No. 08-1032

In the
Supreme Court of the United States

RICHARD F. ALLEN,
Commissioner of Alabama Dept. of Corrections,
Petitioner,
v.
HERBERT WILLIAMS, JR.,
Respondent.

On Petition for a Writ of Certiorari to
The Court of Appeals for
the Eleventh Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Did the Court of Appeals for the Eleventh Circuit err in holding that the state courts' denial of Herbert Williams's penalty ineffective assistance of counsel claim involved an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), when: as a result of trial counsel's failure to investigate their client's life history, (i) the jury and sentencing judge never learned of several categories of mitigation of precisely the type that this Court has found to undermine confidence in a death sentence, and (ii) that mitigation discredited the portrait of Williams's background the judge relied upon in overriding the jury's 9-3 life recommendation?

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STATEMENT OF THE CASE

This petition arises from a death judgment entered by Alabama Circuit Court Judge Ferrill McRae, overriding the jury's 9-3 recommendation of a life sentence for 19-year-old Mr. Herbert Williams, Jr. At state postconviction, Williams was denied sentencing relief, notwithstanding compelling evidence of the neglect and abuse that he suffered throughout his life—evidence that refuted the trial court's sentencing analysis, but that was not presented at sentencing because of trial counsel's failure to investigate readily available mitigating evidence.

In federal habeas proceedings, the Court of Appeals for the Eleventh Circuit straightforwardly applied *Strickland v. Washington*, 466 U.S. 668 (1984), correctly concluding that Williams established both components of an ineffectiveness claim, that the Alabama Court of Criminal Appeals' application of *Strickland* was unreasonable, and that Williams was entitled to habeas relief as to his sentence. App. 37a-38a. The panel decision was unanimous. No judge on the Court of Appeals voted for *en banc* review in response to Commissioner Allen's request. App. 167a.

There is nothing novel or noteworthy about the Eleventh Circuit's opinion in this case. Petitioner has presented no argument that meets the requirements of this Court's Rule 10: Petitioner has not pointed to anything in the Court of Appeals' opinion that creates a split in the circuits or warrants an exercise of this Court's

supervisory power, *see* SUP. CT. R. 10(a); nor has Petitioner identified any important question of federal law that has not been but should be resolved by this Court, *see* SUP. CT. R. 10(c). Moreover, Petitioner recognizes that the decision below is not final, Cert. Pet. at 15 n.4, but does not argue that this case presents special circumstances that overcome the Court's "ordinar[y] reluctan[ce] to exercise . . . certiorari jurisdiction" over nonfinal decisions of the lower federal courts. *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997).

The Eleventh Circuit's straightforward application of clearly established law to the facts of this case is correct and does not warrant further review. Although the Commissioner asserts that the petition presents an important federal question because the Eleventh Circuit purportedly "blurr[ed] the distinction between excluding and weighing mitigating evidence," Cert. Pet. at 18, it is actually Petitioner that blurs the distinction between cases addressing the role of the sentencer and cases addressing the role of the postconviction court under *Strickland*, in evaluating mitigating evidence. In any event, Petitioner's argument does not affect the Court of Appeals' judgment because: (1) the facts of this case are materially indistinguishable from *Williams v. Taylor*, 529 U.S. 362 (2000), and thus this Court's holding in *Williams* that *Strickland* required relief applies equally here; (2) the state courts unreasonably applied *Strickland* by failing to consider the totality of Respondent's mitigating evidence; and (3) the state courts unreasonably

failed to acknowledge *Strickland*'s holding that prejudice is more difficult to establish in highly aggravated cases than in cases (such as this one) where the death sentence is only weakly supported by the record.

A. Conviction and Sentence

On November 2, 1988, Williams was arrested while driving the Porsche of Mr. Timothy Hasser, north of Mobile, Alabama. Hasser's body was in the backseat. App. 3a. Police suspected that Hasser and Williams knew each other, and questioned acquaintances of Williams who confirmed that Williams had mentioned to them that he had a friend named Tim who owned a Porsche. Vol. 4 at 125-26, 161, 181-90; Vol. 6 at 149-53.

Thereafter, Williams was indicted for murder during the course of a robbery in violation of Ala. Code § 13A-5-40(a)(2) (1975). At the guilt phase, the parties split sharply over a number of key points. The prosecution asserted that Williams and Hasser were strangers, and Williams was guilty of capital robbery-murder because he had shot Hasser while stealing his car. *See, e.g.*, Vol. 7 at 46-56.

Williams, on the other hand, asserted that he was not guilty of capital murder. He dealt drugs for Hasser, who promised him the car as payment. Williams did not break into Hasser's home, as the prosecution alleged—Hasser had provided him with the security code (of which he was able to provide correctly three of the four numbers, *see* Vol. 4 at 93, Vol. 5 at 57). After the two drove to

Creola, Alabama, for a drug transaction Hasser had arranged, drug dealers, not Williams, killed Hasser, and ordered Williams to dispose of his body. *See, e.g.*, Vol. 7 at 57-65.[1]

On February 16, 1990, the jury found Herbert Williams guilty of capital murder.

The penalty phase commenced and concluded that day. The State presented no additional evidence, and the defense presented only one witness, Williams's mother, Arcola Williams. In four pages of testimony, she stated: it "seem[ed] like" Williams's father, Herbert Williams, Sr., "whipped [Williams] more than he should," though she noted that "children have to be whipped sometimes"; during Williams's early childhood, Williams, Sr., "g[ot] drunk" regularly and used marijuana, and had beaten her in front of Williams; and, at the time of the trial, Williams, Sr., was in jail, charged with raping their mentally retarded daughter, Mabel. Vol. 7 at 119-22.

The jury voted 9-3 that Williams be sentenced to life without parole. *Id.* at 149.

Judge McRae scheduled sentencing for April. *Id.* at 152. Despite knowing that Judge McRae had previously overridden other juries' life recommendations,

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[1] Prior to trial, the prosecution offered Williams a deal wherein he would be sentenced to life without parole if he pleaded guilty and gave a confession that did "*not* include any alleged narcotics transaction gone awry." Am. Pet., 7/31/02, Doc. No. 15, at 10 n.6 (citing letter dated 1/18/1990).

and with almost two months to prepare, trial counsel presented no additional mitigating evidence at sentencing and repeated without verification the presentence investigation report's (PSI's) characterization of Arcola Williams as having an "excellent reputation" in the Thomasville, Alabama area. Vol. 5 at 180; *see* Vol. 1 at 108. Judge McRae embraced counsel's representation, stating that Williams's mother's reputation was beyond reproach and that she was an extremely good person. Vol. 5 at 180. When Judge McRae asked counsel before he pronounced the sentence whether Williams wished to address the court, counsel responded: "Judge, I haven't asked him. I have nothing to say." *Id.* at 183.

Judge McRae overrode the jury's recommendation and sentenced Williams to death.

Of Alabama's eight available aggravating circumstances, *see* Ala. Code § 13A-5-49 (1975), the trial court found the existence of only one: that the capital offense was committed during the commission of a robbery. Vol. 5 at 188-90. Judge McRae explicitly found that "the capital offense was not especially heinous, atrocious or cruel compared to other capital offenses." *Id.* at 190. The court also found two statutory mitigators, Williams's youth and his lack of any criminal record, and one non-statutory mitigator, that his "father was violent and abusive towards him as a child." *Id.* at 190, 192. However, Judge McRae minimized the import of this non-statutory mitigator, stating that because Williams's mother and

grandmother "appeared to be decent people who genuinely cared for [him,] [i]t . . . would strain credulity to find that [his] background was one of total deprivation." *Id.* at 192.[2] Finally, the court recognized that the jury's 9-3 life recommendation was due "very serious consideration and substantial weight." *Id.* at 193. Nonetheless, Judge McRae concluded that the sole aggravator outweighed the three mitigators and the jury's life without parole recommendation. *Id.*

B. State Postconviction Proceedings

After Williams's sentence was affirmed on direct appeal, he timely sought state postconviction relief, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. At an evidentiary hearing, Williams presented persuasive evidence that his trial had been rendered fundamentally unfair by counsel's failure to investigate and present a lifetime history of abuse and neglect at the hands of both parents, along with the psychological impact of that abuse and neglect.

1. Deficient Performance

The attorney responsible for the penalty-phase investigation in Herbert Williams's capital trial was an appointed counsel who "was reluctant to represent [Williams]." Vol. 13 at 55. By his own account, counsel did "'not do[] much of anything other than legal research,' and non-witness-related trial preparation." App. 16a. Indeed, despite red flags that would have led any reasonable attorney to

[2] As the Eleventh Circuit noted, Williams's grandmother testified during the guilt phase of his trial. App. 8a n.2.

investigate further, and "despite the availability of several of Williams' family members, trial counsel sought mitigating evidence from only one person with firsthand knowledge of his background: his mother." App. 26a-27a. The Eleventh Circuit correctly applied this Court's clearly established law to hold that counsel's lack of investigation constituted deficient performance under *Strickland*, and that the state courts' contrary conclusion was unreasonable. App. 21a-31a. Commissioner Allen does not seek review of this holding. Cert. Pet. at 30.

2. Counsel's Deficient Performance was Prejudicial

In stark contrast to the portrait of Williams's life presented at the penalty phase—in which one parent acted kindly, and took care of Williams, and the other engaged in corporal punishment that sometimes crossed the line—had trial counsel investigated readily available evidence, they would have learned that: (1) both parents neglected Williams severely, such that his basic needs went unmet; (2) Arcola Williams physically abused Williams and facilitated her husband's criminal assaults; (3) Williams, Sr., did not just whip Williams "more than he should" have; he used weapons and other forms of brutality against Williams and other family members throughout Williams's time living with his parents; and (4) Williams had a troubled psychiatric history resulting from this violent, neglectful background.

The postconviction evidence showed unmistakably that Williams's childhood was one of severe neglect, abject fear and terror. And, because

Williams's mother moved the family to an isolated trailer to keep far away from neighbors who could report this abuse and neglect, Williams had no outlet from his harrowing world.

a. Deprivation and Neglect

As noted, at sentencing, trial counsel repeated the PSI's description of Arcola Williams as having an "excellent reputation"—a characterization the trial judge relied on to discount the sparse mitigation. However, had trial counsel spoken with available witnesses, they would have learned the following.

Arcola Williams left her children's basic needs unmet. Vol. 14 at 59, 93-94, 98; Supp. Vol. 9 at 1122-23. She considered Williams old enough to wander the neighborhood unsupervised by the time he was four or five years old such that neighbors perceived that "the neighborhood was his home or was his parents." Vol. 14 at 98; *see also* Supp. Vol. 9 at 1120 (available evidence of Williams's father's neglect). Williams and his siblings frequently ate handouts. Vol. 14 at 98. Williams wore noticeably shabby clothing that marked him as especially deprived, "even by the standards of a rather poor community." *Id.*[3] "[N]o one supervised [Williams's] hygiene and cleanliness"; Williams was unaware that people brushed their teeth daily until he was incarcerated at age nineteen. *Id.* at 99. Arcola Williams's unavailability was tied to a "catastrophic collapse" in Williams's

[3] Contrary to the Petitioner's mischaracterization of her penalty-phase testimony, Cert. Pet. at 5, Arcola Williams never mentioned the family's poverty. *See* Vol. 7 at 118-22.

academic performance resulting in repetition of the fourth grade. *Id.* at 116.

Williams's parents refused to seek medical attention for even serious injuries that he suffered. One laceration that cut to his bone was treated at home and covered for weeks with the same unexamined bandage. When Williams, Sr., learned that the school principal had the impression that Williams, Sr., caused the injury, he beat Williams severely because he believed that Williams "put[] that idea into their heads." *Id.* at 100.

In sum, Williams suffered abject poverty and "extreme[] . . . deprivation" because of his parents' neglect, *id.* at 98; he grew up in a home where there were "no good parents," *id.* at 116a. *See* Supp. Vol. 9 at 1120-23.

b. Arcola Williams's Abuse

Similarly inconsistent with the positive sentencing portrait of Arcola Williams is the unrebutted postconviction evidence that she physically abused her children, beating them at her husband's direction in order to "make an example of [them]." Vol. 13 at 123. Like her husband, Arcola Williams used belts or other instruments on the children's bare backs and the backs of their heads so that the bruises would be undetected by strangers. *Id.* at 123-24. As Williams's sister, Queenie May Peoples, testified at Rule 32, "[Arcola Williams] would make us pull off all our clothes except . . . our underwear and . . . lay down across the bed, face down, because they didn't believe in hitting in the front because they would show

bruises and people would know." *Id.* at 123.

Furthermore, Arcola Williams facilitated her husband's brutal assaults on their children. She "never did or . . . said anything" when Williams, Sr., beat Williams. *Id.* at 122. Similarly, although Peoples told her mother that Williams, Sr., was molesting her (beginning at age eight), Arcola Williams never came to her defense. "She took him to his word. She never told us that she believed us for anything that we said. She always took his side." *Id.* at 122. Peoples slept with a knife to protect herself from Williams, Sr., because she knew that her mother would not protect her. *Id.* at 133.

This extreme parental abuse was no secret; many in the community were aware that Herbert Williams was "battered or brutalized at home." Vol. 14 at 102. When one set of neighbors confronted Williams, Sr., about his mistreatment of his family, instead of seeking help, Arcola Williams relocated the family to a trailer in "an isolated part of Thomasville where they wouldn't have any neighbors and wouldn't be troubled." *Id.*; *see also id.* at 118; Vol. 13 at 141-42. As a result of his family's exile, Williams's only reprieve from what the District Court described as the "horror of the abuse" in his home, Order, 3/13/06, Doc. No. 39 ("Hearing Order") at 4, was solitary play in the woods behind the trailer. Vol. 14 at 111.

c. Herbert Williams, Sr.'s, Criminal Abuse

Arcola Williams's trial testimony that it seemed like her husband whipped

Herbert Williams "more than he should" but that "children have to be whipped sometimes," Vol. 7 at 119, barely scratched the surface of the brutality Williams experienced and witnessed. As the Eleventh Circuit recognized, "contrary to the impression created by Arcola Williams, this violence was not of a type remotely associated with ordinary parental discipline. Williams Sr.'s beatings were in fact serious assaults, many of which involved the use of deadly weapons." App. 32a.

Starting when Williams was just four years old, Williams, Sr., beat him mercilessly with a belt several times a week until Williams, Sr., was too exhausted to continue. Vol. 14 at 97, 100, 103. "[Williams, Sr.,] just hang [Williams] up in the air by his arm and just go until he was tired . . . . He would hold him up by his arm and he would take the belt, and, see, they doubled the belt and they just beat, and when they got tired with one arm, they just switched sides." Vol. 13 at 145-46; *see also id.* at 145 (describing Williams, Sr., forcing Williams to spend an entire day in a hole dug for a septic tank); Supp. Vol. 9 at 1121 (Williams's grandmother recounting incident when Williams "came to my house and had bruises all over the side of his face and neck from his daddy hitting him"). Nor did the abuse cease as Williams grew older. Vol. 14 at 97. In fact, shortly before Williams left home permanently at seventeen, his father broke a chair over his head. *Id.* at 121.

In addition to the physical abuse he suffered, Williams watched his father beat his mother severely and relentlessly. Vol. 13 at 132; App. 10a. "On one

occasion, Williams Sr. struck his wife in the mouth so hard that he broke the bridge of her false teeth." App. 10a. On another occasion, Williams, Sr., forced Arcola Williams onto all fours, and brandished a long knife while threatening to decapitate her. When the police arrived in response to Peoples reporting the incident, both parents told the police that Peoples had "made it up." Williams, Sr., was not arrested. Vol. 13 at 125-26. On yet another occasion, Williams, Sr., shot a pistol at Arcola Williams, but "he was so drunk that [he missed] and the bullet went in the sofa right beside [Peoples]." *Id.* at 127.

Williams, Sr., also brutalized Williams's siblings in front of Williams. Williams watched his father throw scissors at Peoples, *id.* at 129, and pummel his mother's belly while she was pregnant with his younger brother, Thomas, *id.* at 117. Similarly, Williams and Peoples believed that their sister Mabel's severe mental retardation resulted from their father assaulting Arcola Williams while Mabel was in utero. Vol. 14 at 108. In another incident, when Williams, Sr., could not locate his stash of marijuana, he went on a rampage and accused Peoples and Williams of taking it. He later discovered two-year-old Thomas eating the marijuana:

> [Williams, Sr.,] became very furious. So, he took his belt and he beat [Thomas] with the belt, and Thomas just went to screaming and crying and he wouldn't stop. So, [Williams, Sr.,] . . . threw him and when he did, he went up side the wall. He hit the wall . . . and [Williams, Sr.,] told him to hush and not to say another word. Well, eventually when he stopped crying, he went to sleep, and when he

woke up, he never spoke another word . . . til he was six years old.

Vol. 13 at 118-19; *see also* Vol. 14 at 83. Unsurprisingly, the children lived in "pervasive terror and fear . . . . And by all accounts, Herbert [Williams] was much more regularly beaten than Tommy was." Vol. 14 at 117.

d. Psychological Impact on Williams

As psychiatrist Eliot Gelwan testified at Rule 32, Herbert Williams experienced an "almost total lack of parental functioning [and] protection . . . . The [resulting] effects . . . are incalculable." Vol. 14 at 106. From ages four to seventeen, the "inescapable" abuse from both parents resulted in Williams's "extreme brutalizing exposure to trauma." *Id.* at 97; *see also id.* at 109-110. Moreover, "the significance that [watching brutal assaults by one's father against one's mother during her pregnancies] has to a child is that it is an ultimate perversion . . . of parenting as the protection, preservation, and promotion of life." *Id.* at 105. Arcola Williams's failure to protect the children from severe abuse resulted in a "sense of betrayal by the mother tha[t] the children were never supported and never believed." *Id.* at 116b. Ultimately, Williams fled "in fear for his life." *Id.* at 117.

The damaging effects of the abuse and neglect Williams suffered were readily discoverable. Williams begged his grandmother to let him live with her, and, as she explained, he "never wanted to go back [to his parents' home] after he

visited me. He would hide . . . and refuse to come out when his mother came . . . . [O]ne of the ways [Williams] tried to escape from home was by [quitting school and] going to the Job Corps[.]" Supp. Vol. 9 at 1121-22; *see also* Vol. 14 at 119-20.

Had counsel requested Williams's Job Corps records, they would have learned that: while there, a dorm supervisor had to divest Williams of the razor-blade with which he intended to slit his wrists; Williams reported having similar problems as a child; he was diagnosed with "major depression" and admitted for inpatient observation as a suicide precaution; and he was later referred to a psychiatrist for drug therapy. Supp. Vol. 8 at 986-88; *see also* Vol. 14 at 120. It was recommended that Williams be examined by a psychiatrist if he departed the program. *Id.* Gelwan's interviews with Williams's family members confirmed that they were aware of his serious psychological problems upon his return from the Job Corps. Vol. 14 at 120; *see also* Supp. Vol. 9 at 1122.[4]

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[4] Petitioner attempts to obscure the issues before this Court by spending several pages addressing Gelwan's diagnosis that Williams suffered from post-traumatic stress disorder (PTSD), and noting that the Eleventh Circuit did not discuss the testimony of the State's postconviction psychological expert, Dr. Karl Kirkland. *See* Cert. Pet. at 8-11 & n.1. However, in the Eleventh Circuit, "[t]he only evidence from Dr. Gelwan's testimony that Williams . . . cited [were] the factual assertions drawn from [Gelwan's] investigation into Williams's background." App. 29a n.8. Kirkland disagreed with Gelwan's PTSD diagnosis, but not with Gelwan's social history—which included interviews with nine of Williams's family members, three of his former neighbors, and two former teachers, Vol. 14 at 85. Contrary to Petitioner's inaccurate description of the record, Cert. Pet. at 10, Kirkland testified that he spoke with only *one* of Williams's relatives, who was unaware of the violence Williams suffered, but that he relied on Gelwan's social history in his own evaluation of Williams, and that he had "no reason to doubt that [Williams came from] a dysfunctional abusive home[.]" Vol. 14 at 182, 195.

3. Judge McRae's Injudicious Handling of the Rule 32 Proceeding

The overwhelming record supporting sentencing relief was accomplished despite Judge McRae's frequent interruptions of mitigation witnesses, repeated insertion of his own testimony vouching for Williams's trial counsel, mocking comments about relevant mental health evidence, and other seriously injudicious conduct. *See, e.g.*, Vol. 13 at 53, 55, 57, 67, 84, 113, 122, 129-30, 134-35, 156, 174; Vol. 14 at 2, 86, 135; Vol. 15 at 7, 17-18, 26, 36. As the Eleventh Circuit recognized, "[i]n a number of instances, the judge appeared to take on the role of an advocate against Williams' ineffective assistance claims," and "[o]ther statements [by Judge McRae at Rule 32] suggest an unwillingness to give Williams' mitigating evidence serious consideration." App. 43a n.13 (discussing specific examples); *see also* Hearing Order at 4 (District Court order describing Judge McRae's conduct).

After Rule 32 proceedings, Judge McRae denied relief by entering an order that, in relevant part, copied nearly verbatim the State's proposed order. *Compare* Vol. 15 at 174-83 *with* Supp. Vol. 4 at 626-35. The Court of Criminal Appeals, adopting verbatim the relevant portion of Judge McRae's order, affirmed. App. 131a-140a.

REASONS THE WRIT SHOULD BE DENIED

Certiorari should be denied because the petition seeks review of the Eleventh

Circuit Court of Appeals' faithful application of clearly established law to Respondent's case. Petitioner does not contend that the decision below implicates an important dispute among the lower courts, and Petitioner's assertion that the Eleventh Circuit granted relief in the absence of clearly established law is erroneous. *Strickland v. Washington*, 466 U.S. 668 (1984), supplies the clearly established law, and this Court has unambiguously held that, under *Strickland*, confidence in a death sentence is undermined when, as a result of defense counsel's deficient performance, the sentencer was unaware of compelling mitigating evidence. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000). Petitioner attempts to obscure the clarity of this legal rule by relying on an inapposite line of authority addressing not *Strickland* claims, but rather Eighth Amendment claims where (unlike here) all relevant mitigating evidence was presented to the sentencer. Cert. Pet. at 17, 24-29.

In any event, the Eleventh Circuit's decision is not an appropriate vehicle for reaching the question presented by the petition. The state courts made multiple unreasonable errors in applying *Strickland*'s prejudice prong; therefore, the narrow issue raised by the Commissioner has no effect on the judgment below.

A. The Court of Appeals for the Eleventh Circuit Faithfully Applied this Court's Precedent; No Further Review of its Fact-Bound Application is Warranted

"It is past question that the rule set forth in *Strickland* qualifies as 'clearly

established Federal law, as determined by the Supreme Court of the United States.'" *Williams v. Taylor*, 529 U.S. at 391 (2000); *see also, e.g., Knowles v. Mirzayance*, 556 U.S. __, slip op. at 10 (Mar. 24, 2009). "That the *Strickland* test 'of necessity requires a case-by-case examination of the evidence,' obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." *Williams*, 529 U.S. at 391 (citation omitted). In the decision below, the Eleventh Circuit recognized that *Strickland* constitutes the clearly established law that governs this case, and also correctly set forth the rules federal habeas courts must follow to determine whether a state court decision constitutes an "unreasonable application" of *Strickland* within the meaning of 28 U.S.C. § 2254(d)(1). App. 19a-20a.

Contrary to Petitioner's contention, this case bears no resemblance to recent cases in which the Court has reversed grants of relief under 28 U.S.C. § 2254(d)(1). In each of those cases, the Court of Appeals set forth a new legal rule not grounded in this Court's precedent. *See Knowles*, 556 U.S. at __, slip op. at 10 ("This Court has never established anything akin to the Court of Appeals' 'nothing to lose' standard for evaluating *Strickland* claims."); *Wright v. Van Patten*, 128 S.Ct. 743, 746 (2008) ("No decision of this Court . . . clearly establishes that [*United States v. Cronic*, 446 U.S. 648 (1984), the case relied upon by the Court of Appeals] should replace *Strickland* in this novel factual context."); *Carey v.*

Musladin, 549 U.S. 70, 76-77 (2006) ("No holding of this Court required the California Court of Appeal to apply the [cases relied upon by the Ninth Circuit]," because "[i]n contrast to state-sponsored courtroom practices, the effect on a defendant's fair-trial rights of the spectator conduct to which [the habeas petitioner] objects is an open question in our jurisprudence"). Here, the Eleventh Circuit did not create any new legal rule or apply an inapposite line of authority to a novel factual context. Rather, the Court of Appeals applied *Strickland*'s clearly established two-prong test to the facts of this case. App. 20a-38a. Although this is a sufficient basis for denying the Petition, *see* SUP. CT. R. 10, for the reasons discussed below, the Eleventh Circuit's fact-bound application of *Strickland* was also clearly correct.

As the Eleventh Circuit recognized, to satisfy *Strickland*'s prejudice component, a habeas petitioner "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result [of] the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" App. 31a (quoting *Strickland*, 466 U.S. at 694). "This standard presumes a reasonable sentencer." *Id.* (citing *Strickland*, 466 U.S. at 695); *see also id.* at 37a (citing *Strickland*, 466 U.S. at 700).

Under this Court's precedent, the postconviction evidence of Herbert Williams's "childhood, filled with abuse and privation" is precisely the type of

evidence that undermines confidence in a death sentence because it "might well have influenced the [sentencer's] appraisal of his moral culpability." *Williams*, 529 U.S. at 398; *see also Wiggins v. Smith*, 539 U.S. 510, 538 (2003). Nonetheless, the Alabama postconviction courts denied relief, concluding that the Rule 32 evidence had "little mitigation value" because it lacked a "causal relationship" to Williams's capital crime. App. 134a, 133a. As the Eleventh Circuit recognized, in reaching this conclusion, the state courts made the same unreasonable error in applying *Strickland* that the Virginia Supreme Court did in *Williams v. Taylor*.[5]

In *Williams v. Taylor*, trial counsel's deficient performance resulted in their failure to present evidence of abuse and neglect in the habeas petitioner's background, which mirrors the evidence of abuse and neglect Herbert Williams's trial counsel failed to investigate here. *Compare* 529 U.S. at 370, 395 *with* App. 9a-15a, 32a-33a. In state postconviction proceedings, the Virginia Supreme Court recognized that trial counsel failed to present available mitigating evidence but concluded that the petitioner, Terry Williams, had not established *Strickland* prejudice. *Williams v. Warden of the Mecklenburg Correctional Ctr.*, 487 S.E.2d 194, 198-200 (1997). The state court recounted the "'overwhelming'" aggravating evidence presented by the State at sentencing, and determined that the

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[5] Contrary to Petitioner's suggestion, Cert. Pet. 15-16, Respondent also made precisely this argument before the Eleventh Circuit. *See Williams v. Allen*, No. 07-11393 (11th Cir.), Brief of Appellant at 44; Reply Brief of Appellant at 23-24.

postconviction mitigation, which did not undermine or rebut any of this aggravating evidence, "barely would have altered the profile of this defendant that was presented to the jury." *Id.* at 199, 200.

On habeas review, this Court held that the Virginia Supreme Court's application of *Strickland*'s prejudice prong was objectively unreasonable. Specifically, this Court explained:

> *Mitigating evidence unrelated to [the aggravating evidence] may alter the [sentencer's] selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case.* The Virginia Supreme Court did not entertain that possibility. It thus failed to accord appropriate weight to the body of mitigation evidence available to trial counsel.

529 U.S. at 398 (emphasis added). (In attempting to distinguish *Williams*, Petitioner omits the italicized sentence and then inserts bracketed text that recharacterizes the "possibility" the Virginia Supreme Court failed to entertain. Cert. Pet. at 22.)

As the Eleventh Circuit recognized, the Alabama Court of Criminal Appeals made the very error that the Virginia Supreme Court made in *Williams v. Taylor*. As noted, the Alabama Court of Criminal Appeals denied relief because, even though Herbert Williams presented postconviction mitigation indistinguishable from the mitigation in *Williams*, the state court found he had not proven that evidence had a "causal relationship" to the crime. App. 133a. Thus, as the Eleventh Circuit explained:

> Like the state court [in *Williams v. Taylor*], the Alabama court rested its prejudice determination on the fact that Williams' mitigating evidence did not undermine or rebut the evidence supporting the aggravating circumstance. It did not consider the possibility that the mitigating evidence, taken as a whole, might have altered the trial judge's appraisal of Williams' moral culpability, notwithstanding that the evidence did not relate to his eligibility for the death penalty.

App. 36a.

Petitioner's attempt to distinguish this case from *Williams v. Taylor* is unavailing. *See* Cert. Pet. at 20-22. Notably, Petitioner does not attempt to argue that the new postconviction mitigation here is materially different from the new postconviction mitigation in *Williams*. And, as Petitioner recognizes, in *Williams*, the state court unreasonably denied relief notwithstanding the fact that "a jury might find [the habeas p]etitioner less morally culpable based on the new evidence." Cert. Pet. at 22. That is exactly what happened here. And, just as in *Williams v. Taylor*, the state courts failed to acknowledge this because they did not recognize that "[m]itigating evidence unrelated to [the aggravating evidence] may alter the [sentencer's] selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Williams*, 529 U.S. at 398.

Lacking any support in *Williams v. Taylor*, or any of this Court's Sixth Amendment cases, Petitioner relies on a number of differing strands of Eighth Amendment authority; in cobbling them together, Petitioner strains to persuade the Court that it should look away from *Strickland* and its progeny, the cases that

constitute the relevant clearly established law, but which make clear that the petition is bereft of any basis for granting certiorari.

Specifically, Petitioner cites a number of cases standing for the proposition that, while the Eighth Amendment requires resentencing where "'relevant mitigating evidence was placed beyond the effective reach of the sentencer,'" it does not require the sentencer to give any particular weight to that evidence. Cert. Pet. at 27 (quoting *Graham v. Collins*, 504 U.S. 461, 475 (1993)); *see id.* at 2, 17, 25, 26, 28 (citing cases).[6] This is indeed a well-settled Eighth Amendment principle, but to the degree it is relevant in this Sixth Amendment case, it supports the decision below. Here, as a result of trial counsel's deficient performance, the capital sentencer was precluded from giving effect to (indeed, never even learned of) the powerful Rule 32 mitigation. Moreover, in the Eighth Amendment context, the Court has squarely rejected, as "constitutionally inadequate," a state postconviction court's reliance on a causal relationship test to deny relief when relevant mitigating evidence was beyond the reach of the sentencer. *Smith v. Texas*, 543 U.S. 37, 44-45 (2004) (per curiam) (citing, *inter alia*, *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) and *Penry v. Lynaugh*, 492 U.S. 302, 319-22 (1989)). As

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[6] Similarly, in the California Factor K jury instruction cases discussed by Petitioner, the Court has held that "'the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Ayers v. Belmontes*, 549 U.S. 7, 13 (2006) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)); *see also* Cert. Pet. at 25 (recognizing that in *Brown v. Payton*, 544 U.S. 133 (2003), "the Court predicated its opinion on the fact that the *jury* was allowed to *consider* all of the defendant's evidence") (first emphasis added).

discussed, this is precisely what happened in the state court's adjudication of Respondent's *Strickland* claim.

Petitioner seeks to obfuscate the fact that this is not a case about the capital sentencer's role in weighing mitigation, but rather a case in which the sentencer was precluded from giving any consideration to Respondent's mitigation, with statements such as: "the [Eleventh Circuit] court of appeals crossed into territory [concerning the weight of mitigating evidence] this Court has historically reserved for the sentencer *and state appellate courts*." Cert. Pet. at 17 (emphasis added); *see id.* at 2, 18. Petitioner confuses the role of the sentencer with that of the state postconviction court. Under clearly established law, the sentencer has wide latitude to weigh mitigating evidence, but the role of a state postconviction court adjudicating a *Strickland* claim is much more limited.

When a habeas petitioner brings an ineffective assistance of counsel claim, the state postconviction court does not consider what weight it would accord the postconviction mitigation were it the sentencer. Rather, the state postconviction court "must ask" only whether the petitioner has shown a reasonable likelihood that the new mitigation would lead a reasonable sentencer to impose a sentence less than death. *Strickland*, 466 U.S. at 694-96; *see also, e.g.*, *Williams*, 529 U.S. at 391; *Wiggins*, 539 U.S. at 534. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694;

see also id. ("[Because a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable[,] . . . [t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.").[7]

Thus, although a state postconviction court adjudicating a *Strickland* claim weighs the new mitigating evidence, it does so only for the limited purpose of determining whether that evidence is sufficient to create a reasonable probability of a different sentence. *See, e.g., Williams*, 529 U.S. at 398 (recognizing that, under *Strickland*, a state postconviction court must reweigh the totality of the mitigating evidence against the aggravating evidence to determine whether there is a reasonable probability that the new mitigation would result in a sentence less than death). This is a well-defined legal inquiry that must be resolved consistent with this Court's precedent. Where, as here, the state postconviction court denies relief because a direct nexus between the crime and the evidence of petitioner's difficult

[7] Because the reasonable probability test assumes a hypothetical, objective sentencer, evidence about how the new mitigation would have affected Judge McRae as a sentencer, *cf.* Cert. Pet. at 7, 13, is "'irrelevant to the prejudice inquiry.'" App. 37a (quoting *Strickland*, 466 U.S. at 700). But even if *Strickland* prejudice were a subjective test, the Rule 32 evidence would undermine confidence in Herbert Williams's death sentence. "Alabama's capital sentencing statute gives the jury an essential role in the sentencing process that is, in fact, as important as the role of the judge." *Brownlee v. Haley*, 306 F.3d 1043, 1077 (11th Cir. 2002). Williams's jury voted for life without parole by a 9-3 margin. Had the Rule 32 evidence been presented at trial, it is reasonably likely that the strength of the jury vote for life without parole would have been 11-1 or 12-0, which, under Alabama law, would have been more difficult for Judge McRae to override. *See Ex Parte Carroll*, 852 So.2d 833, 836 (Ala. 2002).

life history has not been established, the court unreasonably "fail[s] to accord appropriate weight to the body of mitigation evidence available to trial counsel." *Id.* Regardless of the weight the state postconviction court would accord the mitigation if it were the sentencer, a reasonable sentencer may well conclude that this type of mitigation calls for a sentence less than death even absent a direct nexus between that mitigation and the crime—and, in evaluating *Strickland* prejudice, that is all that matters. *See id.*[8]

For the foregoing reasons, the Eleventh Circuit correctly held that it was an unreasonable application of *Strickland* for the state postconviction courts to deny relief because they concluded that Respondent's mitigating evidence lacked a "causal relationship" to the State's death-eligibility case. Petitioner's challenge to

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[8] More broadly, the weighing function of a state court reviewing a capital sentence depends on the nature of the court's inquiry, but in no context may a state appellate court, let alone a state postconviction court, act as the sentencer would have been entitled to when the state court reweighs mitigating evidence that was *not* presented at sentencing. For example, this Court has approved state direct appeal courts' independently reweighing aggravating and mitigating evidence that *was* presented at sentencing to ensure that a death sentence has not been arbitrarily imposed. *See, e.g., Proffitt v. Florida*, 428 U.S. 242, 253 (1976) (Joint Opinion) (describing Florida law); *see also Strickland*, 466 U.S. at 695 (holding that, where a state direct appeal court undertakes such an independent reweighing, the reasonable probability test must take into account the possibility that the direct appeal court would have invalidated the petitioner's death sentence if the postconviction mitigation had been presented at sentencing). And, *Barclay v. Florida*, cited by Petitioner, Cert. Pet. at 17, holds that the Eighth Amendment permits state direct appeal courts to reweigh aggravating and mitigating evidence in cases where all of that evidence *was* presented to the sentencer, but one of multiple aggravating circumstances found by the sentencer was legally invalid. *See Barclay v. Florida*, 463 U.S. 939 (1983); *see also Clemons v. Mississippi*, 494 U.S. 738 (1990); *Zant v. Stephens*, 462 U.S. 862 (1983). Indeed, the same footnote of the *Barclay* opinion relied upon by Petitioner noted that the validity of the capital sentencing scheme at issue depended upon "evidence of mitigation [not being] excluded from consideration at the sentencing proceeding." *Barclay*, 463 U.S. at 961 n.2 (Stevens, J., concurring in the judgment); *see* Cert. Pet. at 17.

that holding conflates the role of the sentencer with that of a state postconviction court applying *Strickland*.

B. The State Courts Made Additional Unreasonable Errors in Their Application of *Strickland*

Without regard to the state courts' unreasonable imposition of a nexus requirement to discount Respondent's mitigating evidence, the state courts' adjudication of Respondent's ineffective assistance of counsel claim constitutes an unreasonable application of *Strickland* for three reasons. First, the facts of this case are materially indistinguishable from *Williams v. Taylor*; therefore, *Williams* establishes that the state courts unreasonably applied *Strickland* here. Second, the state courts did not evaluate the totality of the mitigating evidence as required by *Strickland*. Third, the state courts unreasonably ignored the distinction between this case, where the death sentence was "only weakly supported by the record," and cases where the death sentence had "overwhelming record support." *Strickland*, 466 U.S. at 696.

1. *This Case is on All Fours with* Williams v. Taylor

In *Williams v. Taylor*, this Court found *Strickland* prejudice because the postconviction mitigation about the habeas petitioner's life history, which was not presented at sentencing, "might well have influenced [the sentencer's] appraisal of his moral culpability." 529 U.S. at 398. The postconviction mitigation here is materially indistinguishable from the postconviction mitigation in *Williams*.

As described above, Herbert Williams's Rule 32 evidence "paint[ed] a vastly different picture of his background." App. 32a. Because of counsel's deficient performance, the sentencing jury and judge never learned that: (1) contrary to the positive depiction of Arcola Williams that the judge relied on in imposing a death sentence, Williams's mother actively abused him and failed to protect him from his father's wanton attacks; (2) both parents so neglected Williams that he lacked adequate food, clothing, and knowledge of rudimentary hygiene; (3) "contrary to the impression created by Arcola Williams, [the] violence [Williams suffered at the hands of the father] was not of a type remotely associated with parental discipline," App. 32a; rather, his father's attacks "were . . . serious assaults, many of which involved the use of deadly weapons" and "resulted in serious injuries," App. 32a; (4) contrary to the sentencing court's conclusion that Williams's father abused him "as a child," Vol. 5 at 192, the violence continued until Williams was seventeen years old and left home permanently after a particularly savage thrashing wherein his father broke a chair over his head; (5) before Williams's eyes, his father issued death threats against members of his immediate family and administered beatings that apparently caused severe brain damage to two of his siblings; and (6) this isolated life of stark deprivation and pervasive violence resulted in Williams's suffering severe depression requiring psychiatric treatment. *See* App. 9a-15a, 32a-33a. This "graphic description of [Herbert] Williams' childhood, filled with abuse

and privation" mirrors the postconviction evidence about Terry Williams's "nightmarish childhood" that undermined confidence in his death sentence. *See Williams v. Taylor*, 529 U.S. at 398, 395 (describing Terry Williams's childhood).

In fact, the only meaningful distinctions between this case and *Williams v. Taylor* cut in Respondent's favor: first, unlike Terry Williams, who was 31 at the time of his capital crime, *see* 487 S.E.2d at 199, Herbert Williams was still a teenager, *see generally Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (given the capital defendant's youth, "there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant"); and, second, the aggravating evidence in *Williams v. Taylor* was far stronger than it was here. *See* Part B.3, *infra*.

Thus, as in *Williams v. Taylor*, the entire postconviction record, "viewed as a whole and cumulative of mitigation evidence presented originally," creates a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented the available mitigating evidence. 529 U.S. at 399. It follows that the Alabama Court of Criminal Appeals, which held that Williams's postconviction evidence "ha[d] little mitigation value" and thus denied relief, App. 134a, rendered a decision that was contrary to, or involved an unreasonable application of, clearly established law.[9]

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[9] As noted, in addition to describing the severe abuse and deprivation Herbert Williams

2. The State Courts did not Evaluate the Totality of Respondent's Mitigation

As Petitioner repeatedly acknowledges, *Strickland* requires courts to evaluate the totality of the mitigating evidence that was presented both at trial and at postconviction. Cert. Pet. at 19, 21, 22, 23, 25, 28-29; *see Strickland*, 466 U.S. at 695. Yet, contrary to Petitioner's assertion that the state courts considered the "entire body of Williams's new mitigating evidence in their prejudice inquiries," Cert Pet. at 19, the Eleventh Circuit correctly recognized that the state courts "'failed to evaluate the totality of the available mitigation evidence in reweighing the aggravating and mitigating circumstances in this case,'" and that this failure constituted "an unreasonable application of *Strickland*." App. 36a-37a.

In addressing Respondent's ineffective assistance of counsel claim, the Alabama Court of Criminal Appeals—adopting wholesale the trial judge's postconviction order (which itself adopted the State's proposed order)—recited verbatim the sentencing court's description of the single aggravator without any

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suffered, the postconviction evidence also revealed the serious psychological difficulties that he experienced (namely, suicidal tendencies and severe depression requiring psychiatric treatment). The postconviction evidence further showed that Williams has a low IQ. Vol. 14 at 123. Thus, as in *Williams v. Taylor*, the postconviction evidence revealed that Herbert Williams had significant mental health/cognitive difficulties. *See* 529 U.S. at 396, 398. But, even absent this additional similarity, the Alabama Court of Criminal Appeals' decision would be unreasonable because *Williams v. Taylor* holds that postconviction evidence *either* of a severely abused and deprived background, or of serious mental health/cognitive difficulties, undermines confidence in a death sentence. *See* 529 U.S. at 398 ("[T]he graphic description of Williams' childhood, filled with abuse and privation, *or* the reality that he was 'borderline mentally retarded,' might well have influenced the [sentencer's] appraisal of his moral culpability.") (emphasis added).

corresponding description of the three mitigators found at sentencing, the substantial weight due the jury's life recommendation, or the extensive mitigating evidence presented at postconviction that was missing from sentencing because of counsel's deficient performance. *See* App. 138a-140a. The state courts did not even cursorily describe, *inter alia*, the postconviction evidence of Herbert Williams's mother's abuse and neglect, the severity of his father's criminal abuse, his family's abject poverty, or his inpatient observation and psychiatric treatment for serious depression. *See* App. 133a-140a.

Indeed, as the Eleventh Circuit recognized, because the state postconviction courts failed to evaluate the totality of Respondent's mitigating evidence, they did not recognize that the postconviction evidence refuted the sentencer's conclusion—based on the inaccurate picture allowed by trial counsel's failures—that Arcola Williams was a caring mother who had an excellent reputation. App. 33a, 36a. Rather, the state courts described the postconviction evidence regarding the horror and privation Herbert Williams suffered as nothing more than abuse by Williams's father. App. 133a-134a ("This [Rule 32] testimony was presented to show that Williams was physically abused *by his father* as were other members of his family. . . . Any additional testimony offered by Williams at the Rule 32 evidentiary hearing *that he was physically abused by his father* has little mitigation value . . .") (emphases added). And, as the Eleventh Circuit explained, "[g]iven the

importance the trial judge placed on Williams' relationship with his mother and his purported lack of deprivation [in deciding to override the jury's 9-3 life recommendation and sentence Williams to death]," evidence about Williams's mother's abuse and neglect "clearly would have been beneficial to Williams had it been presented." App. 33a.

The Eleventh Circuit correctly concluded that the state courts' failure to acknowledge the postconviction evidence—much less to consider it as part of the holistic evaluation of trial and postconviction mitigation required by *Strickland*—was an unreasonable application of clearly established federal law. *See* App. 36a-37a; *see also Williams v. Taylor*, 529 U.S. at 397-98 (holding state court's conclusion that petitioner was not prejudiced to be "unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and . . . in the habeas proceeding").

3. The State Courts Ignored Strickland*'s Distinction Between Highly Aggravated Death Sentences and Death Sentences Weakly Supported by the Record*

As the Eleventh Circuit recognized, under *Strickland*, "'a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" App. 33a (quoting *Strickland*, 466 U.S. at 696). According to Judge McRae's trial findings, on one side of Williams's sentencing scale were three mitigators (one non-

statutory) along with the jury recommendation for life, which the trial court recognized was due substantial weight. On the other side was the one statutory aggravator, the robbery, an element of the capital charge. In sentencing Williams to death, Judge McRae stated that, in his view, the "single statutory aggravating circumstance" outweighed "all the statutory and non-statutory mitigating circumstances," plus the "very serious consideration and substantial weight" due the jury's life recommendation on the mitigating side of the scale. Vol. 5 at 193.

Because there were strong mitigators and a single aggravator, and because the jury had decisively recommended life, Williams's death sentence epitomized "a verdict or conclusion only weakly supported by the record," *Strickland*, 466 U.S. at 696. *See* App. 33a-34a (recognizing that "this case is not highly aggravated" and the "relative weakness of the state's death penalty case is underscored by the fact that the jury recommended a life sentence by a vote of 9-3," even though the jury did not know about "the powerful [mitigating] evidence adduced at postconviction").

Notwithstanding the foregoing, Petitioner continues to embrace the state postconviction courts' reliance on two inapposite Eleventh Circuit cases for the proposition that Williams was not prejudiced by counsel's failure to investigate. Cert. Pet. at 12 & n.2. As Judge McRae himself recognized, however, those two cases both involved torture, and one also involved a rape. App. 139a (citing and

describing *Francis v. Dugger*, 908 F.2d 696, 703-04 (11th Cir. 1990) and *Thompson v. Wainwright*, 787 F.2d 1447, 1453 (11th Cir. 1986)). In Williams's case, the murder involved no torture or sexual assault; as noted, the sentencing court explicitly concluded that the "heinous, atrocious or cruel" aggravator permitted under Alabama law did not apply. Vol. 5 at 190. Under clearly established law, the calibration of prejudice resulting from counsel's deficient performance in this capital case, which was not highly aggravated, is very different from that in a highly aggravated case. *See Strickland*, 466 U.S. at 696, 700; *Wiggins*, 539 U.S. at 537-38. Thus, the state courts' reliance on *Francis* and *Thompson*, cases in which the death sentence had "overwhelming record support," to conclude there was no prejudice here, where the death sentence was "only weakly supported by the record," constitutes another unreasonable application of *Strickland*. *Strickland*, 466 U.S. at 696.

Indeed, in applying § 2254(d)(1), this Court has held that *Strickland* required relief even when the death sentence had far greater record support than the sentence in Williams's case. As discussed, in *Williams v. Taylor*, this Court held that the Virginia Supreme Court unreasonably denied relief under *Strickland* because the postconviction evidence of "abuse and privation . . . might well have influenced the jury's appraisal of [the petitioner's] moral culpability" and therefore changed the outcome of the sentencing proceeding. 529 U.S. at 398; *see id.* at 399.

The *Williams* Court reached this conclusion even though: (1) the prosecution's case in aggravation was strong—in the months following the murder for which he was being sentenced, the habeas petitioner, *inter alia*, "had savagely beaten an elderly woman [leaving her in a vegetative state], stolen two cars, set fire to a home, stabbed a man during a robbery [and arson], and confessed to [having strong urges to choke] two inmates and break[] a fellow prisoner's jaw," *Wiggins*, 539 U.S. at 537 (describing *Williams*); *see also Williams*, 529 U.S. at 368; and (2) the additional evidence discovered during postconviction was not entirely favorable to the petitioner, as it also revealed a series of crimes he had committed as a youth, *see Williams*, 529 U.S. at 396.

Unlike in *Williams v. Taylor*, the evidence in this case showed that despite his upbringing steeped in violence and privation, Herbert Williams had no prior criminal record before this offense, and there was no evidence that he had engaged in any other violent conduct. Therefore, "in contrast to the petitioner in *Williams v. Taylor*, [Herbert Williams] does not have a record of violent conduct that could have been introduced by the State to offset th[e] powerful mitigating narrative" that counsel failed to present as a result of their deficient performance. *Wiggins*, 539 U.S. at 537.[10]

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[10] The Commissioner emphasizes the prosecution's evidence indicating that Respondent's capital offense was deliberate. Cert. Pet. at 3, 6. Any such evidence does not change the fact that the aggravating evidence in *Williams v. Taylor* (concerning a 31-year-old offender who had

In short, because "the State's evidence in support of the death penalty [is] far weaker" here than it was in *Williams v. Taylor*, *id.* at 538, and because the postconviction mitigation was comparable, under clearly established law, Herbert Williams was prejudiced by his counsel's deficient performance. As in *Williams v. Taylor*, the state courts' contrary conclusion was an unreasonable application of *Strickland*.

CONCLUSION

At bottom, Petitioner seeks this Court's review of a routine federal habeas decision whose outcome was required by *Strickland* and its progeny and 28 U.S.C. § 2254(d)(1). Respondent respectfully requests that this Court deny the petition for certiorari.

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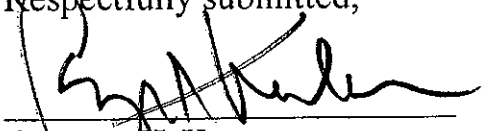
committed multiple violent felonies) was far stronger than it was here, where Herbert Williams was a 19-year-old first-time offender, and the trial judge expressly found that the only aggravator was the underlying robbery. Indeed, after hearing the aggravating evidence, the jury in *Williams v. Taylor* unanimously imposed death, *see* 529 U.S. at 370, whereas Herbert Williams's jury recommended life without parole by a 9-3 vote.

It is also worth noting that this Court has rejected unequivocally the deliberateness of a capital crime as a basis for assuming that a sentencer would discount mitigation related to a defendant's life history. *See e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 254 (2007); *id.* at 237-42 (describing petitioner's deliberately planned crime and mitigating evidence). A reasonable sentencer may conclude that, even if a capital crime was deliberate, and even if "deliberate" means something beyond "intentional," the defendant should receive a life without parole sentence because his troubled background renders him less morally culpable than other capital defendants. *Penry*, 492 U.S. at 322-23; *see also id.* at 322 ("Personal culpability is not solely a function of a defendant's capacity to act 'deliberately.'"); *Wiggins*, 539 U.S. at 535 (citing *Penry* for the proposition that "[p]etitioner . . . has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability").

Respectfully submitted,



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No. 08-1032

In the
Supreme Court of the United States

RICHARD F. ALLEN,
Commissioner of Alabama Dept. of Corrections,
Petitioner,
v.
HERBERT WILLIAMS, JR.,
Respondent.

On Petition for a Writ of Certiorari to
The Court of Appeals for
the Eleventh Circuit

CERTIFICATE OF SERVICE

I, Laura Fernandez, do swear or declare that on this date, April 14, 2009, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 days.

The names and addresses of those served are as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 14, 2009.

Laura Fernandez