No. 24-7262

In the Supreme Court of the United States

RICHARD ROLAND LAIRD,

Petitioner,

–v–

LAUREL HARRY, SECRETARY,
PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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***** CAPITAL CASE *****

COUNTER QUESTION PRESENTED

In a multi-component constitutional claim such as ineffective assistance of counsel, where the denial of a single component of the claim is sufficient to defeat the entire claim, does the presumption that silence implies consent in *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991), apply when a State court of last resort limits its discussion of the merits to only what is necessary to resolve the claim such that deference to the lower court's ruling on the remaining components is still due in federal habeas corpus review pursuant to 28 U.S.C. § 2254(d)(1)?

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COUNTER STATEMENT OF THE CASE

I. Factual History

A. Guilt Phase Evidence

On December 15, 1987, Laird, with the assistance of his co-defendant, Frank Chester, kidnapped and killed 26-year-old Anthony Milano by repeatedly slashing his throat with a box cutter, almost severing his head from his body. Anthony Milano's only conduct that led to this horrific crime was to show up to the same bar as Laird and Chester in order to grab a bite to eat and a beer.

The evidence adduced at trial showed that Laird and Chester had been drinking together with friends on the night of December 14, 1987, and then went to the Edgley Inn near Laird's apartment sometime after 9:30 p.m. that night. N.T. 2/6/07, pp. 21-22, 25-28, 218; N.T. 2/7/07, pp. 23-27. While at the bar, Laird continued drinking and acted like a "bully," calling another patron a "faggot" and "pussy," and threatening to "stick a pool cue up his ass." N.T. 2/5/07, pp. 195, 203, 210, 219, 241-43, 254-55; N.T. 2/6/07, p. 29. Laird was also belligerent to several police officers who had come to the bar to investigate a stolen car report, telling them, in response to their inquiry as to how long Laird had been at the bar, that it was none of their "fucking business." N.T. 2/5/07, pp. 203-04.

Anthony Milano left his home a little after 11:00 p.m. that night, telling his father he would not be gone long. He arrived at the Edgely Inn at approximately 12:30 a.m. There, he sat alone and ordered a beer and a sandwich. N.T. 2/5/07, pp. 49-52, 80-81,

195-98, 200-01. Laird called Milano over and ordered him to buy Laird and Chester a drink, which Milano did. *Id*. at 202-03. When Milano got up to use the bathroom, Laird stated in a loud voice, "I don't like fucking faggots." *Id*. at 205, 208.

When Milano returned, Laird insisted the men all have another shot, which Milano again bought. *Id*. at 208-09. Laird at some point threw his shot glass behind the bar and stated that he was "sick and tired of these people trying to infiltrate us." *Id*. at 216. Laird and Chester also got up and slow danced with each other while laughing. *Id*. at 211-13, 258.

Laird then insisted that Milano give him and Chester a ride home, despite the fact that Laird lived less than 500 yards from the bar. N.T. 2/5/07, p. 211. Although the bartender warned Milano not to leave with the men, Milano responded that he "didn't want any problems" and would give Laird and Chester a ride. *Id*. at 214. The three men then left the bar together at approximately 2:00 a.m. with a six-pack of beer. *Id*. at 115-17, 217-18.

At approximately 4:00 a.m. that morning, Laird and Chester appeared at an apartment belonging to some acquaintances. When they entered, Chester said that they got into a fight and that "the guy is dead." N.T. 2/6/07, pp. 143-44. Laird told Chester to shut up. *Id*. at 145. Laird was not wearing a shirt and immediately went to the kitchen and washed himself off. *Id*. Laird and Chester then got a ride to Laird's apartment, where Laird proceeded to wash off his boots. *Id*. at 160; N.T. 2/7/07, p. 31. Laird's girlfriend was at the apartment and asked what had happened, to which Chester responded that she should ask Laird "what he did" and stated that Laird had

ruined Chester's life. N.T. 2/7/07, p. 32. Laird said that "things got crazy." *Id*. at 34. Later that day, when back at his own apartment, Chester also reported to friends that "some faggot came walking into the bar" and Laird kept picking on him, that they left the bar with him, and that Laird "went crazy" and began "viciously attacking [the victim] and just cutting him." N.T. 2/6/07, pp. 30-37, 151-54; N.T. 2/7/07, pp. 36-37.

That afternoon, Laird put his clothes in a plastic trash bag, along with a key chain that had blood on it, and put it in the trunk of his car. N.T. 2/6/07, pp. 86-87; N.T. 2/7/07, pp. 34-35. He threw the bag in the dumpster behind a pizza shop. He also threw the box cutter that he always carried with him into the Neshaminy Creek. N.T. 2/6/07, pp. 87-89, 95.

Laird told Chester that he and Laird's brother would take care of the victim's car by burning it. N.T. 2/6/07, pp. 158-60. That night, a little after 11:00 p.m., police were called out to reports of a vehicle fire in Bristol Township, Bucks County. N.T. 2/5/07, pp. 72-73. There they found the victim's vehicle engulfed in flames, which firefighters on scene were able to extinguish. *Id*. at 73-74. Anthony Milano's body was found shortly thereafter in the nearby woods, with a gaping wound to his neck and multiple cuts to his face. *Id*. at 83-98.

An autopsy revealed that Milano had multiple cuts to his shoulder, forehead, and the sides of his face. All were made with a sharp cutting instrument consistent with a box cutter or carpenter's knife. N.T. 2/7/07, pp. 77-80, 88-90, 103, 105. In addition, there were multiple ("too many to count") deep slashing cuts to Milano's neck that penetrated right through to the bone, causing Milano's head to be nearly severed from

his body. *Id*. at 93-94, 96, 106-07, 109. Milano also had multiple contusions and bruising to his head, face and mouth; hemorrhaging and swelling of the brain; and a hairline fracture to the base of the skull consistent with having suffered a beating. *Id*. at 90, 94, 98-100, 103, 105, 112-13. The pathologist concluded that, despite the beating, Milano had remained conscious when the cutting began and would have suffered excruciating pain. He remained alive and breathing in his own blood for a period of five to ten minutes before he died. *Id*. at 95-96, 122-23.

Laird was arrested on December 22, 1987, at the Falls Motel, where he had attempted to hide from police. N.T. 2/6/07, pp. 191-94. Chester was arrested on December 30, 1987.

At Laird's 2007 trial, Laird admitted that he had killed Anthony Milano but presented a diminished capacity defense, claiming that due to his large consumption of alcohol prior to the murder, he lacked the specific intent to kill. Toxicologist Gary Lage estimated that Laird's blood alcohol content (BAC) was 0.45 at the time of the murder, and forensic psychiatrist Dr. John O'Brien testified that Laird's level of intoxication would seriously impair any person's functioning and cognition and would have a much greater effect on someone with brain damage.

The jury rejected that defense and convicted Laird of first-degree murder.

B. Relevant Penalty Phase Evidence

At the penalty phase of Laird's trial, trial counsel presented the testimony of a Catholic deacon who had known Laird throughout his incarceration, two state corrections officers who supervised Laird, Laird's brother, two expert witnesses, and

also incorporated the testimony of the toxicologist and forensic psychiatrist from the guilt phase.

Deacon James Sheil testified that he had been meeting with and administering Communion to Laird inside of prison for over seventeen years, that he had no fear of Laird, and that other inmates described him as peaceful and nonviolent. N.T. 2/12/07, pp. 29-30, 41. Sergeant Martin Saunders and Caption John Werner both testified that they had supervised Laird for approximately six years while he was incarcerated at SCI Greene, that Laird had served as a block worker on his unit, and that he was a respectful, responsible, and peaceful inmate. *Id*. at 43-44, 59-61.

Mark Laird, Laird's younger brother, testified regarding the abuse their father inflicted on them and their mother growing up. Specifically, Mark Laird testified that his father "beat[ ] the shit out of [their] mother" in front of him and Laird; that his father would beat Mark and Laird with a military belt or hit them on the head with a gold ring with a "big letter R" that would make Mark dizzy; and that Laird, as the older brother, got hit even harder than Mark. N.T. 2/12/07, pp. 69-71. With respect to sexual abuse of Laird, Mark testified as follows:

> Q: Now, you have also mentioned to me that there was sexual abuse going on in the household; is that correct?
>
> A: Yeah. I remember crying because I would be knocking on the door wanting to play with my brother and my father and I wasn't allowed in. Of course, they were naked at the time and I didn't really understand it at the time what was going on but I do remember that. I don't know the specifics of what happened. I just remember wanting to go into the room and not understanding why I wasn't allowed in.

N.T. 2/12/07, pp. 71-72.

Counsel attempted to elicit from Mark that his brother later confided that his father sexually abused him, but the court sustained the Commonwealth's hearsay objection. *Id*. at 72-74. Counsel followed up with Mark about the incident, and Mark described it as "the norm" with his father and that it continued until his mother ultimately divorced him. *Id*. at 82-83.

Mark Laird also testified regarding head injuries his brother received when he was younger, specifically recalling a time when Laird – then approximately 20 years old – was hit over the head by a two-by-four, and another occasion on which Laird was riding on the hood of Mark's car and fell off, cracking his head on the ground. *Id*. at 84-85. Mark testified that Laird had abused drugs and alcohol from around the age of twelve. *Id*. at 85-88.

Dr. Robert Fox, Jr., a psychiatrist who testified in support of Laird's diminished capacity defense during the guilt phase, was also called to testify at the penalty phase. Dr. Fox had evaluated Laird back in 1996, for which he interviewed Laird, Laird's mother, and Mark Laird, and re-interviewed Laird in 2007. N.T. 2/13/07, pp. 5-6, 17. Based on those interviews, as well as his review of relevant records, Dr. Fox testified that Laird had "a very chaotic and abusive family." *Id*. at 6. In particular, Dr. Fox testified that Laird's father, who had been a member of the Marine Corps, was a chronic alcoholic who abused Laird physically, psychologically and sexually when he was a young boy, and abused his mother and brother physically and psychologically as well. *Id*. at 6-7, 30. He described the trauma suffered by Laird as "systemic." *Id*. at 29.

Specifically with respect to sexual abuse, Dr. Fox recounted that when he met with Laird for two-and-a-half hours back in 1996, they talked a long time about Laird's relationship with his father and based on Laird's responses, Dr. Fox formed the opinion that Laird had most likely been sexually abused, though Laird would not provide any information regarding sexual abuse. *Id*. at 17, 23, 27. When Dr. Fox re-interviewed Laird prior to his 2007 testimony, Laird reported to Dr. Fox that his father sexually abused him as a boy and forced him to perform oral sex acts on him. *Id*. at 17.

Dr. Fox further reported that Laird's father served Laird alcohol when he was a child and that Laird began drinking alcohol and taking illegal drugs on a daily basis and in great excess when he was in his early teens. *Id*. at 8-9. Dr. Fox also testified that Laird suffered head injuries both as a result of being hit on the head repeatedly by his father and from falling off the roof of a car in 1983, when he suffered a skull fracture and concussion and was hospitalized. *Id*. at 9.

Based on all the information, Dr. Fox diagnosed Laird with attention deficit hyperactivity disorder (ADHD), post-traumatic stress disorder (PTSD) resulting from the childhood abuse he suffered, a mood disorder based on head trauma, and polysubstance dependence. N.T. 2/13/07, pp. 10-12. Dr. Fox described the condition of PTSD as being "characterized by difficulties with the management of emotions, by paranoia, by difficulty in interpersonal relationships; by flashbacks and other types of anxiety symptoms." *Id*. at 11. Dr. Fox also opined that, at the time of the murder,

Laird was laboring under extreme emotional disturbance and a diminished capacity. *Id*. at 14.

Dr. Henry L. Dee, a psychologist and neuropsychologist, also testified at the penalty phase after having previously testified at trial. Dr. Dee testified that Laird had been severely abused as a child, physically, emotionally, and sexually, and that he and his brother had been beaten by their father with "anything at hand," and that their father employed "creative kinds of punishment," such as forcing Laird to kneel on dried beans. N.T. 2/13/07, pp. 59-60. Laird informed Dr. Dee that he had also been sexually abused, and had been forced to perform oral sex on a male family member. Although Laird declined to say who, Dr. Dee learned from Laird's brother, Mark, that it was their father. N.T. 2/13/07, pp. 59-60. With respect to the sexual abuse, Dr. Dee testified as follows:

> [Laird] was sexually abused in the manner that I've already described, that subsequent to that his father would humiliate him and further emotionally abuse him by telling him he was filthy, he was a nasty boy, to go wash out his mouth and shouldn't be doing things of that sort, which, of course, is terribly confusing to anybody.
>
> ***
>
> The younger brother said he knew something very peculiar was going on – and he was younger, of course, and didn't know why he wasn't included in this and on occasion accidentally or on purpose, he was just a little boy, would somehow get into the bedroom and see these two nude males and he didn't know what was going on and didn't understand it. It was later on that he learned what was going on. . . .

Id. at 61. Laird's father continued to abuse him, his brother and mother until Laird's mother finally left his father when Laird was ten or eleven years old. *Id*. at 62.

Dr. Dee further testified that Laird's father gave him alcohol when he was a child, and that Laird subsequently began using alcohol and, specifically, binge drinking, on a regular basis at a young age. N.T. 2/13/07, p. 63. In addition, Dr. Dee reported that Laird had been diagnosed with ADHD when he was a child, which made him feel rejected by teachers and peers alike, and also led to self-medicating with illegal substances. N.T. 2/13/07, pp. 65-66, 77-78.

On cross-examination, Dr. Dee further opined that Laird had a "long smoldering antagonism toward persons identified as homosexuals" which might have caused him to target Anthony Milano. N.T. 2/13/07, pp. 97-98. Laird's hatred of homosexuals was also documented in another expert report prepared back in 1996 by a Dr. Silverman. *Id*. at 98.

Dr. Dee recounted the various neuropsychological tests that he performed on Laird and diagnosed Laird with chronic brain syndrome with mixed features, which resulted in memory impairment, difficulties in executive functioning and concept formation. He also diagnosed Laird with personality change due to brain damage, causing him to be more impulsive and irritable. N.T. 2/13/07, pp. 71-73. Based on this diagnosed brain damage – which Dr. Dee attributed to various head traumas, including Laird's fall from a car – Dr. Dee opined that Laird suffered from extreme mental and emotional disturbance at the time of the murder. N.T. 2/13/07, pp. 73, 79.

C. Relevant PCRA Testimony

At the 2012 PCRA hearing, trial counsel, Keith Williams, recounted that at the time counsel was preparing for trial in 2006 and 2007, Laird refused to discuss the

allegations of sexual abuse with counsel. Specifically, attorney Williams recalled as follows:

> Q: Do you recall whether during the meeting with – that Dr. Fox had with Mr. Laird whether any new information with regard to defendant's – defendant's history was disclosed?
>
> A: My best recollection is that there was some feeling that there had been sexual abuse, but that Mr. Laird was reluctant to talk about it, [] but it was mentioned.
>
> ***
>
> THE COURT: . . . What information did you have regarding [Laird's] history with his father before the trial?
>
> A: That there was an allegation of sexual abuse as well – if that's the only are you are talking about. Obviously there was physical abuse, mental abuse, there was a lot that the father was responsible for, but the sexual abuse was only an allegation at that point. Like I said, my recollection, Richard wouldn't even talk to me about it . . . .

N.T. 5/23/12, pp. 156-59.

When asked whether Mr. Williams could have attempted to obtain additional information from Laird regarding the sexual abuse by hiring an expert trained to elicit such information, Mr. Williams responded as follows:

> I guess, sure. I mean I had experts, I was using the experts I had, I didn't – never crossed my mind to go out and find some new special expert who could more – was more capable of getting under Mr. Laird's skin and finding it out. No, we had experts. I relied on those experts, I relied on what Mr. Laird told me, I relied on what his brother told me, I relied on the other witnesses we talked to during the whole investigation.

N.T. 5/23/12, p. 165.

Attorney Williams testified that he attempted to elicit corroborating evidence of sexual abuse from Mark Laird, but Mark did not witness the sexual abuse first-hand, and could only testify to his suspicions based on things he saw or overheard when he

was a child. *Id*. at 159. Moreover, in 2007, Mark was less cooperative or forthcoming than he had been at the 1997 PCRA hearing. As such, Mr. Williams attempted to "get whatever [he] could get out of [Mark] for the jury to hear," without giving the jury the impression that Mark Laird did not want to help his brother. *Id*. at 170, 191-92.

Mark Laird's testimony at the 2012 PCRA hearing corroborated this. Mark stated that he did not want to come to Bucks County to testify in 2007 because he had previously cooperated against certain criminal defendants, had many enemies as a result, and was therefore hesitant and nervous about appearing at the courthouse to testify. N.T. 6/19/12, pp. 13-14, 51. In fact, Mark testified that he did not like having to appear; wanted to prepare for his testimony with counsel over the phone, but counsel insisted they meet in person; and that Mark was "pissed off" that Laird's trial counsel made him come. *Id*. at 15-17. Mark further conceded that memories of his childhood were painful and he did not like to discuss them, and that he had difficulty remembering events from his childhood. *Id*. at 22-23, 25. He also denied that spending more time with attorney Williams in advance of his testimony would have made testifying about childhood abuse any easier. *Id*. at 25.

While Mark Laird testified that he probably revealed more information about his childhood to PCRA expert, Dr. Lisak, when they met in 2012 than he previously had disclosed, he also stated that he had "learned a lot of tools along the way" from being incarcerated and from different groups that helped him cope with and discuss his childhood. *Id*. at 44-45. Moreover, with respect to his father's sexual abuse of Laird during childhood, Mark recalled little more about it than he had previously: that he

did not understand why his father wanted to spend more time with Laird and that he "regularly" saw his father and brother laying in a towel after a shower with a pack of cigarettes. *Id*. at 45-46. Mark also testified that when they were teenagers, Laird told him that the kind of attention his father gave Laird was not good attention, but that they did not discuss details of the abuse. *Id*. at 47.

At the PCRA hearing, Laird called Dr. David Lisak, a clinical psychologist with experience working with childhood physical and sexual abuse victims, who testified that he met with Laird twice and that Laird discussed the regular sexual abuse he experienced at the hands of his father, which included both oral and anal rape over the course of years. N.T. 5/24/12, pp. 92-93, 112-13. Dr. Lisak further testified that Laird reported experiencing several reactions to the sexual abuse throughout his life, including gag reflexes and rectal pain, which Dr. Lisak opined was a tactile or sensory memory of the experience of having been orally and anally raped; nightmares about a "ghost-like man" who would come to him at night; and an aversion to being touched by other males. *Id*. at 199-202. Finally, Dr. Lisak testified that as a result of Laird's childhood abuse, Laird felt worthless and ashamed and developed a "persona of hyper-masculinity" to counter those feelings. N.T. 5/24/12, p. 115-16.

Dr. Lisak also interviewed Mark Laird, the only other source of information regarding the sexual abuse. Mark reported that their father would regularly take Laird out of the room, or remove Mark from the room in order to be alone with Laird, and that Laird later indicated to Mark that their father had been sexually abusing him on those occasions. *Id*. at 75-79.

Laird relies on information contained in the report of Dr. Lisak which described further anecdotes of abuse from Mark Laird and Dr. Lisak's opinion that Laird developed a "long smoldering antagonism towards persons identified as homosexual" which Laird attempted to use to connect his childhood abuse to the murder before the District Court and before the Third Circuit. However, this report was not part of the PCRA Court record as the PCRA court excluded it from evidence in favor of Dr. Lisak's live testimony. *Id*., p.218-19. Laird never appealed this evidentiary ruling in the State court proceedings or previously questioned its propriety. Instead, Laird asks that this Court to review this evidentiary ruling for the first time and find that the report was improperly excluded under Pennsylvania's evidentiary rules. *Pet'n for Cert*. p.3 n.1.

This request is wholly improper as it is beyond cavil that "it is not the province of a federal habeas court to reexamine state-court determinations on state law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Moreover, even if cognizable, such a claim is unexhausted as it was not presented to the Pennsylvania Supreme Court. 28 U.S.C. § 2254(b)(1); (3). As such, Laird's continued reliance on information contained in reports which were not admitted into the state court record is improper and this Court should not consider their contents. 28 U.S.C. § 2254(d)(2) (limiting review to facts based on "evidence presented in the State court proceeding.").

II. Relevant Procedural History

On May 19, 1988, Richard Laird was convicted of first-, second-, and third-degree murder, kidnapping and conspiracy in connection with the December 15, 1987

murder of Anthony Milano. On May 21, 1988, a jury returned a sentence of death. Laird's judgment of sentence was affirmed by the Pennsylvania Supreme Court, *Commonwealth v. Laird*, 587 A.2d 1367 (Pa. 1989), *cert. denied, sub nom. Laird v. Pennsylvania*, 502 U.S. 849 (1991), and his subsequent state post-conviction collateral claims were denied. *Commonwealth v. Laird*, 726 A.2d 346 (Pa. 1999).

However, in 2001 Laird was granted federal habeas relief by the Honorable Jan E. Dubois, which resulted in the court vacating his first-degree murder conviction and death sentence and the Commonwealth was directed to either retry Laird for first-degree murder and/or hold a sentencing hearing on the remaining charges. This Court affirmed. *Laird v. Horn*, 159 F. Supp, 2d 58 (E.D. Pa. 2001), *affirmed*, 414 F.3d 419 (3d. Cir. 2005), *cert. denied, sub nom.*, *Beard v. Laird*, 546 U.S. 1146 (2006).

In 2007, the Commonwealth retried Laird for first degree murder and he was again convicted and again sentenced to death. The Pennsylvania Supreme Court affirmed this judgment of sentence, *Commonwealth v. Laird*, 988 A.2d 618 (Pa. 2010), *cert. denied, sub nom. Laird v. Pennsylvania*, 562 U.S. 1069 (2010), and subsequently affirmed the denial of relief in the state post-conviction proceedings. *Commonwealth v. Laird*, 119 A.3d 972 (Pa. 2015).

By Order and Memorandum entered August 18, 2016, Judge Dubois denied Laird's request for federal habeas relief and further denied him a certificate of appealability. *Laird v. Wetzel*, Civ. No. 11-1916; 2016 WL 4417258 (E.D. Pa. August 19, 2016). Relative to the ineffective assistance of counsel claim presented in the instant Petition, the district court applied a deferential standard of review to the

Pennsylvania Supreme Court's determination that Laird failed to establish prejudice. *Id.*, at 39-41. As the Pennsylvania Supreme Court did not reach the question of deficient performance, the district court reviewed that prong *de novo* and found that counsel decision to not act unreasonably in relying on his two retained experts rather than retain a third. *Id.*, at 41 n.15. Laird thereafter filed a Motion to Alter or Amend the Judgment pursuant to Federal Rule of Civil Procedure 59(e). The district court granted the motion in part and denied the motion in part, but ultimately again denied habeas relief and a certificate of appealability. *Laird v. Wetzel*, Civ. No. 11-1916, 2017 U.S. Dist. LEXIS 85530 (E.D. Pa. June 2, 2017).

On June 29, 2017, Laird filed a Notice of Appeal to the Third Circuit Court of Appeals and filed his Application for Certificate of Appealability on January 26, 2018. On March 10, 2020, the Third Circuit Court of Appeals granted Laird's application for a certificate of appealability, limited to the single issue of whether prior counsel was ineffective at the 2007 penalty hearing for failing to present an additional mitigation expert. Following briefing and argument that Court affirmed the denial of habeas corpus relief giving deference to the opinion of the PCRA court on the deficient performance prong of the *Strickland* test and finding it was not contrary to or an unreasonable application of federal law. *Laird v. Sec'y Pa. Dept. of Corr.*, 129 F.4th 227, 247 (3d Cir. 2025).

REASONS FOR DENYING THE PETITION

I. Petitioner has Manufactured a Non-Existent Circuit Split When the Courts to Affirmatively Decide the Issue at Hand Have Applied Deference in a Manner Consistent with the Third Circuit's Practice.

Laird asks this Honorable Court to resolve a conflict between the Circuit Courts which, he alleges, have split on the look-through issue challenged herein. However, a closer examination of the opinions cited by Laird reveals that he has misrepresented the circumstances in which the pertinent courts declined to grant deference to the reasoning of the lower state courts. Instead, a review of these cases reveals that the only split on the discrete issue presented in this matter exists internally within the Seventh Circuit Court of Appeals and not between the Circuit Courts themselves.

In support of his assertion that a split exists between the Circuit Courts, Laird points to the Ninth Circuit's opinions in *Barker v. Fleming*, 423 F.3d 1085, 1093 (9th Cir. 2005), and *Castellanos v. Small*, 766 F.3d 1137, 1145-50 (9th Cir. 2014). Neither of these cases are analogous to the question at hand and neither conflicts with the Third Circuit's approach in this matter.

Beginning with *Barker*, the opinion that accompanied the Washington Supreme Court's decision denying review did not address the *Brady* claim presented by ruling on one component of the test and remaining silent on a remaining portion. Instead, the "Washington Supreme Court, through its Commissioner, denied discretionary review in a thorough opinion" which was adopted by the Court itself. *Barker*, at 1091. That opinion, while agreeing with the reasoning of the Washington Court of Appeals,

was based on an independent review of the record and reflected the Commissioner's own reasoning. *Id*. at 1093. The Ninth Circuit Court of Appeals found this reasoning to be contrary this Honorable Court's precedents as the State court reviewed the materiality requirement of the *Brady* claim by analyzing each piece of withheld evidence separately instead of cumulatively. *Id*. at p.1094.

Thus, the Ninth Circuit's opinion did not look through the Washington Supreme Court's erroneous analysis and supplement it with the lower court's opinion *on the same issue*. *Barker* simply did not involve the same circumstance as the § 2254(d)(1) analysis at hand where the Third Circuit looked through the Pennsylvania Supreme Court's *silence* on the issue of deficient performance. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991), makes clear "silence implies consent, not the opposite" *Ylst*, at 804, and the Washington Supreme Court in *Barker* was not silent – it was wrong.

Laird's citation to *Castellanos* is even more curious. While that opinion cited to *Barker* for the premise that the AEDPA required the court to look for the last reasoned opinion, the similarities ended there. *Castellanos*, at 1145. The opinion then noted that the California Supreme Court's summary denial of discretionary review did not constitute a reasoned decision and looked through to the California Court of Appeal's reasoning. *Id*. at 1145. The Ninth Circuit there found the California Court of Appeal's reasoning was a reasoned decision for the purposes of AEDPA review and that it was not contrary to clearly established federal law and applied deferential review. *Id*. at 1146-47.

Neither Ninth Circuit precedent presented by Laird addressed the circumstances at issue in this matter, let along resolve them in a manner conflicting with the Third Circuit's approach.

Laird further relies on the Eleventh Circuit's opinion in *Knight v. Florida Dep't of Corr.*, 958 F.3d 1035, 1046 n.3 (11th Cir. 2020), which did decline to defer to the state trial court's prejudice analysis when the Florida Supreme Court did not address that component of the *Strickland* claim. This opinion did so with no meaningful analysis beyond a footnote which noted that *Wilson v. Sellers*, 584 U.S. 122, 125 (2018), did not involve the same circumstances and did not change the fact that it was instead bound by *Wiggins*, *Rompilla*, and *Johnson v. Secretary*, 643 F.3d 907, 930 n.9 (11th Cir. 2011). However, as discussed in more detail *infra*, at p.29-30, *Wiggins* and *Rompilla* compel the opposite conclusion as this Court, in those matters, only applied *de novo* review after looking through to all State court opinions and finding none of them addressed the prejudice prong of *Strickland*. In *Johnson*, the Circuit Court's opinion found the Georgia Supreme Court did address both deficient performance and prejudice and thus it had no reason to assess whether it was appropriate to look through to the lower court's decision on either prong. *Johnson*, at 1224-25.

This review confirms that the Eleventh Circuit, after *Wilson*, still follows *Wiggins* and *Rompilla*. *Wiggins* and *Rompilla* both looked through the highest state court opinion to the lower court opinions to determine if there was a reasoned opinion on the additional prong of the *Strickland* analysis and only conducted a *de novo* review

after determining that there was none. As *Wiggins* and *Rompilla* employed § 2254(d)(1) deference consistent with the Third Circuit's approach here, the Eleventh Circuit has not split with the Third Circuit on this question by following those precedents. Rather, in a cursory review of the question contained only in a footnote, the *Knight* Court simply misread *Wiggins* and *Rompilla* in a manner which can only be described as an erroneous application of the correctly identified precedent – not conflicting precedent from a sister circuit.

Indeed, Eleventh Circuit precedents preceding this short-shrift analysis did squarely address the question explicitly held:

> where a state trial court rejects a claim on one prong of the ineffective assistance of counsel test and the state supreme court, without disapproving that holding, affirms on the other prong, both of those state court decisions are due AEDPA deference. Unless both reasons for rejecting the claim are "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), the ineffective assistance of counsel claim is due to be rejected.

Hammond v. Hall, 586 F.3d 1289, 1332 (11th Cir. 2009). Contrary to Laird's assertions, the Eleventh Circuit's approach is consistent with the Third Circuit's on this issue and the *Knight* opinion is nothing more than a misapplication on this Court's precedents due to a cursory analysis.

Laird also points to the Seventh Circuit's decisions in *Dunn v. Jess*, 981 F.3d 582, 591 (7th Cir. 2020), and *Thomas v. Clements*, 789 F.3d 760, 766-67 (7th Cir. 2015). Laird has failed to call attention to *Atkins v. Zenk*, 667 F.3d 939 (7th Cir. 2012), which *Thomas* directly contradicts and created internally conflicting opinions within the Seventh Circuit. Before discussing that contradiction, we begin by wholly discarding

the analysis of *Dunn v. Jess*, seeing as there was none. Instead, the *Dunn* Court acceded to the agreement of the parties that AEDPA deference did not apply. *Dunn*, at 591. As *Dunn* merely assumed without deciding that *de novo* review applied, it cannot be said to depart from the Third Circuit's approach.

In *Atkins*, citing to *Wiggins*, the Seventh Circuit applied deferential review to the trial court's prejudice analysis where the appellate court only addressed deficient performance. *Atkins*, at 944. Specifically, that Court found "both prongs have been addressed by Indiana state courts, in one form or another, the deferential standard of review set out in § 2254(d) applies to both." *Ibid*. The *Thomas* opinion declined to follow *Atkins*, asserting that neither party there contested that the deferential review applied to both prongs. A review of the *Atkins* opinion itself reveals that the Court there did not defer to the concession of the parties on deference, as was the case in *Dunn*, but *Atkins* applied the reasoning of *Wiggins* in direct conflict with *Thomas*.

Subsequent district court decisions within the Seventh Circuit have recognized that

> The Seventh Circuit has gone in different directions as to which standard applies when a trial court decides a federal claim, but the state appellate court, though presented with the claim, does not address it.

McCoy v. Gomez, No. 20-C-2708; WL 3004622, p.9 n.6 (N.D. Ill. 2023)(citing *Thomas* and *Atkins*). At the circuit court level, the Seventh Circuit has intimated that the approach in *Thomas* did not survive this Honorable Court's decision in *Wilson* and declined to follow its rule:

> Here, the Wisconsin Court of Appeals did not explicitly adopt the trial court's reasoning, but it also did not explicitly decline to do so or in any way

> disagree with the trial court's reasoning. Without deciding whether *Wilson* conflicts with *Thomas*, we give the trial court's reasoning great weight under comity.

Adeyanju v. Wiersma, 12 F.4th 669, 674 n.1 (7th Cir. 2021).

Accordingly, the Seventh Circuit has not split with the Third Circuit on this issue but has split with itself. Its internal division appears to have been remedied by this Court's decision in *Wilson*. To the extent that it has not, an internal split is properly rectified through *en banc* consideration and not the grant of certiorari from this Honorable Court. *See Hittson v. Chatman*, 576 U.S. 1028 (2015)(Justice Ginsburg concurring in denial of certiorari).

Based on the foregoing, the Ninth Circuit has not truly reached the question presented to this Honorable Court. The Third, Fifth,[1] and Eleventh Circuits have each reached the same conclusion and found that deference to the lower court is appropriate when the highest court to review the question was silent on a particular component of a multi-factor analysis. The Seventh Circuit appears internally divided on the question but has intimated that *Wilson* compels a look through approach consistent with the Third Circuit's here. Put simply, there is no true circuit split on this issue despite Laird's attempt to fabricate one and this Honorable Court should deny the Petition for Writ of Certiorari.

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[1] Laird concedes that the Fifth Circuit Court of Appeals also follows the Third Circuit's approach. *See*, *Loden v. McCarty*, 778 F.3d 484, 494-95 (5th Cir. 2015).

II. The Ruling of the Third Circuit Court of Appeals is Consistent with the Statutory Text and Precedents of this Honorable Court.

The Third Circuit's approach is consistent with the plain text of 28 U.S.C. § 2254(d)(1), which reads:

> (d) 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;

Ibid. Because *Strickland* commands that a petitioner's "[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim," *Id*. at 700, a State court adjudicates an ineffective assistance of counsel claim if it denies relief on either component. As the merits of the pertinent ineffectiveness claim were addressed by the State court proceedings here, § 2254(d)(1) prohibits relief unless that adjudication "*resulted in a decision* that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . " *Id.* (emphasis added).

Laird recognizes that this language focuses on the resultant decision of the State court proceedings but emphasizes that Congress chose to use the singular form of "adjudication" and "decision" rather than the plural. *Pet'n for Cert*., p.22 (quoting *Barker*, at 1093). However, Laird overlooks the statutory rules of construction which mandate that unless statute indicates otherwise, "words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. § 1. As the statute's

context does not specifically indicate that Congress intended for this Honorable Court to give AEDPA deference to only the last State court to rule on a particular issue, the rules of statutory construction command an assumption that it intended § 2254(d)(1) to apply to all State courts which adjudicated a federal claim on the merits.

This is consistent with the overarching context of the statute and its purpose "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and to advance the principles of comity, finality, and federalism." *Shoop v. Twyford*, 596 U.S. 811, 818 (2022) (quotations and citations omitted). These interests are not furthered by disregarding the two-pronged analysis of an inferior State court merely because the State court of last resort exercised judicial restraint and rested its decision on the rejection of only the prejudice component of its ineffective assistance of counsel analysis. This Court has long recognized the importance of judicial restraint, *see Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."), and the principles of comity and federalism enshrined in § 2554(d) demand that the AEDPA deference owed to State court decisions not be diminished because the court of last resort exercised that principle and chose not to answer more questions than necessary.

Furthermore, Laird's textual analysis disregards the statute's clear distinction between a State court's "adjudication" and its "decision" on a petitioner's claim. A condition precedent to the heightened standard of review in § 2254(d)(1) is that the

State court must have adjudicated the claim on the merits or, not on procedural grounds. *Johnson v. Williams*, 568 U.S. 289, 308 (2013)(Justice Scalia, concurring) ("An 'adjudication on the merits' is best understood by stating what it is not: it is not a resolution of a claim on procedural grounds.'"). If that condition is met, then the statute commands that relief be denied unless the *decision* was "contrary to, or involved an unreasonable application of, clearly established Federal law . . . " 28 U.S.C. § 2254(d)(1). Clearly, the statute's language recognizes the adjudication by the State court as the rationale behind the denial the federal claim and distinguishes that adjudication from the ultimate decision which was the result of that adjudication – the denial itself. It is the latter which receives the deferential review and not merely the adjudication.

Laird's proposed interpretation conflates the two terms used distinctly in the statutory provision and proposes a rule in which only the adjudication on the merits receives deferential treatment and not the decision on the claim. However, whereas here, *Strickland* commands that its two-factor analysis comprise separate prongs of the same ineffective assistance of counsel claim, for a writ of habeas to issue pursuant to § 2254(d)(1), the resultant decision of a *Strickland* claim must necessarily be "contrary to, or involved an unreasonable application of, clearly established Federal law" with respect to both components of the ineffectiveness test once it is determined that the claim was adjudicated on the merits by the State court.

Put simply, each component of the *Strickland* test, must be "contrary to or an unreasonable application of, clearly established Federal law" for the writ of habeas

corpus to be granted on Laird's ineffective assistance of counsel claim pursuant to 28 U.S.C. § 2254(d)(1). To assess only one prong of the test is to address the adjudication and not the decision. The question then becomes what reasoning does the federal habeas court "train its attention on" and "give appropriate deference to"? *Wilson*, at 125 (quotations and citations omitted).

On the issue of prejudice, it "is a straightforward inquiry" as the Pennsylvania Supreme Court "explain[ed] its decision on the merits in a reasoned opinion." *Id*. at 125. On the question of counsel's performance, the Pennsylvania Supreme Court was silent on this issue as it had no reason to reach this question since the prejudice assessment resolved the matter. *Laird*, 119 A.3d at 997-99. In such circumstances, *Ylst* and *Wilson* apply and command that the federal habeas court must look through the silence "to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Id*. at 125.

While the procedural posture in *Wilson* was not precisely the same in that the Georgia Supreme Court's decision there was a summary denial of review without explanation, there is no principled distinction between a state court of last resort affirming with no opinion when state law does not mandate one and when the state court of last resort affirms while exercising judicial restraint and opining on only the issues necessary to resolve the question before it. In both cases, the state court of last resort gave no indication that it disagreed with the rationale of the lower court. In both cases, the presumption of agreement with the rationale should be applied unless

rebutted. *Wilson*, at 125-26; *Ylst*, at 804 ("The maxim is that silence implies consent, not the opposite . . . "). It is also of note that the practice of the Third Circuit Court of Appeals which Laird assails stems from its initial decision in *Bond v. Beard*, 539 F.3d 256 (3rd Cir. 2008), which was cited by this Honorable Court in *Wilson* in its examples of Circuit Courts which applied the methodology adopted therein. *Wilson*, at 128.

This look-through procedure is also consistent with the practice of this Honorable Court. While the question has not been explicitly decided by this Court, it has previously looked through the last State court's opinion on a single *Strickland* prong to assess whether a lower court addressed the remaining prong. In both *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court reviewed the deficient performance question by applying the deferential standard of § 2254(d)(1). *Rompilla*, at 380-81; *Wiggins*, at 519-20. In both cases, this Court disagreed with the State court's decision under this heightened standard of review and proceeded to the analysis of prejudice. *Rompilla*, at 389-90; *Wiggins*, at 534.

This Court in both matters applied a *de novo* review on the question of prejudice as the opinions noted that the highest State court's opinion did not reach the question of prejudice having found counsel's performance was sufficient. Crucially, in both opinions, this Court first looked to the lower State court's opinion to determine if those opinions reached the separate question of prejudice. It was only after this Court found none of the State courts had reached the question of prejudice that the issue was reviewed under a *de novo* standard. The *Rompilla* opinion specifically noted "Because the state courts found the representation adequate, they never reached

the issue of prejudice . . . and so we examine this element of the *Strickland* claim *de novo* . . . " *Rompilla*, at 390 (citing *Wiggins*, at 534) (emphasis added). The *Wiggins* opinion also explicitly sought a lower court opinion to apply deferential treatment to but concluded "our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis." *Wiggins*, at 534 (emphasis added).

Laird asks that the past practices of this Honorable Court be overturned and that the principles of comity embodied in § 2254 be ignored in matters when a state court of last resort exercises judicial restraint and does not rule on more questions than needed. The only argument that Laird offers in furtherance of this request is a reading of § 2254(d) which ignores the principles of statutory construction, 1 U.S.C. § 1, and drastically overstates the level of disagreement between the Circuit Courts on this issue. As such, Laird's request should be denied and this Honorable Court should continue to apply its longstanding principle that a reviewing court's silence on an issue gives a presumption of consent.

Without overtly recognizing this presumption, Laird attempts to overcome it with an assertion that because the Pennsylvania Supreme Court commented that it did "not necessarily endorse the concept that Dr. Lisak's testimony would have been insignificant . . . " that Court wholesale rejected the rationale of the PCRA Court. *Pet'n for Cert*., p.22-23. At most, this statement reflects a concern over the PCRA's court's use of the term insignificant and not the entire rationale as the Pennsylvania Supreme Court did agree with the PCRA court that prejudice was not established by

Dr. Lisak's testimony. This minor distinction in language used to describe Dr. Lisak's testimony is insufficient to overcome *Ylst*'s presumption as when the Pennsylvania Supreme Court disagrees with a lower court's rationale it affirmatively states as much. *See*, *e.g.*, *Commonwealth v. Johnson*, 771 A.2d 751, 758 (Pa. 2001)("we affirm the Superior Court, although on different grounds."); *Commonwealth v. Chisebwe*, 310 A.3d 262, 270 (Pa. 2024)("Our reasoning here notably differs from the reasoning of the Superior Court."). Moreover, the linguistic quibble with the PCRA court's word choice in its prejudice assessment had no bearing on the PCRA court's discussion of deficient performance and strategy and the presumption of agreement must prevail.

III. Trial Counsel's Performance was Not Deficient Under Even a *De Novo* Standard of Review

Because trial counsel's performance was not deficient under even a *de novo* standard of review, this Court need not address the question of deference as it would not affect the outcome. While Laird argues that trial counsel was ineffective for not employing a third expert to evaluate and interview him, he fails to meaningfully appreciate that it was Laird himself who withheld the information that he now claims was vital to his mitigation strategy. There is no precedent from this Honorable Court that commands an attorney to hire expert after expert to make continued efforts to extract information that his client refuses to disclose.

Precedents from this Honorable Court command that an attorney conducting a mitigation investigation must make a diligent search into other available sources for information when the client has refuses to disclose helpful mitigating evidence. *See Porter v. McCollum*, 558 U.S. 30 (2009). Counsel here did just that and compiled all

relevant records and interviewed available family members. There was simply no other investigatory avenue which would have provided counsel with the information that Laird himself withheld.

Under such circumstances, there is no holding which commands trial counsel to expend limited investigatory time and resources on redundant experts to interview his own client until the client's will be overborne such that he releases the withheld information. To the contrary, this Court has directly eschewed *Strickland* claims which require federal courts to second-guess counsel's choice of expert based on a proposed expert who was allegedly more qualified, stating:

> We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of strategic choice that, when made after thorough investigation of the law and facts, is virtually unchallengeable. We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired.

Hinton v. Alabama, 571 U.S. 263, 275 (2014)(alterations and quotations omitted). Here, trial counsel employed two qualified and competent experts who interviewed Petitioner and authored reports based on those interviews. Neither expert opined that a different expert or different interview technique would result in more information and there was no reason for trial counsel to believe a third expert would prove more fruitful than the two already employed. As trial counsel was entitled to rely on his two qualified experts, and as those experts gave no reason to believe an additional expert with a different specialty would prove helpful, counsel acted reasonably under even a *de novo* standard of review.

Finally, to the extent that Laird's petition attempts to argue the substance of the prejudice prong of his *Strickland* claim, such analysis is not pertinent to the question he presents for review. Moreover, as the Third Circuit's opinion did not reach the question of prejudice, this Honorable Court traditionally refrains from considering it in the first instance. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.").

Nonetheless, to avoid the implication of acquiescing in Laird's analysis of the prejudice question, Respondents note that trial counsel presented testimony establishing systemic sexual abuse suffered at the hands of Laird's father and the effects that abuse had on Laird's psychological development. Dr. Dee's testimony also provided a causal nexus between that abuse and the circumstances of the murder resulting in the jury finding the suffering of sexual abuse as one of the eight mitigating factors.

Dr. Lisak's testimony presented little more than a few additional anecdotes of the abuse Laird suffered at the hands of his father. However, as Laird's trial team had already presented evidence on the grounds of the sexual abuse he suffered and its effects on his psychological development, these few additional points on targeting this same area of mitigation would not have had a significant benefit on the jury. *See*, *Bobby v. Van Hook*, 558 U.S. 4 (2009); *Wong v. Belmontes*, 558 U.S. 15 (2009). The Pennsylvania Supreme Court's decision on this question was not "contrary to, or

involved an unreasonable application of, clearly established Federal law, as determined by [this Honorable Court.]" 28 U.S.C. § 2254(d)(1).

CONCLUSION

Wherefore, as the Third Circuit's holding comports with the text of § 2254(d), this Honorable Court's precedents, and the holdings of its sister circuits which have meaningfully addressed the question at hand, Respondents' request that this Honorable Court deny the request for certiorari in this matter.

Respectfully submitted,

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