of this precedent, which is supported by the record, presents nothing warranting certiorari review. *See United States v. Johnson*, 268 U.S. 220, 227 (1925). *See also Texas v. Mead*, 465 U.S. 1041 (1984).

II. Lance's *Cronic* argument is not properly before this Court and does not warrant review.

Lance argues that the state courts should have assessed his claim of ineffective assistance of sentencing-phase counsel under *United States v. Cronic*. This argument is not properly before this Court because Lance failed to raise it below. In any event, this argument does not warrant certiorari review. *Cronic* applies only in a "very narrow set of cases" "where the accused has effectively been denied counsel altogether" or "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. Trial counsel here did not abandon Lance in the sentencing phase of trial; he cross-examined witnesses, made objections to keep potentially aggravating evidence from the jury's consideration, and made strategic decisions not to present evidence. Thus, *Cronic* is not the appropriate standard and there is no issue warranting certiorari review.

A. Lance waived his argument that the Georgia Supreme Court utilized the wrong standard.

This Court generally does not entertain arguments not raised below. *See Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Thornton v. United States*, 541 U.S. 615, 624, n.4 (2004). Lance did not raise this argument before the Eleventh Circuit, so it is not properly before this Court for review. Consequently, certiorari review of this argument is not warranted.

B. The Eleventh Circuit's *Strickland* analysis is in direct accordance with this Court's precedent.

Even if Lance had preserved this argument for review, it would not provide a basis for granting certiorari review because the Georgia Supreme Court properly reviewed the effectiveness of counsel under *Strickland*.

In *United States v. Cronin*, 466 U.S. 648 (1984), this Court held that defendants are relieved of the obligation of establishing *Strickland* prejudice in a “very narrow set of cases” “where the accused has effectively been denied counsel altogether” or “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing.” *Cronin*, 466 U.S. at 659; *see also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1915 (2017); *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015). “Prejudice can be presumed with respect to these errors because they are ‘so likely to prejudice the accused that

the cost of litigating their effect in a particular case is unjustified.’” *Weaver*, 137 S. Ct. at 1915.

Bell v. Cone, 535 U.S. 685 (2002) shows just how narrow this set of cases is. There, the habeas petitioner had been convicted of murder and sentenced to death. During the sentencing phase, trial counsel referenced mitigating evidence that had been presented in the guilt phase of trial. The federal court of appeals concluded that because counsel had failed to introduce mitigating evidence at the sentencing phase of trial and waived final argument, the *Cronic* standard applied. This Court reversed, holding:

“When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney’s failure to test the prosecutor’s case, we indicated that the attorney’s failure must be complete. We said ‘if counsel *entirely* fails to subject the prosecution’s case to meaningful adversarial testing.’ *Cronic, supra*, at 659 (emphasis added). Here, respondent’s argument 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. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind.”

Cone, 535 U.S. at 696-97 (emphasis in original).

Cone is on point here. Lance claims that because his trial counsel chose not to put up character witnesses, cross-examine the witnesses presented by the

State in sentencing, or present evidence at the sentencing phase of trial, he is entitled to presumed prejudice under *Cronic*, and that the use of *Strickland* conflicts with the precedent of this Court. But the record firmly refutes Lance's suggestion that counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," *Cronic*, 466 U.S. at 659 (emphasis in original), and the state court properly conducted a *Strickland* analysis. Specifically, for the sentencing phase of trial, trial counsel objected to potential jury charges, the admission of Lance's prior conviction, and the admission of victim impact evidence, Resp. App. 3-17, 28, 34, 40, 45-47, and trial counsel "objected on hearsay grounds to the introduction of two letters written by Joy's son after her death." Pet. App. 214. Also, as noted by the Eleventh Circuit, although trial counsel had an excellent rapport with Lance and his family, trial counsel strategically chose not to cross-examine witnesses or present Lance's family members to testify to his "good character." Pet. App. 11. Indeed, trial counsel explained to the trial court that if he presented character witnesses, they would be subject to cross-examination and the parties would "be all afternoon hearing the same negative similar transaction and prior difficulty hearing that we've heard for three days." Pet. App. 182. Counsel then argued in closing that Lance maintained his innocence and asked the jury to spare Lance for his family and his children. Resp. App. 62-69.

Thus, unlike counsel in *Cronic*, Lance's attorney did not "entirely" fail to subject the prosecution's case to adversarial testing. Like *Cone*, Lance's complaint is

with the degree of representation, not the utter lack of it. The state court properly applied *Strickland* rather than *Cronic* and certiorari review is unwarranted.

C. There is no circuit split.

Lance also contends that the Eleventh Circuit's denial of relief under AEDPA in his case created a split on this *Cronic* question with the Sixth Circuit's *de novo* review of an ineffectiveness claim in *Phillips v. White*, 851 F.3d 567 (6th Cir. 2017). Not so. As an initial matter, the Eleventh Circuit did not create a split with respect to whether *Cronic* should apply because Lance did not raise this argument below, and the Eleventh Circuit thus did not address it.

Moreover, *Phillips* is easily distinguished on its facts. In *Phillips*, trial counsel had not prepared for the sentencing phase of trial, did not give an opening statement, and in closing, only stated:

Ladies and gentlemen given the dispatch with which you resolved all the holes in the government's case that I spent two days pointing out, it's apparent to me that I'm somehow not communicated with you during the first part of the trial. So I don't intend to take anymore of your time in this part.

Id. at 573. That was the full extent of trial counsel's participation in the sentencing phase.

The jury recommended life without parole. Later, during the sentencing hearing before the trial judge, although the State presented witnesses to support the recommendation, trial counsel offered no evidence or arguments in support of a lesser sentence. *Id.*

In post-conviction proceedings, no state court ruled on Phillips's claim of ineffective assistance of counsel prior to the federal district court addressing it. Because the state court had failed to pass on the claim, and after finding the claim exhausted, the federal circuit court conducted a *de novo* review of trial counsel's effectiveness at sentencing. The court acknowledged *Cone* and distinguished this Court's denial of relief in that case. The Sixth Circuit in *Phillips* noted that this Court had concluded that Cone's counsel had "failed to introduce mitigating evidence or make a closing argument during a capital sentencing hearing," but had "made an opening statement 'call[ing] the jury's attention to the mitigating evidence already before [it],' cross-examined some of the state's witnesses, and unsuccessfully pleaded for petitioner's life." *Phillips*, 851 F.3d at 580 (quoting *Cone*, 535 U.S. at 691-92). The district court held that this Court had found *Strickland* was the proper analysis under the facts of *Cone* "because counsel failed to oppose the state only 'at specific points,' not 'throughout the sentencing proceeding as a whole.'" *Id.* (quoting *Cone*, 535 U.S. at 697). The Sixth Circuit in *Phillips* noted the distinction was one of "non-representation, not poor representation." *Id.* (quoting *Miller v. Martin*, 481 F.3d 468, 473 (7th Cir. 2007) (per curiam)).

As set forth above, at the sentencing phase of trial, Lance's trial counsel made objections, made strategic decisions keeping aggravating evidence from the jury's consideration, and argued in closing for Lance's life. This is not a case of "non-representation" like the Sixth Circuit found in *Phillips*. There is thus no conflict with *Phillips*, so certiorari review is not warranted for that reason either.

◆

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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