No. ______________

IN THE
SUPREME COURT OF THE UNITED STATES

DEVIN ALLEN BENNETT, *Petitioner,*

v.

MISSISSIPPI, *Respondent*

ON WRIT OF CERTIORARI TO THE
MISSISSIPPI SUPREME COURT
PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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THIS IS A CAPITAL CASE
NO EXECUTION DATE PENDING

QUESTION PRESENTED

Devin Bennett's trial counsel counted on a manslaughter plea agreement that fell apart just days before trial when Bennett refused to say he harmed his son intentionally. Because trial counsel was banking on either a plea agreement or an acquittal, counsel conducted no mitigation investigation or preparation for the sentencing phase of trial. Given counsel's admitted deficiency, the jury that sentenced Bennett to death never had the opportunity to learn about his childhood with parents who were addicts, mentally ill, and violent, and Bennett's own mental health issues and stints in homeless shelters. In state post-conviction, the Mississippi Supreme Court held that, under *Strickland v. Washington,* it is "arguable that counsel fell below the standard of a minimally competent attorney." Even so, when assessing prejudice, the Mississippi Supreme Court continued its disturbing trend of discounting mitigation unearthed in post-conviction relating to the defendant's reduced moral culpability simply because the court could imagine some downside to that evidence.

The question presented is:

Whether trial counsel's failure to investigate, uncover, and present evidence of defendant's reduced moral culpability may be categorically discounted based on conjecture that a jury "might have" concluded the evidence was "double-edged," thereby foreclosing a conclusion that the defendant was prejudiced?

RELATED PROCEEDINGS

Bennett v. State, 933 So. 2d 930, 934 (Miss. 2006) (direct appeal)

Bennett v. State, 990 So. 2d 155 (Miss. 2008) (granting post-conviction relief)

Bennett v. State, 383 So. 3d 1184 (Miss. 2023) (denying post-conviction relief)

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Devin Allen Bennett, a state capital inmate, respectfully requests that the Court grant a writ of certiorari to review the decision of the Supreme Court of the State of Mississippi.

OPINIONS BELOW AND APPENDIX

The order of the Mississippi Supreme Court affirming the denial of post-conviction relief was entered on November 16, 2023 and is attached as Appendix A. It is published at *Bennett v. State*, 383 So. 3d 1184 (Miss. 2023).

The order of the trial court denying post-conviction relief was entered on April 1, 2021 and is attached as Appendix B. It is unreported.

The appellate briefing from the denial of post-conviction relief is attached as Appendix C. Appendix C references the applicable record on appeal.

The order of the Mississippi Supreme Court granting post-conviction relief in the form of an evidentiary hearing was entered on August 28, 2008 and is attached as Appendix D. It is published at *Bennett v. State*, 990 So. 2d 155 (Miss. 2008).

The Mississippi Supreme Court's denial of rehearing and issuance of the mandate is attached as Appendix E. Both are unreported.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Mississippi Supreme Court on the basis of 28 U.S.C. Section 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves a defendant's constitutional right to the effective assistance of counsel under the Sixth Amendment, which provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence."

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides: "No State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Introduction

The sentencing jury in this capital case never heard substantial evidence about Devin Bennett's considerable abuse and neglect as a child, his parents' alcohol and drug abuse, episodes of sexual abuse, his stints in homeless shelters, and his own mental health conditions. Despite obvious red flags, trial counsel admittedly failed to investigate Bennett's abusive childhood and therefore could not present evidence of this kind at sentencing. The Mississippi Supreme Court recognized trial counsel's deficient performance and expressly held that "a jury might have taken pity on Bennett" and chosen to spare his life. Pet. App. 179a. However, without any support, the lower court also conjured another possibility: that "Bennett's proposed additional evidence would have ruled out any chance of success" due to "its double-edged

nature." Pet. App. 179a, 183a.

It is difficult to imagine how a unanimous jury could have concluded that Bennett deserves death because he suffered through a childhood plagued by abuse and violence, drugs and alcohol, homeless shelters, and mental illness. But having decided that the jury "might have" reacted in such a way, because "abuse begets abuse" under the "tropes of popular psychology," the Mississippi Supreme Court refused to find "prejudice" resulting from counsel's complete failure to investigate mitigating evidence. Pet. App. 182a. The decision of the court is grossly wrong, but it also is more broadly significant.

First, the Mississippi Supreme Court's decision falls out of step with this Court's precedent. This Court has carefully scrutinized representation in capital cases, finding reversible error where trial attorneys have failed to uncover and present powerful mitigating evidence relating to a defendant's reduced moral culpability. *Williams v. Taylor,* 529 U.S. 362 (2000); *Wiggins v. Smith,* 539 U.S. 510 (2003); *Rompilla v. Beard,* 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009); *Sears v. Upton*, 561 U.S. 945 (2010); *Andrus v. Texas*, 140 S. Ct. 1875, 1882-83 (2020).

Despite these decisions, the Mississippi Supreme Court has adhered to an approach denying Sixth Amendment relief in cases, such as the present one, involving acknowledged deficiencies in counsel's punishment-phase performance. According to the Mississippi Supreme Court, the most substantial forms of mitigating evidence—such as evidence of psychiatric illness, brain damage, and/or childhood abuse—are

always "double-edged." Therefore, in Mississippi, defense counsel's unprofessional failure to investigate and present such evidence at the punishment phase is unlikely to ever be prejudicial.

Nothing in this Court's decisions suggests that evidence of reduced moral culpability should be discounted in the prejudice calculus based on its purported "aggravating" aspects. This Court has instead insisted that such mitigating evidence should be evaluated in light of the aggravating evidence of a defendant's criminal actions. In other words, this Court has never counted a defendant's impairments themselves as "aggravating." This Court, in fact, once strongly suggested that "due process of law would require that [a] jury's decision to impose death be set aside" if a State had "attached the 'aggravating' label to … conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness." *Zant v. Stephens,* 462 U.S. 862, 885 (1983) (citations omitted).

Second, the Mississippi Supreme Court's decision is wrong because there is no reasonable basis for the conjecture that Bennett's mitigation evidence could have been perceived as only aggravating. In fact, the "prejudice" component of *Strickland v. Washington,* 466 U.S. 668 (1984) does not require more than what the Mississippi Supreme Court explicitly recognized: that "it is possible a jury might have taken pity on Bennett given his claimed history of childhood abuse." Pet. App. 179a. That alone is *Strickland* prejudice. Bennett was not required to show that "the jury" in its entirety would have been so moved; it is sufficient that, had this evidence had been placed "on the mitigating side of the scale, there is a reasonable probability that at

least one juror would have struck a different balance." *Wiggins,* 539 U.S. at 537; *see Thornell v. Jones*, 144 S. Ct. 1302, 1310 (2024) (discussing the prejudice standard).

What is more is that, in Mississippi, aggravators are set by statute. Miss. Code Ann. § 99-19-101. The statutory aggravating circumstances for a jury to consider all involve circumstances that occurred at the time of the crime—not in the future. *Id.*; *Balfour v. State*, 598 So. 2d 731, 748 (Miss. 1992) ("Aggravating circumstances are to be limited to the eight factors enumerated in Miss. Code Ann. § 99–19–101 … While some jurisdictions *do* provide for propensity for future dangerousness as a statutory aggravating factor, such is not the case in Mississippi jurisprudence."). The jury also may not consider diminished moral culpability as an aggravator. *Id.* It is thus impossible for mitigation evidence, including the evidence presented by Bennett in post-conviction, to be aggravating or have any "double edged" impact.[1]

Third, the Mississippi Supreme Court's decision also is more broadly significant. It reflects a divergence by some courts on how to view a failure to investigate and present mitigation evidence, and particularly evidence that conceivably might be viewed by some jurors in a negative light—a characterization that is possible for virtually *any* evidence. In Mississippi, evidence that "might have" an aggravating effect essentially forecloses a finding of *Strickland* prejudice even with counsel's admitted failure to investigate. Pet. App. 179a. The Mississippi

[1] To assume that the jury would disregard the law and the Court's instructions and include an aggravator outside the statute is in contravention of Mississippi jurisprudence. Mississippi courts presume that jurors follow the trial court's instructions. "To presume otherwise would render the jury system inoperable." *Galloway v. State*, 374 So. 3d 452, 491 (Miss. 2023) (citing *Johnson v. State*, 475 So .2d 1136, 1142 (Miss. 1985)).

Supreme Court also applies the label "double-edged" in a knee-jerk manner, even though reasonable people could disagree as to how much weight that evidence should be given. *Compare Garcia v. State*, 356 So. 3d 101, 114 (Miss. 2023) (the Mississippi Supreme Court foreclosing a finding of prejudice by branding fetal alcohol syndrome (FAS) as "double-edged") *with Rompilla*, 545 U.S. at 393 (unpresented brain damage caused by fetal alcohol syndrome is "sufficient to undermine confidence in the outcome" of jury's deliberations).

Like the Mississippi Supreme Court, a few other courts have expressed a similar conceptual error. *See, e.g., Bowie v. Branker,* 512 F.3d 112, 121 (4th Cir.), *cert. denied*, 128 S. Ct. 2972 (2008) ("mitigating evidence … should be discounted, under our precedent," if "double-edged"); *Harris v. Cockrell,* 313 F.3d 238, 244 (5th Cir. 2002) ("The failure to present such double-edged evidence is not prejudicial."). This error appears attributable to the old Texas capital sentencing statute, under which all mitigating evidence was filtered solely through the lens of the future dangerousness special issue. Under that statute, jurors were not permitted to consider mitigating evidence apart from its tendency to disprove future dangerousness. Hence, mitigating evidence of psychiatric and mental impairments was "double-edged" in the sense that it offered a rational basis for a life sentence, yet could only function to support the state's case for death in light of the statute's exclusive focus on dangerousness. Under the post-1991 Texas statute, jurors are required to consider mitigation apart from dangerousness.

Unlike Mississippi, many courts correctly view mitigating evidence for what it

is: *mitigation*. These courts thus do not dismiss the potential significance of mitigating evidence simply because it might be characterized as "double-edged." Rather, consistent with clearly established precedent of this Court, these courts recognize that mitigation evidence generally *explains* violence that already has been found, rather than negating the possibility that such violence might occur. *See, e.g.*, *Blystone v. Horn,* 664 F.3d 397, 421-22 (3d Cir. 2011) (finding ineffective assistance based on trial counsel's failure to present mitigation evidence); *Stevens v. McBride,* 489 F.3d 883, 897 (7th Cir. 2007) (same); *Ainsworth v. Woodford,* 268 F.3d 868, 878 (9th Cir. 2001) (same); *Wilson v. Sirmons,* 536 F.3d 1064, 1096 (10th Cir. 2008) (same).

This Court should grant certiorari to declare that the Mississippi Supreme Court's categorical approach to branding mitigating evidence as "double-edged" is constitutionally flawed.

B. Factual Background

1. Bennett's child and early adult life

Devin Bennett experienced considerable abuse and neglect as a child. He was physically and emotionally abused by authority figures in his life and left to fend for himself in a world filled with sex, drugs, alcohol, homeless shelters, and violence. Bennett was also sexually assaulted by other individuals during this vulnerable period of late childhood/early adolescence. Pet. App. 47a.

Bennett grew up around Fort Lauderdale, Florida. Pet. App. 48a. His parents, Dale and Debbie, had severe substance abuse problems. Pet. App. 48a. Bennett's

parents' addictions to drugs and alcohol worsened and were "chronic" and "out of control" by the time Bennett was born. Pet. App. 48a. Bennett's mother also used drugs and alcohol during pregnancy. Pet. App. 48a. Bennett's parents divorced in less than two years of marriage, and within one year of Bennett's birth. Pet. App. 48a.

Bennett's parents gave him drugs as early as age nine, and his father gave him marijuana laced with crack-cocaine when he was fifteen. Pet. App. 48a-49a. Bennett also remembers his dad trying to rape his mom and getting arrested when they tried to reunite. Pet. App. 49a. When Bennett was a small child, his grandmother and aunt found him in the kitchen with a pair of scissors or a knife—trying to feed himself by cutting into a loaf of bread— while his mother was unresponsive in bed with drug paraphernalia on the bedside table. Pet. App. 48a. At age five, Bennett found his mother passed out with a needle in her arm. Pet. App. 48a.

Bennett's father remained on drugs and alcohol his entire life, except for brief periods in rehab. Pet. App. 49a. After his arrest for his fourth DUI, Bennett's father was arrested for an outstanding warrant and kept in jail for fifteen days. Pet. App. 49a. Two days later, the Florida Department of Children and Family Services received allegations of neglect. Bennett was forced to choose another place to live until his father was released from jail. Pet. App. 49a.

Bennett's mother was very promiscuous and unable to abstain from her addictions. Pet. App. 49a. When Bennett was twelve years old, his mother's promiscuity and addiction caught up with her when police arrested her in the house

of another man for possession of crack cocaine. Pet. App. 49a. Bennett also recalls his mother having sex with men in front of him when he was young. Pet. App. 49a.

Bennett also discussed with Dr. Shawn Agharkar, a forensic psychiatrist retained in post-conviction, about being sexually abused when young. Pet. App. 49a. A babysitter touched him sexually and a stranger fondled him when he was six or seven years old. Pet. App. 49a. These incidents left Bennett justifiably feeling insecure and unsafe. Pet. App. 49a.

Bennett's childhood friends and family also remember his home life being unsafe and unstable. Pet. App. 50a. Bennett's uncle described his childhood as being "punctuated by frequent moves, exposure to drugs, alcohol and the social element associated with that life style." Pet. App. 50a. It was not unusual for Bennett to have bruises or cigarette burns on his arms when living with his father. Pet. App. 50a. Bennett began running away at age nine, and he was often unkempt with unclean and torn clothing. Pet. App. 50a. In 1992, Bennett was admitted to a residential reform school, Sheridan House Family Ministries, for his emotional problems, and he lived there until 1994. Pet. App. 50a. As a teenager, he experienced periods of homelessness and was in and out of treatment programs. Pet. App. 50a. He dropped out of school when he was 15 or 16, only finishing the ninth grade. Pet. App. 50a.

The only life Bennett knew was the one he was taught: to self-medicate with alcohol and illicit drugs. Pet. App. 50a-51a. Bennett's irritability and impulsivity described by family and friends also led to his hospitalization at a behavioral health facility when he was eight or nine. Pet. App. 51a. Bennett's background and conduct

aligns with Dr. Agharkar's diagnosis of bipolar disorder—a mental health condition that can manifest in episodes of impulsivity and irritability. Pet. App. 51a. Also, both of Bennett's parents were diagnosed with bipolar disorder, and family history is a strong risk factor for the disorder. Pet. App. 51a.

The trauma Bennett suffered fueled his emotional lability and irritability, acting as a "catalyst" for someone already suffering from a mental health condition. Pet. App. 51a. The resulting complex PTSD causes "significant impairment in personal, family, social, educational, occupational or other important areas of functioning." Pet. App. 51a. As Dr. Agharkar opined, Bennett's bipolar disorder and complex PTSD existed during his childhood and at the time of his son's death—they were a "contributing factor to [his] irritability and impulsivity around the time of the alleged crime." Pet. App. 51a-52a.

Despite Bennett's early life obstacles and trauma impacting his developing brain, he developed friends and family who would have testified on his behalf. Bennett's first cousin, Jennifer Clukey, would have testified to his "struggle[] to overcome the manner in which he was raised." Pet. App. 52a. Childhood friend Kara Gialluca would have testified to how Bennett would jump a brick wall surrounding her apartment complex to get away from his parents' physical abuse, and, even despite his rough upbringing, Bennett still tried to make friends. Pet. App. 52a. Bennett's friend Gina Degregorio stated that he was a "good hearted guy" who "had a lot of problems" but "was trying to straighten his life out." Pet. App. 52a.

These witnesses also agree that Bennett loved his son, Brandon, and Bennett was very excited to become a father. Pet. App. 52a. Clukey said that Bennett "was extremely attentive to [Brandon's] needs and beamed with pride." Pet. App. 52a. Bennett's cousin Justin remembered him to be "a very caring and loving father." Pet. App. 52a. Hector Pabon observed that Bennett was "deeply hurt by Brandon's death" and "would just start crying." Pet. App. 52a.

This evidence adds up to a compelling mitigation case under this Court's precedent. As explained below, however, Bennett's counsel never investigated these issues before sentencing, and the jury thus never heard any of this evidence before making a life-or-death decision.

2. The crime, trial, and direct appeal

Bennett was indicted for the death of his two-month-old son. Shortly before his capital murder trial was set to begin, Bennett appeared in court to accept the State's offer to plead guilty to the lesser included charge of manslaughter with a sentence recommendation of 20 years. *Bennett v. State*, 933 So. 2d 930, 941 (Miss. 2006). The plea agreement fell apart when Bennett refused to admit he harmed his son intentionally. *Id.* Bennett was then tried for and convicted of capital murder for the death of his son. *Id.* at 934-37 (Miss. 2006).

Bennett's jury heard astonishingly scarce mitigation evidence before sentencing him to death. Although Bennett's trial counsel had practiced law for thirty years, he had never tried a capital murder case and had received no training in death penalty representation. Pet. App. 53a. Counsel's inexperience was not the only issue

though. Trial counsel concedes that he spent no time preparing for the sentencing phase of trial or investigating potential mitigation witnesses or evidence. Pet. App. 53a. Counsel's timesheet supports that assessment. Pet. App. 53a. According to trial counsel, he did no mitigation investigation because he counted on a plea agreement or an acquittal. Pet. App. 53a.

As a result of having conducted no mitigation investigation, and thus no preparation for sentencing, counsel was forced to act at the last minute and call the only witnesses available: the spectators already in the courtroom. These were Bennett's father, Brandon's mother (Yalanda), and Bennett himself. Pet. App. 53a-54a. The testimony from Bennett's father and Yalanda was succinct, and trial counsel did not prepare them for trial. Pet. App. 54a. Counsel elicited no specific instances or details of Bennett's childhood, his parents' substance abuse, or Bennett's own addictions and mental health issues. Nor did counsel elicit any other mitigating information that would inspire compassion from jurors and explain the influences in Bennett's life that converged in the years, days, and hours leading up to the reason Bennett was on trial for capital murder.

Because trial counsel had no witnesses to call during the sentencing phase of trial, aside from those already in the courtroom, Bennett presented the most testimony. Pet. App. 54a. Trial counsel also did not prepare Bennett to testify. Bennett accepted fault for Brandon's death but reiterated he did not harm his son intentionally. Pet. App. 54a. Bennett claimed that he wanted to be put to death and that his life was over. Pet. App. 54a. Trial counsel presented no further evidence and

called no other witnesses. Pet. App. 54a. Instead of counsel's closing argument being about Bennett and his life story, counsel refashioned the closing argument and made it about himself: "I would give anything to know what I did so wrong that would make you think that this man killed his child intentionally." Pet. App. 54a; *see also* Pet. App. 64a (during the opening argument at sentencing, counsel argued: "I didn't think the appropriate sentence was capital murder … I believe in my client. I still believe in him. You don't. I'm sorry … I think you've made a mistake.").

Because trial counsel admittedly spent no time preparing for the sentencing phase of trial, or investigating potential mitigation witnesses and evidence, the jury saw Bennett only as a "member[ ] of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." *Woodson*, 428 U.S. at 304. Bennett was sentenced to death, and the Mississippi Supreme Court affirmed on direct appeal.

3. State post-conviction proceedings

A Petition for Post-Conviction Relief ("PCR") was filed in 2007. Pet. App. 29a. Bennett presented affidavits showing that his trial counsel failed to investigate, inter alia, his significant substance-abuse history, troubled childhood, and mood disorders. Pet. App. 29a. The affiants who filed the affidavits in post-conviction attested to Bennett's "long history of psychiatric and drug-related treatment," "mental disorders due to his traumatic childhood," "substance-abuse history and its behavioral impact," and "his relationship with his son." Pet. App. 29a.

The Mississippi Supreme Court granted leave to file a PCR petition in the trial court after finding a substantial showing of ineffective assistance of counsel during

the sentencing phase of trial. *Bennett v. State*, 990 So. 2d 155, 162 (Miss. 2008). The court recognized that "[t]he record in this case discloses no evidence of premeditation. Nor is there evidence that Bennett abused his son in any way prior to the incident which led to his death." *Id.*

In circuit court, PCR counsel presented evidence telling Bennett's life story. That evidence includes a psychosocial timeline based on Bennett's school records, medical records, social services records, arrest records, and mental health records. Pet. App. 32a. It chronicles Bennett's childhood behavior, school conduct, medical history, substance abuse, arrest record, and the abusive and violent family background he experienced. Pet. App. 32a. As discussed, PCR counsel also retained psychiatric expert Dr. Bhushan Agharkar, a forensic psychiatrist, who prepared two reports based on separate evaluations. Pet. App. 32a. Dr. Agharkar diagnosed Bennett with bipolar disorder, complex post-traumatic stress disorder (PTSD), and polysubstance dependence.[2] Pet. App. 32a.

The circuit court held a PCR evidentiary hearing in March 2021. Pet. App. 31a. (circuit court commenting that the "nine people [on the Mississippi Supreme Court] who probably never tried many cases in their life somehow found sufficient that we're going to have a hearing"); *id.* at p. 43 ("[L]et me go on ahead and be frank. The Supreme Court said I've only got to look at a few things, and that's all I'm going to look at."). The trial court denied post-conviction relief immediately after the hearing and, a month later, it issued its written order denying post-conviction relief. Pet. App.

[2] Dr. Robert Storer, a forensic psychologist, also conducted an evaluation and submitted a report to the court. Pet. App. 30a.

31a; Pet. App. 12a-16a. The order consists of four substantive pages—almost half of which is a quotation from the initial order directing there be a hearing. Pet. App. 12a-16a. With no legal analysis and citing only *Strickland*, the circuit court found that trial counsel was "constitutionally effective." Pet. App. 12a-16a.

The Mississippi Supreme Court affirmed after finding no *Strickland* prejudice because a jury "might have" concluded that Bennett's mitigation evidence was "double-edged." Pet. App. 158a-183a.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari Because The Mississippi Supreme Court's Rule That Mitigation Evidence Should Be Discounted In Evaluating Prejudice Under *Strickland* If The Evidence Might Be Considered "Double-Edged" Conflicts With This Court's Clearly Established Precedent.

The decision in this case is wrong and, if not addressed by the Court, could allow the execution of Devin Bennett before he has had a full and fair opportunity to present compelling, available evidence to a jury on why the death penalty is inappropriate in his case. Just as important, the decision raises fundamental questions about the nature of mitigating evidence and how lower courts should evaluate the significance of a failure by counsel to investigate and present available mitigation evidence.

The first issue in any case challenging the effectiveness of counsel is whether counsel's performance was deficient. *Strickland,* 466 U.S. at 687. In this case, however, the Mississippi Supreme Court's view of the significance of the mitigating evidence at issue—which the court addressed in its analysis of the "prejudice" prong

of *Strickland*—is integral to its evaluation of whether counsel's undisputed failure to investigate and present that evidence constituted deficient performance. As a result, it is essential to review this Court's precedents on the nature and significance of mitigating evidence, to compare the standards articulated in those cases in contrast with Mississippi's view of the significance of Bennett's childhood and early adult life, and to compare how other lower courts have assessed the significance of counsel's failure to investigate and present available mitigating evidence.

A. In Upholding the Constitutionality of the Death Penalty, This Court Has Emphasized the Critical Role of Mitigation Evidence.

"Where life itself is what hangs in the balance, a fine precision in the process must be insisted upon." *Lockett v. Ohio*, 438 U.S. 586, 620 (1978) (Marshall, J., concurring). This Court has made clear that the presentation of mitigating evidence during a capital sentencing proceeding is absolutely essential to ensure that a defendant's sentence is adequately reliable—which is of particular concern where the sentence is death. *See, e.g., id.* at 604.

"As a practical matter, the defendant probably has little or no chance of avoiding the death sentence unless the defense counsel gives the jury something to counter both the horror of the crime and the limited information the prosecution has introduced about the defendant." Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 Am. J. Crim. L. 359, 364 (1997). Indeed, this Court has explained that it is because of "the need for reliability in the determination that death is the appropriate punishment" that the sentencing process must permit consideration of the "character and record of the

individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina,* 428 U.S. 280, 304-05 (1976); *Roberts v. Louisiana,* 431 U.S. 633, 637 (1977); *Jurek v. Texas,* 428 U.S. 262, 271-74 (1976); *Gregg v. Georgia,* 428 U.S. 153, 189-90 & n.38 (1976).

Such evidence is relevant because it can help explain the defendant and his actions. It creates a complete picture of a flawed and complicated human, to which the jury, in all its complex humanity, can react. Thus, deeply embedded in this Court's jurisprudence is the principle that "punishment should be directly related to the personal culpability of the criminal defendant" and that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original); *see also Lockett,* 438 U.S. at 604 (explaining that mitigation evidence is any evidence that might serve "as a basis for a sentence less than death"); *Kansas v. Carr*, 577 U.S. 108, 119 (2016) ("Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not.").

The prejudice analysis in this Court's Sixth Amendment cases reflects this understanding of the nature and purpose of mitigation evidence, and gives force to "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Brown,*

479 U.S. at 545 (O'Connor, J., concurring). Thus, in a series of cases, this Court has held that evidence showing that the defendant was subject to severe abuse as a child is mitigating, and that counsel's failure to introduce it at sentencing has a prejudicial effect by decreasing the reliability of the proceeding. *See Strickland,* 466 U.S. at 687. (explaining that counsel's assistance is ineffective where it deprives the defendant of "a trial whose result is reliable").

For this reason, this Court found prejudice in *Williams v. Taylor,* 529 U.S. 362 (2000), where trial counsel failed to uncover and present to the sentencing jury the "graphic description of Williams' childhood, filled with abuse and privation" as well as evidence of defendant's borderline mental retardation. *Id.* at 398. Such evidence "might well have influenced the jury's appraisal of his moral culpability." *Id.*

In *Wiggins v. Smith,* 539 U.S. 510 (2003), this Court also found prejudice, explaining that "Wiggins experienced severe privation and abuse in the first six years of his life" and "has the kind of troubled history [that the Court has] declared relevant to assessing a defendant's moral culpability" – so that if this evidence had been placed "on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 535, 537.

In *Rompilla v. Beard,* 545 U.S. 374 (2005), the defendant suffered abuse as a child and witnessed violence between his parents. This Court found that "[t]his evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not

the test. It goes without saying that the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Rompilla's] culpability." *Id.* at 393 (internal quotation marks omitted; second bracket in original); *Andrus*, 140 S. Ct. at 1882-83 (failing to prepare mitigation witnesses or go over their testimony before calling them to the stand contributed to trial counsel's ineffectiveness).[3]

B. The Mississippi Supreme Court's Double-Edged Rule Conflicts with This Court's Sixth and Eighth Amendment Jurisprudence.

In evaluating *Strickland* prejudice, the Mississippi Supreme Court unreasonably discounts mitigating evidence of reduced moral culpability based on its perception that jurors might regard such evidence as "aggravating." This approach, traceable to the constitutional defects in the former Texas capital sentencing statute, cannot be squared with this Court's case law.

1. Under the Mississippi Supreme Court's double-edged approach, the court trivializes mitigation evidence by hypothesizing that such evidence could also be considered aggravating. In this case, for example, the court found it "arguable" that trial counsel's performance was constitutionally deficient given that counsel admittedly conducted no mitigation investigation at all. All the same, the court found no prejudice under *Strikland* by categorically discounting the mental health evidence and evidence of childhood abuse that trial counsel would (and should) have unearthed

[3] *See also, e.g., Eddings v. Oklahoma,* 455 U.S. 104, 110, 113-15 & n.9 (1982) (concluding that evidence of Eddings' childhood, including "excessive physical punishment," was relevant mitigating evidence that the sentencer was required to consider under the Eighth Amendment); *Skipper v. South Carolina,* 476 U.S. 1, 13-14 (1986) (Powell, J., concurring in judgment) (evidence concerning a defendant's "emotional history … bear[s] directly on the fundamental justice of imposing capital punishment").

had he conducted a mitigation investigation.

A proper prejudice inquiry under *Strickland* in a capital case focuses on whether death is an appropriate penalty, given counsel's deficient performance. Fundamental to this analysis is whether the evidence that counsel failed to uncover or introduce could have explained the defendant's circumstances so as to mitigate, or offset, his criminal actions. *See Rompilla,* 545 U.S. at 392-93; *Wiggins,* 539 U.S. at 535; *Williams,* 529 U.S. at 398. The prejudice inquiry under *Strickland* is properly conducted by weighing the mitigating evidence introduced by the petitioner against any aggravating aspects of criminal behavior, such as the circumstances of the crime.

Under the proper framework, this Court has granted Sixth Amendment relief in cases involving the omission of powerful mitigating evidence similar to that presented by Bennett in post-conviction. For example, in *Williams*, this Court held that a failure to find *Strickland* prejudice was objectively unreasonable because evidence of intellectual disability and childhood abuse, among other mitigating evidence, may have significantly altered the picture of the defendant's moral blameworthiness. 529 U.S. at 398. Even though this Court recognized that the defendant's mitigating evidence "may not have overcome a finding of future dangerousness," this Court emphasized how "the graphic description of [the defendant's] childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.*

The Mississippi Supreme Court's decision turns this Court's well-established

jurisprudence on its head. In the Mississippi Supreme Court's view, any failure by counsel to uncover and present mitigating evidence—whether it be defendant's mental illness, childhood abuse, drug use, etc.— is not likely to be deemed prejudicial because such types of evidence could alert jurors to the defendant's impairment(s) or be characterized as aggravating. *Compare Garcia*, 356 So. 3d at 114 (the Mississippi Supreme Court foreclosing a finding of prejudice by branding fetal alcohol syndrome (FAS) as "double-edged") *with Rompilla*, 545 U.S. at 393 (unpresented brain damage caused by fetal alcohol syndrome is "sufficient to undermine confidence in the outcome" of jury's deliberations). Thus, in Mississippi, the most important and powerful mitigation evidence become the evidence *least* likely to establish prejudice.

This is so even though a jury in Mississippi may not consider future dangerousness as an aggravator. *Balfour*, 598 So. 2d at 748. A Mississippi jury may only consider the aggravators in state statute in returning a death sentence. *Id.* The aggravating circumstances in statute all involve circumstances that occurred at the time of the crime, not in the future. Miss. Code Ann. § 99-19-101. The statute also does not allow the jury to consider diminished moral culpability as an aggravator. *Id.* In all events, then, a jury may either consider mitigation evidence as persuasive or not—but a jury may never consider it as an aggravating circumstance. Mississippi's "double edge" rule is thus doubly problematic: it altogether discounts mitigation and presumes that jurors will impose a death sentence in a "freakish" and "arbitrary" manner by finding aggravators that are not aggravators under state law.

The rule in Mississippi also makes the difference between the evidence

presented at trial and the evidence presented during post-conviction irrelevant because no reweighing of all the evidence occurs. Mississippi's categorical approach is thus inconsistent with the requirement set forth in *Williams* that, to assess prejudice, the totality of the mitigation evidence, including evidence introduced in the habeas proceeding, must be reweighed against the aggravating evidence presented at trial. *Williams,* 529 U.S. at 397-98. In a recent dissent from a denial of certiorari out of the Fifth Circuit, Justice Sotomayor raised this very point:

> [T]he panel majority did not properly "reweigh the evidence in aggravation against the totality of available mitigating evidence." … Rather, the majority dismissed the new FASD evidence because it purportedly created a "significant double-edged problem" in that it had both mitigating and aggravating aspects, and stopped its analysis short without reweighing the totality of all the evidence. 861 F.3d 545, 551 (2017). That truncated approach is in direct contravention of this Court's precedent….

Trevino v. Davis, 584 U.S. 1019, 138 S. Ct. 1793, 1794–95 (2018) (Sotomayor, J., dissenting from the denial of certiorari). Further, just last month, this Court emphasized the importance of considering the "totality of the evidence" in determining whether the errors of counsel give rise to *Strickland* prejudice. *Thornell*, 144 S. Ct. at 1310.

Under Mississippi's approach, which is similar to the Fifth Circuit's, trial counsel (like trial counsel here) can completely fail to explore potentially mitigating evidence, despite a clear obligation to do so, and not be deemed ineffective. Such an approach not only denies relief to defendants, such as Bennett, who have suffered injustice because counsel's unprofessional conduct has prevented the discovery of powerful evidence of reduced moral culpability, but it also sends the inappropriate

and inaccurate message that mitigating evidence, such as childhood abuse or mental deficiencies, provides a reason *for* executing a defendant rather than withholding the death penalty. That is a grave constitutional error.

2. One possible reason for Mississippi's analytical error is the peculiar history of a Texas capital sentencing statute, and this Court's decision in *Penry* interpreting that pre-1991 law. *See* Tex. Code Crim. Proc. Ann. art. 37.071(b) (West 1981 & Supp. 1989); *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989). Under that state statute, Texas juries were required to assess all evidence in a capital trial by deciding "whether there [was] a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann., art. 37.071(b). In *Penry,* the Supreme Court used the term "two-edged sword" in describing a crucial flaw in such a sentencing statute – *i.e.*, that many of the most important types of mitigating evidence are "double-edged" in the sense that evidence supporting a finding of diminished moral culpability also tends to support an inference of future dangerousness, and such a statute creates an unacceptable risk that such mitigating evidence will lead to a death sentence. *See* 492 U.S. at 324.

The Mississippi Supreme Court's legal error here imperils the very same values underlying the Eighth Amendment right to individualization that led this Court repeatedly to reverse death sentences when a defendant's mitigating evidence could be viewed only through the lens of future dangerousness. *See Smith v. Tex.,* 550 U.S. 297 (2007); *Brewer v. Quarterman,* 550 U.S. 286 (2007); *Abdul-Kabir v. Quarterman,* 550 U.S. 233 (2007); *Smith v. Tex.,* 543 U.S. 37 (2004); *Tennard v.*

Dretke, 542 U.S. 274 (2004).

3. Regardless of the cause of Mississippi's analytic error, the error is particularly egregious here. Trial counsel knew Bennett had a traumatic childhood, and that he had a history of drug use. Pet. App. 60a. Multiple notations on counsel's timesheet reveal he was aware throughout his representation that Bennett and his father were in treatment. Pet. App. 60a. For example, the timesheet shows that, as early as September 26, 2000 and November 8, 2000, trial counsel had actual knowledge that his client was in treatment.[4] Pet. App. 60a.

Trial counsel's knowledge about the generalities of his client's background did not *discharge* his duty to investigate—it *triggered* it. Even so, and despite the known red flags, trial counsel declined to investigate. He also failed to send his guilt-phase investigator, or anyone else, to Florida for mitigation purposes, even though Bennett spent nearly his entire life there. Pet. App. 61a. Additionally, trial counsel failed to request funding for a mental health expert or have his client evaluated by a mental health professional for mitigation purposes. In trial counsel's affidavit, he conceded that he did not even think about hiring a mental health investigator *for mitigation purposes*: "I thought that Devin was competent to stand trial and that there was not a sanity defense available; therefore, I did not hire or request funding for mental health experts[.]"[5] Pet. App. 67a.

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[4] On page 23 of the Mississippi Supreme Court's opinion, it states that trial counsel did other work on the case "not recorded in the time sheets." Pet. App. 23a. That is a clearly erroneous factual finding. Trial counsel explicitly testified that "this time log would have all that I did." Pet. App. 59a.

[5] On page 23 of the Mississippi Supreme Court's opinion, it states that trial counsel "repeatedly advised Bennett that he should see a psychiatrist, but [trial counsel] ultimately deferred to Bennett's refusal to do so." Pet. App. 23a. That is a clearly erroneous factual finding. First, the only mental health professional counsel discussed with Bennett concerned competency and insanity. Thus, any

All in all, trial counsel did not even know he was supposed to look for potential avenues of mitigation. When asked about his preparation for sentencing, counsel responded, "Well, there was little that we could do. I talked to Devin about it. I talked to his father about it."[6] Pet. App. 61a; *Cf. Hinton v. Alabama*, 571 U.S. 263, 275 (2014) (per curiam) (counsel's failure to "understand the resources that state law made available to him" was deficient); *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (counsel was deficient for failing to request discovery permitted under state law).

The law is clear: counsel has an obligation to conduct a reasonable investigation into potential mitigating evidence. In assessing the reasonableness of an investigation, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins,* 539 U.S. at 527. Where "counsel [chooses] to abandon their investigation at an unreasonable juncture," a "fully informed decision with respect to sentencing strategy" is "impossible." *Id.* at 527-28. Despite clearly established precedent from this Court, the Mississippi Supreme Court dismissed counsel's failure to follow up on known red flags and made no reference to

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mental health professional that Bennett refused to speak with did not concern mitigation. Second, in his affidavit, trial counsel testified as follows: "I talked with Devin prior to trial about hiring mental health experts to evaluate him, but after discussions with him, *I decided* not to do so … [F]rom my own investigation, *I thought* that Devin was competent to stand trial and that there was not a sanity defense available; therefore, *I did not hire or request funding* for mental health experts to evaluate Devin prior to trial." Pet. App. 67a (emphasis added).

In like measure, a client's lack of cooperation does not alleviate a lawyer's legal duty to investigate. *See Rompilla,* 545 U.S. at 381; *Porter,* 558 U.S. at 453.

[6] The Court here is not left to speculate about trial counsel's strategy. Counsel testified at an evidentiary hearing and baldly stated that he did not investigate or prepare and, therefore, had no strategy for the sentencing phase of trial. The "residual doubt" strategy was concocted by the lower court out of whole cloth. Pet. App. 14a.

the American Bar Association Standards for Criminal Justice, which *Wiggins* emphasized. *Id.* at 523.

The lower court simply hypothesized that a jury might have found Bennett's mitigation evidence to be aggravating, rather than mitigating. But there is no basis for the Mississippi Supreme Court's conjectures that the jury "might have" found Bennett's victimization as a child *aggravating* on a theory that "abuse begets abuse" or that, because of this evidence, it is "probable" that a jury would vote for death. Indeed, although the Mississippi Supreme Court explicitly recognized that "a jury might have taken pity on Bennett given his claimed history of childhood abuse," Pet. App. 22a, it found that this was not enough—solely because the court could conjure *other* conclusions that the jury "might have" reached.

This Court has never suggested that to prove prejudice a defendant must show that there is no adverse inference of any kind that conceivably might be drawn from the mitigating evidence. A defendant need not even show "that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland,* 466 U.S. at 693. Rather, a defendant only need show "a reasonable probability" that the outcome would have been different, which is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

As this Court held in *Rompilla*, "it is possible that a jury could have heard it all and still have decided on the death penalty," but "*that is not the test*." 545 U.S. at 393 (emphasis added). That is precisely, however, the basis on which the Mississippi Supreme Court rejected Bennett's claim here. Certiorari is warranted to correct the

Mississippi Supreme Court's departure from this Court's decisions.

C. Although Most Courts Correctly Apply This Court's Precedent, Some Courts Follow Mississippi's Unconstitutional Approach That Counsel Need Not Investigate Evidence That is Potentially a "Double-Edged Sword."

The Mississippi Supreme Court held that Bennett did not suffer prejudice at the sentencing phase because, even though much of the evidence that Bennett's counsel failed to introduce was mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that could purportedly be considered aggravating. The court thus gave so-called "double-edged" mitigating evidence essentially no weight in the *Strickland* prejudice analysis—even though none of Bennett's mitigation evidence could be considered an aggravator under Mississippi law.

Like the court here, the Fifth and Fourth Circuits also hold that an attorney's failure to present double-edged evidence is not ineffective assistance. By contrast, most courts, including the Third, Seventh, Eighth, Ninth, and Tenth Circuits, have rejected the type of categorical rule adopted by the Mississippi Supreme Court. In conflict with the ruling below, those circuits weigh evidence on a case-by-case basis and will frequently find prejudice even when evidence may be "double edged."

1. Like Mississippi, the Fifth Circuit applies a similar rule that double-edged evidence is immune from a claim of ineffective assistance. For example, in *Dowthitt v. Johnson,* 230 F.3d 733, 745 (5th Cir. 2000), that court held that defense counsel's failure to investigate and present evidence regarding the defendant's brain damage and mental illness did not constitute ineffective assistance. Notably, the Fifth Circuit

did not balance the competing ways in which the evidence at issue might have been both helpful and harmful to the defendant to determine how a sentencer might receive it. The court instead held as a matter of law that there was no prejudice under *Strickland* – *i.e.*, "no 'reasonable probability' that the outcome would have been different" – because the asserted "evidence was double edged in nature." *Id.; see also Gray v. Epps,* 616 F.3d 436, 449 (5th Cir. 2010).

The Fourth Circuit similarly applies a categorical rule, though it often does so under *Strickland*'s "reasonableness" prong instead of the "prejudice" prong. In *Truesdale v. Moore,* 142 F.3d 749, 755 (4th Cir. 1998), the habeas petitioner raised a claim of ineffective assistance based on his attorney's failure to present mental health evidence regarding his "organic brain dysfunction." The Fourth Circuit rejected that argument, holding that when evidence "is a double-edged sword," counsel's decision not to introduce it "exemplifies the type of reasonable 'strategic judgment' that we respect." *Id.* (quoting *Bunch v. Thompson,* 949 F.2d 1354, 1364 (4th Cir. 1991); *see also Howard v. Moore,* 131 F.3d 399, 421 (4th Cir. 1997) (en banc).

2. In contrast, many courts recognize that, by its nature, mitigation evidence often *is* "double-edged," and that this is precisely the point of the evidence—it may *explain* why a defendant engaged in the violent act the jury already has found, or show that the defendant is a troubled person in need of help, rather than a cold-blooded killer. Thus, for example, in *Outten v. Kearney,* 464 F.3d 401 (3d Cir. 2006), the Third Circuit held that the state courts had "unreasonably applied the second prong of *Strickland* in reaching the determination that [the petitioner] could not

establish prejudice because [his] records contained some harmful information," *id.* at 422. Instead, after weighing "the totality of the evidence," the court of appeals concluded that *Strickland*'s prejudice prong was satisfied because, given the "wealth of readily accessible mitigating evidence" and the fact that "the jury heard little of it," there was "a reasonable probability that at least one juror [or more] would have struck a different balance. *Id.* (quoting *Wiggins, supra*) (internal quotation marks omitted) (alteration in original).

Similarly, the Seventh Circuit found prejudice and ordered a new sentencing hearing based on defense counsel's failure to introduce evidence of defendant's mental capacity and life history, even though its mitigating value was "outweighed or at least offset by the mitigation specialist's additional evidence of criminal and antisocial behavior." *Emerson v. Gramley,* 91 F.3d 898, 907 (7th Cir. 1996).

Additionally, in *Smith v. Mullin,* 379 F.3d 919 (10th Cir. 2004), the Tenth Circuit found prejudice resulting from counsel's failure to present mitigation evidence and held that the district court's refusal to give weight to "double-edged" evidence of brain damage and an abusive childhood—on the ground that it suggested the defendant was "an unstable individual with very little control" over his actions—"reveal[ed] a fundamental misunderstanding of the purpose for which such mitigation evidence would have been presented." *Id.* at 943. As the court explained, "[t]he jury already had evidence of Mr. Smith's impulsiveness and lack of emotional control. What the jury wholly lacked was an *explanation* of how Mr. Smith's organic brain damage caused these outbursts of violence and caused this 'kind hearted'

person to commit such a shocking crime." *Id.* (footnote omitted).[7]

Similarly, in *Simmons v. Luebbers,* 299 F.3d 929 (8th Cir. 2002), the Eighth Circuit rejected an argument that counsel's failure to present evidence of the abuse the defendant had suffered as a child was not prejudicial because the evidence could have an aggravating effect, reasoning that "[b]y the time the state was finished with its case, the jury's perception of Simmons could not have been more unpleasant. Mitigating evidence was essential to provide some sort of explanation for Simmons's abhorrent behavior. *Id.* at 938-39 & n.6. Additional courts have reached similar results, all contrary to the analysis of the court here.[8]

3. Importantly, the circuits that weigh double-edged evidence often show special solicitude to ineffective assistance claims when, as here, defense counsel has conducted no mitigation investigation at all. In *Emerson*, for example, the Seventh Circuit explained that when there was "no evidence of mitigation before the jury despite irrefutable evidence of aggravating circumstances," the possibility that the mitigating evidence, even though double-edged, might have altered the sentence "cannot confidently be reckoned trivial." 91 F.3d at 907.

The Eighth Circuit similarly found prejudice when defense counsel introduced

[7] More recently, there appears to be a split in the Tenth Circuit. *Compare Wilson v. Sirmons,* 536 F.3d 1064 (10th Cir. 2008) (rejecting the "double-edged sword effect" and noting that a "double-edge rule" would also apply to "*Williams, Wiggins*, and *Rompilla*") *with Wackerly v. Workman*, 580 F.3d 1171, 1178 (10th Cir. 2009).

[8] *See, e.g., Correll v. Ryan,* 539 F.3d 938, 955 (9th Cir. 2008) (applying balancing test and finding prejudice for failure to introduce evidence that "could be either dehumanizing or mitigating, depending on the context and history given for each cited fact"); *Kenley v. Armontrout,* 937 F.2d 1298, 1308-09 (8th Cir. 1991) (mitigation evidence could have cast defendant in a "sympathetic light"); *see also Harris v. Dugger,* 874 F.2d 756, 764 (11th Cir. 1989) (failure to investigate or introduce character evidence at sentencing was prejudicial even though evidence "was fraught with danger").

no evidence of defendant's background even though "the jury may not have been sympathetic to" it. *Pickens v. Lockhart,* 714 F.2d 1455, 1467 (8th Cir. 1983). Because defense counsel had not engaged in any investigation into defendant's background, "[i]t is sheer speculation that character witnesses in mitigation would do more harm than good, and that Pickens was not prejudiced by the omission." *Id.* (citation omitted).

Certiorari is warranted here to reiterate that the failure to investigate mitigation evidence cannot be categorically excused simply because that evidence might have a "double edge."

II. This Case Is An Ideal Vehicle To Decide The Question Presented.

This case serves as a good vehicle for certiorari review for three primary reasons.

1. Bennett's petition arises out of an initial state post-conviction proceeding. Because of this, the petition is in a posture where the Court can consider a case involving significant constitutional rights free from both the pressure of a pending execution date[9] and the overlay of the highly deferential standard of review that applies under the Antiterrorism and Effective Death Penalty Act (AEDPA).[10]

Members of this Court have expressed a "deep[ ] concern" over certain courts' application of a "double-edged rule" for evaluating *Strickland* prejudice, especially

[9] Recently, some members of this Court have expressed concerns about significant constitutional claims, arising in death-penalty cases, being presented in end-stage litigation. *See Bucklew v. Precythe*, 587 U.S. 119 (2019); *Price v. Dunn*, 139 S. Ct. 1533 (2019).

[10] The AEDPA reflects the view that "state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 88 (2011).

when trial counsel conducted no mitigation investigation. *See Peede v. Jones*, 138 S. Ct. 2360, 2361, 201 L. Ed. 2d 1087 (2018) (Sotomayor, J., dissenting from denial of certiorari). That said, because of the posture of cases like *Peede*, such cases were not good vehicles for certiorari review. *Id.* ("Considering the posture of this case, under which our review is constrained by the [AEDPA], I cannot conclude the particular circumstances here warrant this Court's intervention."). Here, Bennett's case is in the ideal posture to decide the question presented.

2. There is no dispute in this case about all the pieces of evidence that trial counsel would have discovered if he had conducted any mitigation investigation at all. Thus, this is not a case where counsel conducted an adequate mitigation investigation and "strategically" chose not to present some of the evidence unearthed. Rather, this case presents a claim with an admitted failure to investigate and prepare for sentencing.

In *Lockett*, the Court's overarching concern was that the sentencer not be precluded from giving "independent mitigating weight" to any mitigating factors the defendant might wish to establish. 438 U.S. at 605. This Court should reiterate that neither counsel nor a court can merely speculate that a potential line of mitigation will have a double edge and decline to conduct any investigation at all on that basis.

3. Because state courts are supposed to be the "principal forum" for adjudicating habeas claims, including ineffective assistance claims, the failure of a state court to fully accept this responsibility undermines the delicate balance of power between the state and federal judiciaries. *Harrington v. Richter*, 562 U.S. 86, 103

(2011). This Court should grant certiorari to ensure that this balance is restored, especially in jurisdictions that elect to seek death sentences.

Allowing this case to proceed to federal habeas when it should have been fully and fairly reviewed by the Mississippi Supreme Court will only further delay justice. The very least that should be mandated where a life and the integrity of our criminal justice system hang in the balance is that courts examine an ineffectiveness claim in line with this Court's precedent. For these reasons, this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the decision of the Mississippi Supreme Court.

Respectfully submitted,

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August 16, 2024

CERTIFICATE OF SERVICE

I, Krissy C. Nobile, do hereby certify that I have this day, August 16, 2024, caused to be delivered via email and U.S. Mail first class a copy of the foregoing Petition for a Writ of Certiorari to Counsel for Respondent:

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/s/ *Krissy C. Nobile*
KRISSY C. NOBILE