No. _____

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

PETITION FOR A WRIT OF CERTIORARI

Troy King
Attorney General

Corey L. Maze
Solicitor General

J. Clayton Crenshaw*
Assistant Attorney General

*COUNSEL OF RECORD
STATE OF ALABAMA
Office of the Attorney General
500 Dexter Avenue
Montgomery, Alabama 36130
(334) 242-7300

February 11, 2009

QUESTION PRESENTED

(Capital Case)

Respondent Herbert Williams, Jr. presented new mitigating evidence at a state post-conviction hearing to establish a claim of ineffective assistance of counsel. In finding that Williams failed to establish prejudice, the state courts considered the new evidence in its weighing process, assigning it "little mitigation value" because the evidence possessed no "causal relationship" with Williams's long-planned and premeditated crime. Under 28 U.S.C. §2254(d)(1), the Court of Appeals for the Eleventh Circuit granted Williams habeas relief because, in its opinion, the state courts "failed to give sufficient weight to mitigating evidence that did not relate to the aggravating circumstance in the case." App. 35a.

In light of this Court's admonition that, "the Constitution does not require a state to ascribe any specific weight to particular factors, either in aggravation or mitigation," *Harris v. Alabama*, 513 U.S. 504, 512 (1995), the question presented is:

In assessing whether a defendant was prejudiced by his counsel's failure to present additional mitigating evidence during a capital sentencing proceeding, does a state appellate court unreasonably apply "clearly established Federal law, as determined by [this] Court," 28 U.S.C. §2254(d), when it emphasizes the absence of a "causal relationship" between the mitigating evidence and the underlying murder when determining the weight of the mitigating evidence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

OPINIONS BELOW

The opinion of the court of appeals is reported at 542 F.3d 1326. App. 2a-44a. The opinion of the district court is not published in the *Federal Reporter* but is reported at on-line at 2006 WL 3075635. App. 45a-109a.

STATEMENT OF JURISDICTION

The court of appeals' judgment was entered on September 17, 2008, and the court denied the State's timely petition for rehearing *en banc* on November 13, 2008. App. 167a. This petition is timely because it is filed within 90 days of the court's order refusing an *en banc* rehearing. *See* Sup. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

2. The Antiterrorism and Death Penalty Act of 1996 provides in relevant part: "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1).

STATEMENT OF THE CASE

This case presents yet another grant of §2254 habeas relief by a federal court of appeals without the basis of "clearly established" precedent from this Court. *See, e.g.*, *Wright v. Van Patten*, __ U.S. __, 128 S. Ct. 743 (2008) (reversing the grant of §2254 relief because no clearly established case law exists on the question of whether counsel's appearance by speaker phone violates the Sixth Amendment); *Carey v. Musladin*, 549 U.S. 70 (2006) (reversing the grant of §2254 relief because no clearly established case law exists on the question of whether "spectator-conduct" can require reversal of a defendant's conviction). Here, the Court of Appeals for the Eleventh Circuit wrongly granted §2254 habeas relief to Respondent by holding that, when determining whether a death-row inmate is prejudiced by counsel's failure to present additional mitigating evidence at trial, *Strickland v. Washington*, 466 U.S. 668 (1984) forbids a state appellate court from determining the amount of weight to give newly-presented mitigating evidence by referring to the evidence's ability (or lack of ability) to extenuate the facts of the inmate's crime.

To date, the Court's death-penalty precedent distinguishes between the questions of (1) whether relevant mitigating evidence can be excluded from the sentencer's consideration and (2) how much weight the sentencer must give it. As long as a sentencer is allowed to consider all relevant mitigating circumstances, the Court has left the question of how much weight to assign the evidence to the sentencer and state appellate courts. *See, e.g.*, *Harris v. Alabama*, 513 U.S. 504, 512 (1995); *Barclay*

v. Florida, 463 U.S. 939, 961 n.2 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982).

As shown *infra*, the court of appeals wrongly crossed the line between exclusion and weight. Because the court did so without the backing of "clearly established" caselaw from this Court, *see* 28 U.S.C. § 2254(d)(1), certiorari review is warranted to correct the error.

A. The Murder of Timothy Hasser

Herbert Williams was obsessed with stealing Timothy Hasser's model 928 Porsche. For months, Williams conveyed his desire to friends, telling them he would soon possess a Porsche. Vol. 6 at 120-23; 129-132; 153; 160-63; 181-82; Vol. 7 at 10-11. He wrote about it in his diary; specifically detailing how he would obtain a gun, catch a ride to Mobile, and then walk to Mr. Hasser's house. Vol. 5 at 122. Williams even chronicled his scheme to break into the "back" of Mr. Hasser's home and await his return if the Porsche was not present upon Williams's arrival. *Id.*

On November 2, 1990, Williams executed his plan. Upon arriving at Mr. Hasser's empty home, Williams broke in through the rear bedroom window and then climbed into the attic when police officers arrived to check the security alarm that Williams tripped upon entering. When Mr. Hasser returned home, Williams abducted him at gunpoint and had Mr. Hasser drive to an abandoned building 15-20 miles away. Vol. 2 at 43-45. Evidence indicates that Williams next had Mr. Hasser draft and sign fake documents purporting to convey ownership of the Porsche to Williams. *Id.* at 118-19. Williams then murdered Mr. Hasser with three gunshots to the

back of the head. *Id.* at 80-84. Williams was apprehended while driving the Porsche, shortly after being observed in his unsuccessful attempt to throw Mr. Hasser's body off of a bridge into a nearby river. Vol. 6 at 5.

Williams gave three inconsistent statements to police, each proving to be implausible. In his final statement, Williams claimed that he and Mr. Hasser dealt drugs together, and that Mr. Hasser had promised to give Williams the Porsche and $7,500 at the end of their present deal. Vol. 6 at 90. According to Williams, the deal went south when a group of drug dealers murdered Mr. Hasser but allowed Williams to live. *Id.* at 97-98.

B. Trial and Direct Appeal

At trial, the State introduced Williams's diary, his statements to police, the fake documents conveying the Porsche to Williams, and the testimony of several persons to whom Williams conveyed his lust for the Porsche. The State further established that the gun used to shoot Mr. Hasser was the same gun Williams concealed under the front seat of the Porsche and that the weights police found strapped to Mr. Hasser's feet matched weights found in Williams's home. Vol. 6 at 23, 140.

In defense, Williams argued that he and Mr. Hasser knew each other, and that Mr. Hasser was killed in a drug deal gone awry. Along that line, Williams further argued that Mr. Hasser had conveyed the Porsche to him before the murder; thus, eliminating a finding of robbery.

The jury found Williams of murder during the course of a robbery, a capital offense under §13A-5-

40(a)(2) of the Alabama Code.

At the penalty phase, Williams presented one witness in mitigation: his mother, Arcola Williams. Mrs. Williams testified that:

- Due to her poverty, Williams lived with his grandmother until age four, Vol. 4 at 118-19;
- Upon moving in with his parents, Williams was repeatedly beaten by his father;
- Williams's father was an alcoholic, Vol. 3 at 121;
- Williams's father "whipped his [children] more than he should," Vol. 3 at 119;
- As Williams grew, his father began to "beat" him with "his fists," Vol. 3 at 120;
- After one incident, Williams called the police to report that his father "choked him and did everything to him while he was in there," Vol. 3 at 121;
- At the time of trial, Williams's father was in jail on charges for molesting and raping the couple's 14-year-old, mentally retarded daughter, Vol. 3 at 122.

In addition to this non-statutory mitigating evidence, Williams's trial counsel argued two statutory mitigating factors: (1) Williams's lack of significant criminal history and (2) Williams's young age (19) at the time of the murder. *See* Ala. Code §13A-5-51(1), -51(7). The State argued one statutory aggravating circumstance, which it proved during the guilt phase: Williams committed the murder committed during the course of a robbery. *See* Ala. Code §13A-5-49(4).

By a 9-3 vote, the jury recommended Williams be sentenced to life without parole.

Under Alabama law, the trial judge is the ultimate sentencer. Ala. Code §13A-5-47. After weighing Williams's three mitigating circumstances and the jury's recommendation against the State's aggravating circumstance, the Honorable Ferrell McRae sentenced Williams to death.

Judge McRae's weighing process is contained in his sentencing order. *See* Vol. 1 at 113-22. In determining the weight of aggravation, Judge McRae gave great significance to the calculated precision with which Williams planned and systematically executed the murder-robbery. Vol. 1 at 117-18. Specifically, Judge McRae found that Williams's diary entries demonstrated "greed and depravity of mind and characteristics of an individual who has an utter disregard for human life and the rights of property of others," Vol. 1 at 118, and that the events which led Mr. Hasser's death were not "the product of chance; rather, these events were planned and executed with military-like precision." Vol. 1 at 114.

In mitigation, Judge McRae found and considered each of the mitigating circumstances argued by Williams at trial: age, lack of criminal history, and troubled childhood. Vol. 1 at 119-121. Judge McRae gave them little weight, however, as indicated by his findings (1) that the "reptilian coldness with which this criminal act was devised and perpetrated vitiates any contention that the innocence of youth was a factor in the murder of Timothy Hasser," Vol. 1 at 120, and (2) that Williams's father was "violent and abusive toward him as a child" "makes [Williams] no less accountable for his action."

As required by Alabama law, both the Alabama Court of Criminal Appeals and the Supreme Court of Alabama independently weighed the same aggravating and mitigating circumstances on direct appeal. *See* Ala. Code §13A-5-53(b)(2). Both courts affirmed Williams's conviction and sentence. *Williams v. Alabama*, 627 So. 2d 994 (Ala. Crim. App. 1992), *aff'd*, *Ex parte Williams*, 627 So. 2d 999, 1005 (Ala. 1993). This Court denied Williams' petition for writ of certiorari. *Williams v. Alabama*, 511 U.S. 1012 (1994).

C. State Post-Conviction Proceedings

Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, Williams filed a post-conviction, "Rule 32" petition with the Mobile County Circuit Court collaterally attacking his conviction and death sentence. Relevant here, Williams claimed that his trial counsel was ineffective under *Strickland* for failing to investigate and present additional mitigating evidence during the penalty-phase.

Judge McRae—*i.e.* the same judge who presided over Williams's trial and sentencing—granted Williams an evidentiary hearing to present witnesses to prove his penalty-phase *Strickland* claim. At the hearing, Williams called three family members to further detail Williams's troubled childhood.

Queenie Mae Peoples, Williams's half-sister, offered the following details:

- Williams's father whipped all of his children with a belt, Vol. 13 at 145-46;
- Williams's mother physically abused the children at her husband's direction, Vol. 13 at 138;

- Williams's father hit his wife with his fists and threatened her on different occasions with a knife and gun," Vol. 13 at 132;
- Williams's father sexually abused her (Queenie), Vol. 13 at 128;
- Williams's father throw his other son, Thomas, into a wall, Vol. 14 at 107;
- Williams's father once forced Williams to spend an entire day in a hole, Vol. 14 at 97.

Curtis Williams, Williams's paternal uncle, then testified that he observed Herbert Williams's childhood bruises presumably made by beatings from Williams's father. Vol. 14 at 58. Curtis Williams also testified that Herbert Williams's mother was routinely absent from home due to her involvement with the church. Vol. 14 at 57-61. Finally, Williams's paternal aunt, Deborah Perine, testified that Williams lived with his grandmother during his early years and that Williams looked up to his aunt (Ms. Perine) as a mother figure, Vol. 14 at 91-92.

Williams concluded with the testimony of a psychiatrist, Dr. Eliot Gelwan, who reviewed numerous records documenting Williams's life and interviewed Williams on several occasions. Dr. Gelwan testified that, in his opinion, Williams suffered from post-traumatic stress disorder (PTSD) at the time of the murder, as proved by the following:

- Williams's early traumatic experiences,
- Williams's lack of childhood relationships,
- Williams's reports of intrusive memories of childhood abuse,

- Williams's claim that he would avoid places where he remembered being abused,
- Williams's claim that he suffered from increased arousal, sleep difficulties, angry outbursts, and decreased concentration,
- Williams's departure from the Job Corps due to depression, and,
- Williams's (unsubstantiated) claims that he and Mr. Hasser were friends who dealt drugs together.

Vol. 14 at 97-115, 329-30.

In rebuttal, the State offered testimony from both of Williams's trial attorneys. One of the attorneys, James Lackey, testified that Williams had been evaluated by a psychiatrist, Dr. Clyde Van Rosen, prior to trial. Mr. Lackey testified that he did not present Dr. Van Rosen's testimony at the penalty-phase because it would not have been helpful to Williams's defense. In particular, Mr. Lackey explained that "basically, [Dr. Van Rosen's] report indicated that there was—that other than some borderline problems in intelligence and so on, that there was basically nothing wrong with Mr. Williams and that the testing was—felt was somewhat skewed by a lack of effort or attempts to confuse the tester by Mr. Williams." Vol. 13 at 66. Specifically, Dr. Van Rosen's pre-trial report concluded:

> During the evaluation, [Williams] did not show any significant signs of psychosis. The mental state at the time of the alleged crime is quite difficult to assess due to his varying stories, but there are no persuasive signs of a

> major psychotic disturbance which influenced his actions in any of his versions.

Vol. 13 at 68.

The State also offered its own expert psychologist, Dr. Karl Kirkland, to dispute Dr. Gelwan's PTSD diagnosis.[1] Dr. Kirkland testified that one of his areas of expertise was diagnosing PTSD and that he concluded that Williams did not suffer from, nor did he meet the diagnostic criteria for, PTSD. Vol. 14 at 193. The results of Dr. Kirkland's testing indicated that Williams had a normal profile with no evidence of a psychopathic condition. Vol. 14 at 178. Dr. Kirkland also testified that he conducted interviews with some of Williams' family members, and that Williams' uncle told him that the Williams' household was not a "violent home." Vol. 14 at 183.

Judge McRae rejected Williams's claim that trial counsel had been constitutionally ineffective for failing to discover and present the mitigation evidence presented by Williams's post-conviction attorneys under both *Strickland* elements (deficient performance and prejudice). *Williams*, 782 So. 2d at 825-29; App. 131a-140a. Because this petition focuses solely on the propriety of Judge McRae's prejudice determination, which was later adopted by the state appellate court as correct, we focus solely on that portion of his order.

Judge McRae determined that the failure to call Dr. Gelwan, Williams's post-conviction psychiatrist, at trial did not prejudice Williams for several

---

[1]The Eleventh Circuit's opinion does not reference any of Dr. Kirkland's testimony, despite its role in the state courts's opinions.

reasons. First, Williams failed to prove Dr. Gelwan would have been available to testify at Williams's trial, which occurred in 1990. *Williams*, 782 So. 2d at 828; App. 136a-138a. Second, Judge McRae found that Dr. Gelwan's PTSD diagnosis was incredible when other mental health officials who interviewed Williams—including one hired by Williams's trial counsel—failed to reach the same conclusion. *Id.* at 827; App. 134a-136a. Third, Judge McRae determined that Dr. Gelwan's testimony was incredible (if not dubious) because it was based in part on Williams's unsubstantiated claims that he "was taken under a wing by Mr. Hasser" (*i.e.* the man he murdered for a car) and the pair bonded in a way that satisfied some of Williams's need for affiliation and belonging. *Id.* at 828; App. 136a-138a.

Concerning the failure to present the additional family members to discuss Williams's childhood, Judge McRae first reiterated the reasons he gave similar testimony from Williams's mother little weight at trial:

> The evidence regarding Williams's background was never found to have a causal relationship with Williams committing capital murder. In the sentencing order, this Court found that Williams 'purposely and deliberately' planned [the murder]. This court further stated in the sentencing order that 'the events which led to the murder of Timothy Hasser were not the product of chance; rather these events were planned and executed with a military-like precision. . . . Williams carried out his plan to take [Mr. Hasser's] Porsche by abducting the victim at gunpoint and killing him at a remote site

> and attempting to dispose of the body by throwing it into a river.

Williams, 782 So. 2d at 826-27; App. 133a-134a. Judge McRae then judged the weight to be given Williams's new, admittedly more-detailed, mitigation evidence:

> Any additional testimony offered by Williams at the Rule 32 evidentiary hearing that he was physically abused by his father *has little mitigation value* due to the fact that this was a deliberately planned crime where the victim was murdered because Williams wanted his car.

Id. at 827; App. 134a. (emphasis added). Relying on Eleventh Circuit precedent in similar murder-robbery cases,[2] Judge McRae concluded with *Strickland's* prejudice determination:

> Weighing the evidence presented by Williams at the evidentiary hearing against the aggravating circumstances that were proved beyond a reasonable doubt at the penalty phase of trial shows that trial counsel was not constitutionally ineffective. . . . In light of the gravity of the aggravating circumstances proven beyond a reasonable doubt in this case and the non-compelling nature of the mitigating evidence that Williams alleges trial counsel should have presented, the presentation of this evidence would not have resulted in this court passing

---

[2]*See Francis v. Dugger*, 908 F.2d 696, 703-04 (11th Cir. 1990); *Thompson v. Wainwright*, 787 F.2d 1447, 1453 (11th Cir. 1986)

> down a sentence other than death. There is no reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant a death sentence. Therefore, Williams is not prejudiced by trial counsel's failure to present the evidence that was presented at the Rule 32 evidentiary hearing, even if it had been available to him.

Id. at 829; App. 138a-140a.

On appeal, the Alabama Court of Criminal Appeals repeatedly cited the "two-pronged *Strickland* analysis" as governing its review. *Id.* at 822, 826, 829; App. 123a-125a, 132a-134a, 138a-140a.[3] The court adopted Judge McRae's eight-page *Strickland* findings in full, *id.* at 825-29; App. 131a-140a, and affirmed Judge McRae's findings that Williams failed to prove deficient performance or prejudice under *Strickland*. *Id.* at 829; App. 138a-140a. Thus, the Court of Criminal Appeals (1) considered Williams's post-conviction mitigation evidence in its weighing process, (2) assigned Williams's new evidence "little mitigation value," and (3) held that Williams failed to prove a reasonable probability that the sentencer—in this case, Judge McRae—would have reached a different sentencing outcome had Williams's trial attorneys presented the same evidence at trial. The Supreme Court of Alabama denied certiorari review. *See Ex parte Williams*, 782 So. 2d 842 (Ala. 2000).

---

[3] The petitioner has included in the appendix the Alabama Court of Criminal Appeals's opinion that affirmed the denial of state post-conviction relief. *See Williams v. State*, 782 So. 2d 811 (Ala. Crim. App. 2000); App. 110a-166a.

D. Federal Court Proceedings

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), *see* 28 U.S.C. §2254(d) *et. seq.*, Williams sought federal habeas relief on the same penalty-phase *Strickland* claim, among others. Two of his arguments are relevant here.

First, Williams argued that the state courts generally erred in their finding of no *Strickland* prejudice. *Williams v. Haley*, __ F.3d __, 2006 WL 3075635, at *24 (S.D. Ala. Oct. 30, 2006); (App. 103a-106a). The district court determined that Williams failed to establish a "reasonable probability" that the trial sentencer (*i.e.* Judge McRae) would have reached a different conclusion, largely because Judge McRae witnessed and considered the new evidence during the state post-conviction proceedings and concluded that his sentence would not have changed had the new evidence been presented at trial. App. 103a-104a.

The second claim serves as the impetus to this petition: Relying on *Tennard v. Dretke*, 542 U.S. 274 (2004), in which this Court held the Fifth Circuit wrongly denied a certificate of appealability, Williams argued "that the state courts erroneously required that the petitioner show a 'nexus' between the mitigating evidence and the murder." App. 103a-104a. The district court rejected this claim for two reasons. First, not only did *Dretke* fail to "clearly establish" a rule of law beyond whether a certificate of appealability is warranted in certain circumstances, 28 U.S.C. § 2254(d), *Dretke* had yet to be decided when the state courts made their decision in Williams's case. App. 103a-104a. Second, the underlying issue in *Dretke* was whether a "nexus

requirement" in the Texas special instructions scheme prevented the sentencing jury from *considering* relevant mitigation. App. 104a-105a. *Dretke* did not address the situation presented here; that is, whether a nexus requirement can assist the sentencer in determining the *weight* to be given a mitigating circumstance that is being considered. *Id.* (Petitioner further details the relevance of the Texas "special issues" line of cases *infra*, pp. 26-28.) The district court denied Williams's habeas petition outright. App. 45a-109a.

The court of appeals reversed on the penalty-phase ineffectiveness claim, ruling that the Alabama Court of Criminal Appeals's decision was an unreasonable application of *Strickland's* deficient performance and prejudice elements. App. at 18a-38a.[4]

To grant §2254(d) relief under *Strickland's* prejudice element (*i.e.* the sole target of this petition), the court of appeals latched on to Williams's "nexus" argument: "We conclude that the Alabama court's emphasis on the absence of a 'causal relationship' between Williams's mitigating evidence and the statutory aggravator reflects an unreasonable application of *Strickland*." App. 34a-35a. To find its "clearly established" law, the court

---

[4]The Eleventh Circuit's decision also reversed the federal district court's ruling that Williams's *Batson* claim was procedurally defaulted. App. at 38a-40a. The district court has subsequently filed an order considering and rejecting Williams' *Batson* claim on the merits. *Williams v. Haley*, 01-0777-CB-C, Doc. 78 (S.D. Ala. Oct. 20, 2008). Williams' motion to alter or amend that judgment, *see* Doc. 84, remains pending in the federal district court.

jettisoned Williams's reliance on *Dretke* and relied instead on this Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000). App. 34a-37a. According to the court of appeals, "[c]entral to the Court's holding in *Williams* was its conclusion that the Virginia Supreme Court failed to give sufficient weight to mitigating evidence that did not relate to the aggravating circumstance in the case-the petitioner's future dangerousness." App. 35a-36a. Applying its interpretation of *Williams's* "clearly established" precedent—*i.e.* that a state court must not only accept and consider mitigating evidence that does not extenuate the State's aggravating circumstance, it must give the evidence "sufficient weight"—the court held that

> Like the state court in [*Williams*], the Alabama court rested its prejudice determination on the fact that Williams's mitigating evidence did not undermine or rebut the evidence supporting the aggravating circumstance. . . . Thus, as in *Williams*, the court 'failed to evaluate the totality of the available mitigation evidence' in reweighing the aggravating and mitigating circumstances in this case. [citation omitted] This failure constitutes an unreasonable application of *Strickland*.

App. 36a-37a. The court denied the State's petition for rehearing *en banc* on November 13, 2008. App. 167a.

REASONS FOR GRANTING THE WRIT

In granting §2254 habeas relief, because the Alabama Court of Criminal Appeals attached "little"

weight to Williams's post-conviction mitigation evidence, the court of appeals crossed into territory this Court has historically reserved for the sentencer and state appellate courts. This Court has long distinguished between the outright exclusion of mitigating evidence and the weight it must be given:

- *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982): "The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."

- *Barclay v. Florida*, 463 U.S. 939, 961 n.2 (1983): "Neither of these cases [*Eddings* or *Lockett v. Ohio*, 438 U.S. 586 (1978)] establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all."

- *Harris v. Alabama*, 513 U.S. 504, 512 (1995)(citations and internal quotations omitted): "[T]he Constitution does not require a state to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer. To require that 'great weight' be given to the jury recommendation here . . . would offend these established principles and place within constitutional ambit micro-management tasks that properly rest within the State's discretion to administer its criminal justice system."

In blurring the distinction between excluding and weighing mitigating evidence, the court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). And the court's error is exacerbated because it occurred during a §2254 proceeding. *See Van Patten*, __ U.S. __, 128 S. Ct. 743; *Musladin*, 549 U.S. 70.

I. THE COURT OF APPEALS GRANTED §2254 RELIEF WITHOUT A BASIS IN "CLEARLY ESTABLISHED" FEDERAL LAW FROM THIS COURT.

While, in Petitioner's view, the court of appeals is wrong on the law—*i.e.* the constitution does *not* prohibit a sentencer or state appellate court from considering the extenuating nature of mitigating evidence when assigning weight—that is not the lower court's only error. Instead, the court of appeals' primary error, and the one that has warranted certiorari review in several cases of late, is that the court granted §2254 habeas relief without a case from this Court "clearly establish[ing],"28 U.S.C. §2254(d)(1), that state courts are barred from considering the extenuating nature of mitigating evidence when determining its weight during a *Strickland* analysis. *See, e.g.*, *Van Patten*, __ U.S. __, 128 S. Ct. 743 (2008)(reversing the grant of §2254 relief because no clearly established case law exists on the question of whether counsel's appearance by speaker phone violates the Sixth Amendment); *Musladin*, 549 U.S. 70 (2006)(reversing the grant of §2254 relief because no clearly established case law exists on the question of whether "spectator-conduct" can require reversal of a defendant's conviction).

Below, Petitioner first shows that this Court did not "clearly establish" such a rule in *Williams v. Taylor*, 529 U.S. 362 (2000), the case relied upon by the court of appeals. Petitioner then shows how the court of appeals' rule is inherently rejected by this Court's pre- and post-*Williams* precedent.

A. *WILLIAMS V. TAYLOR* DOES NOT "CLEARLY ESTABLISH" A RULE PRECLUDING A STATE COURT FROM CONSIDERING THE EXTENUATING NATURE OF MITIGATING EVIDENCE DURING ITS *STRICKLAND* ANALYSIS.

Again, this case arises from a state appellate court's determination of prejudice under *Strickland*. *Strickland* itself does not create guidelines on how mitigation evidence must be weighed; it simply establishes that mitigation evidence must be weighed against the State's aggravating evidence to determine whether a "reasonable probability" exists that the sentence "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. In fact, *Strickland* states that, as a general rule, "evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination." *Id.*

Here, both Judge McRae and the Alabama Court of Criminal Appeals considered the entire body of Williams's new mitigating evidence in their prejudice inquiries:

Weighing the evidence presented by

> Williams at the evidentiary hearing against the aggravating circumstances that were proven beyond a reasonable doubt at the penalty phase of the trial shows that trial counsel was not constitutionally ineffective. . . . There is no reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant a death sentence.

Williams, 782 So. 2d at 829; App. 138a-140a. Accordingly, the state courts' decisions were in no way "contrary to or an unreasonable application of" the law "clearly established" by *Strickland* itself. 28 U.S.C. §2254(d)(1).

To overcome this lack of "clearly established" caselaw to grant habeas relief, *see* 28 U.S.C. §2254(d)(1), the court of appeals latched onto the Court's decision in *Williams v. Taylor* for the proposition that, in applying *Strickland*, "the Virginia Supreme Court failed to give sufficient weight to mitigating evidence that did not relate to the aggravating circumstance in the case-the petitioner's future dangerousness." App. 35a-36a. According to the court of appeals, the Alabama Court of Criminal Appeals violated this principle when it assigned "little mitigation value" to Herbert Williams's new mitigation evidence because the evidence had no "causal relationship" with the purpose and manner of Williams's crime. App. 34a-37a. A review of the facts in *Williams*, however, shows that this Court did not "clearly establish" standards for assigning weight to particular types of mitigating circumstances in the midst of a

Strickland analysis.

In reversing the grant of state post-conviction relief to Terry Williams, the Virginia Supreme Court held that, to establish *Strickland* prejudice, a post-conviction petitioner must show both that (1) a "reasonable probability" exists that the petitioner's sentence would have been different if his new evidence had been presented at trial and (2) the petitioner's trial was "fundamentally unfair or unreliable" under *Lockhart v. Fretwell*, 506 U.S. 364 (1993). *Williams v. Warden*, 487 S.E.2d 194, 199-200 (Va. 1997). Applying this standard, the state supreme court held that the trial court improperly granted relief because the trial court adopted a *"per se* approach" of finding prejudice if any new mitigating evidence was found, regardless of whether petitioner's trial was unfair. *Id.* at 200.

This Court found fault with the state supreme court's decision for two reasons. First, the Court stated that attaching *Lockhart's* "fundamentally unfair or unreasonable" requirement onto *Strickland's* prejudice inquiry was an unreasonable application of *Strickland*. *Williams*, 529 U.S. at 397. Second, the Court disagreed that the state trial court had applied a "*per se* approach" to its weighing process; instead finding that the trial court properly considered the totality of the new mitigating evidence. *Id.* The error, according to this Court, lay with the state supreme court for (1) "fail[ing] to evaluate the totality of the available mitigation evidence," and (2) "fail[ing] even to mention the sole argument in mitigation that trial counsel did advance." *Id.* This failure to even consider the petitioner's new mitigation evidence/argument led to

the Court's only mention of weight: "The Virginia Supreme Court did not entertain that possibility [*i.e.* a jury might find Petitioner less morally culpable based on the new evidence]. It thus failed to accord appropriate weight to the body of mitigation evidence available to trial counsel." *Id.* In other words, because the state supreme court erred in its distinction between *per se* prejudice and prejudice under a "totality" of mitigation evidence, the state supreme court failed to consider the petitioner's new mitigation evidence.

Thus, to the extent *Williams* "clearly established" any law, it is only this: *Strickland's* prejudice inquiry (1) does not contain *Lockhart's* "fundamentally unfair or unreasonable" trial requirement and (2) requires consideration of the entire body of a petitioner's mitigating evidence, instead of a piecemeal or *per se* approach.

The state courts' application of *Strickland* met these requirements. Neither Judge McRae nor the Alabama Court of Criminal Appeals applied *Lockhart's* "fundamentally unfair" trial rule to Williams's *Strickland* claim, and both considered "the totality" of Williams's new mitigation evidence and his arguments in determining prejudice. *See Williams*, 782 So. 2d at 821-29; App. 122a-140a. Accordingly, the Eleventh Circuit erred in holding that the state courts unreasonably applied the "clearly established" *Strickland* principles adopted in *Williams v. Taylor.* And to the extent that Respondent will claim that the Court's one mention of "sufficient weight" in *Williams*, *id.* at 397, clearly established a constitutional weight requirement, the pre- and post-*Williams* cases outlined below dispel

that notion.

B. OTHER PRECEDENT FROM THIS COURT DISPELS A "CLEARLY ESTABLISHED" CONSTITUTIONAL WEIGHT REQUIREMENT.

That this Court has not clearly established a requirement that sentencers and state appellate courts turn a blind eye to the extenuating value of mitigating evidence, or that they are required to assign any particular amount of weight to pieces of mitigating evidence, is proved by other precedent from this Court. For example, in *Harris v. Alabama*, 513 U.S. at 512, this Court rejected a claim that Alabama courts must give "great weight" to the mitigating effect of a jury's recommended sentence. According to the Court, "settled is the corollary that the Constitution does not require a state to ascribe *any specific weight* to particular factors, either in aggravation or mitigation, to be considered by the sentencer." *Id.* (emphasis added.) Thus, "[t]o require that 'great weight' be given to the jury recommendation here . . . would offend these established principles and place within constitutional ambit micromanagement tasks that properly rest within the State's discretion to administer its criminal justice system." *Id.*

Petitioner has cited other cases establishing the same rule; that is, while the Constitution requires all relevant mitigating evidence be considered, it does not require a specific weight be assigned. *See supra* at pp. 16-17. Instead of rehashing the same citations again, Petitioner briefly outlines two lines of cases—both of which include pre- and post-*Williams v. Taylor* decisions—that put the exclusion versus

weight dichotomy into practice.

1. California's "Factor (k)"

The Court has dealt with sentencers and state courts considering the "extenuating" nature of mitigating evidence in three cases arising from California's "Factor (k)" instruction. *See Ayers v. Belmontes*, 549 U.S. 7 (2006); *Brown v. Payton*, 544 U.S. 133 (2003); *Boyde v. California*, 494 U.S. 370 (1990). Before 1983, California's instructions for considering mitigating evidence contained the following "catch-all" provision:

> You shall consider, take into account and be guided by the following factors, if applicable:
> . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

California Jury Instructions, Criminal 8.85(k) (as quoted in *Boyde v. California*, 494 U.S. 370, 373 n.1 (1990)). California juries were instructed that a "circumstance which extenuates" under Factor (k) meant a mitigating circumstance that "lessen[s] the seriousness of a crime as by giving an excuse." *Boyde*, 494 U.S. at 381.

On every occasion, this Court has upheld challenges against instructions under "Factor (k)." In *Boyde*, the Court rejected Petitioner's argument that Factor (k) "precluded the jury from evaluating the 'absolute weight' of the aggravating circumstances" and determining whether, "in light of all the aggravating and mitigating evidence, death was the appropriate penalty." 494 U.S. at 376. The

Court held that, under the Factor (k) instruction, the jury was properly allowed to *consider* all of Petitioner's mitigating background evidence and "the requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Id.* at 377, 386 (quoting *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990)).

In *Payton*, the Court reversed the granting of §2254 habeas relief when a prosecutor wrongly argued that Factor (k) precluded consideration of the defendant's post-crime behavior because it did not extenuate the defendant's crime. *See* 544 U.S. 133. As in *Boyde*, the Court predicated its opinion on the fact that the jury was allowed to *consider* all of the defendant's evidence.

In *Ayers,* the Court again upheld use of the Factor (k) instruction because the jury was not precluded from considering evidence of the defendant's post-crime religious conversion based on its lack of extenuating qualities. *See* 549 U.S. 7 (2006). The Court first noted 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." *Id.* at 13 (emphasis added). The Court then extensively quoted the prosecutor's argument to note that it was permissibly targeted at giving the conversion evidence little weight, not outright exclusion:

> Nothing the prosecutor said would have convinced the jury that it was forbidden from even considering respondent's religious

> conversion, though surely the jury could discount it; and nothing the prosecutor said would have led the jury to think it could not consider respondent's future potential, especially since he indicated that this is exactly what the jury had "to weigh" in its deliberation

Id at 17-18. Notably, the dissent's focus was not on the amount of weight given to non-extenuating mitigation evidence, but a concern that a Factor (k) instruction made it "much more likely than not that the jury believed that the law forbade it from giving that evidence any weight at all." *Id.* at 39 (Stevens, J. dissenting).

Petitioner's point is that each of the Court's Factor (k) cases, two of which arose under AEDPA after *Williams v. Taylor*, turned on whether non-extenuating mitigating evidence was allowed to be considered *at all.* Each opinion, in majority and dissent, assumed that a sentencer could assign whatever weight it pleased to non-extenuating evidence, as long as the sentencer was allowed to consider the evidence.

2. Texas's "Special Issues" Instructions

Further evidence of this exclusion versus weight dichotomy lies within the ebb-and-flow of the Court's review of Texas's "special issues" instructions. Unlike Alabama's weighing process, Texas submits "special issues" questions to a sentencing jury to determine whether the death penalty is warranted. *See* Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon 2006). Prior to a 1991 revision of the Texas Code, these questions opened the possibility that certain

types of mitigating evidence might not be considered by the jury; thus spawning a string of cases in this Court.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), the Court remanded for a new sentencing hearing due to "the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background," *id.* at 328.

In *Graham v. Collins*, 506 U.S. 461 (1993), the Court affirmed Petitioner's death sentence because "[Petitioner] indisputably was permitted to place all of his [mitigating] evidence before the jury and both of [Petitioner's] lawyers vigorously urged the jury to answer 'no' to the special issues based on this evidence." *Id.* at 475. In distinguishing its previous cases, including *Lockett, Eddings,* and *Penry I*, the Court noted that, "[i]n those cases, the constitutional defect lay in the fact that relevant mitigating evidence was placed beyond the effective reach of the sentencer." *Id.*

In *Johnson v. Texas*, 509 U.S. 350 (1993), the Court affirmed Petitioner's death sentence because, under the facts of Petitioner's case, "there is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant [mitigating] aspects of Petitioner's youth" due to the special issues instructions. *Id.* at 368.

Finally, in *Brewer v. Quarterman*, 550 U.S. 286, 127 S.Ct. 1706 (2007) and *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S.Ct. 1654 (2007), which were released on the same day, the Court reversed Petitioner's death sentence because the

special issues instructions allowed Petitioner's mitigating evidence to be used as a "two-edged sword" that affirmatively answered one of the special questions warranting a death sentence, without allowing the jury to consider the mitigating evidence as a reason to reject the death penalty by "weigh[ing] such evidence in its calculus of deciding whether a defendant is truly deserving of death." *Brewer*, 550 U.S. at __; 127 S.Ct. at 1714.

Again, Petitioner's point in raising these cases—two of which post-date *Williams v. Taylor*—is to show the continuous dividing line between (1) preventing the sentencer from considering mitigating evidence and (2) the weight mitigating evidence is to be given. Regardless of whether the Court granted relief (*Penry I*, *Brewer*, and *Abdul-Kabir*) or denied it (*Graham* and *Johnson*), the result in the *Penry*-line of cases always turned on whether the sentencer was "permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence" or was instead "forbidden from doing so by statute or a judicial interpretation of a statute." *Abdul-Kabir*, 550 U.S. at __; 127 S.Ct. at 1675.

Not once—even after *Williams v. Taylor* was released—did the Court hint that reversal was a possibility if the sentencer was allowed to consider the full body of mitigating evidence and simply assigned certain pieces a lower weight. Nor does it appear this point was even argued. The most logical inference to be drawn is that *Williams v. Taylor* never changed the long-standing rule of this Court: "The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give

it no weight by excluding such evidence from their consideration." *Eddings*, 455 U.S. at 114-15.

C. THE COURT OF APPEALS'S DECISION CONFLICTS WITH THIS COURT'S RECENT §2254 REVERSALS.

As shown above, the Court has not "clearly established," 28 U.S.C. §2254(d)(1), a rule that forbids state appellate courts from taking into account the extenuating value of newly-presented mitigating evidence when determining whether that evidence establishes *Strickland* prejudice.

The Court has recently reversed two cases, one summarily, in which a court of appeals granted habeas relief in the absence of "clearly established" caselaw from this Court. *See, e.g. Van Patten*, __ U.S. __, 128 S. Ct. 743 (finding that no clearly established case law exists on the question of whether counsel's appearance by speaker phone violates the Sixth Amendment); *Musladin*, 549 U.S. 70 (finding no "clearly established Federal law" on the question of whether "spectator-conduct" can require reversal of a defendant's conviction). In several more cases, the Court has granted cert, vacated judgment, and remanded for further consideration in light of *Musladin's* holding. *See, e.g.*, *Hudson v. Spisak*, __ U.S. __, 128 S.Ct. 373 (2007); *Patrick v. Smith*, __ U.S. __, 127 U.S. 2126 (2007); *Knowles v. Mirzayance*, 549 U.S. 1199 (2007); *Miller v. Rodriguez*, 549 U.S. 1163 (2007). The Court is currently considering one of the *Musladin* GVR's after remand. *See Knowles v. Mirzayance*, No. 07-1315.

The Court's message is clear: Courts of appeals

cannot grant §2254 habeas relief without a basis in "clearly established" caselaw from this Court. *See* 28 U.S.C. §2254(d)(1). Because that is what happened here, certiorari review is warranted.

II. THIS CASE IS AN APPROPRIATE VEHICLE TO ANSWER AN IMPORTANT FEDERAL QUESTION.

Petitioner intentionally omits the fact-intensive question of the court of appeals' ruling under *Strickland's* deficient performance element. Petitioner does so to limit this petition to one, outcome determinative question: Has this Court "clearly established" a rule that bars state appellate courts from giving, during a *Strickland* prejudice analysis, "little mitigation value" to newly-presented mitigating evidence that fails to extenuate the facts of an inmate's crime? This question is outcome-determinative because, if the Court answers "no," the court of appeals' decision is due to be reversed because the state appellate court properly applied the *Strickland* reweighing process in determining that Williams failed to prove prejudice. *See* 28 U.S.C. §2254(d)(1). If the Court answers "yes," the court of appeals is due to be affirmed.

The question presented is worthy of certiorari review for two reasons. First, as shown in *Musladin* and *Van Patten*, enforcing the standards set forth by AEDPA is a necessary and important function of the Court. Second, states in the Eleventh Circuit are now faced with binding precedent that their courts must not only allow and consider new mitigating evidence during post-conviction proceedings, they must afford the new evidence a "sufficient weight" to

later be determined by a federal court under an amorphous standard. App. 34a-38a.

"Federalizing" the weighing process—that is, having federal courts review the process of assigning a particular weight to mitigating evidence during a post-conviction *Strickland* review—should be rejected here for the same reason the Court rejected a "great weight" requirement for jury recommendations in *Harris*: It "place[s] within constitutional ambit micromanagement tasks that properly rest within the State's discretion to administer its criminal justice system." *Harris*, 513 U.S. at 512. No two cases are alike, and the weight to be assigned any piece of aggravating and mitigating evidence will necessarily vary based on the facts of a particular case. Sentencers and state appellate courts should be given the freedom to conduct the weighing process on the facts of each individual case, without fear of federal second-guessing under AEDPA.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,
Troy King
Attorney General

Corey L. Maze
Solicitor General

J. Clayton Crenshaw*
Assistant Attorney General

*Counsel of Record
STATE OF ALABAMA
Office of the Atty. General
500 Dexter Avenue
Montgomery, AL 36130
(334) 242-7300

February 11, 2009