No. _____

In the

# Supreme Court of the United States

STATE OF ALABAMA,

*Petitioner*,

v.

MARCUS BERNARD WILLIAMS,

*Respondent*.

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI AND APPENDIX VOLUME ONE


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## CAPITAL CASE
## QUESTIONS PRESENTED

While Melanie Rowell and her two toddlers slept, Marcus Williams broke into her house, crept up the stairs, climbed into Melanie's bed, strangled her to death, and raped her lifeless body. Williams confessed to his crimes and received the death penalty.

In state habeas, Williams argued that he was abused as a child and that his counsel was ineffective for failing to investigate and present such evidence at sentencing. The trial court denied his claim on the merits. But, according to the Eleventh Circuit, the state decision was owed no deference under 28 U.S.C. §2254(d) because it was later affirmed on procedural grounds, not the merits. The first question is:

1. Does a state-court adjudication on the merits lose its entitlement to AEDPA deference if it is affirmed on procedural grounds?

The Eleventh Circuit granted habeas relief, concluding that Williams was prejudiced because the jury never heard about his childhood abuse and resulting "hypersexuality." But the jury also never heard that weeks after he killed Rowell, he broke into the home of another woman and tried to rape her. Raising his "hypersexuality" would not have been solely mitigating and would have opened the door to devastating evidence that Williams was a dangerous and unrepentant serial rapist. The second question is:

2. Was it proper to find *Strickland* prejudice without considering the double-edged nature of Williams's "hypersexuality" and the new aggravating evidence of his second violent sex crime?

## PARTIES AND RULE 29.6 STATEMENT

Petitioner (appellant below) is the State of Alabama.

Respondent (appellee below) is Marcus Bernard Williams.

No party is a corporation.

## STATEMENT OF RELATED PROCEEDINGS

The following proceedings are related:

United States Court of Appeals for the Eleventh Circuit, No. 21-13734, *Williams v. Alabama*, judgment entered Sept. 22, 2023 (denying rehearing).

United States Court of Appeals for the Eleventh Circuit, No. 21-13734, *Williams v. Alabama*, judgment entered July 11, 2023 (affirming merits determination).

United States District Court for the Northern District of Alabama, No. 1:07-cv-01276-KOB, *Williams v. Alabama*, judgment entered Nov. 19. 2021 (granting stay).

United States District Court for the Northern District of Alabama, No. 1:07-cv-01276-KOB, *Williams v. Alabama*, judgment entered Sept. 23, 2021 (granting petition for writ of habeas corpus).

United States District Court for the Northern District of Alabama, No. 1:07-cv-01276-KOB, *Williams v. Alabama*, judgment entered March 3, 2020 (granting Rule 59(e) motion to alter or amend judgment).

United States District Court for the Northern District of Alabama, No. 1:07-cv-01276-KOB, *Williams v. Alabama*, judgment entered Apr. 17, 2019 (denying petition for writ of habeas corpus).

United States District Court for the Northern District of Alabama, No. 1:07-cv-01276-KOB, *Williams v. Alabama*, judgment entered Oct. 4, 2017 (granting evidentiary hearing).

United States Court of Appeals for the Eleventh Circuit, No. 12-14937, *Williams v. Alabama*, judgment entered Aug. 21, 2015 (denying rehearing).

United States Court of Appeals for the Eleventh Circuit, No. 12-14937, *Williams v. Alabama*, judgment entered June 26, 2015 (reversing denial of writ of habeas corpus and remanding to determine whether to hold an evidentiary hearing).

United States District Court for the Northern District of Alabama, No. 1:07-cv-01276-KOB-TMP, *Williams v. Alabama*, judgment entered Apr. 12, 2012 (denying petition for writ of habeas corpus).

Alabama Supreme Court, No. 1060576, *Ex parte Williams*, judgment entered June 29, 2007 (denying petition for writ of certiorari).

Alabama Court of Criminal Appeals, No. CR-04-0711, *Williams v. State*, judgment entered Jan. 12, 2007 (denying rehearing).

Alabama Court of Criminal Appeals, No. CR-04-0711, *Williams v. State*, judgment entered Dec. 15, 2006 (affirming dismissal of habeas petition).

St. Clair County Circuit Court, No. CC-97-57.60, *Williams v. State*, judgment entered Jan. 13, 2005 (denying motion to reconsider).

St. Clair County Circuit Court, No. CC-97-57.60, *Williams v. State*, judgment entered on Dec. 13, 2004 (dismissing habeas petition).

Alabama Court of Criminal Appeals, No. CR-03-0681, *Williams v. State*, judgment entered Mar. 4,

2004 (reversing and remanding dismissal of habeas petition).

St. Clair County Circuit Court, No. CC-97-57.60, *Williams v. State*, judgment entered Jan. 14, 2004 (dismissing habeas petition as untimely).

Supreme Court of the United States, No. 01-5052, *Williams v. Alabama*, judgment entered Oct. 1, 2001 (denying petition for certiorari).

Alabama Supreme Court, No. 1990902, *Ex parte Williams*, judgment entered Mar. 30, 2001 (denying rehearing).

Alabama Supreme Court, No. 1990902, *Ex parte Williams*, judgment entered Jan. 12, 2001 (affirming ACCA).

Alabama Court of Criminal Appeals, No. CR-98-1734, *Williams v. State*, judgment entered Jan. 28, 2000 (denying rehearing).

Alabama Court of Criminal Appeals, No. CR-98-1734, *Williams v. State*, judgment entered Dec. 10, 1999 (affirming conviction).

St. Clair County Circuit Court, No. CC-97-57, *Williams v. State*, judgment entered Apr. 6, 1999, (sentencing Williams to death).

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## PETITION FOR WRIT OF CERTIORARI

The State of Alabama respectfully petitions for a writ of certiorari to review the judgments of the U.S. Court of Appeals for the Eleventh Circuit in this case.

## DECISIONS BELOW

The Eleventh Circuit's 2023 decision affirming the grant of the petition for a writ of habeas corpus is reported at 73 F.4th 900 and reproduced at App.3-34 The district court's decision granting the petition for a writ of habeas corpus is available at 2021 WL 4325693 and reproduced at App.35-173.

The Eleventh Circuit's 2015 decision reversing the district court's denial of the petition for a writ of habeas corpus and remanding to the district court is reported at 791 F.3d 1267 and reproduced at App.223-244. The district court's decision denying the petition for a writ of habeas corpus is available at 2012 WL 1339905 and reproduced at App.245-520.

## JURISDICTION

The Eleventh Circuit denied the State's petition for rehearing en banc on September 22, 2023. Petitioner timely invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

## PROVISIONS INVOLVED

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence." U.S. Const. amend. VI, §1.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

## INTRODUCTION

Melanie Rowell's family has waited decades to see justice done for what Marcus Williams did on November 6, 1996. Melanie was a 20-year-old single mother of two—a boy and a girl barely old enough to walk. To them, Melanie was everything. To Williams, she was nothing: So little was his regard for her life that he strangled Melanie to death so that he could have sex with her body without her resistance.

To the St. Clair County jury in 1999, that act warranted the death penalty. To the Eleventh Circuit in 2023, that act merely reflected Williams's "hypersexuality," for which he could be morally excused. App.25. The majority concluded (over a stinging dissent) that if the jury had known that Williams was a victim of sexual abuse who became "very driven to be sexually active," App.18, he never would have received the death penalty for what he did to Melanie. In the federal court's view, the jury just needed to hear that Williams' "compulsive sexuality … made him feel like a man." *Id.* Then they'd understand.

The Eleventh Circuit vacated Williams's sentence in two steps. First, in 2015, the court crafted a new exception to AEDPA: If a state court's decision on the merits is later affirmed on a procedural ground, the first decision doesn't count. Far from showing "respect for the state court," App.236, that novel workaround violates AEDPA's text, structure, and design.

Second, in 2023, the court found *Strickland* prejudice based on counsel's failure to present a "hypersexuality" theory of the crime. Never mind that Williams's "hypersexuality" would only make him more dangerous in the eyes of the jury. Never mind

that it would've opened the door to evidence that Williams tortured and tried to rape *another* woman, Lottie Turner, just weeks after he killed Melanie Rowell. Never mind that it would have led the State to offer more evidence of the horror Williams inflicted on Melanie's young children, one of whom discovered her mother's battered body. Flouting this Court's *Strickland* precedents, the court below considered only the "good" and flat-out ignored the "bad." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009); *see also Cullen v. Pinholster*, 563 U.S. 170, 201 (2011). Like the similarly flawed decision out of the Ninth Circuit that this Court recently agreed to review, "[t]he panel failed to consider *all the evidence* in evaluating the 'new' mitigation evidence, and it failed to undertake a serious reweighing of the mitigation and aggravation evidence," thereby "improperly lower[ing] *Strickland*'s 'highly demanding' standard." *Jones v. Ryan*, 52 F.4th 1104, 1155 (9th Cir. 2022) (Bennett, J., dissenting from denial of rehearing en banc), *cert. granted sub nom. Thornell v. Jones*, No. 22-982 (U.S. Dec. 13, 2023). This petition should be granted as well.

Both times the Eleventh Circuit touched this case, it committed grave legal error and deepened a divide among the circuit courts. Both errors warrant this Court's review, and justice demands it.

## STATEMENT

### A. Williams Murders, Rapes, and Robs Melanie Rowell.

At 1:00 a.m. on November 6, 1996, Marcus Williams decided to rape his neighbor, Melanie Rowell, a 20-year-old mother of two small children. *Williams v. State*, 795 So. 2d 753, 761 (Ala. Crim. App. 1999). In

his own words, he went to Melanie's apartment "for one thing[:] to have sex with her." Doc. 84-15 at 99.[1]

The doors were locked, so Williams tried the kitchen window, removing a screen. *Williams*, 795 So. 2d at 761. It opened, and he crawled inside. *Id.* Williams grabbed a knife from the kitchen and made his way to the stairs to Melanie's bedroom. *Id.* Knife in hand, he took off his pants before he reached the top of the stairs. *Id.* He stepped over a baby gate and checked the kids' room to make sure Melanie's 15-month-old daughter and 2-year-old son were asleep. *Id.*

Melanie too was asleep when Williams crept into her room and climbed on top of her. *See* App.5, 28. Melanie woke up screaming at the sight of him. He held the knife to her throat and tried to take off her shorts. App.28. She kept screaming, so he put his hand over her mouth and pinned her down. *Williams*, 795 So. 2d at 762. She bit his hand and kept fighting for her life. App.28. But he overpowered her, "held her down and strangled her until she stopped moving." App.28-29. Then he raped her motionless body for fifteen minutes, "apparently not caring whether she was alive or dead." App.29. After taking everything from

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[1] Citations in this brief to the District Court record cite the District Court docket number and page number, abbreviated as "Doc. __ at __." Citations to the state-court record begin with the District Court docket number for the State's Habeas Corpus Checklist, Doc. 12, an index of the state-court record that was filed with the District Court. The checklist divides the state-court record by volume ("Vol"), tab ("Tab"), and page number ("Pg"), with pages from the clerk's record preceded by the letter "C." and pages from the transcript preceded by the letter "R."

her, Williams took her purse, too, and left out the back door. App.39.

The next morning, Melanie's daughter was the first to find her "brutalized and half-naked body on the floor." App.29.

**B. Williams Attempts to Rape Lottie Turner.**

Just weeks after killing Melanie Rowell, Williams tried to rape another woman, Lottie Turner, whom he had known for years. As he'd done before, Williams broke into the home around two in the morning, Doc. 84-15 at 100; this time, his pants came off before he even climbed through the window. App.217; *see also* App.160-61 n.9 (quoting Williams's confession). Lottie Turner was in bed when Williams jumped on top of her. *See* App.217. She started to fight back, but Williams "put his hands around [her] thro[a]t trying to choke" her. Doc. 84-15 at 94.

Falling to the floor, Lottie Turner kept fighting, which angered Williams. *Id.* He snarled that she'd "messed up" by refusing him because he "could have killed [her]." *Id.* And he "picked the perfect night" because no cars could be heard passing by. *Id.* Williams also told her that "he had 'wanted her for a long time'[] and that he had 'had all her girls and they gave good blow jobs.'" App.216.

Williams then "put his hand up in her vagina" and discovered that Lottie Turner was menstruating. *Id.* "[T]hen you['re] going to suck me," he demanded, Doc. 85-15 at 95; "rubbing his penis between her breasts," App.216, and against her lips, yelling, "Suck it!" Doc. 84-15 at 95. Turner endured this terror for hours, struggling to resist Williams until "daylight." *Id.*; App. 216.

Law enforcement interviewed Williams in connection with the assault on Lottie Turner. App.39. Because the two crimes were "eerily similar," investigators came to suspect Williams for Melanie Rowell's murder too. App.216. Williams ultimately confessed to both crimes.[2] App.5, 160 n.9.

### C. Trial and Sentencing for the Murder of Melanie Rowell

**1.** Williams faced "overwhelming evidence" of his guilt. App.14, 225, 284. Rowell died by "asphyxia due to strangulation," App.39, and Williams repeatedly confessed (after his arrest) that he was the killer, App.224. If that weren't enough, "DNA testing confirmed that semen and blood found at the crime scene were consistent with his genetic profile." *Id.* Williams's trial strategy was to show that he meant to rape Melanie Rowell, not to kill her. App.6. The jury found him guilty of capital murder, and the penalty phase began the next day. App.39-40.

**2a.** Before the jury, the prosecution relied primarily on the statutory aggravator that Williams murdered Rowell while engaged in a rape, burglary, or robbery. Doc. 84-29 at 3; *see* ALA. CODE §13A-5-49(4).

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[2] Often in post-conviction proceedings, the State describes the crime based on its evidence at trial, which the jury may or may not have fully credited. But this is the rare case where we know exactly what happened on the night of November 6, 1996, because the killer told us:

> She got still and stopped breathing. … I thought I killed her. She was dead. I did kill her but I had sex with her anyway.

Doc. 84-15 at 99-100.

The defense offered as mitigation the testimony of Williams's mother and that of his aunt. App.6, 225. Williams's mother testified that she had Williams when she was sixteen and unmarried. App.6, 225. Williams "had no relationship with his father and lacked adult male figures in his life." App.225. Sometimes he lived with his grandmother or aunt. *Id.* In high school, Williams played sports until he injured his knee. App.6. When he dropped out of school, he started hanging with a rough crowd. *Id.* Trying to do better, Williams joined the Job Corps but was kicked out for fighting. *Id.* Once he returned home, Williams quit attending church and wanted to sleep all day and stay up all night. *Id.*

The aunt testified that Williams had an unstable home life and "became sad and withdrawn at times." App.6. Williams was a good student, and he had no significant criminal history. *Id.* He struggled after his grandfather and uncle died. *Id.* Williams's aunt also testified that he had a short temper, had been arrested as a teenager for fighting, and was often unemployed. App.6-7. On her account, Williams began drinking and using drugs shortly before the crime. App.7. She "ended on a positive note, telling the jury that since [] Williams had been in jail, he had stayed out of trouble and expressed remorse for his crime." App.226; *see* App.6-7.

The prosecution did not offer any rebuttal evidence to Williams's mitigation. App.226. The jury recommended a death sentence by an 11-to-1 vote. App.7, 226.

**b.** The trial court then held a separate sentencing hearing at which Melanie Rowell's mother and Williams himself testified. App.227.

Donna Rowell testified that she suffered flashbacks of the horrific morning she found her daughter's body. Doc. 84-29 at 69. Melanie's children, around three and four years old by the time of sentencing, were living with their grandmother. *Id.* at 68. All of them had been to therapy. *Id.* at 69. Melanie's daughter was angry. *Id.* Although she did not "understand a lot of things," she knew "that her mommy is gone" and cried for her almost every night. *Id.* The grandmother testified:

> [T]hey know their mommy is in heaven, but they can't understand why she can't come down and visit. I let them pick out balloons for holidays with helium in them. Little William just started learning how to print so he wrote her a letter on the balloon and they sent it up to their mommy. They put, "We love you mommy and we miss you." On the one for Easter this year, he wrote, "Please come down and see us." They are okay when they first send it up, but when it is out of sight Kristen will cry and cry and cry and say, "I miss mommy."

*Id.* at 69-70.

At his counsel's prompting, Williams stated, "I would just like to apologize. There is nothing I can do to bring their daughter back. I hope I can make it a little easier on them by apologizing." *Id.* at 71-72. He testified that he was currently 23 years old, that he had confessed to the crime, and that he was under the influence of marijuana and alcohol when he murdered

Rowell. *Id.* Williams's description of his upbringing agreed with the testimony of his mother and aunt. *Id.* at 72-74.

In closing, Williams's lawyers offered four mitigators: "his age, his lack of criminal history; his remorsefulness; his cooperation." *Id.* at 86. They also noted that Williams blew out his knee and lost his chance to play sports "[t]wo weeks before his senior year." *Id.* at 87. Williams failed to graduate but obtained a GED and worked "various jobs." *Id.* By the time of the murder, however, "he didn't have a job, didn't have any parents that were taking care of him, had nowhere to go." *Id.* at 85-86. The defense acknowledged that Williams had "made a serious mistake and it has cost someone their life." *Id.* at 87. But they argued life imprisonment was enough. *Id.*

The prosecution emphasized the brutality of Williams's crime: "[T]he sheer aggravation involved in slipping into a single mother's residence in the middle of the night, going up those stairs, and going into that bedroom and holding this girl down as he raped her and in the process killing her far outweighs any mitigation he claims here today." *Id.* at 91.

In a written order, the court found some mitigation, including the "defendant's upbringing," "the end of a promising athletic career," "attainment of his GED after failing to graduate from high school," and his "remorse." Doc. 12-Vol 4-Tab 26-Pg C.111. The court noted that Williams had no significant history of criminal activity, *id.* at C.106, but rejected the idea that his drug and alcohol use diminished his culpability, *id.* at C.109. Williams had shown "deliberateness and forethought" in breaking into Rowell's home,

taking a knife from her kitchen, and "check[ing] on whether the children were awake as witnesses." *Id.* Plus, he had "cover[ed] up his offense by disposing of evidence after the crime." *Id.* Williams deserved no credit for cooperating; he didn't surrender himself but spoke to police only upon his arrest for assaulting Turner. *Id.* Given the enormity of Williams's crime, the court sentenced him to death.

### D. Direct Appeal Proceedings

Williams appealed to the Alabama Court of Criminal Appeals (ACCA). With new counsel, Williams argued, *inter alia*, ineffective assistance of counsel (IAC) at the penalty phase, but the ACCA found that claim to lack factual support. App.227. The court affirmed his sentence. *Id.*

The Alabama Supreme Court granted Williams's cert petition and affirmed because the ACCA had "thoroughly addressed and properly decided" Williams's claims. App.227-28. This Court later denied Williams's petition for certiorari.

### E. State Habeas Proceedings

#### 1. The State Trial Court Adjudicates on the Merits and Denies Relief.

In state habeas, Williams claimed IAC for failing to conduct a reasonable investigation for mitigation evidence. App.228. He alleged that his trial counsel should have compiled a social history and presented additional evidence about Williams's childhood abuse and neglect. *Id.* For instance, trial counsel should have learned, Williams argued, that he was sexually abused "by an older male." *Id.*

The trial court denied Williams's request for an evidentiary hearing and denied the petition. *Id.* As to the claim about abuse and neglect, Williams's petition failed to meet the pleading standard (a merits determination). App.229. Williams had not "identif[ied] a single specific instance of abuse inflicted on him by a specific family member." App.599. And "even if members of Williams' family would have been willing to testify …, the State would have been able to rebut them with Williams' own words." *Id.* Indeed, in his pre-trial mental evaluation, Williams had "denied" any "history of childhood sexual, emotional, or physical abuse." *Id.* Thus, it was reasonable that counsel did "not present[] mitigating evidence that either does not exist or that would … be directly refuted by Williams' own statements." *Id.*

**2. The Court of Criminal Appeals Affirms Based on a Procedural Bar.**

On appeal, the State defended the trial court's reasoning on the merits. *See* Doc. 12-Vol 12-Tab 51-Pg 27-35. But the ACCA applied a procedural bar *sua sponte* without reaching the merits. App.229. Under Alabama law, a petitioner's claim may be barred from collateral review if he had raised the same ground for relief (or could have raised it) on direct review. *See* ALA. R. CRIM. P. 32.2(a). Because Williams had already raised IAC on direct appeal, the ACCA decided that his claim was precluded under Rule 32.2, did "not address [it]," and affirmed. App.541, 544. The Alabama Supreme Court denied certiorari. *See* Doc. 12-Vol 13-Tab 61.

### F. Federal Habeas Proceedings

#### 1. The District Court Applies AEDPA and Denies Relief.

Williams filed a federal habeas petition under 28 U.S.C. §2254. In an amended petition, Williams raised eight penalty-phase IAC claims, such as failure to "hire a mitigation specialist" and failure "to thoroughly investigate … his childhood sexual abuse." App.9-10 n.2. And Williams added new details to his abuse allegations. App.230. This time, he identified a boy, Mario Mostella, who allegedly raped Williams when Williams was four to six years old. *Id.*

Finding "that it owed 28 U.S.C. § 2254(d) deference to the [state] court's decision" and reviewing that decision in light of Williams's less "fully fleshed [] out" claim in state court, the district court denied relief. App.231.

#### 2. The Eleventh Circuit Refuses to Apply AEDPA, Reverses, and Remands.

Willliams appealed and won for the first time. The Eleventh Circuit asked (1) whether there was a state "adjudication on the merits" owed deference and (2) if not, whether the ACCA's use of a procedural bar prevented federal review. App.233. It answered both in Williams's favor, refusing AEDPA deference, rejecting the ACCA's procedural ground, and freeing the federal courts to review *de novo*. App.233-39.

The Eleventh Circuit recognized that there was an "adjudication on the merits," but reasoned that it was not owed AEDPA deference because it was affirmed on non-merits grounds. App.228-29, 233-34. Had the trial and appellate court made "alternative, but

consistent, merits determinations," the court would have deferred to both. App.235. But, according to the Eleventh Circuit, the ACCA's procedural holding meant that it did "not agree with" the trial court's merits decision. App.235-36. Distinguishing circuit precedent, the court stated that "respect for the state court judgment" meant refusing to defer to the original merits decision. App.236.

The Eleventh Circuit then rejected the ACCA's procedural ruling too. App.236-39 (no adequate and independent state ground for denying federal review). According to the Eleventh Circuit, the ACCA's application of state law "rested on a false premise" that the same claim had been raised on direct appeal. App.239.

After rejecting both state-court grounds for denying relief, the Eleventh Circuit tendered its own "observations" on the merits and remanded for an evidentiary hearing and *de novo* review. App.240-44.

### 3. The District Court Again Denies Relief, But Then Grants It.

On remand, the district court held an evidentiary hearing on Williams's failure-to-investigate claim. App.4. Williams presented eleven witnesses, including himself, one of his trial attorneys, certain family members, a clinical psychologist, and a neuropsychologist. App.9-10. The State called an expert to rebut Williams's experts. App.10.

The district court again denied habeas relief. App.174. Although Williams had uncovered potentially mitigating evidence, the district court held that trial counsel's performance was not prejudicial because the State likely would have introduced evidence

of Williams attempting to rape Lottie Turner in a manner "eerily similar to the rape and murder" of Melanie Rowell, App.216, 219 n.9. Such evidence would have been "highly prejudicial" and "highly relevant" to the jury's assessment of "Williams's future dangerousness." App.220; *see* App.211-21.

Then, on motion to alter or amend—with no new evidence or intervening precedent—the court reversed itself, granting relief on five of Williams's IAC claims. App.11 n.3. This time, the court dismissed the weight of the Lottie Turner evidence on the grounds that the jury knew Williams would spend the remainder of his life in prison regardless (App.163-65) and that the attempted rape was "entirely consistent" with Williams's theory that he couldn't help but rape. App.166. So Williams's new mitigation evidence would have provided helpful "context" for his multiple "sex-related crimes." *Id.*

#### 4. The Eleventh Circuit Affirms on the Assumption that "Hypersexuality" Is Purely Mitigating.

A divided Eleventh Circuit panel affirmed. It concluded that counsel's preparation for the penalty phase was "patently unreasonable." App.16. Although Williams's lawyer had asked him "about his childhood" and "about family and school," it wasn't enough: "Williams was never asked about his family background; whether he had been neglected; or whether he had been sexually … abused." *Id.* And although the jury heard from Williams's mother and aunt, "their testimony revealed very little about the true extent of [his] troubled upbringing." App.23.

"A more thorough investigation," according to the court, would have revealed Williams's own testimony that he was sexually abused by an older boy and that he was exposed to sexual relations at a young age. App.16-17.[3] The court held that reasonable counsel also would have learned that:

- Williams used to share a bed with his mother and her boyfriends (although he never witnessed his mother having sex);
- Williams did witness domestic violence between his mother and her boyfriend, whom Williams once tried to stab;
- Williams's family members, including, *e.g.*, his great-great-great uncle, also perpetrated or suffered sexual abuse;
- Williams and his mother were alcoholics; and
- Williams lacked a stable home and often stayed with family or friends because of his mother's neglect.

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[3] The majority also assumed that because post-conviction counsel discovered the sexual abuse, any reasonable trial counsel would have found it too. But trial counsel spoke to Williams, who said nothing about the abuse—allegedly "because '[t]hey didn't ask.'" App.17. And they spoke to his mother and great-grandmother, but they never knew about the abuse. *See* App.30 n.1. Williams denied being abused in his pre-sentence mental health evaluation. *Id.* And even when post-conviction counsel asked whether he was sexually abused, Williams denied it. *Id.*; App.17. Only after "growing comfortable" with that lawyer, who happened to ask again, did Williams finally reveal the alleged abuse. App.17.; *see also* App.30 n.1 (Grant, J., dissenting) ("The majority accepts as a given that Williams would have disclosed the abuse to trial counsel if they had asked, but I am not convinced.").

App.16-20. The panel majority then declared this evidence "powerful" mitigation. *See* App.24. First, the majority observed that this Court "has found that counsel's failure to present evidence of abuse in mitigation constitutes prejudice." App.23-24. Second, the majority asserted that "the nature, quality, and volume of the mitigation never known to the jury [was] significant" in Williams's case. App.24. And it concluded that had the jury known "all of the mitigating evidence," the outcome likely would have been different. App.25.

Judge Grant dissented. In her view, the majority misapplied *Strickland* when it considered only the mitigating evidence, not "all the evidence—the good and the bad—when evaluating prejudice." App.31 (quoting *Belmontes*, 558 U.S. at 20).

First, the majority ignored how Williams's "hypersexuality" evidence was double-edged. The panel imagined that a jury would find Williams less culpable if they knew that his "compulsive sexuality" was "reassuring to him" and "made him feel like a man." App.18. But, Judge Grant noted, such testimony "had the potential to harm Williams in the eyes of the jury" and "invite[] argument … that Williams's tendencies toward violence and aggression would make him a danger." App.31-32.

Second, the majority ignored how the "hypersexuality" theory would have opened the door to much more aggravating evidence—*viz.*, the sexual assault, burglary, and attempted rape of Lottie Turner mere weeks after Williams murdered Rowell. App.32-33. Judge Grant recounted how the "record reflects graphic evidence of yet another violent attack," App.32., which would have "show[n] future

dangerousness," "eliminated the mitigating value of his lack of significant prior criminal history," and "demonstrated Williams's lack of regret." App.33.

Yet the majority never mentioned Lottie Turner, the "elephant in the courtroom … that would have been presented had [Williams] submitted the additional mitigation evidence." *Belmontes*, 558 U.S. at 26. The majority never mentioned the possibility of rebuttal evidence to Williams's mitigation, nor the effect of Turner's case on Williams's future dangerousness.

Instead, when the majority reweighed the evidence, the only new evidence it considered was that which could have helped Williams. Nothing new that constituted new aggravation evidence or that undercut his new or old mitigation evidence was discussed. With the scales thus set, the majority balanced "all of the mitigating circumstances that we now know" against just one thing—"the aggravating circumstance … that the murder was committed during a rape"—and concluded that Williams was prejudiced. App.25.

## SUMMARY OF ARGUMENT

**1.** The 2015 Eleventh Circuit decision not to apply §2254(d) deference was wrong and deepened a circuit split. The court should have applied AEDPA's re-litigation bar because Williams presented his failure-to-investigate claim to the trial court in state habeas proceedings, and it was rejected on the merits. But the Eleventh Circuit held that the ACCA's procedural affirmance stripped the trial court's merits adjudication of its entitlement to AEDPA deference. On the Eleventh Circuit's reading, the ACCA "disagreed with" the *merits* decision below because the petition was (also)

procedurally barred. App.234. Thus, on federal review of the same claim, the original merits decision was worth nothing.

**a.** The holding below worsened a "divide[]" among the lower courts over "[w]hether the first in a sequence of state-court decisions should be ignored" for purposes of §2254(d). *Thomas v. Clements*, 797 F.3d 445 (7th Cir. 2015) (Easterbrook, J., concurring in the denial of rehearing en banc). The Third, Fifth, and Eleventh Circuits have held that lower state-court decisions receive deference. But the Third Circuit and (now) the Eleventh Circuit apply an exception when the appellate affirmance reflects a view that the lower court should not have addressed the merits. And the Sixth, Seventh, and Ninth Circuits have held that only the last reasoned opinion receives AEDPA deference.

Because AEDPA is vital for protecting state convictions from federal interference, this divide "belongs on the Supreme Court's plate." *Thomas*, 797 F.3d at 446 (Easterbrook, J., concurring in the denial of rehearing en banc).

**b.** The decision below is on the wrong side of the divide. State court decisions affirmed on alternate grounds deserve deference under §2254(d). A claim is "adjudicated on the merits in State court proceedings," 28 U.S.C. §2254(d), even if it is later adjudicated on procedural grounds. In such a case, "there is little reason to treat the first [decision] as having been obliterated." *Thomas*, 797 F.3d at 446 (Easterbrook, J., concurring in denial of rehearing en banc). Not only is the State's view a better fit with the text of AEDPA, but this Court's precedents teach that silence is

presumed to be an adjudication on the merits, *see Harrington v. Richter*, 562 U.S. 86, 98-99 (2011), even when a court expressly decides some issues but not others, *Johnson v. Williams*, 568 U.S. at 298, and that silence is presumed to be agreement, *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

**2.** The 2023 Eleventh Circuit decision was wrong to find *Strickland* prejudice based on new evidence that Williams's upbringing and abuse caused him to become "hypersexual" and violent.

First, an expert opinion that a rapist and murderer is "hypersexual" and hyper-aggressive, driven by his past to strangle a young mother and rape her dead body, is far from purely mitigating. It would have led to jury to believe that Williams "was simply beyond rehabilitation." *Cullen v. Pinholster*, 563 U.S. 170, 201 (2011).

Second, the panel majority ignored the State's rebuttal evidence that "would have come in with" the mitigation evidence. *Wong v. Belmontes*, 558 U.S. 15, 20 (2009). And the State's rebuttal evidence would have been devastating: Not even three weeks after Williams murdered and raped Melanie Rowell, he broke into the home of another woman, Lottie Turner, where he attempted to rape her and then sexually assaulted her until daybreak. Had Williams made the mitigation case that he now argues the Constitution requires, the State "undoubtedly would have introduced" the "graphic evidence" about the attempted second rape. App.32. It should go without saying that proof of additional rapes is not mitigating evidence.

Third, like the Ninth Circuit's recent decision in *Jones*, the majority below "barely engaged with the

overwhelming aggravating evidence. Given the importance of this factor in a *Strickland* analysis, the panel's omission materially weakens the applicable standard." *Jones v. Ryan*, 52 F.4th 1104, 1154 n.17 (9th Cir. 2022) (Bennett, J., dissenting from denial of rehearing en banc), *cert. granted sub nom. Thornell v. Jones*, No. 22-982 (U.S. Dec. 13, 2023).

The Eleventh Circuit's errors map onto those in *Jones* and are in many ways more egregious. Whereas the *Jones* panel "essentially ignor[ed] all the evidence that cut against the mitigation evidence" there, *id.* at 1147 n.12 (Bennett, J., dissenting from denial of rehearing en banc), such evidence was completely ignored by the panel below.

As shown by this Court's recent grant of certiorari in *Thornell v. Jones*, No. 22-982, a decision that so clearly waters down *Strickland* merits this Court's review. Repeated errors like this not only damage state sovereignty and the finality of convictions; they are unlikely to help petitioners because the State's rebuttal evidence in aggravation will undoubtedly be presented to the jury on remand. The Court therefore should grant the State's petition and hear the case this Term alongside *Jones*.

## REASONS TO GRANT THE PETITION

### I. The 2015 Panel Wrongly Refused To Defer To The Trial Court's Merits Adjudication.

#### A. The Circuits are Split Over Whether AEDPA Deference is Owed to a State Court Ruling on the Merits Affirmed on Alternate Grounds.

Under 28 U.S.C. §2254(d), federal courts must defer to state courts on "any claim that was adjudicated on the merits." But the courts of appeals are divided with respect to the deference owed to adjudications on the merits by lower state courts that are affirmed on alternate grounds. "Whether the first in a sequence of state-court decisions should be ignored has divided the courts of appeals." *Thomas v. Clements*, 797 F.3d 445, 446 (7th Cir. 2015) (Easterbrook, J., concurring in denial of rehearing en banc).

**1.** On one side of the split are federal courts that will defer to lower state-court decisions on the merits. In the Fifth Circuit, "[w]here a lower state court ruled on an element that a higher state court did not, the lower state court's decision is entitled to AEDPA deference." *Loden v. McCarty*, 778 F.3d 484, 495 (5th Cir. 2015). And traditionally, the Eleventh Circuit defers to trial-court rulings that "have not been overturned" or "disturbed on appeal." *Loggins v. Thomas*, 654 F.3d 1204, 1217-18 (11th Cir. 2011). But the general rule is complicated by an affirmance on procedural grounds that does not disagree with the merits ruling below but may disagree with the decision to reach the merits. In the Eleventh Circuit today, even when a trial court's views on the merits are never disturbed on appeal, they count for nothing under AEDPA if the state

appellate court thought the case should have been disposed on procedure. App.233-36.

Similarly, the Third Circuit will defer to a lower state-court's merits ruling—even one affirmed on other grounds—so long as "nothing" in the appellate court's ruling "questioned or undermined" the ruling below. *Collins v. Sec'y of Pa. Dep't of Corr.*, 742 F.3d 528, 545-46 (3d Cir. 2014). But when confronted with a case like this one, the Third Circuit applied principles of claim preclusion, observing that a "purely procedural" affirmance strips the judgment below of "preclusive effect." *Thomas v. Horn*, 570 F.3d 105, 115 (3d Cir. 2009). Accordingly, like the Eleventh Circuit, the Third Circuit will not give §2254(d) deference to trial-court decisions affirmed on procedural grounds.

**2.** The Sixth Circuit, by contrast, has held that only the last decision can ever receive deference under AEDPA. In *Barton v. Warden, Southern Ohio Correctional Facility*, the court did not apply §2254(d) deference to a merits decision that was affirmed on res judicata grounds. 786 F.3d 450, 462 (6th Cir. 2015). "In arriving at this conclusion," the court "rel[ied] entirely on the Supreme Court's decision in *Ylst*," *id.,* which considered "whether the unexplained denial of a petition for habeas corpus by a state court lifts a state procedural bar imposed on direct appeal, so that a state prisoner may then have his claim heard on the merits in a federal habeas proceeding," *Ylst v. Nunnemaker*, 501 U.S. 797, 799 (1991).

The Seventh Circuit has also held that the last reasoned opinion is the only relevant one for AEDPA deference. *See Thomas v. Clements*, 789 F.3d 760, 766-68 (7th Cir. 2015). In *Thomas*, the post-conviction trial

court had addressed *Strickland*'s performance prong, while the appellate court had addressed only prejudice. *Id.* at 766. The Seventh Circuit held, citing AEDPA's reference to a "singular" adjudication and a "single" decision, that 2254(d) deference did not apply to the trial court's decision. *Id.* at 767. As a result, in the Seventh Circuit, a lower state-court ruling does not receive deference unless the appellate court adopts its reasoning. *Id.* at 766; *but see Adeyanju v. Wiersma*, 12 F.4th 669, 674 n.1 (7th Cir. 2021) (suggesting that *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), might have undermined *Thomas*).

The Ninth Circuit's approach is similar. Opining that §2254(d) "is at best ambiguous" as to whether a court can "review multiple state court judgments at once," it concluded that only the last reasoned decision is reviewed unless it "adopted or substantially incorporated the reasoning" of a previous decision. *Barker v. Fleming*, 423 F.3d 1085, 1092-93 (9th Cir. 2005). In reaching that result, it also relied on *Ylst* and the statute's reference to a single decision. *See id.*

**3.** This case is an excellent vehicle for the Court to address the divide. Its resolution would provide much-needed guidance on whether state lower-court merits decisions affirmed on alternative grounds receive deference under §2254(d), and under what circumstances, if any, they can lose that entitlement depending on the rationale of the appellate court. Because federal habeas review has the power to undo state convictions, intruding on state sovereignty, the question of when to apply §2254(d)'s "difficult to meet" standard is undeniably "important." *Johnson v. Williams*, 568 U.S. 289, 292 (2013).

### B. The Eleventh Circuit Was Wrong to Deny AEDPA Deference to the State Court's Merits Adjudication.

The Third Circuit and now the Eleventh Circuit are wrong to refuse deference to a state-court merits decision based on subsequent procedural history that leaves intact the lower court's views on the merits. In such cases, the Third and Eleventh Circuits function like the Sixth, Seventh, and Ninth Circuits in refusing to defer to state-court merits determinations.

First, AEDPA's text directs federal courts to defer to state courts "with respect to any claim that was adjudicated on the merits in State court proceedings." 28 U.S.C. §2254(d). There is no qualifier about subsequent procedural history or which court must have issued the merits ruling. By AEDPA's plain text, any merits adjudication "in State court proceedings" should count.[4] A lower-court opinion rejecting a claim on the merits does not cease to be an adjudication simply because it is affirmed on alternate grounds. *See* Black's Law Dictionary 50 (10th ed. 2014) ("To rule on judicially"). "When two state courts give different reasons, and the second … does not disagree with the first …, there is little reason to treat the first as having been obliterated." *Thomas*, 797 F.3d at 446 (Easterbrook, J., concurring in denial of rehearing en banc).

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[4] Arguably, if an appellate court expressly contradicted the lower court's views on the merits, the prior adjudication would not receive deference. But that position is not mandated by the text of AEDPA. And, in any event, the question would be unnecessary to decide here because no higher court registered even slight disagreement with the *Williams* trial court's views on the merits of Williams's IAC claims.

Second, the State's reading accords with this Court's precedents interpreting and applying AEDPA. In this case, the ACCA was silent on the merits of Williams's claim. Silence is presumed to be an adjudication on the merits, *see Harrington*, 562 U.S. at 98-99, even when a court expressly decides some issues but not others. *Johnson*, 568 U.S. at 298. Moreover, this Court has instructed federal courts to presume that silence indicates agreement with a lower court decision. *Wilson*, 138 S. Ct. at 1192. By the same token, federal courts should not refuse deference to an earlier merits adjudication simply because the higher state court spoke on a procedural issue but was silent on the merits. *See Thomas*, 797 F.3d at 446 (Easterbrook, J., concurring in denial of rehearing en banc) (deference due unless the merits decision was "obliterated" on appeal).

Third, the structure and design of AEDPA supports the State's reading. Congress did not create a system by which a federal court's "respect for the state court judgment" could be marshaled *to ignore* a state-court merits adjudication. App.236. But that's just what the Eleventh Circuit said and did, contravening "AEDPA's purpose" "to further the principles of comity, finality, and federalism." *Williams (Michael) v. Taylor*, 529 U.S. 420, 436 (2000).

Section 2254(d) in particular was "designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington*, 562 U.S. at 103. AEDPA is supposed to protect states from the violence of federal habeas review, which "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority" and "imposes special costs on our federal

system." *Shinn v. Ramirez*, 596 U.S. 366, 376 (2022). Interpreting AEDPA to eviscerate years of state process, to undermine a lawful sentence, and to interpose interminable delay is not "respect." *Contra* App.236. Real "[r]espect for the state judiciary requires considering both" decisions. *Thomas*, 797 F.3d at 446 (Easterbrook, J., concurring in denial of rehearing en banc).

The text and design of AEDPA, as well as precedent applying it, mandate reversal. No one disputes that there was a state-court adjudication on the merits: The trial court rejected Williams's IAC claims because Williams failed to allege specific facts that would support his abuse allegations, and he failed to proffer what each "witness could have testified about or argue how such testimony would have been mitigating." App.599. No state court ever questioned those holdings. The ACCA affirmed. App.553-54. And it makes no difference that to do so, the appellate court invoked a rule that it then considered jurisdictional.[5] The federal court had no reason to deny adjudicated-on-the-merits status to an uncontradicted ruling on the merits.

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[5] The Alabama Supreme Court has since clarified that the rule it applied in Williams's case is not jurisdictional. A court does not lack jurisdiction merely because it "erroneously concludes that it lacks jurisdiction," *Rutherford v. McDonough*, 466 F.3d 970, 976 (11th Cir. 2006), and habeas petitioners are not entitled to benefit from erroneous decisional law at the time of adjudication. *See Guzman v. Sec'y, Dep't of Corr.*, 73 F.4th 1251, 1256 (11th Cir. 2023) (citing *Lockhart v. Fretwell*, 506 U.S. 364 (1993)).

## II. The Eleventh Circuit Improperly Lowered *Strickland*'s Highly Demanding Prejudice Standard By Failing To Consider New Aggravating Evidence.

### A. *Strickland*'s Prejudice Inquiry Requires Assessing "the Good and the Bad."

"When a defendant challenges a death sentence" on IAC grounds, he must show "there is a reasonable probability that, absent the errors, the sentencer … would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington*, 466 U.S. 668, 695 (1984). The court must consider "the totality of the evidence" that would have been presented if counsel had acted reasonably. *Id.* And the court must assess the likely effect that evidence would have had on the sentence.

Every case is different, and proffered mitigation must be evaluated in the context of the case, not in a vacuum. What may seem mitigating at first blush may have hurt the particular defendant in the eyes of the jury. For example, in *Pinholster*, the Court explained that new mitigation about the offender's family—"their more serious substance abuse, mental illness, and criminal problems"—was "by no means clearly mitigating." *Cullen v. Pinholster*, 563 U.S. 170, 201 (2011). "[T]he jury might have concluded that Pinholster was simply beyond rehabilitation." *Id.*

Similarly, the court must "consider *all* the relevant evidence that the jury would have had"—"the good and the bad." *Wong v. Belmontes*, 558 U.S. 15, 20, 26 (2009). Counsel's failure to present certain mitigation may not have been prejudicial in light of aggravating evidence that "would have come in with

it." *Id.* at 20; *see also id.* at 26. In *Belmontes*, this Court found no prejudice where mitigation showing Belmontes's "emotional instability" "and "impulsivity," for example, "would have triggered" rebuttal evidence of another murder. *Id.* at 22, 25.

In sum, courts must consider whether proffered mitigation would have been a "two-edged sword" or "would have opened the door to rebuttal." *Pinholster*, 563 U.S. at 201. Either quality diminishes the evidence's "mitigating value." *Id.*

### B. The Court Below Ignored All the "Bad," Including Strong Evidence of Future Dangerousness, a Second Sex Crime, and the Damage to Melanie Rowell's Family.

The decision below flatly ignored the teachings of *Pinholster* and *Belmontes*. The court did not once consider how the evidence developed on remand about Williams's "troubled upbringing" could harm his case. Nor did it consider the likely effect of rebuttal evidence had Williams made a full-throated mitigation case based on his "hypersexuality." In short, the evidence of his compulsive and aggressive sexuality "would have made a difference, but in the wrong direction for [Williams]." *Belmontes*, 558 U.S. at 22.

**1.** Much of the supposed mitigation would have cast Williams in a negative light. Williams's new theory was that because he was "sexually abused on three or four occasions" as a child, he became both "hypersexual and hyperaggressive." App.16, 31. Then his "compulsive sexuality," combined with his aggression, led to "sexual violence." App.18, 25.

Maybe someone could see that as a reason for lenience. But by definition, that evidence would have

amplified the State's case for future dangerousness, which is "of inestimable concern at the penalty phase." *Floyd v. State*, 289 So. 3d 337, 431 (Ala. Crim. App. 2017). It is simply implausible that the jury would have looked kindly on Williams if only they'd heard his expert opine about "compensatory hypermasculinization," "hypersexualization," and "ego dystonic" behavior. Doc. 93 at 59-61. The testimony that Williams has a "driven desire or need" to rape is repulsive. *Id.* at 61.

At a minimum, the evidence of his "hypersexuality" and "hyperaggression" is "by no means clearly mitigating," *Pinholster*, 563 U.S. at 201; *see* App.31-32 (Grant, J., dissenting). Yet the panel majority apparently never considered how any juror could see it differently. The majority simply declared that being prone to rape is "powerful" mitigating evidence. App.24

Likewise, the court failed to consider how more developed testimony about Williams's drug and alcohol problems and his family history could have been aggravating—or at least not purely mitigating. As this Court concluded in *Pinholster*, the jury might have viewed Williams as "simply beyond rehabilitation." 563 U.S. at 201; s*ee* App.31 (Grant, J., dissenting).

**2.** The court also ignored the devastating evidence that would have followed Williams's purported mitigation. First there was the "elephant in the courtroom": Williams's home invasion, sexual assault, and attempted rape of Lottie Turner. *Belmontes*, 558 U.S. at 26. Had Williams's trial counsel made a "heavyhanded case to portray" him in a sympathetic

light, it would have "invited the strongest possible evidence in rebuttal." *Id.* at 25.

Here is what the jury would have heard—perhaps from Lottie Turner herself—if Williams had argued that his "hypersexuality" was exculpatory: Just 18 days after Williams strangled and raped Melanie Rowell, he tried again. *Supra*, pp. 6-7 & n.2. Late at night, he broke into the home of another woman with the plan to rape her too. *Id.* Naked on top of her, he put his hands around her throat. *Id.* But she fought back, and they fell to the floor. *Id.* Williams wanted to rape her, but he changed his mind after he forced his fingers into her vagina and discovered she was menstruating. *Id.* Still, he persisted, rubbing himself on her, demanding oral sex, shouting "Suck it!" and other profanities. *Id.* Williams told her that he could kill her, but Lottie Turner somehow escaped with her life. *Id.*[6]

The jury heard none of this, but no one disputes that it would have been admitted had the defense pressed Williams's "hypersexuality." The question, then, is whether the jury would have recommended a more lenient sentence for Williams after hearing the whole story. The answer should go without saying: No, evidence of more rape is not mitigating. *See* App. 31-34 (Grant, J., dissenting); *see also Belmontes*, 558 U.S. at 25 (rejecting "more-evidence-is-better" logic).

The exclusion of Lottie Turner from the court's analysis might have been the worst error, but it wasn't the last. The panel majority should have considered

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[6] In Williams's retelling to the court below, "Ms. Turner resisted, and [he] eventually left without harming her." Resp. Br. at 54, *Williams v. Alabama*, No. 21-13734 (11th Cir.).

how the State would have rebutted Williams's plea for sympathy based on his childhood. *See* App.33-34 (Grant, J., dissenting). To "counteract[]" Williams's focus on his childhood, the prosecution would have reminded the jury of the damage—the horror, grief, and trauma he inflicted on Melanie Rowell's children. *See Payne v. Tennessee*, 501 U.S. 808, 825 (1991). The jury would have been left to weigh Williams's self-serving testimony alongside the image of Rowell's one-year-old girl walking in on her mother's brutalized, half-naked corpse. Indeed, at Williams's sentencing hearing, "the State introduced only one witness to testify about the children's anger, fear, grief, and confusion," but "the evidence Williams now proffers would have opened the door to much more." App.33-34 (Grant, J., dissenting).

The majority also failed to consider how the new evidence would have undercut the old mitigation evidence presented at trial. Williams's counsel, by keeping out evidence of his client's brutal sexual assault of Lottie Turner, was able to present Williams as a man with "no significant history of prior criminal activity" filled with deep "remorse" for taking Melanie Rowell's life. App.7. But any notion that Williams felt "remorse" for killing Melanie would have been preposterous in light of the fact that, just 18 days after he choked the life out of her, Williams was strangling and sexually assaulting Turner from "the middle of the night … until daybreak." App.32-33 (Grant, J., dissenting).

As Judge Grant's dissent recognized, these attempts to garner sympathy for Williams likely would have resulted in the jury viewing him "as an

unrepentant murderer and serial home invader" undeserving of their mercy. App.33.

Judge Grant raised these points. The majority responded with silence and misplaced nods to the standard of review. The *Jones* panel at least paid lip service to its duty to "consider all the evidence—the good and the bad." *Jones v. Ryan*, 52 F.4th 1104, 1116 (9th Cir. 2022), *cert. granted sub nom. Thornell v. Jones*, No. 22-982 (U.S. Dec. 13, 2023). Though Judge Grant highlighted this requirement, the majority never mentioned it. And its analysis confirms that when the majority considered new evidence, it accounted only for that which was "good" for Williams, without any recognition of how the rest of the evidence would undermine his mitigation evidence and paint him in an even more malevolent light. Like the decision in *Jones*, the decision below never "consider[ed] all the counterevidence, in direct contravention of *Strickland*." *Jones*, 52 F.4th at 1148 (Bennett, J. dissenting from denial of rehearing en banc), *cert. granted sub nom. Thornell v. Jones*, No. 22-982 (U.S. Dec. 13, 2023). And like the decision in *Jones*, the decision below warrants this Court's review.

### C. Hearing *Williams* Alongside *Thornell v. Jones* Would Help Illuminate Recurring Problems with *Strickland* Prejudice.

*Jones* is an opportunity for this Court to clarify how courts should apply *Strickland*'s prejudice prong to new mitigation. The Ninth Circuit's errors in *Jones* are manifest in the Eleventh Circuit's decision as well. But the decision below flouted this Court's precedents in ways even more obvious and egregious. In order to have before it a fuller view of the problem and thus to

provide clearer guidance to lower courts, this Court should grant certiorari to consider this case alongside *Jones* this Term.

Like the Ninth Circuit, the Eleventh Circuit "improperly and materially lowered *Strickland*'s highly demanding prejudice standard" in multiple ways. Pet. at 26, *Thornell v. Jones*, No. 22-982 (U.S. filed Apr. 6, 2023; granted Dec. 13, 2023).

First, the Ninth Circuit "fail[ed] to weigh the 'new' mitigation against the aggravating factors" already present at sentencing. *Id.* at 26-28. So too the Eleventh Circuit cited the requirement to reweigh the evidence but "never actually *did* that mandatory reweighing," *id.* at 27. *See* App.26 ("While we do not minimize the brutality of Williams' crime, those facts must be weighed against all the mitigating evidence. … We find no clear error in the [district] court's factual findings … [so] we conclude that Williams has established *Strickland* prejudice.").

Second, the Eleventh Circuit also—and more egregiously—"ignor[ed] the state's rebuttal evidence" "that would have been presented had [Williams] submitted the additional mitigation evidence." Pet. at 26, 28, *Thornell v. Jones*, No. 22-982 (U.S. filed Apr. 6, 2023; granted Dec. 13, 2023) (quoting *Belmontes*, 558 U.S. at 26). In *Jones*, the Ninth Circuit at least "briefly mention[ed] the testimony from the State's three experts at the federal evidentiary hearing" before dismissing their conclusions. *Id.* at 28. Here, the Eleventh Circuit completely excluded from its analysis the Lottie Turner rebuttal evidence and the victim-impact evidence about Melanie Rowell's children.

The State's new rebuttal evidence would have been even more impactful than the unanalyzed rebuttal evidence in *Jones*. Not only would evidence of a second sex crime have undermined Williams's new mitigation; it also would have shown future dangerousness (a factor the majority never mentioned). Plus, it would have devastated Williams's original case in mitigation, premised on his remorse and lack of significant criminal history. In truth, he was not remorseful: He attempted another rape 18 days after the first. And the jury would have heard from the defense that Williams had no significant criminal past followed by the State's evidence of *another* violent sex crime.

The error below is worse than merely "overstating" the effect of new mitigation evidence or giving "short shrift" to aggravation evidence. Pet. at 26-27, *Thornell v. Jones*, No. 22-982 (U.S. filed Apr. 6, 2023; granted Dec. 13, 2023) (quoting *Bobby v. Van Hook*, 558 U.S. 4, 13 (2009)). At a minimum, *Pinholster* and *Belmontes* require the court to weigh both the good and the bad; nothing in the Eleventh Circuit's opinion indicates that it considered "the bad" *at all*. "Instead, the panel considered *only* the evidence that was helpful to [Williams]." *Id.* at 28.

Alongside *Jones*, this case would be an attractive vehicle because it would permit the Court to address a wider variety of ways that lower courts incorrectly reweigh mitigation evidence. Beyond its erroneous and incomplete re-balancing, the Eleventh Circuit left out how new rebuttal evidence would have (1) undermined the new mitigation, (2) undermined the old mitigation, and (3) exacerbated the original case in aggravation. The Ninth Circuit committed the first error, but the Eleventh Circuit added two of its own.

The two decisions reflect different symptoms of the same root problem—a willingness to treat new evidence as a one-way ratchet in favor of the defendant.

This case would be a righteous vehicle too. Melanie Rowell's children have lived almost their entire lives without knowing their mother. They should not have to go their entire lives without knowing justice.

## CONCLUSION

The Court should grant Alabama's petition for a writ of certiorari, hear the case this Term alongside *Thornell v. Jones*, No. 22-982, and reverse.

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