No. 26-

IN THE

Supreme Court of the United States

DONTAE CALLEN,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Petitioner was convicted of a horrific crime, but post-conviction evidence showed that, at the time of the crime, he was likely suffering from organic brain damage caused by severe childhood trauma and neglect, as well as chronic sexual abuse at the hands of one of the victims. The petition identified with specificity experts who would have been available to testify to those facts and what their testimony would have been. It further pled that trial counsel unreasonably failed to investigate and present such mitigation evidence at the penalty phase, despite numerous red flags indicating the need for investigation. Despite these well-pleaded allegations, the lower court adopted a barely modified version of the prosecution's adversarial pleading and summarily dismissed the petition without even holding an evidentiary hearing.

The questions presented are:

1. Is the Due Process Clause violated when a court summarily dismisses a post-conviction petition in a death penalty case by adopting a near-verbatim version of the state's error-riddled and adversarial motion to dismiss?

2. Did the state courts depart from this Court's precedents in concluding that the allegations in a post-conviction petition failed to state a facially meritorious claim of ineffective assistance of counsel at the penalty phase?

PARTIES TO THE PROCEEDING

Petitioner is Dantae Callen.

Respondent is the State of Alabama.

No corporate parties are involved in this case.

RELATED CASES

This case arises from the following proceedings in the Alabama Supreme Court, the Alabama Court of Criminal Appeals, and the Alabama Circuit Court:

Callen v. *Alabama*,
No. SC-2026-0276 (Ala.); and

Callen v. *Alabama*,
No. CR-2025-0396 (Ala. Crim. Ct. App.); and

Callen v. *Alabama*,
No. CC-2011-002047.60 (Ala. Cir. Ct.).

No other proceedings directly relate to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dantae Callen[1] respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama.

OPINIONS AND ORDERS BELOW

The Alabama Supreme Court's judgment is unreported and reproduced at App. 165a. The Alabama Court of Criminal Appeals' opinion is unreported and reproduced at App. 1a–80a. The Circuit Court's order is unreported and reproduced at App. 81a–163a.

STATEMENT OF JURISDICTION

The Alabama Supreme Court entered its judgment on August 21, 2026. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides, as relevant:

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

The Fourteenth Amendment provides, as relevant:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

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[1] Although Petitioner's name throughout these proceedings has been spelled "Dontae," his legal name is spelled "Dantae." This Petition uses the correct legal spelling.

INTRODUCTION

Petitioner Dantae Callen is on death row because he did not receive two of the Constitution's most fundamental guarantees: competent representation and the protections of due process.

Mr. Callen's Sixth Amendment claim focuses on the penalty phase of his trial, where appointed Trial Counsel failed to conduct a constitutionally adequate investigation. Trial Counsel ignored obvious warning signs and red flags, including that Mr. Callen suffered from *organic brain damage* and that he was *sexually abused as a child*. These mitigating facts were critical to any jury's understanding of who Mr. Callen is and what led to the tragic events here. But Trial Counsel did not even obtain Mr. Callen's medical records, never mind call any experts to explain or contextualize those records—leaving the jury with a fundamentally misleading picture of Mr. Callen's life. Post-conviction counsel did the work that Trial Counsel did not do, and the evidence is powerful. Absent Trial Counsel's failures, it is likely Mr. Callen would not have been sentenced to death.

Mr. Callen has also been deprived of his due process rights while seeking to bring these failures to light in post-conviction proceedings. In a Second Amended Rule 32 Petition ("Petition"), Mr. Callen pled his claims with specificity, and the Alabama courts were required to take those allegations as true. But there is no evidence the trial court even independently *considered* Mr. Callen's pleadings. Instead, the trial court refused to hold an evidentiary hearing by adopting—nearly verbatim—a Proposed Order from the State. That 83-page Proposed Order was replete with substantive errors and the adversarial zeal of the State, and yet the trial court changed just two words before adopting the State's advocacy as its own. Had Mr.

Callen pursued these same claims in other parts of the country, other courts would have held (correctly) that such a practice violates due process.

Together, these errors deprived Mr. Callen of the trial and procedures that the Constitution guarantees. The Court should grant certiorari and reverse.

STATEMENT OF THE CASE

I. Offense and penalty-phase case presented.

On October 29, 2010, Birmingham firefighters and police responded to a fire at Bernice Kelly's apartment. App. R. 442. There, firefighters found the bodies of Ms. Kelly, Quortes Kelly, and Aaliyah Budgess, all members of Mr. Callen's household. App. C. 117; App. R. 442; App. 3a. Police focused on Mr. Callen. After hours of interrogation, he said that he loved his relatives and could not remember what happened, but he made an inculpatory statement. App. C. 2027, 2033. Ultimately, Mr. Callen was indicted, charged, and convicted of three counts of capital murder. App. C. 131–32.

The question at sentencing was why. The State sought death based on three aggravating circumstances, including that the offense was especially heinous, atrocious, or cruel. App. R. 1017–18. Defense Counsel presented a mitigation case that centered on the fact that Mr. Callen's mother abandoned him as a child. See App. 13a. Counsel called Mr. Callen's grandmother, brother, and sister, but described his early years as "normal" and "standard." App. R. 1028, 1037, 1053–78. Trial Counsel did not obtain or present ample medical records showing childhood abuse, neglect, trauma, neurological impairment, and medical vulnerability, or present expert testimony to explain those records. App. R. 1053–78; App. 216a–40a. Nor

did they investigate or present any evidence of organic brain damage or sexual abuse, despite knowledge that Mr. Callen may be a victim of both. Instead, Trial Counsel called Dr. Ronald Meredith, a clinical psychologist who summarily recited diagnoses—PTSD, borderline personality disorder, a dissociative episode—without explaining their causes or their relationship to the offense. App. R. 1081, 1100, 1103, 1106. When Dr. Meredith told the jury that Mr. Callen had reported sexual abuse by a close family member, Trial Counsel asked nothing further. App. R. 1106. In closing, Trial Counsel told the jury that abandonment did "not excuse" the offense, that "we can't explain why" it happened, and that the offense was "cruel, atrocious and heinous." App. R. 1165, 1182.

The jury agreed and recommended a sentence of death by a vote of 11-1. The court accepted that recommendation and sentenced Mr. Callen to death, stating it had given counsel all available resources to investigate why Mr. Callen committed the offense but that "[t]here has been no reasonable explanation given." App. R. 1273–74.

II. Trial Counsel's mitigation investigation and what the jury never heard.

1. Such an explanation exists. Trial Counsel recognized that mitigation was central to this case and obtained multiple continuances to investigate it. App. C. 459; App. R. 6–7. Weeks before trial, however, they told the court that they had not yet "do[ne] the mitigation that is required in this case" and that an unexamined "treasure trove of information" remained. App. 183a–85a. They never examined it. Although they requested and received funding to obtain Mr. Callen's medical records, Trial Counsel never obtained them, and they never retained a neuropsychologist. App. 207a–10a, 216a–18a, 275a–76a.

Warning signs that this investigation was necessary were apparent. Trial Counsel knew: At sixteen, Mr. Callen was an unrestrained passenger in a head-on collision; he suffered head injuries and complained of headaches afterward. App. 196a–97a. As an infant he was dropped down stairs, and he was later beaten by an uncle, leaving his face "all swollen." App. 198a–99a. He reported headaches, blackouts, and hallucinations, told his grandmother he did not feel "right in the head," and had for years "drank significant amounts of alcohol every night." App. 199a, 201a. Trial Counsel themselves saw his flat affect and involuntary repetition of thoughts "[f]rom the first day [they] met." App. 207a–09a. Their own psychologist, Dr. Ronald Meredith, flagged possible "brain impairment" and "organic brain dysfunction," and counsel's notes contain the circled word "Neuropsych," though one was never obtained. *Id*.

Counsel also knew of serious abuse. Dr. Meredith told counsel that Mr. Callen reported being sexually abused as a child by a close family member—one of the victims, Quortes Kelly—and that abuse or attempted abuse by Mr. Kelly may have immediately preceded the offense. App. 218a, 245a; App. 271a n.57. Counsel did not follow up.

2. Post-conviction counsel obtained what Trial Counsel did not. Neuropsychologist Dr. Kristine Lokken, who was available at the time of trial, administered extensive testing on Mr. Callen and found profoundly impaired executive functioning, with scores below the first percentile on several measures. App. 186a–93a. Her findings were consistent with severe organic brain dysfunction and frontal-lobe damage, comparable to the functioning of someone who had suffered a gunshot wound to the head. App. 187a–94a. Post-conviction

counsel asked for an MRI to corroborate her findings; the court denied the request. App. 188a.

Postconviction counsel also obtained nearly 300 pages of medical records from local providers. App. 216a–18a. The records showed that when Mr. Callen was ten, he was diagnosed with a urinary-tract infection, urethritis, and was recommended for STI testing. App. 219a, 221a–22a. The next year, he returned to the emergency room with headaches and was later diagnosed with depression. App. 219a. The records also showed severe dental decay and abscesses—well-established signs of neglect—and revealed that from ages eleven to seventeen he was prescribed Lexapro, Remeron, hydrocodone, tramadol, and Percocet. App. 219a, 223a–24a. School records showed chronic tardiness and absenteeism beginning in kindergarten. App. 228a–29a.

Post-conviction counsel also obtained experts necessary to explain these records. Emergency-medicine physician Dr. Heinz Dueffer would have testified that the records reflected child abuse and neglect, poverty, lack of coordinated care, mental-health problems, chronic pain, and substance-abuse risk. App. 221a–25a. Dr. Dueffer would have testified that sexual-abuse indicators applied to Mr. Callen, notably a UTI diagnosis at ten years old and physicians' ordering of STI testing at that same age. App. 221a–22a. He would have explained that both of these events, for a boy that age, are rare absent a physician's concern that there has been sexual abuse. *Id*.

Childhood-trauma expert Dr. Merida Grant would have explained that Mr. Callen's later denials of abuse were consistent with shame-based avoidance, and how abuse by a family member shapes development, emotional regulation, and behavior. App. 237a–38a. Fo-

rensic psychologist Dr. Karen Salekin would have explained how the absence of any protective factors left him especially vulnerable to the lasting effects of that abuse. App. 226a–34a. The jury heard none of this.

III. Appeal and Rule 32 proceedings.

Mr. Callen's conviction and sentence were affirmed on direct appeal, and this Court denied certiorari. *Callen* v. *State*, 284 So.3d 177 (Ala. Crim. App. 2017); *Callen* v. *Alabama*, 587 U.S. 1042 (2019). Mr. Callen's Second Amended Rule 32 Petition pleaded the facts above with specificity, naming the witnesses, records, and experts, and describing the testimony each would have given. App. 167a–292a. The State moved to dismiss, and Mr. Callen opposed. App. 293a; C. 918.

Though the circuit court had not requested proposed orders, the State submitted one, which was a near copy of its own motion to dismiss. C. 968–1050; *compare* C. 530–642 *with* C. 968–1050. On April 10, 2025, the circuit court denied the petition without an evidentiary hearing by adopting the State's order, changing only "Proposed" to "Final" in the title and "Dismissed" to "Denied" in the conclusion. App. 81a–163a; *compare* C. 968–1050 *with* App. 81a–163a.

The Alabama Court of Criminal Appeals affirmed and rejected the challenge to the copied order. App. 10a–11a. It acknowledged that Dr. Lokken was available and had found profound executive-function deficits, yet described the claim as one of "[potential] organic brain damage." App. 21a–23a. It held the omitted neuropsychological, medical, and trauma evidence cumulative of Dr. Meredith's testimony, App. 31a–41a, 52a–53a, including the sexual-abuse evidence because Dr. Meredith had mentioned it in passing, App. 38a. It analyzed each category of omitted evidence separately rather than as a whole. See App. 128a; App.

31a–41a. And without a hearing at which counsel could explain themselves, it supposed that counsel may have been "weed[ing] out some arguments to stress others." App. 32a, 37a (citation omitted). The Alabama Court of Criminal Appeals denied rehearing, App. 164a, and the Alabama Supreme Court declined review without comment on August 21, 2026. App. 165a.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURT'S ADOPTION OF THE STATE'S PROPOSED ORDER WARRANTS REVIEW.

The first error is straightforward but profound: in direct conflict with other lower courts, the state court copied—chapter and verse, errors and all—a Proposed Order from the State itself. There was no evidence of independent judicial review, and the Due Process Clause simply does not permit such an overt abdication of that procedure. On this basis alone, the Court can, and should, grant certiorari, vacate, and remand this case back to Alabama for a constitutionally legitimate decision on Mr. Callen's post-conviction Petition for an evidentiary hearing.

A. Courts diverge on when it is appropriate to adopt a party's proposed order verbatim.

The Due Process Clause mandates that a court exercise independent judgment and articulate that judgment in writing. See *Zant* v. *Stephens*, 462 U.S. 862, 884–85 (1983); *Proffitt* v. *Florida*, 428 U.S. 242, 259 (1976). As such, courts, including this Court, have criticized the practice of "verbatim adoption of findings of fact prepared by prevailing parties, particularly when

those findings have taken the form of conclusory statements unsupported by citation to the record." *Anderson* v. *City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985).

The practice requires careful scrutiny to determine whether it is or is not appropriate. On one side, in *Anderson*, the Court upheld the district court's verbatim adoption because it did "not appear to have uncritically accepted findings prepared without judicial guidance by the prevailing party." *Id.* at 572. On the other side, by contrast, this Court has vacated judgment when the factfinder "adopt[ed] findings that contain internal evidence suggesting that the judge may not have read them." *Jefferson* v. *Upton*, 560 U.S. 284, 293–94 (2010) (per curiam). In other words, the relevant test for determining whether a court violated due process by adopting a party's verbatim proposed order is whether the resulting order embodies the judge's own independent conclusions, drafter notwithstanding.

The practice of verbatim adoption has become commonplace in the capital context. See*, e.g.*, *Skillicorn* v. *State*, 22 S.W.3d 678, 690–91 (Mo. 2000) (recognizing the practice "has become . . . common practice in Missouri" and upholding a capital sentence because "[a]s a whole, the findings of fact and conclusions of law are accurate, both legally and factually").

Critically, however, the lower courts have split over when the Due Process Clause permits verbatim adoption. The Third Circuit, for example, does not allow verbatim adoption of a proposed order when "there is no record evidence which would allow [the reviewing court] to conclude that the District Court conducted its own independent review, or that the opinion is the product of its own judgment." *Bright* v. *Westmoreland*

County, 380 F.3d 729, 731–32 (3d Cir. 2004). Alabama's sister state has likewise vacated a trial court's judgment in a capital case when it adopted the State's proposed order verbatim, remanding with instructions to "issue [its] own Findings of Fact and Conclusions of Law, and to enter a new judgment based thereon." *Chase* v. *State*, 112 So.3d 421, 422 (Miss. 2013).[2]

Alabama approaches verbatim opinions differently. A group of amici curiae, including three former Presidents of the Alabama Bar and three retired Justices of the CCA and the Alabama Supreme Court, previously urged this Court's intervention on the issue. As they explained, "[t]he practice of Alabama trial court judges of adopting verbatim the state's proposed orders in death penalty cases is, even in the least egregious circumstances, abhorrent." Brief of *Amici Curiae* Alabama Appellate Court Justices in Support of Petitioner, *Hamm* v. *Allen,* No. 15-8753 (April 28, 2016).

That is exactly what happened to Mr. Callen here. Alabama courts affirmed the State's proposed order, even though that order carried forward material errors and adversarial language from the State's motion to dismiss. Contrary to the Third Circuit's approach, the Alabama courts found no constitutional violation even though there was "no record evidence which would allow [the reviewing court] to conclude that the District Court conducted its own independent review, or that the opinion is the product of its own judgment." *Bright*, 380 F.3d at 731–32; see *infra* § I.B. Mr. Callen's due process rights should not be safeguarded less stringently just because he happened to reside in

[2] The court in *Chase* had the benefit of an evidentiary hearing.

Alabama.[3] The Court should grant certiorari to make clear that, especially in the capital context, lower courts must consistently apply crucial due process requirements.

B. The judgment violates the due process clause which requires a court to exercise independent judgment in writing.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "[B]ecause there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Zant*, 462 U.S. at 884–85 (quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976)). It is thus "of vital importance to the defendant and to the community" that a court's denial of challenges to the legitimacy of a death sentence "be, and appear to be, based on reason." *Id.* Written orders satisfy this edict. See *Proffitt*, 428 U.S. at 259; *Gardner* v. *Florida*, 430 U.S. 349, 360

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[3] Courts reviewing federal habeas petitions have also struggled with the effect of a state court order that adopts the State's proposed order wholesale. See *Burr* v. *Jackson*, 19 F.4th 395, 407 (4th Cir. 2021) (posing question of whether AEDPA mandates deference to a state court's "verbatim adoption" of the State's proposed order, but declining to resolve it because facts indicated order was product of court's own judgment); see *Jefferson* v. *GDCP Warden*, 941 F.3d 452, 471, 474–477 (11th Cir. 2019) (finding that state court's uncritical adoption of State's proposed order was not entitled to deference under pre-AEDPA law, but not reaching issue under current law).

(1977) (rejecting the argument that trial judges can exercise discretion without documenting their reasoning).

The requirement to issue independent written conclusions, which applies to any form of independent judicial conclusion, see *United States* v. *Ramos*, 65 F.4th 427, 440 (9th Cir. 2023) (Collins, J., concurring in part and dissenting in part), readily applies when a trial court denies a capital Rule 32 petitioner the opportunity to present evidence to prove his well-pleaded allegations of ineffective assistance of counsel. See *Strickland* v. *Washington*, 466 U.S. 668, 704 (1984) (recognizing this Court has "consistently required that capital proceedings be policed at *all stages* by an especially vigilant concern for procedural fairness and for the accuracy of factfinding") (Brennan, J., concurring in part and dissenting in part) (emphasis added). Rule 32 proceedings present a critical opportunity to ensure that the imposition of capital punishment is accurate, fair, and constitutionally sound.

The circumstances that supported the attribution of independent judgment in *Anderson* are absent here. The trial court did not request proposed findings or first issue a memorandum supplying a decisional framework as in *Anderson*. Instead, the trial court adopted as its own the State's Proposed Order, which was itself indistinguishable from its motion to dismiss, to deny Mr. Callen's petition. See App. 6a. The State's Proposed Order reproduced the substance and adversarial character of those filings under the label "Proposed Order." *Compare* C. 530–642 *with* C. 968–1050 (only showing ministerial changes). For example, the order rejects Mr. Callen's organic brain damage claim as insufficiently pleaded in part because he did not identify "where . . . he was hospitalized" in one place. App. 96a. But a few lines later, it acknowledged that

the Petition alleges Mr. Callen visited the ER at UAB Children's Hospital in 2009. App. 96a–97a; see *generally* App. 219a–20a, 196a–98a (providing further details about the accident). The order also mimics the state's description of potential witnesses as unnamed, App. 25a, 310a, despite them being readily identified by name in the Petition, App. 178a, 179a, 196a, 245a, 261a–62a; C. 615.

These are not minor errors. They are patently erroneous mischaracterizations of the Petition that show the trial court failed to independently express its reasoning. See *Bright*, 380 F.3d at 731–32 ("When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions."). Alabama courts violated Mr. Callen's due process rights. The Court should grant certiorari, vacate, and remand this case back to Alabama for a constitutionally proper adjudication.

II. TRIAL COUNSEL'S CONSTITUTIONALLY INADEQUATE MITIGATION INVESTIGATION WARRANTS REVIEW.

Trial Counsel's obligation to conduct a reasonable investigation is bedrock in a capital case. See *Strickland*, 466 U.S. at 684–85; *Wiggins* v. *Smith*, 539 U.S. 510, 527 (2003). "[D]efense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation." *Rompilla* v. *Beard*, 545 U.S. 374, 380–381 (2005). To that end, counsel's decision to curtail an incomplete investigation is constitutional only if a reasonable attorney would consider further investigation futile. *Strickland*, 466 U.S. at 690–91; *Wiggins*, 539 U.S. at 527. And, where counsel's substandard investigation results in the omission of salient mitigating evidence, prejudice exists if there is a reasonable probability that the omitted evidence would have materially altered the jury's appraisal of a

defendant's culpability. *Strickland*, 466 U.S. at 693–94.

Mr. Callen pleads exactly this kind of failure. His Rule 32 petition facially alleges that Trial Counsel knew of and failed to pursue evidence of organic brain damage, childhood sexual abuse, and readily available medical records, among others. He also identified specific experts and evidence that a reasonable investigation would have uncovered. But the circuit court dismissed those facially meritorious allegations without an evidentiary hearing, inexplicably excusing Trial Counsel's failure to investigate as legitimate strategy and dismissing untapped mitigation evidence as cumulative. App. 81a–163a. Certiorari is warranted.

A. Trial Counsel performed deficiently by failing to conduct a constitutionally adequate mitigation investigation.

1. Trial Counsel must investigate meaningful red flags.

Trial counsel's duty to investigate and present mitigation evidence in a capital case is discharged only when supported by a reasonable belief, founded on counsel's existing investigation, that further inquiry would be "fruitless or even harmful" to their client's mitigation case. *Strickland*, 466 U.S. at 691; *Wiggins*, 539 U.S. at 527. Evidence of organic brain damage, a history of childhood sexual abuse and troves of potentially corroborating records are firmly established as constitutionally salient mitigation; each provides "powerful" evidence of a defendant's reduced moral culpability, requiring defense counsel's follow up. *Rompilla*, 545 U.S. at 392–93. More specifically:

- **Past head trauma**. See *Williams* v. *Taylor*, 529 U.S. 362, 370–71 (2000) (repeated head injuries were indicative of organic tissue damage); *Sears*

v. *Upton*, 561 U.S. 945, 949 (2010) (per curiam) (head injury and youth alcohol abuse supported a later finding of frontal-lobe abnormalities).

- **Serious psychiatric clinical symptoms**. See *Andrus* v. *Texas*, 590 U.S. 806, 816 (2020) (per curiam) (auditory hallucinations alongside "depression, mood lability and emotional dysregulation" should lead "a reasonable attorney to investigate further."); *Rompilla*, 545 U.S. at 391–92 (test results "pointing to schizophrenia" indicated potential organic brain damage, requiring reasonable counsel to conduct further testing).
- **Observable cognitive and behavioral abnormalities**. See *id.* at 391–92 (third-grade level cognitive functioning); *Porter* v. *McCollum*, 558 U.S. 30, 32 (2009) (per curiam) (defense counsel's own perceptions that client was "not mentally healthy").
- **Adolescent substance abuse**. See *Rompilla*, 545 U.S. at 392; *Sears,* 561 U.S. at 949.
- **History of sexual abuse**. See *Wiggins*, 539 U.S. at 529 (calling this a "major aspect" of a defendant's background that any reasonably competent attorney must further investigate).

Each of these categories was readily implicated—but never satisfactorily investigated—in Mr. Callen's case.

At minimum, moreover, trial counsel has a duty "to discover all reasonably available mitigating evidence," including their client's medical records. *Id.* at 524 (quoting then current ABA guidelines); see also 2003 Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* 31 Hofstra L. Rev. 913 (2003) (Guideline 10.7)

("Counsel should use all appropriate avenues . . . to obtain all potentially relevant information pertaining to the client," including "medical records."). Reasonably available records can both reveal additional lines of mitigation and objectively corroborate existing mitigation. See, *e.g.*, *Porter*, 558 U.S. at 39–40 (a minimally reasonable investigation requires obtaining readily available records such as medical, school, and court records); *Williams*, 529 U.S. at 396–97 (counsel's failure to uncover readily available prison and juvenile records was deficient). Yet here, Trial Counsel failed to obtain Mr. Callen's readily available records.

Together, these authorities reflect a settled principle violated in this case: when counsel learns of red flags suggesting organic brain damage or serious trauma, including sexual abuse, counsel is constitutionally compelled to conduct the investigation necessary to make an informed professional judgment, including obtaining reasonably available records. See *Wiggins*, 539 U.S. at 524–28; *Rompilla*, 545 U.S. at 389–93. Trial Counsel's cursory and arbitrarily curtailed investigation fell far short of that standard.

2. Trial Counsel failed to investigate all avenues of known mitigation.

Mr. Callen's allegations[4] established deficient performance in three mutually reinforcing respects: Trial Counsel failed to investigate pervasive indications of organic brain damage; failed to develop known evidence of childhood sexual abuse, including abuse by

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[4] Here, Mr. Callen's ineffective assistance of counsel claim pleaded a paradigmatic failure to investigate with specificity and, at the pleading stage, Alabama law required those allegations to be taken as true. *See Ex parte Boatwright*, 471 So.2d 1257, 1258 (Ala. 1985).

one of the victims; and failed to obtain readily available medical records that would have corroborated and further developed both lines of mitigation.

Organic Brain Damage

Trial Counsel's failure to investigate Mr. Callen's organic brain damage was constitutionally deficient. Trial Counsel had direct notice of pervasive neurological red flags that underscored the critical need for an extensive mitigation investigation and should have prompted Trial Counsel to immediately conduct further neurological evaluation. The red flags that Trial Counsel was on notice of included, among others, (1) that Mr. Callen was involved in an unrestrained, head-on traffic collision at age 16, sustaining head and back injuries he continued to complain of afterward, App. 196a–97a; (2) that Mr. Callen had been dropped as an infant and beaten by his uncle, sustaining injuries that left his face "all swollen," App. 198a–99a; (3) that Mr. Callen had a flat affect and expressed involuntary repetition of thoughts, and difficulties with executive functioning apparent to Trial Counsel "[f]rom the first day [they] met," App. 207a–09a; (4) that Mr. Callen "drank significant amounts of alcohol every night" for years, App. 199a; (5) that Mr. Callen experienced blackouts and hallucinations, App. 199a; and (6) that Trial Counsel's own retained psychologist, Dr. Meredith, flagged possible "brain impairment" and "organic brain dysfunction." App. 209a.

In light of the substantial indicia of head trauma, poor cognitive and executive functioning, and substance use known to Trial Counsel, any reasonable attorney would have investigated further. See *Wiggins*, 539 U.S. at 527. The constitutionally adequate response to this information was to retain a qualified neuropsychologist like Dr. Lokken, who was available and willing to testify. See *Rompilla*, 545 U.S. at 391–

92. Had Trial Counsel done so, Dr. Lokken would have conducted extensive testing on Mr. Callen, concluding that he had "profoundly impaired" executive functioning consistent with someone who had sustained a gunshot wound to the head, and explained the "neurodevelopmental insults" that demonstrated Mr. Callen's severe organic brain dysfunction and their significance for his reduced moral culpability. App. 186a–95a. Trial Counsel's performance was deficient.

Sexual Abuse

Likewise, Trial Counsel's failure to investigate and present evidence that Mr. Callen suffered chronic sexual abuse by one of the victims, Quortes Kelly, including the possibility that attempted sexual abuse immediately preceded this crime, fell far short of Mr. Callen's constitutional guarantee of representation. See App. 221a–22a. Trial Counsel received direct notice that Mr. Callen reported childhood sexual assault from defense expert, Dr. Meredith. See App. 218a, 245a. Dr. Meredith likewise stated that sexual abuse from Quortes Kelly may have immediately preceded the crime. App. 70a, 354a. Yet, Trial Counsel made no attempt to investigate or present this evidence to the jury.

"[S]exual abuse" is a "major aspect" of a defendant's background that any reasonable attorney would investigate. *Wiggins*, 539 U.S. at 529. But Trial Counsel did not even seek Mr. Callen's medical records to see if there was objective evidence of childhood sexual abuse (there was). See *supra* Section II.B.1. Trial Counsel did not obtain an expert, such as Dr. Dueffer, to explain the significance of these records. App. 221a–22a. Nor did Trial Counsel explore obtaining an expert such as Dr. Grant, a specialist in childhood trauma, who would have explained that Mr. Callen suffered from a range of conditions indicative of sexual abuse, App.

238a, and that Mr. Callen's denials of the experience are consistent with shame based avoidance. App. 237a. Trial Counsel also failed to retain and present expert testimony from an expert like Dr. Salekin, a forensic psychologist, to explain the developmental context of Mr. Callen's sexual abuse – in particular the absence of protective factors that rendered him vulnerable to the long-lasting effects of the abuse he experienced. App. 226a–34a. No reasonable attorney would have eschewed any meaningful investigation into reported sexual abuse.

Medical Records

A reasonable investigation required Trial Counsel to obtain Mr. Callen's readily available medical records. App. 197a n.8. Objective, contemporaneous accounts of Mr. Callen's health are critical to understanding the mitigation landscape. Yet Trial Counsel made no attempt to even obtain Mr. Callen's 300-page medical records, which showed, among other things, that at ten years old, Mr. Callen was diagnosed with a UTI and ordered to receive STI testing, a particularly rare occurrence for a boy his age and indicative of sexual abuse. App. 221a–22a. Medical records also would have shown that Mr. Callen visited the emergency room at least four times, complaining of neck pain and headaches, App. 199a–200a, and was prescribed multiple narcotic pain medications as an adolescent, including hydrocodone, tramadol, and Percocet, increasing his risk for substance abuse and dependency. App. 218a–20a, 224a. Trial Counsel was constitutionally compelled to pursue these corroborating medical records. *Wiggins*, 539 U.S. at 524. Indeed, Trial Counsel recognized as much, specifically requesting (and receiving) funding to pursue medical records. App. 218a. But they never obtained the readily accessible records. App. 207a–10a, 216a–17a, 228a–29a, 275a–76a.

3. No sound reason justified Trial Counsel's failures.

The decisions below set aside these investigative failures on the grounds that the untapped mitigation evidence was cumulative to that presented at trial and that Trial Counsel might have been "weed[ing] out some arguments to stress others and advocate effectively." App. 32a, 37a (citation omitted). That is wrong. Trial Counsel presented no evidence of organic brain damage, made no argument that sexual abuse mitigated Mr. Callen's culpability,[5] and, as noted, did not even obtain Mr. Callen's medical records. This Court has "never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears*, 561 U.S. at 955 (emphasis omitted). The unpursued evidence and omitted expert testimony explaining that evidence were distinct from the cursory testimony presented by Dr. Meredith, as explained *supra* Section II.B.

Similarly, Trial Counsel's investigatory omissions cannot be redeemed as "strategy" when those omissions amount to a failure to investigate the very evidence needed to inform counsel's strategic judgment in the first place. *Wiggins*, 539 U.S. at 527 (admonishing that this Court's precedents "do[] not establish that a cursory investigation automatically justifies a tactical decision with respect to [] strategy"). Trial Counsel's performance is deficient if they "ignore[] pertinent avenues for investigation of which [they] should . . . [be]

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[5] That a passing reference was made to such abuse and left unexplored is further proof of Trial Counsel's deficiency. *Contra* App. 38a.

aware." *Andrus*, 590 U.S. at 816. Here, they did exactly that. Trial Counsel's unfamiliarity with and inattention to key lines of mitigation evidence are probative of an abandoned investigation, not a strategically tailored one. *Id.*; see App. 183a–85a.

B. Trial Counsel's deficient investigation prejudiced Mr. Callen because the omitted evidence paints a vastly different picture than the trial evidence.

1. Unpresented evidence is likely to have swayed the jury.

Trial Counsel's failure to investigate and present mitigation evidence prejudiced Mr. Callen. The prejudice inquiry asks whether there is a reasonable probability that the jury would have decided differently had trial counsel not performed deficiently at trial. *Strickland*, 466 U.S. at 687–88. The petitioner need not show that counsel's deficient performance "more likely than not altered the outcome of the case." *Id.* at 693. Rather, prejudice exists where the omitted evidence is "sufficient to undermine confidence" in the outcome. *Id.* at 693–94. Here, Mr. Callen's pleadings satisfy this standard, and at least one juror found death inappropriate even based on the scant mitigation case presented.

Organic Brain Damage

Organic brain damage is prejudicially distinct from evidence of general mental health diagnoses. See, *e.g.*, *Rompilla*, 545 U.S. at 390–93 (explaining that evidence of organic brain damage is far afield from other pleas for reduced culpability); *Williams*, 529 U.S. at 369, 395 (omitted evidence of impaired cognition was prejudicial even though trial counsel had presented psychiatric testimony). That is because organic im-

pairments provide strong explanation for a defendant's lack of capacity to regulate their behavior, rendering them less culpable. See, *e.g., Sears*, 561 U.S. at 949 (evidence of frontal lobe abnormalities could have mitigated the culpability of the defendant explaining the defendant's incapacity to regulate impulses and behavior).

Trial Counsel's failure to investigate Mr. Callen's organic brain damage was thus highly prejudicial. Postconviction counsel retained Dr. Kristine Lokken, a neuropsychologist who was available at the time of trial. App. 186a–87a. Dr. Lokken administered extensive neuropsychological testing and concluded that Mr. Callen had profoundly impaired executive functioning, including scores below the first percentile on several measures. App. 187a–93a. She further concluded that his profile was consistent with severe organic brain dysfunction and frontal-lobe damage, consistent with someone who had sustained a gunshot wound to the head. App. 187a–95a. Her testing showed deficits in impulse control, emotional regulation and rationality consistent with catastrophic brain damage. App. 187a–88a, 191a–95a. Had Trial Counsel retained Dr. Lokken, she would have testified that Mr. Callen's impaired cognitive and executive functioning likely resulted in heightened aggression and the inability to modify behavior in response to environmental changes. App. 195a. Because Trial Counsel failed to investigate and retain Dr. Lokken, the jury never heard any of that evidence. App. 186a–98a, 244a. But for that failure, Dr. Lokken's testimony would have given the jury a concrete, objective, and clinical explanation for Mr. Callen's conduct—an exceptionally meaningful explanation the mitigation case at trial never provided. *Rompilla*, 545 U.S. at

390–93 (organic brain damage goes beyond other pleas for leniency).

This explanation was not, as the CCA claimed, cumulative to the evidence presented by Dr. Meredith. See *id.* at 391–92 (surveying the distinction between impaired cognition and the "extreme" impairment associated with organic brain damage). Dr. Meredith's testimony was brief and conclusory—a list of mental-health diagnoses, App. R. 1100 (PTSD), 1103 (BPD), 1106 (dissociative episode), delivered without explaining their causes, behavioral effects or relevance to Mr. Callen's culpability. Dr. Meredith was not qualified to diagnose or explain organic brain damage to the jury. App. 209a, 211a. Dr. Lokken was.[6] Dr. Lokken could explain, based on comprehensive testing, that Mr. Callen suffered profound executive dysfunction caused by organic brain damage. App. 186a. Treating Dr. Meredith's cursory recitation of diagnoses and Dr. Lokken's *explanation* of the causes and behavioral *effects* of Mr. Callen's condition as cumulative collapses the distinction that makes omitted neuropsychological evidence so powerful in a capital case. Certiorari is necessary.

This Court's intervention is also needed to clarify how lower courts should evaluate adequately pleaded claims of organic brain damage. Courts below consistently emphasized that Mr. Callen pled "*potential* organic brain damage," because those courts were not

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[6] Dr. Meredith is a clinical psychologist whose practice encompasses counseling, family therapy, and general forensic evaluations. App. R. 1081. Dr. Lokken, by contrast, is a PhD in clinical neuropsychology who specializes in evaluating neurological conditions through testing designed to detect impairments in brain functioning. C. 703–04. These are distinct areas of expertise. Evidence of organic brain damage is fundamentally different from generalized psychological testimony.

equipped to appropriately evaluate the evidence Dr. Lokken could and should have presented. App. 23a (emphasis added) (citation omitted). But Mr. Callen's claims of organic brain damage were not speculative—Dr. Lokken comprehensively tested for organic brain damage, then drew the conclusion her results supported a finding of organic brain damage. App. 189a–93a.

Dr. Lokken's neuropsychological testing established organic brain damage to a clinical certainty, but without imaging of tissue, such testing is probabilistic by nature. Post-conviction counsel recognized as much, requesting MRI imaging to corroborate Dr. Lokken's findings. App. 188a. But the court denied that request. Having denied Mr. Callen the imaging that could have substantiated Dr. Lokken's necessarily probabilistic clinical findings with anatomical evidence, the court cannot fairly dismiss those findings as merely "speculative."

Sexual Abuse

Likewise, Trial Counsel did not inform the jury of evidence that Mr. Callen suffered childhood sexual abuse, let alone Dr. Meredith's report that Quortes Kelly may have attempted to sexually abuse Mr. Callen immediately preceding the crime, sending him into a dissociative state. See App. 271a n.57. Such mitigation evidence is critical, and, as explained above, any reasonable attorney in these circumstances would have obtained and presented Mr. Callen's medical records indicating sexual abuse, as well as retained experts to explain the significance of these records. See *supra* Section II.A.2.

Had Trial Counsel obtained medical records, it would have presented objective, contemporaneous evidence of sexual abuse, and would have presented an

expert such as Dr. Dueffer to explain these records. Had Trial Counsel retained Dr. Grant, a childhood trauma expert available and willing to testify, the jury would have heard a clinical explanation for Mr. Callen's behavior in the context of his history of sexual abuse. She would have testified that Mr. Callen suffered from PTSD, depression with psychotic features, generalized anxiety disorder, panic disorder, and substance-abuse disorders. Dr. Grant would have explained that Mr. Callen's recantation of the sexual abuse was consistent with shame-based avoidance, a defense mechanism common among male victims of sexual abuse, transforming what the jury might have dismissed as inconsistency into evidence consistent with the trauma. App. 237a. And she would have connected those conditions directly to Mr. Callen's culpability, explaining how childhood sexual abuse by a family member shapes a person's development, emotional regulation, and behavior. App. 238a.

Had Trial Counsel retained Dr. Salekin, a forensic psychologist available and willing to testify, she would have supplied a developmental framework the jury never received. Dr. Salekin would have explained that Mr. Callen experienced a convergence of family, individual, and community risk factors associated with poor developmental outcomes including family conflict, neglect, low intellectual functioning, mental disorder, and substance abuse. App. 266a–32a. Dr. Salekin would have explained that Mr. Callen never benefitted from the protective factors that might have counterbalanced those risks. App. 231a–32a. And Dr. Salekin would have quantified the severity of the neglect Mr. Callen experienced in a way Dr. Meredith was wholly unqualified to do, grounding her conclusions in the voluminous medical and school records Trial Counsel failed to obtain. App. 232a–34a. The

absence of those protective factors was particularly significant in light of Mr. Callen's history of sexual abuse—where a person without protective factors such as Mr. Callen is rendered more vulnerable to the psychological impacts of abuse by a family member. There is no serious contention that the unpresented evidence of sexual abuse was cumulative to the case Trial Counsel actually presented; their omission prejudiced Mr. Callen.

Medical Records

Trial Counsel's failure to present key records and explanatory testimony also prejudiced Mr. Callen. Failure to introduce contemporaneous records supporting mitigation is prejudicial because jurors are far more likely to credit mitigation when it is objectively corroborated. See *Wiggins*, 539 U.S. at 536; *Williams,* 529 U.S. at 398; *Porter*, 558 U.S. at 36. The records Trial Counsel failed to obtain and present would have shown new evidence of abuse and neglect and would have corroborated testimony with contemporaneous objective evidence. Specifically, they would have shown that Mr. Callen's childhood and adolescence were marked by extreme deprivation, ongoing medical and psychological harm, persistent headaches and head pain, scabies and severe dental decay consistent with neglect, a childhood UTI, urethritis, and ordered STI testing suggestive of sexual abuse, and an escalating exposure to narcotic pain medication. App. 219a–23a.

At bottom, the omitted evidence would have corrected the core failure that both the jury and the trial court identified: the absence of any explanation for the offense. App. R. 1182, 1258, 1261, 1273. The jury never heard expert neuropsychological proof of organic brain damage, never saw the medical records that corroborated abuse, neglect, head trauma, chronic pain,

and sexual victimization, and never heard from the experts who could explain those records. App. 186a–95a, 219a–23a, 226a–40a.

2. The CCA failed to conduct the holistic prejudice inquiry *Strickland* requires.

The CCA compounded its prejudice error by blue-penciling Mr. Callen's mitigation case into discrete, independent claims and asking whether each, considered in isolation, was prejudicial. See App. 1a–80a. That is *not* the inquiry *Strickland* requires. A reviewing court must reweigh the aggravating evidence against "the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534; *Williams*, 529 U.S. at 397–98.

The Eleventh Circuit has already identified this very error in the CCA's *Strickland* analysis. In *Daniel* v. *Comm'r, Ala. Dep't of Corr.*, the CCA "broke up" a penalty-phase ineffective assistance claim into separate subparts and evaluated child abuse, sexual abuse, intellectual disability, poverty, depression and other mitigation in isolation, as independent and non-mutually reinforcing claims. 822 F.3d 1248, 1278 (11th Cir. 2016). That approach is inconsistent with *Strickland's* requirement to consider the "totality of available mitigating evidence." *Id.* at 1277. And it is antithetical to the very nature of background mitigation itself. The concept of background mitigation contemplates the interaction of life circumstances that together contextualize a defendant's worst acts. See*, e.g., Wiggins,* 539 U.S. at 537 (considered together, each piece of mitigation amounted to an "excruciating life history"); *Rompilla*, 545 U.S. at 390–93 (childhood deprivation, abuse, parental alcoholism and cognitive limitations were each integral parts of developmental mitigation); *Porter*, 558 U.S. at 41–44 (combat trauma, childhood

abuse, substance abuse and likely brain abnormalities *together* amount to the "kind of troubled *history* we have declared relevant to assessing a defendant's moral culpability") (citation omitted). Subdividing that evidence into independent claims and rejecting each in turn threatens to drain the prejudice inquiry of its meaning.

The same is true here. Mr. Callen's evidence of organic brain damage, childhood sexual abuse, medical and familial neglect, substance abuse, and deprivation is not a series of self-contained mitigation theories. These facts reinforce and explain one another. The medical evidence corroborated the sexual abuse and deprivation reflected elsewhere in Mr. Callen's life history; the neuropsychological evidence explained the functional and cognitive consequences of that history; and the trauma and developmental evidence supplied key context for both. By asking whether each assertion was independently prejudicial, the CCA stripped the evidence of the holistic force that *Strickland* and its progeny require a reviewing court to assess.

III. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT AND WIDESPREAD.

The issues in this case—and the need for this Court's guidance—are widespread and recurring. Organic brain damage and sexual abuse are among the most common and significant categories of mitigation evidence in capital proceedings. Alison J. Lynch et al., *"My Bewildering Brain Toils in Vain:" Traumatic Brain Injury, the Criminal Trial Process, and the Case of Lisa Montgomery*, 74 Rutgers U. L. Rev. 215, 216 (2021); see also *Jefferson*, 941 F.3d at 456. Sexual abuse is equally pervasive; in fact, a childhood history of sexual abuse increases the likelihood of arrest for a violent crime by 38%. Cathy Spatz Widom, *The Cycle*

of Violence (Nat'l Inst. Just., U.S. Dep't of Just. 1992), https://www.ojp.gov/pdffiles1/nij/136607.pdf. Nearly a tenth of incarcerated individuals have experienced sexual victimization. Caroline Wolf Harlow, *Prior Abuse Reported by Inmates and Probationers* (Bureau of Just. Stats., U.S. Dep't of Just., 1999), https://bjs.ojp.gov/content/pub/pdf/parip.pdf. As a result, claims that trial counsel were deficient for failing to investigate sexual abuse and neglect recur throughout capital litigation. Mirko Bagaric, *Trauma and Sentencing: The Case for Mitigating Penalty for Childhood Physical and Sexual Abuse*, 30 Stan. L. & Pol'y Rev. 1, 16 (2019). Yet, lower courts lack consistent guidance on what a constitutionally adequate investigation requires as applied to these discrete categories of mitigation.

This case presents an ideal vehicle to provide that guidance. The Court should grant review, clarify what the Sixth Amendment demands of capital defense counsel when confronted with evidence of organic brain damage and childhood sexual abuse, and reverse.

CONCLUSION

For these reasons, the petition should be granted.

Respectfully submitted,

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