CAPITAL CASE

No. 17-1382

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

REPLY BRIEF

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I. This Court Should Resolve Whether The Failure To Conduct Any Sentencing Phase Investigation And Offer Any Mitigation Evidence Precludes The Constitutionally Required Individualized Determination of Culpability

The State's Opposition sidesteps the fundamental question raised by the Petition: Whether a defendant in a capital case can receive the individualized determination of culpability to which he or she is constitutionally entitled if trial counsel fails to conduct *any* investigation into mitigating factors and to offer *any* mitigation evidence during the sentencing phase. It is critical for this Court to provide guidance in this area and reject the effort of courts, like the Georgia Supreme Court here, to paper over this type of abdication of responsibility in a capital case as not being prejudicial to a death-row defendant. Regardless of the legal standard under which the Court reviews this case, and whether it sees its role as clarifying a rule, correcting a manifest error, or resolving a conflict between circuits, there is a clear mandate for the Court to address the consequences that result when trial counsel fails altogether to prepare for what is often the most critical phase of a capital case.

In opposing the petition, the State does not challenge that Petitioner was entitled to an individualized determination of culpability. Nor does the State explain how Petitioner could have received an individualized determination of his culpability at

the sentencing phase in the absence of an investigation and presentation of the readily available evidence. It is undisputed that the jury never heard the undisputed evidence that Petitioner—who was described by the State during sentencing as a "cold and calculating" murderer (Resp't App. 48)—in fact had a borderline IQ and suffered from dementia due to head trauma and alcohol abuse at the time of the crime. The state habeas court found that this evidence "would have been crucial in the sentencing phase of Petitioner's trial, as it directly related to the key issue before the jury: their individualized assessments of Petitioner's character, culpability, and worth." Pet. App. 177. That assessment was correct.

Instead of addressing how Petitioner could have received an individualized determination in a case where readily available and significant mitigating evidence was overlooked, the State retreats to the friendly confines of the "prejudice" prong of *Strickland* analysis. The State argues that, in light of the substantial aggravating evidence that existed, the Georgia Supreme Court reasonably found as a matter of law that the evidence of Petitioner's mental impairments would not have mattered to the jury. Resp't Br. 14–16. But the Georgia Supreme Court's decision in this regard was objectively unreasonable. The aggravating evidence that the State relies upon was heard by the jury; that evidence formed the very basis for the State's claim that Petitioner should receive the death penalty. Resp't App. 23–41. It is precisely because those facts were before the jury that, in order for the adversary system to work and

thus for this Court to have any confidence in the outcome of the sentencing trial, the jury needed to hear the critical mitigating evidence as well in assessing Petitioner's culpability. As this Court explained in *Rompilla v. Beard*, in preparing for the sentencing phase of a capital trial, "defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation." 545 U.S. 374, 380–381 (2005). Where one side of the scale is weighted down, it is imperative that the other side not remain empty when there is ample evidence available to present.[1]

The State notes that a court must assess the "'totality of the available mitigation evidence'" and "'reweig[h] it against the evidence in aggravation,'"

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[1] The State continues to assert that Petitioner's trial counsel made a strategic choice not to offer mitigation evidence from Petitioner's family, quoting from counsel's statements to the trial court at the time of the sentencing as to why he did not intend to call family members. Resp't Br. 3, 6, 21, 24, 27. But the State ignores the Georgia Supreme Court's holding that because trial counsel never discussed mitigation with Petitioner's family, "trial counsel's performance in selecting a strategy must be regarded as deficient because that strategic choice was made without trial counsel's first conducting a reasonable investigation." Pet. App. 83 (citing *Wiggins v. Smith*, 539 U.S. 510, 521–23 (2003); *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984); *Porter v. McCollum*, 558 U.S. 30, 39 (2009)). Trial counsel acknowledged that he lacked any understanding of the scope of available mitigating evidence and was unable even to consider the option of putting on other witnesses. Pet. App. 273. Neither the court of appeals nor the district court challenged this state court finding of deficient performance. Pet. App. 16, 41–42.

Porter, 558 U.S. at 41 (quoting *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000)) (alteration in original). But such a "reweighing" is not license for the state appellate court to simply ignore or diminish the importance of the readily available mitigation evidence of the type involved here. All experts agreed that Petitioner suffered from dementia and had a borderline IQ at the time of the trial. As was the case in *Rompilla*, undisputed evidence of organic brain damage impairing multiple mental functions "adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury," such that the "'mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Rompilla's] culpability.'" 545 U.S. at 393 (quoting *Wiggins*, 539 U.S. at 538). Here, after weighing all of the evidence, the state habeas court expressly found "that there is a reasonable probability that, but for these deficiencies in trial counsel's performance, the outcome of the proceedings would have been different." Pet. App. 178. That finding is bolstered by the fact that in Georgia the death penalty requires a unanimous verdict.

The State also contends that the Georgia Supreme Court acted reasonably in characterizing the evidence of Petitioner's mental impairments as "subtle neurological impairments" that might never have been discovered by a counsel conducting a reasonable investigation. Resp't Br. 8, 19. But the contention that a reasonable investigation might not have uncovered Petitioner's impairments is an unreasonable determination of fact that cannot be

reconciled with the record. Even a base level psychological evaluation would have revealed Petitioner's borderline IQ and history of head trauma, including the gunshot wound to Petitioner's head, mandating further investigation.[2] And the undisputed facts here show that the neuropsychological evaluation that disclosed Petitioner's dementia is the type of examination done in virtually any case in which there are red flags of head trauma (such as the gunshot wound to Petitioner's head and multiple automobile accidents). As the state habeas court noted, the State's own expert confirmed that this type of neuropsychological evaluation is routinely provided in capital cases. Pet. App. 175–76. Once discovered, there is no way that a diagnosis of dementia can be considered "subtle neurological impairments," as by definition, it requires a finding of multiple cognitive deficits causing significant impairment in functioning. Pet. App. 250–51 (Testimony of State's expert, Dr. Martell).

Finally, the State argues that the evidence regarding Petitioner's impairments might have been aggravating rather than mitigating. At its core, this argument confuses one of the multiple causes of Petitioner's brain damage—alcohol abuse—with the

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[2] It is telling that, in *Rompilla*, the defense consulted with mental health experts, but did not conduct the appropriate mental health examinations that a review of available records would have required. Here, even the preliminary consultation never occurred.

fact of the resulting brain damage itself.[3] Petitioner is not claiming that a jury should have considered his alcohol abuse as a mitigating factor impacting his culpability. He is contending instead that, following an extended history of alcohol abuse *and other brain trauma*, including a gunshot wound to his head and multiple automobile accidents, Petitioner suffered from significant mental impairments, including a borderline IQ and dementia at the time of the crime. These impairments, not their underlying cause, constitute significant mitigating factors impacting Petitioner's culpability. Petitioner was constitutionally entitled for the jury to consider these factors in deciding his fate. *Rompilla*, 545 U.S. at 392; *Porter*, 558 U.S. at 42–43. As this Court explained in *Porter*, "the Constitution requires that 'the sentencer in capital cases must be permitted to consider any relevant mitigating factor.'" 558 U.S. at 42 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)). That is particularly true where, as here, the diagnosis of borderline IQ and dementia was "consistent, unwavering, compelling, and wholly unrebutted." *Ferrell v. Hall*, 640 F.3d 1199, 1234 (11th Cir. 2011).[4]

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[3] The state habeas court noted that the State was improperly conflating evidence of the causes of the mental impairments with the mental impairments themselves. Pet. App. 177–78.

[4] The State—like the Georgia Supreme Court—overlooks the significance of the fact that Petitioner had a borderline IQ at the time of the trial. While Petitioner does not contend that his execution is barred by *Atkins v. Virginia*, 536 U.S. 304 (2002), the fact of a borderline IQ is certainly a mitigating factor that the jury should have known about in evaluating his

Given the failure of the State to offer any explanation for how Petitioner—or any defendant who suffers from a total failure of trial counsel to prepare for or offer evidence during the sentencing phase—could receive an individualized determination of culpability, the State's attempt to characterize the petition as requesting "mere error correction" is of no significance. The "no prejudice" determination of the Georgia Supreme Court conflicts with prior precedent of this Court, including *Porter* and *Rompilla*, as Petitioner described in his opening brief. *See* Pet. 9–13. In *Rompilla*, this Court recognized that "[i]t goes without saying that the undiscovered 'mitigating evidence'" of diminished mental capacity "'taken as a whole, might well have influenced the jury's appraisal of [ ] culpability.'" *Rompilla*, 545 U.S. at 393 (citations omitted). And, as in *Porter*, "[t]his is not a case in which the new evidence 'would barely have altered the sentencing profile presented'" to the jury. 558 U.S. at 41. This case meets the standard for certiorari review in a capital case, and it is the appropriate vehicle for the Court to clarify the prejudice standard applicable to deficient performance as to the failure to collect mitigating mental health testimony.

Indeed, the State's arguments ultimately provide the perfect explanation for why this Court should grant certiorari. The Court should clarify that, in a situation where trial counsel has abdicated responsibility at the sentencing phase—conducting

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culpability in a case where the State argued that Petitioner was a cold, calculating murderer who carefully planned the crime.

no investigation and offering none of the readily available mitigating evidence—the defendant is denied the individualized determination of culpability to which he or she is entitled. That individualized determination is the constitutional minimum that is needed for the adversarial system at the sentencing trial to operate at a level that provides any degree of confidence in the outcome.

II. Petitioner Should Be Entitled to a Presumption of Prejudice In Light of the Constructive Absence of Counsel at the Sentencing Phase

While the first question presented provides a vehicle for this Court to determine whether any Petitioner can receive an individualized determination of culpability when trial counsel fails to prepare or participate in sentencing, the second question addresses whether trial counsel's failures in this case were so egregious that Petitioner was effectively denied his Sixth Amendment right to counsel at the sentencing phase because his counsel was constructively absent.

The State argues that this is a new argument based exclusively on this Court's ruling in *United States v Cronic*, 466 U.S. 648 (1984), and, because that case was not cited below, this Court should ignore the issue. But Petitioner has consistently argued that his trial counsel abdicated his responsibility to participate meaningfully at the sentencing phase, thereby undermining the adversary system. For instance, in his reply brief to the Eleventh Circuit, Petitioner argued as follows:

> No more complete breakdown of the adversarial system—and no more compelling reason to doubt the fundamental fairness of the sentencing process—is possible than where *no* investigation [is] conducted and *no* mitigation evidence is presented.

Appellant's Reply Br. at 13. Further, Petitioner's lead contention in oral argument to the Eleventh Circuit was to point the court to the fact that "a fundamental breakdown of the adversarial process at the sentencing phase of Mr. Lance's trial" occurred rendering it impossible that "any court could have any reasonable confidence in the sentence of death that was imposed on Mr. Lance." 11th Cir. Oral Argument Recording at 1:33 (remarks of Mr. Loveland).[5] These arguments have been at the forefront of this case throughout habeas, and citation to a particular case should not alter whether the argument is preserved. *United States v. Rashad*, 396 F.3d 398, 401 (D.C. Cir. 2005) (rejecting the Government's argument that defendant failed to preserve error because he "'did not ... object to the district court's ruling on *Alford* grounds'"; holding that citation to the particular case that supported the ruling defendant was seeking was unnecessary in order to preserve error). At most, the second question offers a different framework to examine the

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[5] http://www.ca11.uscourts.gov/oral-argument-recordings?title=&field_oar_case_name_value=&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=2017&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D=7.

same legal theory that Petitioner has consistently raised, and as such, it is appropriate for this Court to consider. *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

The core question raised by this argument is whether the conduct of Petitioner's trial counsel rises to the level of constructive denial of representation during sentencing. Petitioner's trial counsel did not sleep through the proceedings and was not physically absent, but because he had done nothing to prepare for the sentencing and therefore was not prepared to present any evidence, he was not able to subject the State's death penalty case to any meaningful challenge, and thus "ceased functioning as counsel under the Sixth Amendment." *Phillips v. White*, 851 F.3d 567, 576 (6th Cir. 2017). As trial counsel explained during habeas, "[w]hen penalty phase came, I had nothing to put on because I had not been able to investigate the penalty phase case." Pet. App. 273.[6]

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[6] The State argues that trial counsel was a substantial adversary during sentencing, suggesting that "[t]rial counsel

The decision in *Cronic*, and courts that have followed it, highlight the need for this Court to clarify the prejudice standard applicable to instances where there has been absolutely no development of potentially mitigating evidence for sentencing. The fact that the Sixth Circuit recently relied on *Cronic* in *Phillips*, 851 F.3d at 571, to support a presumption of prejudice under facts substantially similar to this case supports the grant. In both matters, petitioner's trial counsel "conducted no investigation of mitigating evidence," *id.* at 578, which led the Sixth Circuit to conclude that Phillips' trial counsel "ceased functioning as counsel under the Sixth Amendment." *Id.* at 579. The Eleventh Circuit's decision below that trial counsel's abdication of responsibility was not prejudicial conflicts with the holding and

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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." Resp't Br. 21. This statement is both inaccurate and misleading. First, in addition to failing to call any witnesses or offer any evidence himself, trial counsel in fact did *not* cross-examine any of the State's six witnesses at sentencing. *See* Pet. App. 220–21; Resp't App. 29, 30, 31, 35, 38, 40. Second, in terms of evidentiary objections, trial counsel made only cursory objections to photographs and letters offered by the State, which were overruled. Resp't App. 28, 34–35. Third, with regard to the so-called "strategic decisions," the Georgia Supreme Court recognized that trial counsel could not have made a "strategic choice" not to offer mitigation evidence because he did no investigation of Petitioner's mental health and never discussed mitigation issues with Petitioner's family, the key underpinnings of any valid "strategic decision." Pet. App. 83.

reasoning in *Phillips* and presents a separate reason for granting the petition.

CONCLUSION

It is critical for this Court to clarify that prejudice flows inexorably from a total failure of trial counsel to investigate and present critical mitigation evidence at the sentencing phase of a capital trial. Accordingly, Petitioner respectfully requests that the Court grant the petition for certiorari.

Respectfully submitted,

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