NO. 13-1345

IN THE SUPREME COURT OF THE UNITED STATES

JOSHUA DANIEL BISHOP,

Petitioner-Appellant,

v.

CARL HUMPHREY, Warden,

Respondent-Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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QUESTION PRESENTED

SHOULD THIS COURT GRANT CERTIORARI TO REVIEW A DECISION BY THE ELEVENTH CIRCUIT COURT OF APPEALS THAT WAS A PROPER FACT- SPECIFIC APPLICATION OF THIS COURT'S PRECEDENT?

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BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT

I. STATEMENT OF THE CASE

On February 8, 1996, following a jury trial, Petitioner was convicted of malice murder and armed robbery. Following the penalty phase of trial, the jury found the existence of a statutory aggravating circumstance in that the murder of Leverett Morrison was committed while Petitioner was engaged in the commission of another capital felony, armed robbery. Thereafter, on February 12, 1996, the jury recommended a sentence of death for Petitioner. The trial court sentenced Petitioner to death on February 13, 1996. The trial court also sentenced Petitioner to a consecutive life sentence for armed robbery.

The Georgia Supreme Court affirmed Petitioner's convictions and sentences on July 16, 1997. Bishop v. State, 268 Ga. 286 (1997). Thereafter, Petitioner filed a petition for writ of certiorari in this Court, which was denied on February 23, 1998. Bishop v. Georgia, 522 U.S. 1119 (1998), rehearing denied, 523 U.S. 1089 (1998).

Petitioner filed a state habeas corpus petition in the Superior Court of Butts County, Georgia on August 31, 1998. An evidentiary hearing was held on April 22-23, 2002. The state habeas court denied his petition for writ of habeas corpus relief in its entirety on March 17, 2006. The Georgia Supreme Court denied

Petitioner's application for a certificate of probable cause to appeal on October 9, 2007.

Petitioner filed his federal petition for writ of habeas on March 28, 2008. On May 4, 2010, the federal habeas court denied relief. The Eleventh Circuit Court of Appeals denied relief on August 8, 2013. Bishop v. Warden, GDCP, 726 F.3d 1243 (11th Cir. 2013).

II. STATEMENT OF THE FACTS

On direct appeal, the Georgia Supreme Court summarized the facts as follows:

> [The victim, Leverett Lewis] Morrison drove Bishop and Bishop's co-indictee, Mark Braxley, to a bar. Bishop and Braxley decided to steal Morrison's car. The three left the bar around 11:00 p.m. and drove to Braxley's trailer. Bishop reached into the sleeping Morrison's pocket for the car keys, but Morrison awoke and sat up. Bishop began to beat Morrison about the head and face with a blunt object. When Morrison was unconscious, Bishop took the car keys. Eventually realizing that Morrison was dead, Bishop and Braxley wrapped and then loaded the body into the backseat of Morrison's car. They drove to a dumpster which was located a short distance from Braxley's trailer. After unsuccessfully attempting to toss Morrison's body into the dumpster, Bishop and Braxley left the body on the ground where it was discovered several hours later. They drove Morrison's car into the nearby woods, set it on fire, and then walked back to Braxley's trailer to dispose of evidence of their crimes. After his arrest, Bishop made a statement in which he admitted delivering the blows with a wooden rod until Morrison stopped breathing, and described how he and Braxley disposed of the body and burned the car. Bishop subsequently confessed that, some two weeks prior to the murder of Morrison, he participated in the murder of Ricky Lee Wills and that he had buried Wills' body in the woods near Braxley's trailer. After investigators recovered Wills' body, a grand jury indicted Bishop and Braxley for

> that murder as well. The trial court admitted evidence regarding Bishop's participation in Wills' murder in aggravation of punishment during the penalty phase of this trial for Morrison's murder.

Bishop, 268 Ga. at 286-287.

III. DENIAL OF FACTS

Petitioner falsely alleges that "the jury was left to decide Petitioner's sentence based on the State's essentially unrebutted portrayal of him as a remorseless killer who was more culpable then his co-defendant." (Petitioner's brief, p. 32). As correctly found by the Eleventh Circuit Court of Appeals, trial counsel presented broad evidence in mitigation:

> Defense counsel then presented an extensive mitigation case. Thirteen witnesses in all were called by Bishop. Although Bishop claims that counsel's main strategy at the penalty phase was to establish that Braxley was the more culpable actor, the actual penalty phase strategy was more complex than that. In fact, a three-fold strategy was presented, as trial counsel Combs testified during the state habeas proceedings: the use of residual doubt from the guilt phase to establish again that Braxley was the more culpable actor; the presentation of extensive background concerning Bishop's tragic upbringing; and finally, the use of a psychiatric diagnosis from Dr. Thomas Brown. We summarize the mitigation presentation in some detail, because it bears directly on Bishop's claims that his counsel performed ineffectively at the penalty phase.
>
> First, defense counsel's opening argument at the penalty phase urged the jury to "consider what is known in the law as residual or lingering doubt that you may have as to who actually took the life of Leverett Lewis Morrison." At the guilt phase, counsel had pointed out the age difference between the nineteen year old Bishop and the thirty-five year old Braxley. Counsel also had sought to emphasize, based on Bishop's statements to law enforcement, that although Bishop beat

Morrison over the head, he left the room after taking Morrison's car keys and Braxley was the one who administered the fatal blow.

During the penalty phase, defense counsel called Daphne Knowles, who further impeached the testimony of Arnett. Knowles testified that she was at the Hilltop Grill on the night Bishop allegedly threatened Arnett, and that Arnett and Braxley were at the restaurant. Defense counsel next called Braxley's girlfriend Sylvia Stiles and her son Stephen to show that a butcher knife with electrical tape around the handle, which was recovered from a tackle box in Sylvia Stiles' house by law enforcement officers, belonged to Braxley.

The mitigation presentation then detailed at length Bishop's terrible childhood. **Much of the testimony was apparently emotional, leaving some jurors and others in the courtroom in tears.** Indeed, counsel Combs testified that the presentation of Bishop's mother was "the high point emotionally of the case." Bishop first called Angela Prosser, an employee of the Baldwin County Department of Family and Children's Services ("DFACS"). She explained that DFACS came into contact with the Bishop family back in 1972, before Bishop was even born, and there was regular contact between case workers and the family from 1972 through January 1975 for checkups and in order to respond to repeated reports of parental neglect. Prosser said that there were many instances when Bishop and his older brother Michael went unsupervised. Moreover, case workers observed the use and abuse of drugs and alcohol in the home, along with many incidents of family violence. Prosser testified about a shooting incident while a young Bishop and his brother were at home.

Prosser amplified that in 1981, when Bishop was only about 6 years old, DFACS took Bishop and his brother into temporary custody for the first time. But it was hardly the last; from that point forward, Bishop and his brother were moved in and out of several foster and group homes, periodically returning to their mother's custody. But each time they returned, the mother's alcohol abuse, violent relationships, and total lack of supervision resulted in Bishop and his brother being returned to state custody. Prosser also described Bishop as a lovable and polite child who never exhibited any signs of violence. Prosser added that she became attached to the family and

that Bishop showed real concern about his mother and her problems with alcoholism.

Another DFACS case worker, Ida Hart Freeman, similarly testified that Bishop was sweet, quiet, and passive, and that he had a strong bond with his mother. Freeman also testified that Bishop's mother had a violent relationship with her boyfriend; she failed to provide a safe and stable home; and she was often visibly intoxicated when she visited her children. Still a third case worker, Lucy Stewart, testified. She observed the petitioner during his early teenage years, noting that he was very friendly and polite, although withdrawn. She too described Bishop's mother as an unreliable alcoholic, but noted Bishop held out the hope that his mother would get better and he could eventually live with her. She testified that Bishop's own behavior went downhill, that he was placed in a local youth detention center, and that he developed problems with drugs and alcohol. And, as Stewart explained, Bishop and his mother were often left homeless, living "a hand to mouth existence."

Defense counsel also presented the expert testimony of Dr. Thomas W. Brown, a psychiatrist specializing in the treatment of drug and alcohol dependency. Brown opined that Bishop could think clearly and did not suffer from any mental abnormalities, but did evince a pattern of emotional problems and unexplained aggressive outbursts throughout his life. Brown explained that a biochemical disorder called "intermittent explosive disorder" ("IED") caused Bishop to develop these outbursts and a loss of control. Dr. Brown also offered that Bishop suffered from bipolar disorder. He added that in June 1994, at the time of the murders, Bishop suffered from at least four years of alcohol and drug dependency. He noted Bishop's history of inhaling gasoline fumes and his "peculiar devotion to his mother through thick and thin." Finally, Brown opined that Bishop would function well in a controlled prison environment, and that intermittent explosive disorder can be treated successfully with medication.

The defense also presented the testimony of three of Bishop's foster parents and one group home administrator. Weldon Brooks, Bishop's foster father in the early 1980's, testified that Bishop was a good boy who didn't cause major problems and was a "victim of circumstances." Jeffrey Lawrence, an assistant administrator at the

group home where Bishop lived between the ages of 12 and 14, likewise said that Bishop was affectionate, sweet, kind, and well-mannered, and that he bonded quickly with the staff. Lawrence also described periodic episodes of anger where Bishop would have to be restrained, but that Bishop later would express remorse and accept responsibility for his behavior. In 1989, at the end of his stay, Bishop's aggressive behavior escalated and he was removed from the home. Another of Bishop's foster parents, Roy Thigpen, observed that Bishop's mother was bruised, and apparently beaten on more than one occasion.

Bishop's older brother Michael testified that he was the primary caregiver for Bishop, because of their mother's extensive alcohol and drug addiction. Michael explained that violence permeated their household almost every day. He recounted an incident when his mother Carolyn's off-again-on-again boyfriend Townsend fired a gun at the trailer where the family was staying, and the mother's boyfriend at the time returned gunfire, hitting Townsend. Michael also described how their mother would take him and Bishop to a babysitter and leave them for up to a week at a time. Like some of the other witnesses, Michael explained that as Bishop got older, Bishop began inhaling gasoline fumes and later developed a problem with alcohol and drugs.

Finally, Bishop's mother Carolyn testified. She said that her own parents were alcoholics, and that she was raped by a friend of her parents when she was only twelve years old. Carolyn also spent time in the foster system. She developed a drinking problem shortly afterwards, and married Michael Bishop, Sr., the father of her eldest son Michael. Michael Bishop, Sr. left, and Carolyn began seeing several men, including Ray Morrison (the victim Leverett Morrison's brother). She became pregnant with Bishop; she never knew for certain who Bishop's biological father was.

Carolyn described her drug and alcohol abuse; she admitted that she abused drugs and alcohol while pregnant with Bishop, and that she used drugs and alcohol with Bishop as he grew up. In fact, she relayed an anecdote from when Bishop was three or four: she caught Bishop drinking from one of her beers, so she made Bishop and his brother each drink an entire beer.

> After spending some time in state custody, Bishop was returned to the care of his mother when he was about 14 years old. Carolyn said she knew he was drinking, inhaling gasoline, and taking pills. Carolyn herself was in and out of jail with no permanent place to stay, so Bishop would live at different places with or without her, including in cars or under a bridge. In January 1994, Carolyn was released after serving over a year in prison. She explained that she and Bishop begged and performed odd jobs to earn enough to survive; they pooled their money for the purchase of food, alcohol, and drugs. Carolyn also testified that she was sexually assaulted one night in late May 1994 by Willis, and that Bishop woke up and intervened on her behalf. Carolyn concluded her emotional testimony by begging the jury to spare her son's life and blaming herself for the horrible life he had led.

Bishop, 726 F.3d at 1250-1252 (emphasis added).

As Petitioner's ineffectiveness claim is fact-specific, Respondent will address further mischaracterizations of the record in his argument below.

IV. REASONS FOR NOT GRANTING THE WRIT

A. CERTIORARI REVIEW SHOULD BE DENIED AS THE ELEVENTH CIRCUIT COURT OF APPEALS' DECISION WAS A PROPER FACT-SPECIFIC APPLICATION OF THIS COURT'S APPLICABLE PRECEDENT.

Petitioner requests this Court grant certiorari review of his case because there is an alleged split in the federal circuit courts of appeals in how to analyze the prejudice prong of an ineffective assistance of counsel claim. Specifically, Petitioner alleges, as some states have to weigh certain aggravating and mitigating evidence in determining a death sentence and others do not, the circuits are split in how they determine prejudice for ineffectiveness claims. Petitioner did not raise

this issue below, therefore, it not available to him as a claim upon which this Court may confer its certiorari jurisdiction. Additionally, there is no split. The courts do not apply a different prejudice analysis depending on whether the state is a weighing or non-weighing state. Indeed, this Court had applied the prejudice prong in cases from weighing and non-weighing states in an identical matter. Moreover, whether or not a state is a weighing or non-weighing state has no bearing on the prejudice standard announced in Strickland v. Washington, 466 U.S. 668 (1984). Consequently, as the Eleventh Circuit's decision is in direct accord with this Court's precedent, certiorari jurisdiction should be denied.

1. Federal Question Not Raised Below

Petitioner's challenge to the Eleventh Circuit's assessment of the prejudice prong of his ineffectiveness claim was not raised and litigated below and therefore is not properly presented to this Court for review. Under 28 U.S.C. § 1257 (a), this Court's appellate power is extended to any "final judgment or decrees of the highest court of law or equity of a State in which" a federal question is raised. Where the state has not yet ruled on this issue, this Court does not have jurisdiction. Petitioner did not raise the issue of applying a different analysis to the prejudice prong of Petitioner's ineffectiveness claim in his state habeas proceeding or in his appeal from the denial of his state habeas petition. As Petitioner failed to raise this issue before any state court, this Court does not have jurisdiction over

this issue until a final state judgment has been rendered. See Banks v. California, 395 U.S.C. §. 708 (1969) (finding that where Petitioner did not ask the Supreme Court of California to review the judgment entered by the Court of Appeals, the decision of the Court of Appeal is not a "final judgment . . . rendered by the highest court of a State in which a decision could be had ... ." and this Court lacked jurisdiction to review it). See also Cardinale v. Louisana, 395 U.S. 437 (1969); Hammerstein v. California, 341 U.S.C. §. 491 (1951).

Additionally, on appeal to the Eleventh Circuit Court of Appeals, Petitioner stated the following in his brief to the court:

> Reviewing courts must consider the "totality of the available mitigation evidence — both that adduced at trial, and the evidence adduced in the habeas proceeding — in reweighing it against the evidence in aggravation." Williams, 529 U.S. at 397-98. Review of a Strickland claim in Georgia must also take into account the fact that Georgia is not a 'weighing' state where mitigating factors must outweigh aggravating factors in order to impose a life sentence. [1]

(Appellant's brief, p. 50). There is no further argument regarding this statement, much less a claim that there is a split in the circuits on how to analyze the prejudice prong of Strickland in a "weighing" versus a "non-weighing" state. Accordingly, this issue was not raised and reviewed in the Eleventh Circuit and is not properly before this Court for review. See, e.g., Delta Air Lines, Inc. v. August, 450 U.S.

[1] This exact same passage is also in Petitioner's final merits brief to the federal habeas court but also without further explanation. (pp. 70-71)

346, 362 (1981); Youakim v. Miller, 425 U.S. 231 (1976); Taylor v. Freeland & Kronz, 503 U.S. 638 (1992). Certiorari review should be denied.

2. There Is No Split Among The Circuits In Applying The Prejudice Prong Of Strickland Between Weighing And Non-Weighing States.

Petitioner alleges there is a split among the federal circuit courts of appeals in analyzing the prejudice prong of ineffectiveness claims in weighing and non-weighing states. Specifically, Petitioner alleges: the Third, Fourth, Fifth and Eleventh Circuits use the same analysis for weighing and non-weighing states; the Eighth and Tenth Circuits are confused as to the proper analysis; and, the Sixth, Seventh and Ninth Circuits review prejudice depending on whether the state is a weighing or non-weighing state. However, none of the cases to which Petitioner cites, which he alleges are from the most "illustrative circuits" after conducting "thorough research into each federal circuit" and reviewing "nearly five hundred cases," show a split in the circuits. (Petitioner's brief, p. 18, fn. 15). Indeed, the cases show that the circuits all use the same prejudice analysis in all death penalty cases.

a. There Is No Confusion In The Eighth And Tenth Circuit Courts Of Appeals

Petitioner alleges the Eighth Circuit Court of Appeals properly analyzed the prejudice prong of an ineffectiveness claim prior to this Court's decision in Brown v. Sanders, 546 U.S. 212 (2006), and then announced it would change its analysis

in Rousan v. Roper, 436 F.3d 951 (8th Cir. 2006). However, as Petitioner even acknowledges, the decision in Brown had nothing to do with the prejudice analysis of an ineffective assistance of counsel claim and instead decided whether a sentencing decision was unconstitutional after a jury considered invalid sentencing factors. (See Petitioner's brief, p. 40-41, summarizing the Brown decision). Likewise, the decision in Rousan applying Brown, was for Rousan's claim that "the jury instruction on statutory aggravating circumstances" regarding an aggravating factor "prejudicially confused the jury;" it did not concern an ineffective assistance of counsel claim. Rousan, 436 F.3d at 961. Consequently, Petitioner has failed to show any confusion on the part of the Eighth Circuit Court of Appeals in applying the prejudice prong for an ineffectiveness claim in either a weighing or non-weighing state.

Petitioner uses the same argument for the Tenth Circuit Court of Appeals and cites to the decision of Davis v. Executive Dir. of Dep't of Corrections, 100 F.3d 750 (10th Cir. 1996). Davis challenged the constitutionality of his sentence after the jury had considered an invalidated aggravating factor. Davis, 100 F.3d at 767. The court did decide an ineffectiveness claim, but the court did not express any confusion as to how to apply the prejudice prong based on the non-weighing status of Colorado:

As we stated in Brewer:

> Given the State's overwhelming case against him, the number and gravity of the aggravating circumstances found by the jury, and the nature of the crime itself, we do not believe that the speculative, conclusory, and possibly damaging mitigating evidence offered now . . . would have resulted in the imposition of a sentence other than death. Brewer, 51 F.3d at 1527.
>
> We are equally confident that the speculative, cumulative and almost certainly damaging evidence offered now in this case would not have resulted in the imposition of a different sentence.

Id. at 766. Petitioner's interpretation of Davis is unfounded. Consequently, Petitioner has failed to show that either the Eighth or Tenth Circuit Court of Appeals is confused as to how to analyze prejudice under Strickland depending on the weighing status of the state.

b. The Sixth, Seventh And Ninth Circuits Do Not Distinguish Between Weighing And Non-Weighing States In Determining Prejudice.

Once again, Petitioner fails to cite to any precedent in support of his argument. Neither the Sixth, Seventh nor the Ninth Circuit holds that a determination of the prejudice prong of an ineffectiveness claim depends on the weighing status of a state.

Petitioner cites to a portion of Mason v. Mitchell, 320 F.3d 604, 618 (6th Cir. 2003), and states that the Sixth Circuit "properly analyze[s] penalty phase prejudice in light of the relevant state statute." (Petitioner's brief, p. 26). Although the court in Mason recited how the jury determines death under Ohio

law, the court never stated this affects its prejudice analysis under Strickland. In fact, the court in Mason did not perform a prejudice analysis as "[t]he record" prevented the court from performing "a meaningful review of Mason's claim of ineffective assistance of counsel" and the case was remanded for an evidentiary hearing. Mason, 320 F.3d at 620-621. Following the remand to the district court, the Sixth Circuit, in conducting its prejudice analysis, made no mention of analyzing the prejudice prong of Petitioner's ineffectiveness claim pursuant to Ohio's laws making it a weighing state. See Mason v. Mitchell, 543 F.3d 766, 780-785 (6th Cir. 2008).

Petitioner relies upon Stevens v. McBride, 489 F.3d 883, 897-898 (7th Cir. 2007) to support his argument that the Seventh Circuit properly considers a state's particular death penalty scheme when analyzing prejudice under Strickland. However, once again, Petitioner cites to a decision in which a court recites how the jury determines death but never states this affects its prejudice analysis under Strickland. Ultimately, the court in Stevens held:

> In this case, we find a reasonable probability--that is, one sufficient to undermine our confidence in the outcome of the sentencing phase--that the result would have been different if the jury had heard mainstream expert psychological testimony of the sort presented by Dr. Coons and Dr. Kaplan at the post-conviction hearing. See Strickland, 466 U.S. at 694. Competent evidence of Stevens's mental illness would have strengthened the general mitigation evidence presented by defense counsel concerning Stevens's difficult background by focusing the jury on the concrete results of years of abuse on Stevens's psyche. There was, in addition, little downside risk

> of presenting such evidence to the jury; evidence of the most damning sort was already before the jury. Cumulative evidence of his predatory pedophilia and his specific actions on the fateful day was not likely to make any difference. And unlike general mitigation evidence concerning Stevens's background, evidence about Stevens's severely dissociated condition and impaired ability to appreciate the wrongfulness of his conduct at the time of the killing would have provided his lawyers a basis for rebutting the aggravating factors highlighted by the State.

Stevens, 489 F.3d at 897-898.

Petitioner alleges the "Ninth Circuit Court of Appeals properly applies *Strickland* and tailors its analysis to whether the case arose from a weighing or non-weighing state." (Petitioner's brief, p. 25). In support of this, Petitioner cites to Lambright v. Schriro, 490 F.3d 1103, 1121 (9th Cir. 2007). However, this case does not state the court was "tailoring" its prejudice analysis of Strickland, but instead states that in evaluating prejudice, the court took note of the fact that no mitigating evidence was presented at trial and under Arizona law, at that time, it "mandated the death penalty [where one or more aggravating factors were present] . . . if there was no mitigating evidence." Lambright, 490 F.3d 1103, 1126. In more recent cases from the Ninth Circuit, analyzing the prejudice prong of ineffectiveness claims from Arizona, the court considers the aggravating and mitigating evidence specifically found by the sentencing authority, which the court must give deference to unless shown to be unreasonable findings of fact. The court then independently weighs the new evidence with the evidence presented at trial.

See e.g. Miles v. Ryan, 713 F.3d 477, 488-489 (9th Cir. Ariz. 2013) (" In assessing prejudice, we consider the mitigating effect of Petitioner's drug addiction and how it would have altered the balancing of aggravating and mitigating factors discussed at sentencing. See Porter v. McCollum, 558 U.S. 30, 130 S. Ct. 447, 453-54, 175 L. Ed. 2d 398 (2009) (per curiam)"); Schurz v. Ryan, 730 F.3d 812, 816 (9th Cir. Ariz. 2013) ("'To assess prejudice, we consider the mitigating evidence that was presented along with the new mitigating evidence and reweigh all of it against the aggravating evidence to determine whether there is a 'reasonable probability' that it would have produced a different verdict.' Samayoa v. Ayers, 649 F.3d 919, 928 (9th Cir. 2011)"). Thus, although the court discusses the state courts' determinations of aggravating and mitigating evidence, it does not hold that it applies the prejudice prong of Strickland pursuant to the Arizona state's weighing status.

Conveniently, Petitioner has failed to cite to a single case in which a federal circuit Court of appeals has held that the application of the prejudice prong in a case from a non-weighing state deserves a different standard than that announced in Strickland. Consequently, Petitioner has utterly failed to show a split in the circuits and certiorari review should be denied.

3. Strickland Does Not Support Petitioner's Argument.

Petitioner alleges that under Strickland "the question of prejudice is necessarily circumscribed by the legislation governing the imposition of *that particular* death sentence." (Emphasis in original). In support of this statement, Petitioner cobbles together language from this Court's decisions in Harrington v. Richter, 131 S. Ct. 770, 778 (2011) and Strickland. Neither of the passages to which Petitioner cites provides any support for Petitioner's allegation. First, Petitioner cites to this portion of Harrington, "'the range of reasonable applications is substantial.'" (Petitioner's brief, p. 17). The entirety of this passage reads:

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The standards created by Strickland and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The Strickland standard is a general one, so **the range of reasonable applications is substantial.** Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Harrington, 131 S. Ct. at 778 (citations omitted) (emphasis added). Clearly, this Court is stating that counsel can provide effective assistance in a "range" of reasonable ways under Strickland, which has nothing to do with whether or not a state is a weighing or non-weighing state.

The second part of Petitioner's cobbled quote is "'[t]he governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors.'" (Petitioner's brief, p. 17). The entirety of this passage reads:

> **The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors.** When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Strickland, 466 U.S. at 695 (emphasis added). This passage is clearly setting the prejudice test for an ineffectiveness claim, i.e. a reasonable probability of a different outcome. It is not stating, or even implying, that a state's method of determining a death sentence is to be factored into that analysis.

Indeed Strickland makes no distinction between weighing and non-weighing states. Additionally, this Court has applied the prejudice prong from Strickland in cases from weighing and non-weighing states in exactly the same manner. Compare this Court's decisions in Wiggins v. Smith, 539 U.S. 510 (2003) and Rompilla v. Beard, 545 U.S. 374 (2005), both from weighing states, with Wong v. Belmontes, 558 U.S. 15, 27-28 (2009), Cullen v. Pinholster, 131 S. Ct. 1388, 1408

(2011) and Williams v. Taylor, 529 U.S. 362, 397-398 (2000), all from non-weighing states. A fact of which Petitioner is aware as he acknowledges this in footnote 54, but then states "this is the first time this particular Sixth Amendment issue has been brought to [the Court's] attention." (Petitioner's brief, p. 41). Pretermitting the fact that Petitioner would have had to have read every certiorari petition sent to this Court for the past thirty years to verify the accuracy of this statement, this statement also assumes something even more baffling: that this Court, and many other courts in hundreds of cases by Petitioner's count, and countless experienced attorneys have been using the wrong prejudice standard for thirty years without bothering to question it or rectify it.

Petitioner's argument also shows a fundamental misunderstanding of Strickland and its progeny. Petitioner states the following should be the new prejudice standard in Georgia: "Under Georgia law, there is a reasonable probability that, had counsel presented the officers' testimony, (or any alleged mitigating evidence by a petitioner), the jury would have been given the 'any reason satisfactory' needed to vote for a life sentence." (Petitioner's brief, p. 35). This is obviously in direct contravention of Strickland as this was the test proposed by Respondent in Strickland and rejected by the Court:

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, [], and not every error that conceivably could have influenced the outcome undermines the

> reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.

Strickland, 466 U.S. at 693 (citations omitted). The Court goes on to explain the appropriate prejudice standard:

> Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, [], and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, []. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. *It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.* Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, 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.
>
> ...
>
> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 693-696 (citations omitted) (emphasis added).

The prejudice standard requires an assessment of all of the evidence, not the myopic view suggested by Petitioner that assumes any mitigating evidence would sway a jury to a life sentence. As explained above, how a particular juror determines a sentence includes an unknown number of considerations. Maybe one juror will give more weight to the aggravating circumstances of a crime than mitigating circumstances, which would not be inappropriate under the law, nor

would it make the juror unreasonable. The prejudice standard under Strickland removes the imponderable "idiosyncrasies" of a juror and creates a reasonable standard that can be applied when reviewing trial counsel's effectiveness after trial. Consequently, whether or not a state is a weighing or a non-weighing state has no bearing on the prejudice component of an ineffectiveness claim. Instead, the standard is as it should be, a view of the record as a whole with a comparison of the mitigating and aggravating evidence, with the side with the most weight determining if there is a reasonable probability of a different outcome.

Accordingly, Petitioner has failed to show that state habeas court's decision was contrary to, or an unreasonable application, of this Court's precedent. Consequently, the Eleventh Circuit's decision was in direct accord with this Court's precedent and Petitioner's request that this Court create new law fails to present a question worthy of this Court's certiorari review.

4. The Eleventh Circuit's Opinion Is In Direct Accord With This Court's Precedent.

The Eleventh Circuit's decision that the state habeas court's denial of Petitioner's ineffective assistance of counsel claim was not contrary to or an unreasonable application of this Court's precedent was in direct accord with this Court's precedent.

a. Law Enforcement

Prior to trial, defense counsel spoke with local law enforcement officers who provided favorable information regarding Petitioner.[2] However, these officers told counsel that their opinions were only to help with plea negotiations and they would not help Petitioner at trial. Petitioner repeatedly states the state habeas court and the Eleventh Circuit were unreasonable for not holding that trial counsel were deficient for failing to "compel" law enforcement to testify to their opinions provided prior to trial and allegedly in their state habeas affidavits during cross-examination.[3] Petitioner even goes so far as to allege they were deficient for not investigating this issue. However, Petitioner fails to state what "authority" exists that would give trial counsel the ability to "compel" any witness, even law enforcement, to testify in a particular manner at a death penalty trial. Petitioner also fails to identify what "investigation" trial counsel failed to perform regarding

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[2] Petitioner repeatedly mentions testimony from an affidavit by Captain Rusty Wagner in support of his arguments; however, although this affidavit was admitted during the state habeas evidentiary hearing, Petitioner never relied on this affidavit in his state habeas post-hearing brief or in his briefs to the federal habeas court or the Eleventh Circuit Court of Appeals.

[3] As pointed out by Petitioner, the Eleventh Circuit did not decide the performance prong of Strickland, but instead assumed deficiency and determined prejudice. This is proper under Strickland, "In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance." Strickland, 466 U.S. at 697.

the information they had been provided by law enforcement prior to trial. Petitioner's arguments not only have no basis in law, and they also ignore the realities of trial litigation. Most importantly, Petitioner has failed to show that the Eleventh Circuit Court of Appeals was in error in not holding that the state habeas court's decision was contrary to, or an unreasonable application, of Supreme Court precedent as there is no precedent which holds an attorney may "compel" a witness to testify in a particular manner.

Petitioner also alleges the Eleventh's Circuit's findings that the officers' affidavit testimony did not "'undercut' or 'undermine' the state's case in aggravation" conflicted with this Court's precedent because Georgia is a non-weighing state. As shown above, there is no precedent from this Court holding that a different prejudice analysis must be used in non-weighing states. Thus, the Eleventh Circuit's opinion could not be contrary to precedent which does not exist. Moreover, the Eleventh Circuit's opinion is in accord with this Court's precedent. In determining prejudice, the Eleventh Circuit held as follows:

> We need not address counsel's performance, because, even if we were to assume that counsel were ineffective in failing to call the officers, the state court's prejudice determination was not an unreasonable one. The officers' testimony would not have undercut in any way the conduct Bishop himself admitted to, including striking the first blows against both Morrison and Willis, dumping the victims' bodies, and stealing Morrison's Jeep. Relatedly, the officers' testimony also would not have undermined in any way the statutory aggravator found by the jury -- that Bishop committed the murder of Morrison during the course of an armed robbery.

> Moreover, putting the officers on the stand was a double-edged sword, and could have harmed Bishop in a variety of ways. Defense counsel were told by the officers, in no uncertain terms, that they were willing to offer their opinions to help counsel obtain a plea for Bishop, but that they were unwilling to testify at trial. Bishop claims that his counsel's fear that the officers might lie was unreasonable, but, even if we were to accept this, the downside risks were broader. Two hostile officers could have answered counsel's questions curtly, evasively, or not at all. And even assuming they would have expressed an opinion about Bishop's remorse, the officers could also have highlighted the egregious nature of the murders, including the savage beatings of both Morrison and Willis, which were initiated by Bishop, not Braxley. Similarly, the officers could have underscored Bishop's admitted involvement in disposing of the bodies and his theft of the victim Morrison's Jeep and its ultimate destruction. Moreover, the officers undoubtedly would have been asked to highlight that there were two murders at issue here, not just the one, and that Bishop was, by his own words, heavily involved in both. Finally, it would have been impossible for the officers to opine at Bishop's trial about any disparity in sentence between Bishop and Braxley, because Bishop was sentenced to death before Braxley took a plea to a life sentence.

Bishop, 726 F.3d at 1255-56.

It is clear that the court properly analyzed the testimony from the law enforcement officers by viewing the record as whole and determining if this evidence was mitigating enough to outweigh the aggravating evidence. The court's decision is directly in accord with this Court's precedent.

b. Blood Spatter Evidence

During his state habeas proceeding Petitioner presented evidence from a forensic expert regarding the blood spatter evidence in his case. The state habeas court found trial counsel were not ineffective for not obtaining this expert and

presenting this evidence and the Eleventh Circuit found this decision was not contrary to, or an unreasonable application, of Supreme Court precedent. Petitioner alleges the courts' decisions were in error because Petitioner had admitted his involvement in the crimes and this evidence proved he was "truthful to law enforcement officers and that Mr. Braxley lied about this involvement which would have changed the mind of "one juror." (Petitioner's brief, p. 36). However, this statement is entirely misleading and misses the point. The question before the Eleventh Circuit was: is the state habeas court's decision based upon an unreasonable determination of the facts, or was it contrary to, or an unreasonable application, of this Court's precedent? The federal habeas court properly found no to both questions and ruled in accord with this Court's precedent. Consequently, this decision presents nothing for this Court's review.

Prior to analyzing this claim, the Eleventh Circuit found the following facts regarding the evidence presented at trial, which Petitioner has failed to show are not supported by the record:

> Although both Bishop and Braxley initially denied any involvement in the murder of Morrison, Bishop later confessed in a statement given to Detective Ricky Horn. In his statement, which was audiotaped and played by the State for the jury, Bishop explained at considerable length the events culminating in the beating and murder of Morrison on the night of June 24, 1994. Bishop, Braxley, and Morrison had been drinking through the afternoon and had smoked crack later that evening. That night, Braxley suggested that Bishop take the keys to Morrison's Jeep; Morrison was lying in bed at the time. According to Bishop, when he reached into Morrison's pocket, Morrison "popped

[him] and asked [him] what [he] was doing." Bishop then hit Morrison with a wooden stick that "was like a closet rod. "In Bishop's words, he used "[o]ne of them big heavy closet rods." Bishop explained, "I hit him too hard, I reckon, and he didn't say anything. He just wouldn't breathe." At one point in his statement Bishop said that he hit Morrison on the backside of his head "about twice" and Braxley hit him "about three times," but later, Bishop claimed, "I hit [Morrison] like three times in the head with that stick, just to see the first time if I could knock him out where I could get his keys. But he wouldn't knock out. I hit him one more time and finally, he looked like he was knocked out."

According to Bishop, he then exited the room, but left the key to Morrison's Jeep on a coffee table. Bishop added that, while he was outside the room, he "heard something loud." He elaborated: "When I went back in there after I left the key on the coffee table, I walked back there and saw that [Morrison] was dead. I saw we were messing up pretty bad. He wasn't breathing. I checked him out and he wasn't breathing. He was dead." Bishop explained that he and Braxley then wrapped Morrison in a comforter and placed his body in the back seat of the Jeep, and that they tried unsuccessfully to put Morrison's body in a dumpster but ended up leaving the body between two dumpsters. At Braxley's suggestion, Bishop took the Jeep to a nearby pond, poured gasoline all over it, and lit it on fire, destroying all but the frame of the vehicle.

Finally, Dr. James Dawson testified regarding Morrison's injuries and cause of death. He determined that Morrison died in the early morning hours of June 25, 1994, as a result of inner cranial bleeding, with contributing factors of a cerebral contusion and aspiration of blood, all caused by blunt force trauma to the head. Dr. Dawson confirmed that Morrison was beaten to death. Several of Morrison's seven significant head wounds appeared to have been caused by a cylindrical, circular, or tubular object, while other wounds appeared to have been caused by a flat object. Dr. Dawson could not state the order in which the seven injuries took place, nor could he state whether the first blow, the seventh blow, any of the blows in between, or any combination of the blows caused the cerebral contusion (bruising of the brain) or the hemorrhage resulting in inner cranial bleeding and ultimately death; finally, the medical examiner confirmed that all seven injuries

occurred while Morrison was alive.

Bishop, 726 F.3d at1248-1249 .

Having reviewed the record as a whole, the Eleventh Circuit found the following regarding this claim:

> Bishop's final Strickland claim is that his counsel were ineffective for failing to request funds for and failing to present the testimony of a forensic blood spatter expert. Bishop argues that this mitigating evidence would have demonstrated Braxley's involvement in the beating and murder of Morrison.
>
> The state habeas court addressed and rejected this claim too, both on performance and prejudice grounds. The court held that counsel performed reasonably by using their limited funds to hire other experts to assist in mitigation, and that Bishop failed to show prejudice because the State did not dispute that Braxley was involved in the two murders. There was nothing unreasonable about either determination. As for the performance prong, when a "Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact." Williams v. Allen, 598 F.3d 778, 793 (11th Cir. 2010) (internal quotation marks and alterations omitted). Counsel put forth an extensive mitigation presentation that focused on Bishop's horrific childhood and troubled adolescence and his mental infirmities. Moreover, counsel did not neglect to seek funds for expert assistance. On the contrary, counsel moved the trial court several times for funding, received some but not all of the funds they requested, and used their limited funds to hire an investigator, a psychologist, a psychiatrist, and a jury consultant. In fact, the state habeas court found that counsel Combs spent approximately six thousand dollars of his own money on the experts they hired. Nor does petitioner tell us which expert should have been cast aside to make funds available for a blood spatter expert.
>
> In any event, we're hard-pressed to see how the defendant was prejudiced. The blood spatter evidence, even if it corroborated Bishop's account that Braxley was in the room and took part in the beating of Morrison, did not lessen in any way Bishop's involvement

> in the murder, including Bishop's admission that he initiated the beating and struck Morrison with a heavy rod to the point of not breathing. In addition, no one at trial ever disputed Braxley's involvement in the murder of Morrison. Indeed, it was the State that put before the jury Bishop's statements to law enforcement suggesting that Braxley delivered the fatal blow. In closing argument at the guilt phase, the prosecutor explained to the jurors that if they believed Bishop's account that he only hit Morrison two times and that "Braxley finished [Morrison] off . . . [Bishop is] still guilty of murder." The State also acknowledged at both phases of the trial Braxley's presence at the scene and his participation in dumping the body of the victim.
>
> In light of the evidence as a whole, including Bishop's admitted role in beating Morrison and Willis, disposing of the bodies, stealing the victim Morrison's Jeep, and burning that Jeep, the state court's Strickland determination was not objectively unreasonable.

Bishop, 726 F.3d at 1257-1258.

The Eleventh Circuit's decision is supported by the record. Dr. James Dawson conducted the autopsy and found six lacerations on the head of the victim. Dr. Dawson also found two major wounds to the face which broke several facial bones and several defensive wounds to the arms and hands of the victim. Dr. Dawson opined that the cause of death was the result of blunt force trauma to the head of the victim. When asked if it would have required all of the blows to have caused the death of Mr. Morrison, Dr. Dawson stated that there would be no way to tell and he could not determine the sequence of the blows. Id. at 2077-2078. There were no other forensic witnesses presented at trial specifically related to the murder crime scene.

Petitioner's blood spatter evidence presented during his state habeas hearing consists of two small drops of an unknown substance[4] on a pair of Braxley's jeans, a small amount of blood on Braxley's underwear, and tiny dots of an unknown substance[5] on the bottom of a pair of work boots that have not been proven to have belonged to Braxley. This is hardly the type of evidence that would have proven "without question" Petitioner's version of the crimes as "truthful." (Petitioner's brief, p. 37).

Petitioner likens his case to this Court's recent decision in Hinton v. Alabama, 134 S. Ct. 1081 (2014). Hinton was sentenced to death for the armed robbery of three restaurants and the murder of two managers of the restaurants. Hinton maintained his innocence, provided evidence of an alibi and the only physical evidence linking him to the crime were the bullets matching his weapon. Under the mistaken belief that he could not ask for more funds, defense counsel hired the only fire-arms expert that would take the case, despite the fact that the

[4] The Official GBI Crime Lab report found that chemical testing performed on all of the jeans gathered as evidence in Petitioner's case, which would include the pair Marilyn Miller, Petitioner's state habeas expert, examined, failed to "confirm the presence of blood."

[5] The Official GBI Crime Lab report states that examination of the two pair of shoes that were gathered as evidence, which includes the boots relied upon by Ms. Miller, failed to "reveal[] the presence of blood." However, the bench notes on the GBI Crime Lab report indicated that there was blood on the boots.

expert was not experienced enough. The expert was thoroughly impeached by the State at trial.

Clearly, Petitioner's case is distinguishable. Petitioner's trial counsel were not mistaken about what funds they could request. Moreover, the testimony of an expert regarding the bullets and the firearm would have been the linchpin of Hinton's case and helped to prove him innocent of his crimes. Petitioner's state habeas blood spatter expert did not: exonerate Petitioner; dispute the State's case; or prove Mr. Braxley was more culpable. Instead Petitioner's case is more similar to that of Harrington v. Richter, 131 S. Ct. 770, 790 (2011), in which Harrington's forensic evidence in support of his ineffectiveness claim failed to, on the whole, challenge the State's case against him.

Therefore, as Petitioner's state habeas blood spatter evidence did little to change the evidentiary picture in Petitioner's case, the state habeas court's denial of his ineffectiveness claim was not contrary to, or an unreasonable application, of Supreme Court precedent. Consequently, the Eleventh Circuit Court of Appeals decision was in direct accord with this Court's precedent and this issue presents nothing for this Court's review.

CONCLUSION

WHEREFORE, for all the above and forgoing reasons, Respondent prays that this Court decline to exercise its certiorari jurisdiction and deny the instant petition for writ of certiorari seeking review of the judgment of the Georgia Supreme Court.

Respectfully submitted,

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COMPLIANCE WITH WORD LIMITATIONS

This brief complies with Rule 33.2 of this Court.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing pleading, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

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This _2_ day of June, 2014.

_____
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