NO. _____
(CAPITAL CASE)

IN THE
Supreme Court of the United States

ALAN DALE WALKER., PETITIONER,

V.

STATE OF MISSISSIPPI, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

PETITION FOR A WRIT OF CERTIORARI

James W. Craig
Counsel of Record
Hannah A. Lommers-Johnson
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
4400 S. Carrollton Ave.
New Orleans, LA 70119
(504) 620-2259
jim.craig@macarthurjustice.org
hannah.lommersjohnson@macarthurjustice.org

David P. Voisin
P.O. Box 13984
Jackson, MS 39236
(601) 949-9486
david@dvoisinlaw.com

Counsel for Alan Dale Walker

QUESTIONS PRESENTED (CAPITAL CASE)

Counsel for Petitioner Alan Walker admitted he did not prepare for a potential capital murder penalty phase because of his mis-placed confidence that Walker's co-indictee would not testify against him. On the weekend before trial, the co-indictee reached a deal with the state, leaving trial counsel with no option but to "humanize" his client with the witnesses who were available: Walker's mother, half-sister, half-brother, and employer. Counsel had not sought investigative or expert assistance save a self-serving motion for a competency evaluation ten days before trial. He stated on the record he had no basis for the motion and that he wanted to protect himself from an ineffectiveness claim.

In successive post-conviction proceedings permitted under Mississippi law, new counsel for Walker presented mitigation evidence of a childhood saturated with sexual dysfunction and exposure to sexual abuse, including blatant incest on the part of his step-father and the molestation of Walker and his brother by older teenage girls. An expert psychologist who specializes in the treatment of men who were sexually abused as children testified that the sexual abuse, exploitation, and dysfunction which Walker witnessed and experienced in childhood played a central pivotal role in the rage demonstrated by the crime against Ms. Edwards. A neuropsychologist testified that Walker suffered significant deficits in brain functioning often found in children who suffer abuse or trauma.

Despite similarity between these facts and the facts in *Andrus v. Texas,* 140 S. Ct. 1875 (2020), the Mississippi Supreme Court found that Walker had not established the deficient performance of his trial counsel because counsel stated he wanted to "humanize" his client. Contrary to this Court's precedents, the Mississippi Supreme Court excused the lack of even the most basic investigation to prepare for the penalty phase.

Under these facts, the following questions are presented for this Court's decision:

1. Did the Mississippi Supreme Court fail to adhere to this Court's Sixth Amendment jurisprudence requiring counsel in a capital case to conduct a thorough investigation of their client's background and history, and that purported "tactical" decisions are only reasonable to the extent they are based on such an investigation?

2. Was Alan Walker was denied the effective assistance of counsel in the preparation and presentation of mitigation at his capital trial?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below are Petitioner Alan Dale Walker and Respondent the State of Mississippi.

STATEMENT OF RELATED PROCEEDINGS

Alan Dale Walker v. State of Mississippi, Mississippi Supreme Court No. 2018-CA-01059-SCT, 303 So. 3d 720 (Miss. 2020) (original opinion affirming Circuit Court, June 25, 2020; rehearing denied with substituted opinion, October 8, 2020).

Alan Dale Walker v. State of Mississippi, Circuit Court of the First Judicial District of Harrison County, Mississippi, Cause No. 25,945 (order denying post-conviction motion to vacate sentence, April 17, 2018; order denying motion for reconsideration, June 25, 2018).

Alan Dale Walker v. State of Mississippi, Mississippi Supreme Court No. 2015-IA-01765-SCT) (interlocutory appeal order entered January 28, 2016).

Alan Dale Walker v. State of Mississippi, Mississippi Supreme Court No. 2012-DR-00102-SCT, 131 So. 3d 562 (Miss. 2013) (order of December 12, 2013, granting leave to file successive motion to vacate in the Circuit Court of the First Judicial District of Harrison County, Mississippi).

Alan Dale Walker v. Christopher Epps, et al., United States District Court for the Southern District of Mississippi No. 1:97-CV-29-KS (order of February 21, 2013, staying case pending successive state court proceedings).

Alan Dale Walker v. State of Mississippi, No. 03-10649 (order of October 4, 2004, denying petition for certiorari).

Alan Dale Walker v. State of Mississippi, Mississippi Supreme Court No. 97-DR-00376-SCT, 863 So. 2d 1 (Miss. 2004). (order of October 16, 2003, denying leave to file motion to vacate conviction and sentence).

Alan Dale Walker v. State of Mississippi, United States Supreme Court No. 96-5259 (order of December 2, 1996, denying petition for certiorari).

Alan Dale Walker v. State of Mississippi, Mississippi Supreme Court No. 92-DP-00568, 671 So. 2d 581 (Miss. 2001) (order of October 12, 1995, affirming conviction and sentence; order of April 18, 1996, denying rehearing).

State of Mississippi v. Alan Dale Walker, Circuit Court of the First Judicial District of Harrison County, Mississippi, Cause No. 10,863 (judgment of conviction and sentence of death, August 12, 1991, motion for new trial denied, October 18, 1991)

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A. Contrary to this Court's Precedents, the Mississippi Supreme Court Excused Counsel's Admitted Failure to Prepare for the Penalty Phase. 25

1. Trial counsel has a duty to conduct a thorough penalty phase investigation. 25

2. Trial counsel's failure to investigate mitigating evidence left the jury with no basis to vote for a life sentence. 26

3. The Mississippi Supreme Court's excusal of trial counsel's failure to prepare is inconsistent with this Court's precedents. 30

B. There is at least a reasonable probability that at least one juror would have refused to sentence Walker to death had trial counsel not failed to find and present the substantial mitigating evidence that Walker grew up surrounded by sexual abuse and dysfunction. 34

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OPINIONS AND ORDERS BELOW

The opinion of the Mississippi Supreme Court is reported at 303 So. 3d 720 (Miss. 2020) and is reproduced as Pet. App. A.

JURISDICTION

The Mississippi Supreme Court entered its order denying rehearing and substituting opinion on October 8, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> 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.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides:

> Section 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

A. Statement of Proceedings

Alan Walker's conviction and death sentence for the murder of Konya Edwards was affirmed on direct appeal. *Walker v. State*, 671 So. 2d 581 (Miss. 2001). Represented by the Mississippi Office of Capital Post-Conviction Counsel, Walker unsuccessfully sought post-conviction relief. *Walker v. State,* 863 So. 2d 1 (Miss. 2004).

Walker filed a petition for a writ of habeas corpus in federal court, raising a challenge to the effectiveness of trial counsel's penalty phase performance. Although recognizing that the issue had not been presented to the state courts, Walker asked the District Court to excuse his failure to exhaust his state court remedy due to deficiencies in post-conviction representation. Pet. Reply to Resp. Answer (Doc 51), *Walker v. Epps,* No. 1:97-cv-29-KS at 23-83 (S.D. Miss). In turn, the State asserted that there was no right to effective post-conviction counsel and urged the District Court to find the ineffectiveness claim barred. *See Id.* (Doc 99) at 127-44.

In *Knox v. State*, 75 So.3d 1030, 1036-37 ¶¶ 17-18 (Miss. 2011), the Mississippi Supreme Court recognized that death row prisoners had a right, guaranteed by state law, to the effective assistance of post-conviction counsel. Such individuals could overcome procedural bars to state court successive petitions if they could establish ineffectiveness on the part of their initial post-conviction attorney. *See also Grayson v. State*, 118 So.3d 118, 126 ¶14, 128 ¶18 (Miss. 2013).

The District Court granted Walker's motion to stay habeas proceedings in light of *Knox* and *Grayson.* Doc 124, *Walker v. Epps, supra*. The Mississippi Supreme

Court found that prior post-conviction counsel performed in a deficient manner and granted leave for Petitioner to file his successive petition challenging the effectiveness of trial counsel's performance with the Circuit Court of Harrison County, Mississippi. *Walker v. State*, 131 So. 3d 562, 564 (Miss. 2013).

After a two-day evidentiary hearing regarding trial counsel's penalty phase performance, the Circuit Court entered its opinion and order denying relief. Clerk's Papers ("C.P.") 561-90. It then denied a timely motion to alter the judgment CP. 644. The Mississippi Supreme Court affirmed the lower court's decision. On October 8, 2020, the state supreme court denied a timely-filed motion for rehearing but issued a new opinion. App. A; *Walker v. State*, 303 So.3d 720 (Miss. 2020).

B. Statement of Facts

1. Believing a favorable plea offer or even an acquittal was certain, trial counsel did not prepare for the penalty phase.

Earl Stegall,[1] lead counsel for Walker, conceded that very little, if any, effort went into preparing for the penalty phase because he was confident of obtaining a favorable deal, if not an acquittal, for his client. His testimony was corroborated by all lay witnesses at the post-conviction hearing. Walker's father, older brother, and aunt testified that Stegall never spoke to them, and Walker's mother and sister testified that he did not speak to them until the weekend immediately before trial.

Stegall believed that Walker was in a strong position in the weeks leading up to his trial. Venue had been changed from Harrison County to Warren County, and

[1] Stegall lost his files related to Walker's case in Hurricane Katrina. T. 275. In addition, he has some memory problems as a result of a stroke. T. 273.

more importantly, the trial judge had suppressed Walker's incriminating statements. T. 276, 279.[2] Stegall did not believe that Jason Riser, the co-indictee was going to testify. T. 276-77. As a result, as Stegall testified, "I thought for sure that I would be offered a plea offer for him so that he would, at worst, receive, you know, a life sentence rather than facing the death penalty." T. 278. Stegall believed that even if there was no plea offer, he would prevail at the guilt phase with a defense that Riser was the actual killer. T. 279. As Stegall described it, after having the confession suppressed, he thought he "had a lock on the life sentence" and "wasn't as worried about the penalty phase at all at that point."

Stegall's "strategy" for avoiding a capital penalty phase collapsed the weekend before trial when he was already in Vicksburg in Warren County. At that point, he learned that Riser accepted a deal in exchange for his testimony against Walker. T. 277-78. Stegall filed a hand-written motion for a continuance the day the trial began. T. 278; D-1. This motion was denied.

Stegall had not prepared for the penalty phase. Stegall acknowledged in his testimony that that other than planning to receive a plea offer, he had no strategic reason for not finding and developing mitigation evidence. T. 285. Stegall had no recollection of conducting a mitigation investigation at all. T. 279-80. He admitted that it was unlikely he had ever met with Walker's mother before trial began. T. 279-80. Moreover, he had no recollection of speaking with family in Alaska or Florida, including Walker's father. T. 279-80.

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[2] "T" refers to the post-conviction hearing transcript; "Trial T" refers to the capital trial transcript.

Walker's witnesses corroborate Stegall's testimony about the lack of investigation. Stegall had no contact with Alan's father, Ronald, Alan's brother, Terry, or his aunt, Nellie Richards, and they all stated they would have testified at trial had they been asked. T. 171 (Richards), T. 194-95 (Ronald Walker), T. 218-19 (Terry Walker). Although Alan's mother, Anita, and sister, Amanda, testified at the penalty phase, both confirmed that neither Stegall nor his co-counsel Robin Midcalf had ever spoken to them before Anita and Amanda arrived in Vicksburg the weekend immediately prior to trial. T. 94-95 (Amanda Fredrick); T. 134-35 (Anita Frederick).[3]

2. Counsel's self-serving request for a competency evaluation harmed his client.

On July 26, 1991, Stegall requested a competency evaluation. The trial was scheduled to begin barely a week later on August 5, 1991. Stegall admitted on the record he actually did not believe such an evaluation was necessary; he made the request only to protect himself from a subsequent collateral challenge. Trial Record 253; *see also* T. 291-92. Stegall did not seek to proceed *ex parte*.

The same day Stegall made his motion, the trial judge signed the order for Dr. Henry Maggio to conduct the evaluation. In Stegall's experience, Dr. Maggio never made a report favorable to a defendant. T. 287. According to Dr. Maggio's report, Walker was evaluated on July 30, 1991, less than a week before the trial. The contents of the report confirm that the brief evaluation was limited to an assessment of competence and sanity.[4] Although he did not recall specifics about the request for

[3] Alan's brother Leon insisted that he did not testify at the trial; however, he clearly did. T. 242-44.
[4] The Maggio Report was filed under seal in the Court below.

a competency evaluation, Stegall was confident that if he spoke to Dr. Maggio it would only have been about competency, and not about mitigation. T. 293. Moreover, Stegall concurred that a competency evaluation is not the same as an evaluation for mitigation, and therefore would not have been useful at the penalty phase. T. 291.

Stegall had no recollection of conferring with other experts. T. 282. The trial record reflects he made no motion for expert or investigative assistance.

3. Abundant mitigation evidence was available to explain Alan Walker's life and provide a context for his role in the murder of Konya Edwards.

At the post-conviction hearing, Walker called Dr. Matthew Mendel as an expert witness in psychology, and in particular the effects of the traumatizing events in Walker's childhood and adolescence on his psychological makeup at the time of the killing of Konya Edwards on September 8, 1990.[5] As Dr. Mendel put it, "to a large degree, the question came down to, where does Alan Walker's rage, and rage at women in particular, come from?" T. 313. That, of course, is the critical question that Walker's jurors would have wanted answered at his Vicksburg trial.

Dr. Mendel spoke to a large number of individuals who knew Walker in childhood and after. T. 306-07. He reviewed numerous witness declarations and was present during the testimony of the lay witnesses. T. 308-09. He consulted with Dr. Robert Shaffer, the neuropsychologist who also evaluated Walker in preparation for the post-conviction hearing. T. 309.

[5] Much of Dr. Mendel's work has been with adult men who were sexually abused as children. T. 299.

Dr. Mendel testified that in his opinion to a reasonable degree of psychological certainty: (1) Alan Walker experienced a wide range of traumatizing factors in his childhood; (2) these traumatizing factors impacted Walker's psychological development into adulthood, and (3) that "we can only understand Alan's behavior on [September 8, 1990] by understanding and taking into account this – these multiple factors, the traumas that he experienced in childhood." T. 311-12.[6]

In both his report[7] and his testimony, Dr. Mendel set forth the multitude of traumatizing factors in Walker's childhood and adolescence. T. 313-14. These factors, most prominently the experience of sexual abuse as both a witness and victim, were critical influences on Walker's life that would have been important for his sentencing jury to consider.

a. Walker grew up without a functional male role model and was exposed to his stepfather's modeling of predatory sexual relationships.

Alan Walker is the oldest of Anita Frederick's four children. Alan and Terry Walker were born during Anita's short marriage to Ronald Walker. T. 102. Leon Frederick's father is Anita's second ex-husband, Winfred Frederick. T. 102. Amanda Frederick, the youngest, is the child of Michael Shavers, a man with whom Anita had a one-night stand. T. 102.

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[6] Dr. Mendel eschewed the notion that the events of September 8, 1990 were predetermined by Walker's childhood traumatizing experiences. T. 312-13. Rather, his view is that "factors in our lives, childhood events, whether those be benign and positive events, or whether those be traumatizing events, have profound impacts upon us, and lead us in certain directions." T. 313.

[7] Exhibit D-2; T. 360.

When Alan was around 7 years old, his mother Anita married Winfred Frederick. T. 117-18. Winfred was an alcoholic, drinking about a case of beer per day. T. 118-19. Usually, Winfred simply passed out after drinking but on at least one occasion, he punched a hole in the wall. T. 119.

Terry Walker, Alan's younger-by-two-years brother, recalled that he and Alan were unsupervised at home. T. 208-09. Both Anita and Winfred had full-time jobs. T. 208-09. Anita had no days off. T. 120. Even when Winifred was home, he provided no supervision; instead, he drank every day. T. 208-09.

The little interaction with parental figures that the boys had was often negative. Terry testified that their mother used a leather strap and switch to whoop them. T. 213, 221. Leon Frederick concurred. T. 242.

Winfred was a malevolent figure who exposed Alan to his own "extremely unhealthy pathological distorted sexual activity." T. 324. Frederick had an ongoing incestuous sexual relationship with his teenage niece, Brenda, and would engage in sexual activity with the fourteen-year-old in view of Alan and Terry. T. 324-25. Alan, Terry, and the Brenda's two sisters all knew about this relationship. T. 214-15, 324-25. In fact, the four younger children would hide and watch the sexual activity of Alan and Terry's stepfather with the teenaged girl. T. 325. Anita became aware of Winifred's behavior as well. One night when Anita came home from work, she asked Alan and Terry where Winfred was. Terry told her that Winfred was with Brenda in the camper of his truck. Anita found Brenda with Winfred, who had only his underwear on. T. 123-24.

b. In childhood, Walker and his brother were sexually abused and sexualized by older females.

Brenda and her sisters, in turn, subjected their younger step-cousins, Alan and Terry, to what Terry testified was "childhood rape." T. 214. Terry testified that Brenda Reyer and her sisters committed sexual acts on both him and Alan when the boys were younger. T. 215. He testified that they would take the boys into separate rooms, and touch their genitals and use them to perform sex acts. T. 214-15. He recalls this happening "more than once and more than twice." T. 215.

Dr. Mendel, who specializes in therapy with males who were sexually abused in youth, testified about instances of sexual abuse told to him first by Alan Walker and corroborated by his age cohorts who lived in the neighborhood. T. 326-30. These interviews confirmed that Marie Reyer, three years older than Alan and five years older than Terry, and her sister Mary, engaged in sexual activity with Alan and Terry. T. 328-29. At the time Marie was about 11, Alan and Mary were about eight, and Terry was about six.[8] T. 329. The activities included "actual attempted, possibly actually performed penile vaginal sexual intercourse." T. 329. Such sexual activity by prepubescent children indicates to Dr. Mendel that "at least one, if not more of them, have already had that done to them by an older individual, or at the very least, been exposed to a great deal of graphic sexual material." T. 329.

[8] Terry testified that the sexual molestation by the Reyer sisters occurred at some point after the boys' first visit to Alaska, and before their second visit, meaning that it occurred after Alan finished the fourth grade and prior to Alan starting ninth grade. T. 206-7. This is consistent with Dr. Mendel's report.

And while Dr. Mendel noted "a considerable amount of uncertainty" about the exact nature of Alan Walker's relationship with his mother Anita, T. 335, he testified that it was clear "that there was a lack of appropriate boundaries and a sexualization of the interactions between the mother and Alan." T. 336. In this context, sexualization means the crossing of sexual boundaries in a way that the child does not perceive the inappropriateness of the conduct. T. 336-37.

In this context, Dr. Mendel analyzed the public touching of his mother's breasts (over her clothing) by Alan Walker. T. 336-37.[9] Vera Faye Breland, a friend and former work supervisor of Anita's for over 20 years, T. 249, observed this behavior. T. 251. She described seeing Alan touch Anita near her breast during one occasion when he visited Anita at work. T. 252-53. She could testify to the touching in the breast area, but not whether it was a pull or pinch. T. 253.

Physical affection and love in a non-sexual context were not modeled to Walker in his childhood and adolescence. It is significant to Dr. Mendel that Alan Walker was never hugged or given physical affection from his mother. Thus, the physical contact Walker had with females was almost exclusively sexualized. T. 341-43.

c. Walker's upbringing amid transgressive pathological relationships affected his psychological development and his views on sexuality and women.

After experiencing sexual abuse at the hands of his older, female family members, and witnessing sexual abuse by his stepfather, Alan watched as his

[9] However, that is not to diminish the possibility, as related by Robin Saucier to Dr. Mendel, that actual sexual activity took place between mother and son. T. 338-39. The account told by Robin to Dr. Mendel has a fair amount of believable detail. Dec. T. 81.

childhood friend, Robin Saucier (with whom he later had a child), was traded into a sexual relationship with an older man in the neighborhood in return for monetary payment to her family at the age of eleven. T. 332-34. 11-year-old Robin was "given" to a man in his 40's named Leroy Malloy in exchange for some utilities such as a sump pump, a washer and dryer, and a refrigerator.[10] T. 332-34.

This type of predatory relationship was not uncommon in their community. A 21 year-old man named Merlin Castleberry was allowed to have a relationship with Alan's sister Amanda when Amanda was 13, in exchange for Castleberry purchasing goods for Anita Frederick, and performing services such as fixing Ms. Frederick's car. T. 333-34. When Amanda was in ninth grade, she had his child. T. 333-34.

Dr. Mendel's interviews uncovered a pervasive belief in the neighborhood that in addition to her sexual abuse by Winfred Frederick, Walker's step cousin Brenda Reyer was also used sexually by other of her uncles. Brenda's sister Mary learned at age 18 that her oldest "sister," Linda, was actually her mother, and the man she knew as her grandfather is possibly actually her father. T. 327-28.

A witness familiar with the family, Vera Faye Breland, also recalled a conversation with Anita about a neighbor who had taken an inappropriate interest in then 12 year-old Amanda. T. 255-56. This neighbor bought Amanda a pair of

[10] Anita Frederick corroborated the evidence of this sexually toxic environment, including the relationship between Robin and Malloy. T. 130-31. When the police or juvenile authorities came around, Leroy and Robin drove to Louisiana. T. 131. Eventually, Robin married Leroy when she was 17 or 18 years old. T. 132. Alan, who was approximately the same age as Robin, was aware of this relationship. T. 131-32. When Alan was around 23 years old, he and Robin developed a relationship, and they had a daughter, Michelle. T. 133. Michelle stayed with Anita, and Alan helped take care of her. T. 134. Walker and the other children in the neighborhood were aware of this relationship. T. 333.

bikinis. T. 255-56. She stated that Anita did not seem worried or feel threatened about it. T. 256. Faye stated that Anita was made aware that the neighbor peeped in her window, although Anita, herself, claimed she did not see it. T. 257-58.

As Dr. Mendel observed, the sexual abuse suffered by Alan and Terry was part of a larger pattern of pathological sexual relationships in the 28th Street neighborhood where Anita Frederick made her home. T. 326.

d. Walker's childhood vulnerability and powerlessness were demonstrated when an older woman forced him to undress and remain naked in her presence.

Lack of parental protection was a constant theme in Mr. Walker's upbringing. Dr. Mendel asked Walker to describe an early memory of being happy, or sad, or angry; he could not do so. T. 318. This is an unusual circumstance in Dr. Mendel's practice – it is significant when a patient cannot recall a time in early childhood when he was happy, sad, or angry. T. 319. But when asked about an early memory of being scared, Walker gave a vivid account on an incident when he was five or six years old. T. 317-18.

On this date, his mother sent him to the house of a female friend. This woman made Walker strip off his clothes, terrifying him. Walker hid under the bed at the woman's house. When Walker told his mother about the incident after his return home, she treated it as a joke. T. 317. The incident was confirmed to Dr. Mendel by Anita Frederick. *Id.* Anita herself corroborated the incident in her testimony at the evidentiary hearing, although her memory was that the friend pulled Alan's pants off. T. 114-15. Anita noticed Alan was scared when he told her about the incident. T. 114.

e. Walker's biological father was largely absent from his life after leaving the family when Alan was three years-old.

Alan's biological father, Ronald Walker, met Anita when he was about 19 years old. T. 179-80. When they married about two years later, he 21 and she about 18 or 19. Anita had Alan when she was 20 or 21, and Terry two years later. T. 109-10.

Ronald and Anita were married for seven years, during which he moved constantly: to Florida, South Carolina, Hawaii, back to South Carolina, and then back to Florida. T. 180, 197-98. Ronald moved to Alaska without his family in 1969, and was living there when he and Anita divorced. T. 198-99. When Ronald and Anita split up, Alan was about 3 -3½, and Terry was an infant. T. 181.

For several years after his parents' divorce, Alan Walker had no contact whatsoever with his father. T. 115; T. 183. During the first 3 ½ years that Ronald lived in Alaska, he did not hear from the mother of his sons. T. 183. Ronald testified that he tried to get into contact with his sons, but said Anita did not contact him after having moved shortly after Ronald left. T. 183. Anita admitted in her testimony that she concealed their location from Ronald. T. 114-15. While in Alaska, Ronald married Marcella Walker; he was widowed after forty-three years of marriage. T. 186, 188. Ronald helped raise two stepsons. T. 186. Other than two separate years when Alan stayed with his father in Alaska, his father was not a part of his childhood and adolescence. T. 116-17.

Ronald describes Walker in these early years as a "great kid." T. 185-86. He was complemented by his co-workers on Alan's good behavior. *Id.* Alan and Terry were required to do chores to earn allowances. T. 186. In general, Ronald had no

serious behavior problems out of Alan Walker when he was a young child. *Id.* Father and son did activities, such as fishing. T. 187. Marcella and the kids went to church often; Ronald did not always join them because of his work schedule. T. 192-93

f. Walker's early years were marked by poverty, instability, and transience.

In the aftermath of his parents' separation and divorce, Walker's family was subject to extreme poverty and instability. T. 314. After she and Ronald split up, Anita stayed with her mother in Florida for a brief period of time. T. 112. Because Ronald stopped paying child support after one month, and she could not find work in Florida, Anita left with two strangers, went to New Orleans for a time, and then finally settled on the Gulf Coast of Mississippi. T. 112. When they first settled in Mississippi, Anita and her young sons were homeless and slept in a car. T. 113. Eventually, Anita found a restaurant job. T. 113.

g. Walker lacked a parental presence in childhood.

Walker's childhood, from his father left the family forward, was marked by parental absence.[11] Even after his mother found a settled location to live and work, Walker was required to "look out for" his younger brother while his mother worked. T. 316. While Anita worked the two boys were alone in the home. T. 316-17.

According to Alan's sister Amanda, in the late 1980s when Amanda, Alan, and Leon lived with their mother in Mississippi, her mother was rarely home.[12] Anita had two jobs, working 10 pm to 6 am, then going home to rest before working a second job

[11] With the possible exceptions of the two occasions when Alan stayed with his father in Alaska.
[12] During this time, Terry was living with his father in Alaska.

in the daytime. T. 84-85. Anita was frequently exhausted by this grueling schedule; she would fall asleep in the car when waiting for Amanda during cheerleading activities. T. 85-86. While Anita worked, Alan was responsible for looking after Amanda. He cooked and cleaned and was good to her. T. 86.[13]

h. Walker's yearning for a stable father figure led him to be mentored by unsavory older men who introduced him to drinking at a young, smoking marijuana, and stealing.

Unsupervised, Walker was vulnerable to the corrupting influence of very unhealthy male authority figures. As Dr. Mendel testified, except for the times Alan went to Alaska,

> his father was not a part of his life. And so he grew up without a father. So with a single mother who was pretty absent from his life was working two or even three jobs at a time, and connected with the absence of his father, there came, not surprisingly, a great deal of longing for father figures, which left him very vulnerable to the influence of some really unhealthy father -- people of his father's age or perhaps older, the fathers of his friends, who had a very damaging and corrupting influence on Alan.

T. 322.

The "28th Street neighborhood" where Anita moved her children after separating from Winifred, was pathologically toxic as Dr. Mendel observed:

> [T]his is an entire neighborhood in which, I've never seen a neighborhood, a small environment in which there was this degree of crossing of sexual boundary, incestuous relationships, sexual relationships across generations, and that entire constellation of sexual events had a huge impact on Alan, his brother Terry, I believe on all of the kids in this neighborhood.

T. 325.

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[13] This was corroborated by the testimony of Nellie Richards, Alan's maternal aunt. T. 169-70.

The neighborhood was compact. At the post-conviction hearing, Amanda sketched a map showing how close together everyone lived. See Exhibit 1.

Three men played a significantly corrupting role in Walker's childhood and adolescence: Duke Maloney, "Big Jack" Collins, and Frank Potter. The first two of these had sons close in age to Alan. The third lived close by. T. 127, 322-23. These forty-year-old men provided alcohol and marijuana to Walker and his friends. Alan even showed his mother the closet where Duke Maloney grew his marijuana. T. 128.

Collins involved Walker and the other boys in stealing for him. T. 128-29. As Anita Frederick testified, Collins "would have all these little boys off of 28th Street to go out and steal stuff from other people's houses and bring it back." T. 129. On one occasion, the police came to the house and found stolen four-wheelers in her yard. T. 149-50. Duke Maloney's son, Dwayne, hid in Anita's bathroom until the police left. T. 129. See also T. 89, 96. Dr. Mendel testified that this was nothing less than indoctrination into criminal activity. T. 323.

Amanda Frederick testified about these older men coming to her house to drink with Alan and his friends when they were teenagers. T. 87-88. Amanda saw Alan get drunk with those men. T. 86-87. Besides drinking, Alan and his friends smoked marijuana. T. 86-87. Potter acted inappropriately around Amanda. Once, he flashed Anita in front of Amanda. Alan became upset and spoke to Potter about his conduct. T. 88-89. Anita Frederick confirmed that this incident with Potter occurred. T. 156-57.

Terry Walker testified that the Maloney boys got into a lot of fights and that Alan's friends, he and Alan "would be corrupt and do things together." T. 217.[14]

During the period beginning when Alan was 14 and under the influence of these older men, Alan's mother Anita felt she lost control, especially because she worked so much. T. 138. She knew he drank and smoked marijuana, though after she found marijuana in the house, she did not see him smoke it. T. 136-38.

i. Under the influence of alcohol and drugs, Walker could become abusive to women.

In his adolescence, Alan was encouraged to smoke cigarettes, drink alcohol, and use marijuana by the group of older men who served as his role models. T. 343-44. He was drinking heavily with his friends and their fathers. T. 344. Of his four teenage friends, Alan is the only survivor into adulthood; two of his peers died from liver diseases, and one was killed in a drunk driving accident. T. 345-46.

Alan Walker was generally a passive individual who shunned confrontation – to use his brother's term, a "chickens—t." T. 345. But when intoxicated, Walker would become belligerent, start fights, and in particular be aggressive towards females. T. 345.

j. Walker's father noticed the difference in Walker's behavior in his late teens.

Ronald recalls that Alan and Terry stayed in Alaska for one year during their first visit. T. 187. Walker visited Alaska for the second time as a teenager in 1982 or 1983. T. 188. On this visit, Walker was not the same young man that he was during

[14] Walker's half-brother Leon described Collins, Sr. as being like a "leader of the pack." T. 239. Leon knew there was "stealing and stuff going on "with Walker, his friends, and Collins. T. 240.

his first visit. T. 189. Ronald described Walker as being stronger willed and a little rebellious during his second visit. T. 189.

Ronald testified that he knew that Anita had problems with Walker when Anita would call and "try to ship him to Alaska." He testified that Anita wanted him to go to Alaska where he could have a father figure to "straighten him out and set him on the right road." T. 191. However, Ronald considered Alan to be a little "head strong." T. 191. Ronald believes that Walker would have stayed in Alaska, things would have been different. T. 192.

Terry Walker provided testimony – and something of a life example – of the difference between the household of their father from that of their mother. Terry moved to Alaska with his father in 1979 or 1980 when he was in seventh grade. T. 206. He previously spent one year with his father when he was in second grade and one year with his father when he was in fifth grade. *Id.* He recalled that he had chores when he was in Alaska. T. 207. He described his father and stepmother as being "pretty into school," and added that he had "a little more discipline" in Alaska. T. 207. The schooling was good. T. 217. He declared that "he wouldn't pass the life with his dad, stepmother and older brothers up for the world". T. 217.

k. These traumatizing factors impacted Walker's behaviors with regard to women and sexuality at the time of the murder of Konya Edwards.

Dr. Mendel summarized the effect of these childhood traumatizing factors on Alan Walker's development into the 25-year-old who was convicted of the murder of Konya Edwards. The effect of this boundaryless, sexually charged childhood and adolescence is surely obvious. As Dr. Mendel testified:

> We are creatures that learn from our environment. We learn from our parents, from our peers, from our friends, we learn by the role models that we're given. The role models that Alan had were people who did not have the same sense of appropriate boundaries as I believe most of us have. Did not have a sense that one does not have sex with other members of the family, other than husband and wife. It did not have a sense that it's not appropriate for a 40 year old man to have sex with an 11 year old girl. It's not appropriate for a 21 year old man to have sex with a 13 year old girl. So he grew up in a situation where he was exposed multiple times to role modeling that says no, there aren't those kind of boundaries. One has sex with whomever one wants to have sex with.

T. 334-35.

The lack of adult guidance, and its ugly replacement, the corrupting influence of the fathers of Walker's friends – Maloney, Collins, Potter, and Winfred Frederick – prevented timely development of moral boundaries and respect for others. T. 322-25; 333-35.

Moreover, the issues of powerlessness, helplessness and control are central to Alan Walker's adult psychological makeup. T. 347-48. Dr. Mendel testified that these issues begin back with the poverty and helplessness that Alan experienced in early childhood, from his mother's inability to establish a stable home with parental support, control and nourishment. T. 348-49. This evoked "feelings of lack of safety, and a sense of danger and fear." T. 348.

This explains why the incident when six-year-old Alan was forced to strip for his mother's friend is so embedded in his memory – it was "an experience of ultimate powerlessness where he is rendered naked and helpless and terrified." T. 348. It was only two years later when eight-year-old Alan is sexually used by the older girls in the Reyer family. These early sexual experiences were grounded in relationships of

domination and power – the older, more powerful females over Alan and Terry, the older men in his world over their younger sexual victims. *Id.*

These experiences developed in Alan Walker an insecure sense of attachment, a lack of trust that physical affection could be obtained except by sexual contact, and a fear of loss of affection and support. Thus, as Dr. Mendel explains, "There is an ultimate portrayal of power, dominance, control, versus helplessness. And that's the way sexual relation began for him." T. 349. Thus "I don't think it's any surprise in this light that ended up with some distortions, with profound distortions in his views of women and of sexual relationships in which things having to do with power and powerlessness played such a central role." *Id.*

This dynamic provides a large part of the answer to the question Dr. Mendel posed early in his testimony, "where does Alan's anger arise from?" T. 350. Dr. Mendel testified:

> I believe that the premature introduction into sexual relationships, the sense of powerlessness and helplessness he experienced, plays a central pivotal role in his anger and rage and in understanding why it's directly solely, or virtually solely at women.
>
> One of the things that happens with sexual abuse is that people, there is a whole range of experiences people have. But we see increased aggression, increased criminal behavior. We see higher likelihood of substance abuse, and we also experience anger at perpetrators, but also at the class of people that perpetrators represent. There are certainly substance abuse -- excuse me, certainly sexual abuse victims who, male or female, who can't stand being around men, who hate men. Don't want anything to do with men. And there are people who hate, fear, and have these intense emotions toward women. Toward the class of people that has perpetrated abuse against them.

T. 351.

He explained further:

> This is not only about rage and anger, and that can't, like the other factors, can't be understood in isolation. A big piece of that is that Alan has a profoundly distorted view of women and of relationships between men and women, which . . . creates this enormous internal conflict, and as they set up for disappointment, frustration, rage, acting out behaviors, what this core conflict is, this is not something that Alan is alone in experiencing.

T. 352.

Dr. Mendel also pointed to the effect of alcohol and drug abuse in reducing Walker's inhibitions and increasing his rage. T. 355.

In the face of the distortions shaped by these early experiences, however, Dr. Mendel pointed to Walker's ability to show concern and protection for his brothers, his sister and (from prison) his relationship with his daughter. T. 355-56. In the single-gender segregation of prison, Dr. Mendel believes that Alan Walker has, and can continue to, develop control of his negative behaviors. T. 356.

4. Neuropsychological testimony available in 1991 would have provided evidence that also would have been relevant to the sentencing jury's deliberations.

In addition to Dr. Mendel, Robert Shaffer, Ph.D., a neuropsychologist, testified at the post-conviction hearing. Dr. Shaffer determined that Walker suffered significant defects in brain functioning often found in children who suffer abuse or trauma.[15] As Dr. Shaffer explained, neuropsychology "is a form of assessment and

[15] Dr. Shaffer described his professional experience, T. 406-10, and his curriculum vitae was admitted as Defense Exhibit 4. T. 410. The Court found him qualified as an expert witness in forensic psychology and neuropsychology. T. 416.

treatment for individuals that have brain compromise." T. 410. Administration of objective tests reveals the presence or absence of brain impairment, severity of any impairment, and location in the brain of any impairment. T. 410-11.[16]

Dr. Shaffer pointed out that the frontal lobe of the human brain, especially the prefrontal cortex, is highly specialized and overlays the limbic system, which deals with drives, such as hunger or sexuality, as well as emotions. T. 418. The prefrontal cortex plays a key role in inhibiting the expression of emotions. Thus, rather than automatically reacting in fear or rage, the prefrontal cortex enables individuals to think logically about the appropriate action to take. T. 419-20.

Dr. Shaffer observed that there is a relationship between childhood trauma or trauma through life and brain functioning. In particular, children exposed to various traumas have problems with development of the left hemisphere of the brain, which result in difficulty with processing verbal information and verbal memory. T. 421. Similarly, people experiencing trauma may have a smaller hippocampus, a structure important for memory. In addition, the corpus callosum in individuals who have experienced trauma may have impaired functioning. *Id.* Brain impairment from trauma also extends to the limbic system, including the amygdala. Signals from the amygdala must combine with information from the computing center of the brain in

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[16] Before detailing the results of the tests administered, Dr. Shaffer discussed some of the relevant details concerning the brain's structure and functioning. Generally, the left hemisphere of the brain specializes in language functions and other sequential tasks. The right hemisphere, in contrast, is instrumental in spatial relationships, processing of negative emotional states, and the expression of those emotions. T. 417. The two hemispheres communicate with each other through the corpus callosum, which is a band of fibers connecting the hemispheres. When the left hemisphere processes inputs, it should be able to coordinate with the right hemisphere, which regulate the emotional response to those inputs. T. 417-18.

order for a healthy adult to make appropriate judgments. T. 422.

Individuals who experience trauma may also have impaired executive functioning, which interferes with the appreciation of consequences of action and may interfere with the regulation of emotions. T. 422. Dr. Shaffer noted that "hostility and anger are much more prevalent in these adult individuals" and that "depression and anxiety are also more prevalent." T. 422.

Dr. Shaffer remarked that the type of trauma discussed by Dr. Mendel is associated with impaired brain functioning; likewise, alcohol consumption during adolescence may hinder brain development. T. 422-24. Based on his evaluation of Walker, Dr. Shaffer determined that his neuropsychological profile "is consistent with that of individuals that have experienced various traumas during their developmental period." T. 424; *see also* Exhibit 6.

For the evaluation, Dr. Shaffer conducted a Structured Interview of Symptoms and administered a series of objective tests. He concluded Walker had impairments with frontal lobe executive functioning, impairment in his left hemisphere, and impairment in the transfer of information between the two hemispheres of the brain. T. 441.

Of particular note, Walker has impairments with the ventromedial prefrontal cortex. T. 431-32. This area of the brain is essential in socialization and the ability to conduct behavior appropriately and lawfully. T. 433-34. As Dr. Shaffer explained, this impairment means that Alan has difficulty appreciating the consequence of a sequence of actions when those actions may involve significant losses. T. 433.

People with impairment to this region of the brain can handle ordinary, rehearsed situations with little difficulty. However, this region becomes critical when an individual is faced with emotionally-laden or novel situations. T. 434-35. In particular, someone may experience some type of internal conflict when confronted by a "trigger," which "is a term of art . . . that refers to when a person sees something in the environment that reminds them of something from the past." T. 436. Based on Alan's history, a trigger may be associated with abuse, sexual stimulation, or a sexual encounter. T. 436. However, when emotional triggers are absent, Walker functions within normal limits. Thus, he can attend to make routine daily activities, such as hold a job or care for his siblings. T. 442-43. In addition, he should function well in a prison environment because he is subject to many consistent routines. T. 442.

Dr. Shaffer was clear that Walker's problems when encountered with emotional triggers does not make him a "sociopath." A sociopath has no feelings and makes strategic decisions. Someone with this type of prefrontal cortex impairment, "after the experience, reflecting back, have a full range of emotion. Full range of regret, remorse, feelings of sorrow about what happened. But it's leading up to the incident, the ability to predict those feelings is absent." T. 436-37.

Dr. Shafer also discussed the adverse effects of alcohol use on an already impaired brain. As he explained, "impulsive behaviors are committed more readily when somebody is under the influence of alcohol," and if that person also has the type of brain impairment found in Alan, then there is "independent contributions to disinhibition." T. 441-42.

REASONS FOR GRANTING THE WRIT

A. Contrary to this Court's Precedents, the Mississippi Supreme Court Excused Counsel's Admitted Failure to Prepare for the Penalty Phase.

Trial counsel admitted he was not concerned with the penalty phase until the weekend before trial when he learned Walker's co-indictee reached a deal with the State for his testimony. *Walker v. State*, 303 So. 3d at 724. The Mississippi Supreme Court excused this dereliction of counsel's elementary duty because counsel stated his strategy was to "humanize his client" despite this Court's numerous pronouncements about counsel's need to conduct a reasonable investigation. *See generally Strickland v. Washington,* 466 U.S. 668 (1984). The state court even found trial counsel's failure to investigate consistent with the recent decision in *Andrus v. Texas,* 140 S. Ct. 1875 (2020), despite that opinion's admonition that counsel in capital cases must conduct a reasonable penalty phase investigation .

1. Trial counsel has a duty to conduct a thorough penalty phase investigation.

When addressing a challenge to trial counsel's performance, a reviewing court must consider 1) whether counsel's performance was deficient; and 2) whether Petitioner suffered prejudice as a result. *See Strickland v. Washington,* 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003).

In a capital sentencing context, a "reliable adversarial testing process generally requires that counsel present to the sentencing jury evidence of the character and record of the individual offender and the circumstances of the particular offense." *Eddings v. Oklahoma*, 455 U.S. 104, 111-112 (1982). Thus,

counsel has an "obligation to conduct a thorough investigation of the defendant's background." *Porter v. McCollum,* 558 U.S. 30, 39 (2009) (per curiam) (citing *Williams v. Taylor,* 529 U.S. 362, 396 (2000)); *see also Wiggins v. Smith*, *supra*, at 510 (quoting ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Section 11.4.1 (1989)); *see also* ABA Guideline 11.8.6, (counsel should investigate "family and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence))." "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U.S. at 690-91.

There are few limits on the scope on mitigating evidence, which encompasses any information about the defendant which might induce a juror to vote for a life sentence. *See, e.g., Tennard v. Dretke,* 542 U.S. 274, 284-85 (2004). In particular, counsel should be alert to red flags, such as poverty, dysfunctional families, or substance abuse, found in records or arising from an investigation. *See Porter,* 558 U.S. 30, 40 (2009) (counsel ineffective for ignoring "pertinent avenues for investigation of which he should have been aware"). Counsel cannot devise a theory that may be reasonable in the abstract without conducting an adequate investigation making the selection of that theory reasonable. *See Sears v. Upton,* 561 U.S. 945, 953 (2010).

2. Trial counsel's failure to investigate mitigating evidence left the jury with no basis to vote for a life sentence.

The performance of Walker's trial counsel fell below the range of competence demanded of lawyers preparing for a penalty phase. As lead counsel conceded, he

made little, if any, effort to prepare for the penalty phase.[17] As a result, the limited evidence presented at the sentencing phase "left the jury knowing hardly anything about him other than the facts of his crimes" *Porter* 558 U.S. at 33.

After Walker's inevitable conviction, Stegall could do nothing but call the four witnesses who were handy. The first was Mike Maniscalco, a project superintendent for Tilley Constructors, who hired Walker. Trial T. 1605. Maniscalco testified Walker worked on a project in Pascagoula as a general laborer and characterized him as a punctual and well-liked. Trial T. 1608. On cross-examination, however, Maniscalco testified that he would not hire him knowing about the convictions. Trial T. 1609.

Alan's half-brother Leon was called to testify, but he could do little more than provide the most elementary facts, and even then, he struggled. He was asked to list the other people who lived in the house. Trial T. 1610-11. Leon, however, had a difficult time explaining where he lived, and he struggled to remember when Alan lived with him and when Alan went to Alaska. Trial T. 1612-14.[18] Amanda repeated some of the information from Leon's testimony and added that Alan was good to her and took her places. She added that Alan cared about Michelle, his 16-month-old daughter. Trial T. 1624.

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[17] Stegall's lack of preparation in Walker's case was not the only time he failed to discharge his duties to his clients. In 1993, Stegall was disbarred for failing to take any action on behalf of two clients who retained him to pursue post-conviction relief. *Stegall v. Mississippi Bar*, 618 So. 2d 1291 (Miss. 1993). A third former client sued Stegall for malpractice, again alleging that Stegall did not work on his case after accepting and keeping a retainer. This client also asserted that "Stegall has misled him, misrepresented what he was doing, and downright lied." *Singleton v. Stegall*, 580 So. 2d 1242, 1246 (Miss. 1993). Stegall was also convicted of embezzlement.

[18] At the post-conviction hearing, Leon did not recall testifying at his half-brother's sentencing. Rather, he denied this, even when shown the sentencing phase transcript. T. 242-43.

Anita was the final defense witness at sentencing. She recounted superficial details from Walker's life, beginning with his birth in Florida and the move to Mississippi. Trial T. 1627-29. She also mentioned the times that Alan and Terry went to stay with their father in Alaska. Trial T. 1634. Defense counsel asked her about various things such as who else lived with the family, and where Alan worked. Trial T. 1635-41. Stegall also asked about various places where Alan lived. Trial T. 1641-42. Stegall introduced a picture of Michelle, Walker's daughter, into evidence and elicited testimony from Anita that Alan loved and cared for her. Trial T. 1645. She also testified about an instance in which Alan received a certificate of appreciation for going into a burning house to save a baby. Trial T. 1646-47.

Nowhere is the bankruptcy of the defense mitigating case more apparent than in closing arguments. Stegall spent no more than about three pages of the record discussing mitigating circumstances, and in his own argument, he essentially conceded the absence of mitigation other than Alan's lack of a criminal record. Trial T. 1694. He conceded there was no evidence that Walker was under the influence of extreme mental or emotional disturbance. Trial T. 1695. Regarding Alan's age of 25 years old, Stegall agreed with the prosecutor that "he's not real young." Trial T. 1695.

Stegall noted that Walker came from a broken home, but then discounted the mitigating value of the little evidence that he presented: "that doesn't explain or really excuse anything because lots of people go through broken homes. Lots of people

don't always stay with their mama or their daddy all of their life, but that happened to him." Trial T. 1695.[19]

Other than recounting a few details of Alan's life, defense counsel failed to convey anything about the way he was brought up, or the environment in which he developed. Defense counsel presented no evidence at all about the chronic instability in Alan's life, such as his father moving out, the divorce, the relocation to Mississippi, the period of homelessness when he lived in a car, or the separation from his brother. Defense counsel presented no evidence about Anita's background to explain why such a hard-working woman could have had so many problems and why she may have become married to Winfred and remained in that toxic environment even after she divorced him. And he introduced no evidence whatsoever of the pervasive sexually dysfunctional background in which Walker lived, and which left such an indelible impact on him.

Learning about Alan's upbringing, including the perverse, incestuous environment in which he lived and in which young girls were essentially bought and young boys were molested, would have at least provided some kind of explanation for the crime. *See Sears v. Upton,* 561 U.S. at 951 (facts may be mitigating even if those facts do not make the defendant more likeable if they help the sentencer understand

[19] A short time later, he again diminished the value of the little evidence he presented: "He lived kind of a hard life, but a lot of people do that; and that again does not explain why in the world something like this would happen." Trial T. 1696. Later, Stegall again confessed his failure to offer much in the way of mitigation: "I can't give you any explanation." Trial T. 1699. Stegall's co-counsel, Robin Midcalf, also addressed the jury but did little more than beg for her client's life and stated that "there has to be something good in him." Trial T. 1711. She also urged the jury to spare his life so that he would be able to think about what he did. Trial T. 1710.

how he came to be in the situation he is in). The lack of investigation "fettered the defense's capacity to contextualize or counter the State's evidence." *Andrus v. Texas,* 140 S. Ct. 1875, 1877 (2020).

3. The Mississippi Supreme Court's excusal of trial counsel's failure to prepare is inconsistent with this Court's precedents.

The performance of Walker's counsel is remarkably similar to that of the attorney found deficient in *Andrus*. As in Walker's case, trial counsel "performed virtually no investigation of the relevant evidence." *Id.* at 1877. Like here, Andrus's counsel did not prepare the family witnesses he called. He spoke to Andrus's mother when he subpoenaed her and did not speak to Andrus's father until he arrived at the courthouse. *Id.* at 1882. As with Walker, Andrus's mother testified about basic biological information but nothing about the difficult circumstances of his upbringing. *Id.* at 1878. As here, the failure to prepare adequately made the penalty phase presentation "an empty exercise." *Id.* at 1882.

The Mississippi Supreme Court, however, excused counsel's deficient performance because he stated his aim was to "humanize" Walker. *Walker*, 303 So. 3d at 727. No doubt Stegall wanted to "humanize" his client; no reasonable defense attorney would want to "dehumanize" a client. The question, however, is not whether defense counsel can articulate a description for what occurred at the penalty phase; instead, as this Court repeatedly stressed, counsel as a duty to make a thorough investigation of the client's life. *See Porter*, 558 U.S. at 39. The failure to investigate cannot result in a reasoned strategic plan.

The state supreme court also questioned whether Walker proved Stegall's failure to investigate because Stegall has memory problems. *Walker*, 303 So. 3d at 727. However, Stegall was clear and his memory was not faulty when he testified he was not worried about the penalty phase until the weekend before trial. Additionally, all of Walker's lay witnesses corroborated that Stegall did not talk to them at all or only after they arrived for the trial. When Stegall realized he would have to present a penalty phase, he cobbled together whatever he could.

The state supreme court found, despite a lack of evidence, that a report from a competency evaluation would not have given Stegall any basis to investigate further. *Id.* That request was made a scant ten days before trial; at that late date, counsel had already forfeited the time needed for a mitigation investigation. Moreover, Stegall's cavalier, off-the-cuff motion for a competency assessment was not meant to substitute for a mitigation strategy; instead, the only "strategy" motivating Stegall was his concern about avoiding a collateral challenge. Stegall admitted he had no basis for the motion and that the court-appointed psychiatrist, Dr. Henry Maggio, had never written a report favorable to the defense. Moreover, Stegall acknowledged Dr. Maggio's report was limited to competency, not mitigation.[20]

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[20] Reliance on evaluations focused on competency or sanity fails to satisfy counsel's obligation to conduct a thorough investigation into the defendant's life. *See, e.g., Rompilla v. Beard*, 545 U.S. 374 (2005) (counsel deficient despite having expert evaluation to assess sanity at the time of the offense). A limited mental health evaluation into a defendant's competency or sanity at the time of the offense does not satisfy the constitutional requirement of a thorough and reliable investigation into mitigating evidence. Competency involves a narrow question as to whether a defendant has a factual and rational understanding of the trial proceedings. *See Dusky v. United States*, 362 U.S. 402 (1960). The lower Federal courts are clear that competency or sanity evaluations are no substitute for a mitigation investigation. *E.g.*, *Saranchak v. Secretary, Pennsylvania Dept. of Corrections*, 802 F.3d 579 (3rd Cir. 2015); *Williams v. Allen,* 542 F.3d 1326 (11th Cir. 2008); *Haliym v. Mitchell*, 492 F.3d 680, 712 (6th Cir. 2007).

Due to his lack of investigation, even the week before trial (when the evaluation was requested), Stegall could not have provided Dr. Maggio with any additional materials even if his report would have focused on mitigation. Rather than illustrating conscientious preparation on Stegall's part, the request for the competency evaluation was entirely self-serving and is reflective of his overall indifference to developing a penalty phase defense.

The report, however, did flag areas requiring additional information, but it came too late for Stegall to make any use of it. For instance, Dr. Maggio noted problems with alcohol consumption and memory difficulties. *See* Sealed Exhibit. It also indicated Walker came from a broken home, dropped out of school, and had a drug or alcohol problem. Although those observations would not affect competency, they should have alerted counsel to investigate further. *Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (counsel ineffective for failing follow up on "red flags" pointing to the need for further investigation).

The state supreme court also relied on Stegall's assertion he would not have wanted jurors to learn of prior bad acts. However, without investigating the context of any bad act, there can be no reasonable decision about whether to allow the jury to hear about it. For instance, Walker did drugs and stole things as a teen, but he was under the influence of adults in his neighborhood who lured vulnerable boys into criminal activity. In *Sears v. Upton,* 561 U.S. 945 (2010), this Court pointed to information showing Sears's brother introduced him to a life of crime. Such information could have been used to show Sears's vulnerability and diminished

reasoning skills in desiring to follow in the footsteps of his brother. *Id.* at 950. Furthermore, evidence of the sexually depraved neighborhood and family in which Walker was raised may have helped jurors at least have some understanding of why the crime occurred.

The Mississippi Supreme Court also dismissed neuropsychological testing as inconsistent with the strategy to "humanize" Walker. However, there is no inconsistency. The neuropsychological testing would have found weaknesses in the part of the brain governing the appreciation of the consequences of behaviors especially in stressful situations, and that his deficits could be the result of childhood sexual abuse and verbal abuse and other toxicities in his childhood environment as well as his prolonged alcohol and drug dependence. Thus, it would have helped to contextualize the state's case. *Andrus,* 140 S. Ct. at 1877.

Although the Mississippi Supreme Court addressed *Andrus* on rehearing, it noted only that counsel in *Andrus* overlooked readily apparent mitigating evidence without strategic reason, arguing that Walker's counsel made a "tactical decision" that led to him not having learned about the mitigating evidence at issue*. Walker*, 303 So. 3d at 728. Such lip service does not do justice to *Andrus*, the cases *Andrus* relied upon, or the record of this case.

Trial counsel made a generic remark that he intended to humanize Walker. All defense attorneys, however, aim to humanize their clients in some way. Incantation of such a broad and vague "strategy," however must not obscure counsel's total failure to prepare for the penalty phase of the trial. Otherwise, this Court's

consistent requirement for counsel to conduct a thorough investigation would be meaningless.

B. There is at least a reasonable probability that at least one juror would have refused to sentence Walker to death had trial counsel not failed to find and present the substantial mitigating evidence that Walker grew up surrounded by sexual abuse and dysfunction.

Prejudice exists where there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 694 (1984). Under Mississippi statutory law, a jury must be unanimous in order to return a death verdict. Miss. Code Ann. § 99-19-103. Thus, the decision of a single juror that death is not the appropriate sentence would alter the result of the proceeding. *Wiggins v. Smith,* 539 U.S. 510, 537 (2003).

Because the state court found counsel's performance was not deficient, it did not consider the question of prejudice. *Walker v. State,* 303 So. 3d at 728.[21] Regardless of whether the state court believed that counsel's stated last-minute mitigation strategy of humanizing Walker was reasonable, "that a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced [the petitioner]." *Sears v. Upton*, 561 U.S. 945, 953 (2010). As this Court explained in *Sears*, "the 'reasonableness' of counsel's theory was, at this stage in the

[21] Only the lower court's concurring opinion by Justice Kitchens addressed prejudice. After arguing that the failure to find counsel's performance deficient given on the undisputed evidence that Walker's defense counsel failed to perform any meaningful investigation is clear error, Justice Kitchens addressed prejudice, saying only, "I would hold that the record demonstrates that the circuit court's decision on prejudice was not clear error." *Walker v. State,* 303 So. 3d 720, 734 (Miss. 2020).

inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not." *Id.*

The record demonstrates that there is indeed a reasonable probability that at least one juror would have voted for life had the jury had the opportunity to hear the substantial mitigation available, most notably that Walker's childhood was replete with exposure to sexual abuse, including that inflicted upon Walker himself.[22]

The crimes committed by Walker can only be understood with the benefit of this evidence. The limited mitigation presented at trial, that Walker had once saved someone from a burning building and had family members who loved him, left jurors with the seemingly unanswerable question of how a person with a normal upbringing could one day commit sexual violence. Trial counsel gave voice to this question that his penalty phase presentation had left unanswered in his floundering closing argument, saying, "[Walker] lived kind of a hard life, but a lot of people do that; and that again does not explain why in the world something like this would happen." T. 1696 (emphasis added). The compelling mitigation counsel failed to present—that Walker was raised in this highly toxic sexual environment where sexual abuse was repeatedly modeled for him by older men and sexual abuse was committed against him by his step-cousins—was capable of directly answering that question and providing the essential context for the crime.

This Court's precedent establishes that the failure to find and present mitigation evidence of the sort kept from the jury in this case is prejudicial. *See e.g.*,

[22] See *infra* at Section B.3.a and b.

Sears, 561 U.S. at 948-949 (prejudice found in light of evidence of sexual abuse petitioner suffered at the hands of an adolescent male cousin, verbal parental abuse, frontal lobe abnormalities, and substance abuse); *Rompilla v. Beard*, 545 U.S. 374 (2005) (finding prejudice where petitioner grew up with severely alcoholic parents, observed his father physically abuse his mother and discuss cheating on her, was subjected to beatings with belts and other objects by his father, and had impaired brain functioning); *Wiggins v. Smith*, *539* U.S. 510, 535 (2003) (finding prejudice where unpresented mitigation showed that Wiggins had grown up neglected and subjected to sexual abuse, and that he had limited mental capacity); *Williams v. Taylor,* 529 U.S. 362, 398 (2000) (holding that "the graphic description of [the petitioner's] childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability").

Seminally, in *Wiggins v. Smith*, 539 U.S. 510, 535 (2003), this Court held that the failure to present mitigating evidence of sexual abuse, neglect by an absentee, alcoholic parent, periods of homelessness, and diminished mental capacity was prejudicial as this evidence was "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Id.* at 535. While this Court reminded us in *Andrus* that the Court has "never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice," Walker's history includes each of the elements of mitigation discussed in *Wiggins*, with the substitution of

impairment in brain functioning in the frontal lobe and left hemisphere for diminished mental capacity. T. 441. *Andrus v. Texas*, 140 S.Ct. 1875, 1886 n. 6 (2020).

This Court has emphasized in particular the power and weight of mitigating evidence that gives context to the crime committed. Finding prejudice in *Porter v. McCollum*, 558 U.S. 30 (2009), this Court held that the state postconviction court had unreasonably discounted the unpresented evidence of childhood abuse, explaining that such evidence "may have particular salience for a jury evaluating Porter's behavior in his relationship with [the female decedent of Porter's double murder]." *Id.* at 43. Likewise, the evidence that Walker and his brother were subjected to "childhood rape" by their older, female relatives, and that he was raised surrounded by men whose power was demonstrated by their treatment of women as chattel, would have allowed the jury to understand the relevant context of Walker's heretofore seemingly inexplicable sexual violence against the decedent in this case.

It is also clear that a finding of prejudice is not foreclosed by the existence of particularly aggravating circumstances or the shocking nature of a particular crime. This Court has repeatedly found prejudice in cases with extreme aggravating circumstances. For instance, in *Williams v. Taylor*, the prosecution presented evidence that after committing the instant murder of a man who refused to lend him a couple of dollars, Williams had later gone on to commit two additional brutal assaults of elderly victims. 529 U.S. at 367-368. He left one victim in a potentially permanent vegetative state, and set a fire at the other victim's home prior to attacking and robbing him. *Id.* at 368. Williams also set a fire at jail while awaiting

his trial. *Id.* This Court reasoned that while the mitigating evidence of Williams' abuse-filled childhood and mental deficiencies "may not overcome" the prosecution's evidence of aggravating factors, prejudice existed because it "might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398.

Similarly, in *Rompilla v. Beard*, the prosecution presented evidence that Rompilla tortured the decedent prior to robbing and murdering him, including stabbing the man repeatedly and setting him on fire. 545 U.S. at 377–78. This Court held that while it is possible that a jury could have heard the undiscovered mitigation evidence and still have decided on the death penalty, the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *Id.* at 392 (quoting *Strickland*).

The ability of mitigating evidence to influence juries' appraisal of defendants' moral culpability in cases with grim aggravating factors has also been demonstrated by the numerosity of life verdicts returned by juries presented with "heinous" crimes. This includes some of the most notorious cases in recent memory.[23] However, the evidence of jurors returning life verdicts in highly aggravated capital cases extends

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[23] In 2015, the perpetrator of the theater shooting in Colorado that killed 12 people and wounded 70 others was given a life sentence by his capital jury. Jordan Steffen and John Ingold, James Holmes Sentenced to Life in the Aurora Theater Shooting, DENVER POST (Aug. 7, 2015), https://www.denverpost.com/2015/08/07/james-holmes-sentenced-to-life-in-prison-in-the-aurora-theater-shooting/ (last visited Mar. 6, 2021).

Zacharias Moussaoui, one of the co-conspirators responsible for the 9/11 terror attacks, sometimes referred to as the 20th hijacker, was also given a life sentence by his capital jury despite having admitted to planning to fly a plane into the White House as part of the attack. Neil A. Lewis, and David Stout, Moussaoui, sentenced to life, tries to get the last word, N.Y. TIMES, May 4, 2016, available at https://www.nytimes.com/2006/05/04/world/americas/04iht-trial.html. The jurors indicated that multiple mitigating factors influenced their decision to reject the death penalty, in particular, that "Moussaoui had suffered an 'unstable early childhood and dysfunctional family' life and "that his father 'had a violent temper and physically and emotionally abused his family.'" *Id.*

far beyond these highly publicized cases. A 2018 law review article documented over 200 cases from across the country where juries returned life sentences despite the presence of severely aggravating factors including the killing of children and the killing of multiple people. Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 Hofstra L. Rev. 1161, Appendices 2-4 (2018).[24] The plethora of such cases demonstrates that the existence of extremely aggravating factors in a capital murder does not foreclose the reasonable possibility that jurors may be swayed to vote for life.

Had the jury been given the opportunity to hear the mitigating evidence that Walker was raised in an impoverished environment saturated with disturbing sexual and incestual abuse that he both witnessed and was a victim of, and that he suffered from frontal lobe and left hemisphere impairment that left him low functioning when confronted with emotional triggers, it "might well have influenced the jury's appraisal

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[24] Among these 200 example cases, in 2005 a Virginia jury returned two life verdicts in the trial of two gang members who lured their pregnant female friend into the Shenandoah River Valley on the pretext of a fishing trip, then strangled her with a rope and stabbed her 16 times, killing her and her unborn child. Seth Adam Meinero, *La Vida Loca Nationwide: Prosecuting Sureno Gangs Beyond Los Angeles*. THE UNITED STATES ATTORNEYS' BULLETIN, May 2014, at 29, *available at* https://www.justice.gov/sites/default/files/usao/legacy/2014/06/03/usab6203.pdf. A Mississippi jury likewise returned a life verdict in 2009 for a man convicted of two counts of capital murder, who choked and beat a woman and then shot to death the two police officers who responded to her 911 call for help. *Husband v. State*, 23 So.3d 550, 551–52 (Miss. App. 2009).

In 2017, a Nevada jury returned a life sentence for Bryan Clay who they convicted of raping a woman and her 10-year-old daughter and beating them to death with a claw hammer. Briana Erickson, *Jury spares life of Las Vegas man who killed girl, mother*, LAS VEGAS REVIEW JOURNAL (Dec. 5, 2017), https://www.reviewjournal.com/crime/courts/jury-spares-life-of-las-vegas-man-who-killed-girl-mother-1256777/ (last visited Mar. 6, 2021). In 2004, an Alabama jury similarly rejected the death penalty in a vote of six to six for a man who they convicted of murdering each of his three children with a butcher knife. *Man convicted of slaying children taken off death row.* TUSCALOOSA NEWS (Dec. 18, 2004), https://www.tuscaloosanews.com/article/DA/20041218/News/606119225/TL (last visited Mar. 6, 2021).

of his moral culpability" and caused at least one juror to conclude that death was not the appropriate sentence. *Williams v. Taylor*, 529 U.S. at 367-368.

CONCLUSION

The critical question regarding the kidnapping, rape, sexual battery, and murder of Konya Edwards is: why did this extremely sexually violent crime happen? Trial counsel made no preparation to answer this question. His post-hoc "strategy" to "humanize" Walker would not have conflicted with the evidence discovered and presented at the post-conviction hearing. Yet the Mississippi Supreme Court ignored this Court's emphasis on considering the investigation counsel undertook and credited the post-hoc strategy. This Court should grant certiorari and either issue a summary reversal of the Mississippi Supreme Court's judgment, or remand to that Court with instructions to reconsider how its opinion can possibly be reconciled the substantial precedent summarized by *Andrus*.

Respectfully submitted, this the 8th day of March, 2021.

James W. Craig
Counsel of Record
Hannah A. Lommers-Johnson
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
4400 S. Carrollton Ave.
New Orleans, LA 70119
(504) 620-2259
jim.craig@macarthurjustice.org

David P. Voisin
P.O. Box 13984
Jackson, MS 39236
(601) 949-9486
david@dvoisinlaw.com

Counsel for Alan Dale Walker

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2018-CA-01059-SCT

ALAN DALE WALKER

v.

STATE OF MISSISSIPPI

ON MOTION FOR REHEARING

DATE OF JUDGMENT:	04/17/2018
TRIAL JUDGE:	HON. CHRISTOPHER LOUIS SCHMIDT
TRIAL COURT ATTORNEYS:	MARVIN LUTHER WHITE, JR. DAVID P. VOISIN JAMES W. CRAIG
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	JAMES W. CRAIG DAVID P. VOISIN HANNAH LOMMERS-JOHNSON
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LADONNA C. HOLLAND MARVIN L. WHITE, JR. BRAD A. SMITH
NATURE OF THE CASE:	CIVIL - POST-CONVICTION RELIEF
DISPOSITION:	AFFIRMED - 10/08/2020
MOTION FOR REHEARING FILED:	07/23/2020
MANDATE ISSUED:	

EN BANC.

COLEMAN, JUSTICE, FOR THE COURT:

¶1. The motion for rehearing is denied. The previous opinions are withdrawn, and the following opinions are substituted.

¶2. Alan Dale Walker was convicted of the capital murder of Konya Edwards during the commission of sexual battery, and he was sentenced to death. ***Walker v. State***, 671 So. 2d

581, 587 (Miss. 1995). He also was convicted of forcible rape and kidnapping for which he was sentenced to thirty and thirty-five years, to run consecutively. ***Id.*** On direct appeal, the Court affirmed his convictions and sentences. ***Id.*** at 588. We denied Walker's application for leave to file a motion for post-conviction relief. ***Walker v. State***, 863 So. 2d 1, 31 (¶ 92) (Miss. 2003). Walker filed a successive motion, and the Court held that his post-conviction counsel had rendered ineffective assistance of counsel. We remanded the case to the trial court for a hearing to determine whether Walker's trial counsel had been ineffective under the standard set forth in ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984), in searching for and presenting mitigating evidence during the penalty phase of the trial and whether such deficient performance, if any, had prejudiced Walker.

¶3. After a hearing on remand, the Circuit Court of the First Judicial District of Harrison County held that Walker had failed to meet his burden of proof that trial counsel had rendered deficient performance that prejudiced him. Walker appeals. Following a review of the record, we discern no grounds for reversing the trial judge's determination. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

¶4. On December 10, 2013, we granted Walker's motion for leave to file a successive motion for post-conviction relief and ordered the circuit court to conduct a hearing on the following issue:

> whether Alan Dale Walker's trial counsel was ineffective in searching for and presenting mitigation evidence during the penalty phase of his trial, and whether Walker suffered prejudice from such deficient performance, if any, "sufficient to undermine the confidence in the outcome actually reached at

> sentencing." ***Doss v. State***, 19 So. 3d 690, 708 (Miss. 2009) (quoting ***Rompilla v. Beard***, 545 U.S. 374, 393, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (internal quotation [mark] omitted)).

Walker v. State, 131 So. 3d 562, 564 (Miss. 2013).

¶5. On April 29, 2014, Walker filed a motion to vacate sentence in the circuit court. After the conclusion of pretrial matters and additional psychological testing, the circuit court held an evidentiary hearing. On February 22, 2016, the circuit court heard lay-witness testimony from Walker's family members and from his mother's friend. On December 1, 2016, the circuit court heard testimony from Walker's trial counsel, Earl Stegall, and from his experts, psychologist Matthew Mendel, Ph.D., and neuropsychologist Robert Shaffer, Ph.D.

Evidentiary Hearing Testimony

Earl Stegall

¶6. Earl Stegall represented Walker in his capital-murder trial with Robin Midcalf, a relatively new lawyer, as cocounsel. Stegall testified that he had memory problems after suffering a stroke in 2005 and that he had reviewed the case and refreshed his memory but that he was unable to recall everything. Throughout his testimony, Stegall exhibited a significant inability to recall past events.

¶7. Stegall related what he could remember of his representation of Walker. He was proud that he successfully had moved to suppress Walker's confession. He testified that until the confession had been suppressed, he had thought the guilt phase was a "foregone conclusion," but that afterwards he thought "he had a shot." Stegall testified that he had believed that Jonathan Riser, Walker's accomplice, was not going to testify due to his

pending charges. Stegall said his defense strategy was going to be that Riser had committed the acts and that Walker happened to be present during the crime. Stegall had thought "for sure" that after the confession was suppressed, the State would offer Walker a plea deal and, at worst, Walker would face a life sentence. Because Stegall had thought he "had a lock on the life sentence," he was not "as worried about the penalty phase at all." "[A]t the last second," however, Riser made a deal with the State to testify against Walker, after which Stegall requested a continuance. The trial court denied his request.

¶8. Stegall testified as follows about his penalty-phase strategy:

> I remember I was going to have him address the jury rather than have him testify. I think that's exactly what I did. And I wanted to—my thing in death penalty cases was to personalize them. Make them a person, you know. And tell their life history as well as you could so the jury could look at them and think of them as a person and not just somebody sitting there charged as a murderer. And I remember, I don't have an independent recollection of this, but I know I must have done it. We had the mother come and testify, that was the plan, and then a sister or a brother was going to testify.

Stegall testified that he could not remember having done so but that he would have spoken with the penalty-phase witnesses before trial by phone or before they took the stand. He could not recall having spoken with Walker's father or other non-local relatives or whether he had moved for funds for an investigator for the mitigation case. He thought he would have asked Midcalf to investigate. He did not remember having consulted any experts.

¶9. Stegall did remember that he had asked for a mental evaluation to assess Walker's competency to stand trial, but he said that nothing about Walker had given him cause to think to hire a psychologist. He was shown a July 26, 1991 order granting the defense's motion for a mental evaluation, but Stegall was unable to recall speaking with the psychiatrist who

had performed the mental evaluation, Dr. Maggio, before the trial. When asked if he would have wanted the State to obtain a report that showed criminal behavior, he said he would not have wanted the State to hear of any violent or serious crime and use it against his client.

Discovery of Pretrial Psychiatric Evaluation

¶10. After the hearing concluded, the circuit court reviewed the original trial exhibits and found a report of the pretrial psychiatric evaluation by Dr. Maggio that had been requested by defense counsel and was believed to have gone missing after the trial. The report was found under seal in the circuit clerk's files.

¶11. The trial court notified the parties and allowed Walker's counsel to view the sealed report. Walker requested that the court either not consider the report or reopen the evidentiary hearing to take additional testimony from Stegall. The circuit court denied his requests, finding that the report was relevant and that Stegall likely would have nothing helpful to add to his original testimony. The circuit court asked the parties to resubmit their post-hearing briefs, including arguments addressing the report.

Circuit Court's Ruling

¶12. The circuit court entered an order and a corrected order denying Walker's motion to vacate sentence. Under the first prong of the ***Strickland*** test, deficient performance, the circuit court found that Stegall's strategy of seeking to humanize Walker before the jury had been reasonable. The court found that although PCR counsel would have used a different mitigation strategy, Stegall's approach was not constitutionally deficient, that Walker likewise had failed to meet his burden of proving ***Strickland*** prejudice, and that given the

brutality of the crime, no reasonable probability existed that the alleged childhood trauma and impaired brain function would have caused a jury to impose a life sentence instead of the death penalty.

¶13. Walker filed a motion to alter or amend or for reconsideration. In furtherance of his argument that Stegall's performance had been deficient, he attached the affidavits of criminal-defense attorneys Thomas Fortner and Ross Parker Simons, who opined that Stegall's penalty-phase preparation had breached the prevailing professional standards for capital-defense attorneys. We agree with the State that because the affidavits were not admitted at the evidentiary hearing, they cannot be considered. ***Fowler v. White***, 85 So. 3d 287, 292 (¶ 20) (Miss. 2012). Therefore, we do not address Walker's many arguments that rely on the affidavits.

STANDARD OF REVIEW

¶14. "When reviewing a lower court's decision to deny a petition for post conviction relief, this Court will not disturb the trial court's factual findings unless they are found to be clearly erroneous." ***Manning v. State***, 158 So. 3d 302, 304 (¶ 4) (Miss. 2015) (internal quotation marks omitted) (quoting ***Doss v. State***, 19 So. 3d 690, 694 (¶ 5) (Miss. 2009)).

> In making that determination, "[t]his Court must examine the entire record and accept 'that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact . . . .'" ***Mullins v. Ratcliff***, 515 So. 2d 1183, 1189 (Miss. 1987) (quoting ***Cotton v. McConnell***, 435 So. 2d 683, 685 (Miss. 1983)). That includes deference to the circuit judge as the "sole authority for determining credibility of the witnesses." ***Mullins***, 515 So. 2d at 1189 (citing ***Hall v. State ex rel. Waller***, 247 Miss. 896, 903, 157 So. 2d 781, 784 (1963)).

Doss, 19 So. 3d at 694 (¶ 5) (quoting ***Loden v. State***, 971 So. 2d 548, 572-73 (¶ 59) (Miss. 2007)). We apply a *de novo* standard of review to questions of law. ***Doss***, 19 So. 3d at 694 (¶ 5) (quoting ***Brown v. State***, 731 So. 2d 595, 598 (¶ 6) (Miss. 1999)).

DISCUSSION

I. Whether the circuit court clearly erred by finding that Walker was not denied effective assistance of counsel in the penalty phase.

¶15. Mississippi utilizes the following standard in cases in which one convicted of a crime challenges the sufficiency of his attorney's representation:

> In ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court established the standard for assessing an ineffective-assistance-of-counsel claim. The test is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Havard v. State***, 988 So. 2d 322, 328 (Miss. 2008) (quoting ***Strickland***, 466 U.S. at 686, 104 S. Ct. 2052). To prevail on an ineffective-assistance-of-counsel claim, the defendant must prove that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced the defense of his case. ***Havard***, 988 So. 2d at 328 (quoting ***Strickland***, 466 U.S. at 687, 104 S. Ct. 2052). If the defendant cannot prove both deficient performance and prejudice to his case, the Court will not find that the conviction was unreliable.

Goodin v. State, 102 So. 3d 1102, 1117 (¶ 44) (Miss. 2012).

¶16. "First, petitioners must show that counsel's performance was deficient, i.e., 'counsel's "representation fell below an objective standard of reasonableness."'" ***Ronk v. State***, 267 So. 3d 1239, 1248 (¶17) (Miss. 2019) (quoting ***Wiggins v. Smith***, 539 U.S. 510, 521 (2003)). "'Reasonableness' is based on 'prevailing professional norms.'" ***Id.*** (quoting ***Wiggins***, 539 U.S. at 521). Walker's trial counsel is presumed to be competent, and our scrutiny of trial counsel's performance "must be highly deferential." ***Goodin***, 102 So. 3d at 1117 (¶ 45)

(internal quotation mark omitted) (quoting ***Wilson v. State***, 81 So. 3d 1067, 1075 (¶ 10) (Miss. 2012)). "A true presumption is a rule of substantive law which compels a certain conclusion, usually a judgment, absent rebutting evidence." ***Johnson v. Foster***, 202 So. 2d 520, 524 (Miss. 1967) (citing 9 Wigmore, *Evidence* § 2491 (3d ed. 1940)). "Surmounting ***Strickland***'s high bar is never an easy task." ***Harrington v. Richter***, 562 U.S. 86, 105 (2011) (internal quotation marks omitted) (quoting ***Padilla v. Kentucky***, 559 U.S. 356, 371 (2010)).

¶17. In his order, the trial judge noted the ***Strickland*** Court's own description of the difficulty of second guessing trial counsel's investigation of mitigating evidence.

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and *strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.* In other words, counsel has a duty to make reasonable investigations or *to make a reasonable decision that makes particular investigations unnecessary.* In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91 (emphasis added).

¶18. At the post-conviction hearing below, Walker carried the burden of persuading the trial judge by a preponderance of the evidence that his trial attorney had failed to provide constitutionally adequate representation. ***Doss***, 19 So. 3d at 694 (¶ 5) (citing Miss. Code Ann. § 99-39-23(7) (Rev. 2007)). Accordingly, to have succeeded in demonstrating ineffective assistance of counsel, Walker was required to offer evidence that persuaded the trial judge as finder of fact. Nothing required the judge to believe Walker's evidence or to find it credible. The finder of fact "is free to accept all, part, or none" of Walker's evidence.

Thompson v. Dung Thi Hoang Nguyen, 86 So. 3d 232, 236-37 (¶ 13) (Miss. 2012).

¶19. Stegall, Walker's trial counsel, testified at the post-conviction-relief hearing, although his memory had been affected by a stroke suffered after Walker's trial. As the trial court noted, Stegall's strategy was to humanize his client. To that end, he called witnesses in mitigation to testify, among other things, that Walker had a supportive family, loved his daughter, and risked his own life to save the life of a child. Stegall testified at the post-conviction hearing that he would not have wanted to introduce evidence of bad and criminal conduct that his post-conviction attorneys may have wanted to introduce.

¶20. The crux of Walker's argument concerning Stegall's alleged deficient performance and its relation to the testimony of his mitigation witnesses is that had Stegall asked them to testify at trial, they could have told the jury that Walker had a less than ideal childhood. Walker appears to argue that Stegall's inability to remember interviewing mitigation witnesses means that he did not perform such interviews, but Stegall's inability to remember is at best a nullity. Because Walker bore the burden of proof and persuasion at the hearing, Stegall's inability to remember does not weigh in favor of a finding of ineffectiveness. Walker's mother and sister did testify that defense counsel did not speak to them before sentencing, but their testimony alone does not undermine the trial court's finding that Stegall's personalization strategy was an acceptable trial strategy.

¶21. The trial judge also considered the report of Dr. Maggio, who examined Walker for competency to stand trial. Dr. Maggio found no defect of intellect, memory, or judgment in Walker. The trial judge found that Dr. Maggio's report provided reasonable grounds for trial

counsel to forego additional psychological testing before sentencing. Moreover, as the State argues, the United States Court of Appeals for the Fifth Circuit held in ***United States v. Bernard***, 762 F.3d 467 (5th Cir. 2014), that counsel's failure to present testimony from a neuropsychologist that compromised the trial strategy of humanizing the defendant did not amount to ineffective assistance of counsel.

¶22. The trial judge determined that Stegall's strategy was reasonable. At most, Walker's post-conviction counsel presented an alternative reasonable strategy but failed to show that Stegall's strategy was not reasonable. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." ***Strickland***, 466 U.S. at 689. In short, Walker failed to bear his burden of persuading the trial judge by a preponderance of the evidence that his trial counsel failed to render constitutionally adequate performance.

¶23. On rehearing, Walker asserts this Court has misapprehended ***Strickland***'s standard that counsel's strategic decision must be based on an adequate investigation. As support, Walker cites the very recent per curiam decision by the United States Supreme Court, ***Andrus v. Texas***, 140 S. Ct. 1875 (2020). But ***Andrus*** does not direct reversal here.

¶24. First, in ***Andrus*** the Supreme Court reaffirmed the deferential standard from ***Strickland*** quoted above: "Counsel in a death-penalty case has 'a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary.'" ***Andrus***, 140 S. Ct. at 1881 (internal quotation marks omitted) (quoting ***Wiggins v. Smith***, 539 U.S. 510, 521 (2003)). And "[i]n any ineffectiveness case, a

particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." ***Id.*** (internal quotation marks omitted) (quoting ***Wiggins***, 539 U.S. at 521-22).

¶25. Second, the circumstances surrounding counsel's deficient performance in ***Andrus*** are not present here. In ***Andrus***, counsel did not simply fail to investigate—he overlooked "vast tranches of mitigating evidence" that were readily apparent to him, ***id.*** at 1881, and "would [have] le[d] a reasonable attorney to investigate further." ***Id.*** at 1883 (alterations in original) (internal quotation mark omitted) (quoting ***Wiggins***, 539 U.S. at 527). And when questioned at the postconviction proceeding, Andrus's counsel "never offered, and no evidence support[ed], any tactical rationale for the pervasive oversights and lapses . . . ." ***Id.*** at 1883. "Instead, the overwhelming weight of the record show[ed] that counsel's 'failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment.'" ***Id.*** (quoting ***Wiggins***, 539 U.S. at 526).

¶26. That is not the case here. Stegall did not "disregard[] . . . multiple red flags" with zero justification. ***Id.*** Rather, he made very clear that he pursued a tactical decision to humanize Walker. Given the burden incumbent upon Walker at the post-conviction-relief hearing and the highly deferential standard of review given to the trial court's factual findings, the Court discerns no grounds for reversing the trial judge's determination that Walker's trial counsel provided adequate representation at sentencing. Because Walker failed to prove that the trial court clearly erred by finding that Stegall's performance was not deficient, the Court need not address the prejudice prong of the ***Strickland*** analysis. ***Goodin***, 102 So. 3d at 1117 (¶

44) (holding "[i]f the defendant cannot prove both deficient performance and prejudice to his case, the Court will not find that the conviction was unreliable").

II. Whether the circuit court erred by denying Walker's request to reopen the evidentiary hearing.

¶27. After the circuit court located Dr. Maggio's report, which had been sealed, in the trial record, it allowed Walker's counsel to view it. Walker filed a response arguing that the report was not relevant; but, if the circuit court found the report relevant, Walker argued that the circuit court should reopen the evidentiary hearing. The circuit court entered an order finding the report relevant, providing the State's counsel a copy of it, and asking for supplemental briefing to address it. The circuit court, citing Stegall's memory problems and his testimony that he had no independent recollection of the psychological evaluation, also denied Walker's request to reopen the hearing. The circuit court found that it should consider Dr. Maggio's report from the perspective of defense counsel's evaluation of it at the time of the trial, not from the perspective of what the mitigation experts, Dr. Mendel and Dr. Shaffer, might think about it.

¶28. Walker argues that because the circuit court relied greatly on the report, it erred by not reopening the hearing. We find no error in the circuit court's assessment of the limited usefulness of additional testimony from Stegall, who exhibited memory problems throughout his testimony that were attributable to a stroke. Moreover, the circuit court correctly found it should consider the report from the perspective of trial counsel, a finding not contested by Walker. Finally, as the State argues, the circuit court was under the duty identified in ***Doss v. State***, 19 So. 3d 690, 694 (¶ 5) (Miss. 2009), to examine the entire record of the capital-

murder trial, and it thus was under no obligation to order briefing or a hearing on any particular portion of that record. The circuit court did not err by denying Walker's request to reopen the hearing.

CONCLUSION

¶29. We affirm. The circuit court did not clearly err by finding that Stegall's trial strategy was reasonable. Further, the circuit court did not err by denying Walker's request to reopen the hearing.

¶30. **AFFIRMED.**

RANDOLPH, C.J., MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR. KITCHENS, P.J., CONCURS IN RESULT ONLY WITH SEPARATE WRITTEN OPINION JOINED BY KING, P.J. KING, P.J., CONCURS IN PART AND IN RESULT WITHOUT SEPARATE WRITTEN OPINION.

KITCHENS, PRESIDING JUSTICE, CONCURRING IN RESULT ONLY:

¶31. With respect, I concur in result only. I would hold that because Walker's lead trial counsel, Earl Stegall, did almost no investigation relevant to the trial's penalty phase, the circuit court clearly erred by finding there was no deficient performance. Stegall's testimony established that he did not forego a meaningful investigation based on reasonable professional judgement; rather, he did not investigate because he ran out of time. This Court should not approve trial counsel's slack approach to defending the penalty phase of a death-penalty case. But because the circuit court did not clearly err by finding that Walker failed to meet his burden to prove prejudice, I agree that this case must be affirmed.

¶32. A defendant's right to the effective assistance of counsel in a criminal case is guaranteed by the United States Constitution and the Mississippi Constitution. U.S. Const.

amend. VI; U.S. Const. amend. XIV; Miss. Const. art. 3, § 26; ***Strickland v. Washington***, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In ***Strickland***, the United States Supreme Court set forth a two-part test to be applied to a constitutional claim of ineffective assistance of counsel. ***Conner v. State***, 684 So. 2d 608, 610 (Miss. 1996). Under ***Strickland***, the court first must determine whether counsel's performance was deficient, and, if so, whether the deficiency prejudiced the defendant. ***Id.*** (citing ***Roland v. State***, 666 So. 2d 747, 750 (Miss. 1995)).

¶33. There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that "the challenged action 'might be considered sound trial strategy.'" ***Strickland***, 466 U.S. at 689 (quoting ***Michel v. Louisiana***, 350 U.S. 91, 100, 76 S. Ct. 158, 164, 100 L. Ed. 83 (1955)). "'Reasonableness' is based on 'prevailing professional norms.'" ***Ronk v. State***, 267 So. 3d 1239, 1248 (Miss. 2019) (quoting ***Wiggins v. Smith***, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003)). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." ***Id.*** (internal quotation marks omitted) (quoting ***Strickland***, 466 U.S. at 688-89). "[L]apses 'must be viewed in light of the nature and seriousness of the charges and the potential penalty.'" ***Id.*** (quoting ***Ross v. State***, 954 So. 2d 968, 1004 (Miss. 2007). "[E]very effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Bell v. Cone***, 535 U.S. 685,

698, 122 S. Ct. 1843, 1852, 152 L. Ed. 2d 914 (2002) (second alteration in original) (internal quotation marks omitted) (quoting ***Strickland***, 466 U.S. at 689).

¶34. If the court determines that defense counsel's performance was deficient, it then must determine whether the deficiency had a "reasonable probability" of affecting the outcome of the case. ***Strickland***, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** The defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Ronk***, 267 So. 3d at 1248 (internal quotation marks omitted) (quoting ***Doss v. State***, 19 So. 3d 690, 695 (Miss. 2009)). And he must show "'[a] reasonable probability that at least one juror would have struck a different balance.'" ***Id.*** (alteration in original) (internal quotation marks omitted) (quoting ***Isham v. State***, 161 So. 3d 1076, 1089 (Miss. 2015)). Reviewing the trial court's denial of post-conviction relief, this Court does not disturb the trial court's findings of fact absent clear error. ***Id.*** (quoting ***Loden v. State***, 971 So. 2d 548, 572 (Miss. 2007)). Further, "[i]n capital cases, non-procedurally barred claims are reviewed using '"heightened scrutiny" under which all bona fide doubts are resolved in favor of the accused.'" ***Ronk***, 267 So. 3d at 1247 (quoting ***Crawford v. State***, 218 So. 3d 1142, 1150 (Miss. 2016)).

¶35. At the hearing, Walker sought to show that defense counsel had rendered deficient performance by failing to investigate. He argued that he had been prejudiced because if trial counsel's performance had been constitutionally sufficient, counsel would have presented evidence in mitigation about Walker's childhood trauma and impaired brain function. In

support of that claim, Walker presented testimony from trial counsel, from multiple family members, from a family friend, and from a psychologist and a neuropsychologist. On ***Strickland***'s prejudice prong, the circuit court found that given the brutality of the crime, no reasonable probability existed that Walker's alleged childhood trauma and impaired brain function would have prompted a jury to impose a life sentence instead of the death penalty. The circuit court discounted the credibility of the expert testimony on the ground that much of it was based on unverified information, rumor, and speculation.

¶36. Regarding deficient performance, the circuit court found that trial counsel's penalty phase strategy had been to humanize Walker; in doing so, said the circuit court, trial counsel had offered witnesses who could provide details of Walker's life and counter the brutality of the crime. The circuit court found that the jury had heard unchallenged evidence that Walker had "a supportive family; a young daughter whom he loved; relatives who loved him; he enjoyed respectable employment and had even risked his own life by rushing into a burning house to save a child." The circuit court said that it could not find that Stegall's strategy had been unreasonable. The circuit court also relied on Dr. Maggio's report, which made no major psychiatric diagnosis but found that Walker had antisocial personality disorder and had abused alcohol and illegal drugs. The report described the facts of the murder and how Walker had displayed a lack of remorse. The circuit court found that "[a] fair reading of the report would have ruled out a [***M'Naghten***][1] insanity defense and there would be no reason for trial counsel to develop additional psychological or psychiatric

[1] *See* ***Woodham v. State***, 779 So. 2d 158, 163 (Miss. 2001).

evaluations."

¶37. The circuit court found that if trial counsel had offered the jury the same evidence that PCR counsel had presented, the prosecutor would have been armed with Dr. Maggio's report and would have learned of Walker's other bad behavior and criminal conduct mentioned in the report. Stegall had testified at the hearing that he would not have wanted that kind of evidence in the State's hands. The circuit court found that Stegall's strategy had been reasonable under the facts with which he had been confronted and that although PCR counsel would have offered a different mitigation theory, Stegall's representation of Walker had not been constitutionally deficient.

¶38. Walker argues, and I agree, that Stegall's performance was constitutionally deficient because he failed to investigate meaningfully in preparation for the penalty phase. The record establishes unambiguously that Stegall's mitigation investigation was scanty. Stegall testified that because he had thought Walker would be offered a plea deal until a few days before trial, he conducted no penalty phase investigation whatsoever before that point. When abruptly required to try both phases of the case after Walker's accomplice, Jonathan Riser, had pled guilty and become a witness for the State, Stegall decided to use the humanization strategy that he had employed in other capital cases. But no evidence other than Stegall's testimony about what he usually did was presented to show that he interviewed any of the witnesses he had planned to call. Although Stegall testified that he "would have" interviewed the penalty phase witnesses by phone before the trial, he could not remember having done so. Walker's mother and sister testified that Stegall had not spoken with them about their testimony before

they took the stand, and his brother could not recall having testified. Further, Stegall did not look into hiring experts or hiring a mitigation investigator, although he did have the benefit of Dr. Maggio's report.

¶39. These facts implicate the minimum standards for effective assistance in the preparation of a mitigation case for the penalty phase of a death penalty trial. The United States Supreme Court has established unequivocally that counsel has an "obligation to conduct a thorough investigation of the defendant's background." ***Wiggins***, 539 U.S. at 522 (internal quotation mark omitted) (quoting ***Williams v. Taylor***, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)). "As we established in ***Strickland***, 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" ***Id.*** at 528 (quoting ***Strickland***, 466 U.S. at 690-91). "***Strickland*** does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." ***Id.*** at 527 (citing ***Strickland***, 466 U.S. at 691).

¶40. This Court has held that, "[w]hile courts must defer to lawyers' judgments and strategies, '*at a minimum*, counsel has a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case.'" ***Ross***, 954 So. 2d at 1005 (emphasis added) (quoting ***Ferguson v. State***, 507 So. 2d 94, 96 (Miss. 1987)). "[C]ounsel may be deemed ineffective for relying almost exclusively on material furnished by the State during discovery and conducting no independent investigation." ***Id.*** (citing

Ferguson, 507 So. 2d at 96). "While counsel is not required to exhaust every conceivable avenue of investigation, he or she must at least conduct sufficient investigation to make an informed evaluation about potential defenses." ***Id.*** (citing ***State v. Tokman***, 564 So. 2d 1339, 1343 (Miss. 1990)). ***Strickland*** imposes a duty on counsel either to perform a reasonable investigation or to arrive at a reasonable decision that a particular line of investigation is not necessary. ***Id.***

¶41. Further, "counsel will not be deemed ineffective if there is proof of investigation or if there is no factual basis for the defendant's claim. However, each of these principles presuppose[s] a certain level of investigation." ***Id.*** at 1006. "[S]trategic choices made after less than complete investigation will not pass muster as an excuse when a full investigation would have revealed a large body of mitigating evidence." ***Id.*** (internal quotation marks omitted) (quoting ***Dickerson v. Bagley***, 453 F.3d 690, 696-97 (6th Cir. 2006), *abrogated on other grounds by* ***Bobby v. Van Hook***, 558 U.S. 4, 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009)). "It is not reasonable to refuse to investigate when the investigator does not know the relevant facts the investigation will uncover." ***Id.*** (internal quotation marks omitted) (quoting ***Dickerson***, 453 F.3d 696-97). Counsel has a "duty to conduct a reasonable, independent investigation to seek out mitigation witnesses, facts, and evidence for the sentencing phase . . . ." ***Davis v. State***, 87 So. 3d 465, 469 (Miss. 2012) (citing ***Strickland***, 466 U.S. at 691). The failure to interview family members and other potential witnesses to assess the availability of mitigation evidence before selecting a strategy is deficient performance. ***Sonnier v. Quarterman***, 476 F.3d 349, 358 (5th Cir. 2007).

¶42. The United States Supreme Court reaffirmed the necessity of adequate investigation in ***Andrus v. Texas***, 140 S. Ct. 1875, 207 L. Ed. 2d 335 (2020). In ***Andrus***, "counsel performed almost no mitigation investigation, overlooking vast tranches of mitigating evidence," resulting in deficient performance. ***Id.*** at 1881. Although counsel had presented a nominal mitigation case, the Court deemed that an "empty exercise" because he had not adequately prepared the witnesses. ***Id.*** at 1882. Counsel first met Andrus's father when he arrived to testify, first met Andrus's mother when she was subpoenaed, failed to contact his expert witness until *voir dire*, discovered another witness during the trial, and failed to prepare any of the witnesses to testify. ***Id.*** Counsel did not interview any of Andrus's other close family members before the trial or investigate his background, including his prison record and mental health issues. ***Id.*** at 1882-83. Nothing supported a tactical reason for counsel's failure to investigate. ***Id.*** at 1883. "Instead, the overwhelming weight of the record show[ed] that counsel's 'failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment.'" ***Id.*** (quoting ***Wiggins***, 539 U.S. at 526).

¶43. ***Strickland*** places a duty on counsel either "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Ross***, 954 So. 2d at 1005 (internal quotation marks omitted) (quoting ***Strickland***, 466 U.S. at 691). Stegall testified to having done little to no mitigation investigation for no reason other than that he mistakenly had thought the case was not going to trial. The circuit court found that given the facts known to Stegall, his penalty phase strategy was reasonable. And humanizing the defendant has been deemed a reasonable penalty phase strategy for a violent capital murder

case.[2] ***U.S. v. Bernard***, 762 F.3d 467 (5th Cir. 2014). But the evidence was that Stegall did not select the humanization strategy from a variety of options uncovered by a reasonable mitigation investigation. Rather, as in ***Andrus***, Stegall selected that strategy after very little investigation into other possible options. The majority discounts the critical fact that the record evinces nothing strategic or tactical about defense counsel's decision to perform the slight amount of mitigation investigation done in this case. Stegall gambled that his client would be offered an acceptable plea bargain. He lost, and so did Walker.

¶44. The majority approves the circuit court's reliance on ***Strickland***'s instruction that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation" and that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Strickland***, 466 U.S. at 690-91. But the circuit court failed to note that what must come before selecting a trial strategy is a reasonable decision that no further investigation is needed. Again, that is what was missing in this case. Stegall's testimony was that due to his reliance on the probability of a plea offer, he ended up short on time and consequently relied on his old standby, humanizing the capital defendant. His decision not to investigate was not based on a reasonable professional assessment yielding a reasonable conclusion that no investigation was required. Instead, Stegall adopted a well-worn strategy he thought he could pull off given that his own lack of

[2] In my experience as a former criminal defense lawyer and former district attorney, counsel's seeking to have the jury view the client as a human being rather than as a monster is a component of virtually every capital murder defense, usually in addition to whatever other mitigating evidence is presented.

diligence had caused him to run out of time to conduct any investigation.

¶45. Because of the undisputed evidence that Walker's defense counsel failed to perform any meaningful investigation and thus considered no options for his approach to the penalty phase other than his oft-used humanization strategy, the circuit court clearly erred by finding that counsel's performance was not deficient. ***Ross***, 954 So. 2d at 1005; ***Sonnier***, 476 F.3d at 358. Stegall, faced with a looming sentencing phase portion of the trial in a death penalty case, had done no appreciable investigation before the penalty phase and instead cobbled together, at the last moment, the strategy of trying to humanize Walker before the jury. Stegall's sole line of investigative inquiry was his perusal of Dr. Maggio's competency evaluation that did contain evidence of Walker's mental-health status at the time of the crime. As the majority recognizes and the circuit court found, because that report contained information relevant to mitigation, Stegall reasonably could have decided that additional expert mental-health evaluation was unnecessary.[3] But nothing indicates that Stegall did any *other* investigation. Nothing save his notion about what he usually would have done indicates that he interviewed a single mitigation phase witness about his or her testimony before the sentencing hearing. Indeed, the witnesses who remembered testifying at the trial said that they had not spoken with Stegall before he put them on the stand.[4]

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[3] We have recognized that "where defense counsel has sought and acquired a psychological evaluation of the defendant for mitigation purposes, counsel generally will not be held ineffective for failure to request additional testing." ***Ross***, 954 So. 2d at 1005 (citing ***Moore v. Parker***, 425 F.3d 250, 254 (6th Cir. 2005)).

[4] Stegall's deficient performance in this case was not unusual for him. He testified that approximately two years after representing Walker in this case, he had been disbarred for collecting fees from clients and not performing the work for which he had been hired. In

¶46. Because this minimal level of investigation is insufficient in a death penalty case, I would hold that the circuit court clearly erred by finding that Walker failed to meet his burden to prove deficient performance by a preponderance of the evidence. But the circuit court did not clearly err by finding that Walker incurred no prejudice from the deficiency. ***Sonnier***, 476 F.3d at 358 (finding that although counsel's failure to investigate was deficient performance, counsel's failure to present the evidence that defendant alleged should have been discovered and presented was not prejudicial). I would hold that the record demonstrates that the circuit court's decision on prejudice was not clear error. Therefore, I agree with the majority's decision to affirm, although I reject its reasoning in doing so.

KING, P.J., JOINS THIS OPINION.

Stegall v. The Mississippi Bar, 618 So. 2d 1291, 1292-93 (Miss. 1993), this Court detailed his neglect of two clients who had paid for his services in criminal cases and found that his misconduct warranted disbarment. The Complaint Tribunal had found that "Stegall 'under conditions which are very close to false pretenses' basically took $2,500 each from the Harvestons and the Fairmans and did nothing on the cases of Roger Harveston and Jerry Fairman, respectively." ***Id.*** at 1294.