No. 13-1345

In The

Supreme Court of the United States

JOSHUA DANIEL BISHOP,

Petitioner,

vs.

CARL HUMPHREY, WARDEN, GDCP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY TO RESPONDENT

Respondent is correct that the controversy highlighted in Petitioner's case depends entirely on how one reads *Strickland*. *Strickland v. Washington,* 466 U.S. 668 (1984).

If the *Strickland* test is both universal in its applicability (which is uncontested) and its application – without regard to states' differing statutes and jury instructions on deliberation, aggravation, mitigation, mercy – then Petitioner has advanced no claim worthy of *certiorari* review. If, however, *Strickland*'s reference to applying "[t]he governing legal standard" (*id.* at 695) means that federal courts are bound to consult state legislation related to the imposition of a death sentence, then Petitioner has identified a legal issue affecting all federal circuits that review capital cases.

I. Petitioner has Correctly Interpreted *Strickland* and its Intended Application.

The *Strickland* standard is unquestionably the law of the land – the baseline standard by which courts are to adjudicate Sixth Amendment claims – but courts should consider those claims in consultation with the relevant state death penalty statute. "The *governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice* from counsel's errors." *Strickland,* 466 U.S. at 695 (emphasis supplied).

This Court further explained that "[t]he assessment of prejudice should proceed on the assumption that the decision-maker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id*. Weighing mitigating and aggravating circumstances is required under the capital sentencing statute relevant to *Strickland*. Fla. Stat. § 921.141 (2013). The standard that governs a Georgia capital jury's decision, on the other hand, does not require a weighing analysis or deliberation. Ga. Code Ann. § 17-10-30 (2013); *Zant v. Stephens*, 462 U.S. 862 (1983). In fact, the instructions given to Mr. Bishop's capital sentencing jury stated, in pertinent part: "You may fix the penalty at life imprisonment if you see fit to do so for any reason satisfactory to you or without any reason." TT at 2974.

The Respondent is correct that there is no direct authority from this Court that "weighing" and "non-weighing" states' death sentences should be reviewed differently. Petitioner explained that point, however, when outlining the Questions Presented in this case. The fact that represents an issue of first impression does not diminish the need for clarity regarding the proper analysis in penalty phase ineffectiveness claims raised in a capital case originating in a non-weighing state.

Since *Strickland*, as this Court has considered these issues – state capital sentencing frameworks and effective assistance of counsel – it has been under different circumstances than those presented here. *E.g.*, *Smith v. Spisak*, 558 U.S. 139, 145-149, 154

(2010). But this Court has repeatedly affirmed the legitimacy of Georgia's unique capital sentencing scheme. *Stringer v. Black*, 503 U.S. 222, 229-230 (1992) ("In Georgia . . . 'the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant.'"), quoting *Zant,* 462 U.S. at 872 (internal quotation omitted).

II. There is Great Variety in Federal Appellate Courts' Analysis of Capital Penalty Phase Prejudice.

If Respondent does not read *Strickland* to require analysis tailored to a state's capital sentencing procedures, it will certainly not perceive circuits' differing approaches to the issue.

The heart of Petitioner's claim is that several federal circuits – the Fourth,[1] Fifth,[2] and Eleventh[3]

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[1] *Lovitt v. True,* 403 F.3d 171, 175 (4th Cir. 2005); *Tucker v. Ozmint,* 350 F.3d 433 (4th Cir. 2003); *Rose v. Lee,* 252 F.3d 676 (4th Cir. 2001); *Hunt v. Lee*, 291 F.3d 284 (4th Cir. 2002).

[2] *Garza v. Stephens*, 738 F.3d 669, 674 (5th Cir. 2013); *Wood v. Quarterman*, 491 F.3d 196, 202-203 (5th Cir. 2007); *Faulder v. Johnson*, 81 F.3d 515, 519-520 (5th Cir. 1996); *Motley v. Collins*, 18 F.3d 1223, 1228 (5th Cir. 1994).

[3] *Bottoson v. Moore*, 234 F.3d 526, 534 (11th Cir. 2000); *Bolender v. Singletary*, 16 F.3d 1547, 1556-1557 (11th Cir. 1994); *Cummings v. Secretary for Dept. of Corrections*, 588 F.3d 1331 (11th Cir. 2009); *Wood v. Allen*, 542 F.3d 1281, 1313 (11th Cir. 2008).

Circuit Courts of Appeals – routinely analyze penalty phase prejudice without regard to the state capital sentencing scheme under which the defendant was sentenced to death.

Other federal circuits, however, properly accord the state statutes underlying a capital conviction.[4] The Ninth Circuit Court of Appeals provides a model worth consideration by this Court. It tailors its prejudice analysis to the relevant state's statutory scheme to "evaluate whether the difference between what was presented and what could have been presented is sufficient to 'undermine confidence in the outcome' of the proceeding." *Lambright v. Schriro*, 490 F.3d 1103, 1121, 1126 (9th Cir. 2007) (quoting *Strickland*, 466 U.S. at 694).[5]

While there is notable confusion regarding the difference and significance of that difference between weighing and non-weighing states, the "unique

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[4] Many states have now abandoned capital punishment and most death penalty states are "weighing" states; therefore, some federal circuits only rarely encounter this circumstance or only review capital sentences from weighing states. Fromherz, Nicholas A., *Assuming Too Much: An Analysis of Brown v. Sanders*, 43 SAN DIEGO L. REV. 401 (May-June 2006).

[5] *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002); *Smith v. Stewart*, 140 F.3d 1263 (9th Cir. 1998); *Correll v. Ryan*, 539 F.3d 938 (9th Cir. 2008); *Hernandez v. Martel*, 824 F. Supp. 2d 1025 (C.D. Cal. 2011); *Pizzuto v. Arave*, 280 F.3d 949 (9th Cir. 2002); *Hovey v. Ayers*, 458 F.3d 892 (9th Cir. 2006) ("The aggravating evidence in Hovey's case was strong, but it was not so overwhelming as to preclude the possibility of a life sentence. Heinous crimes do not make mitigating evidence irrelevant.").

seriousness" of a capital trial demands that clarity be given to Circuit Courts. In accordance with relevant precedent of this Court, federal appellate courts considering state-imposed death sentences must respect the state's death penalty framework, the role of the jury under that framework, and the assurance of due process for each capital defendant. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Zant v. Stephens*, 462 U.S. 862 (1983).

III. The Eleventh Circuit Court of Appeals did not Properly Adjudicate Petitioner's Sixth Amendment Claims.

Petitioner's trial counsel was ineffective in failing to present meaningful testimony from several law enforcement officers available at the time of trial and to seek expert testing and testimony related to available blood spatter evidence. The Eleventh Circuit Court of Appeals opinion holding otherwise considered inapplicable standards in doing so, and was therefore contrary to clearly-established federal law.

A. The Eleventh Circuit Court of Appeals Failed to Properly Analyze Petitioner's Sixth Amendment Claim Related to Law Enforcement Testimony.

Petitioner's trial counsel did not seek to elicit helpful testimony from law enforcement officers working on this capital case; had counsel not failed him in this way, there is a reasonable probability that

at least one juror would have voted in favor of life rather than for death. *See*, *e.g.*, Ga. Code Ann. § 17-10-30; *Zant v. Stephens*, 462 U.S. 862 (1983).

When trial counsel met with several law enforcement officers in preparation for Petitioner's trial, these officers remarked on Bishop's remorse, truthfulness, lesser culpability relative to his co-defendant, and his good behavior while in custody. H.T. at 466. ("During my interactions with him, Bishop was polite, straightforward, truthful, and remorseful.") *See also* H.T. at 472. Counsel mistakenly believed, however, that they would not be permitted to call or cross-examine the law enforcement officers on their beliefs about Mr. Bishop. H.T. at 211 ("If it was helpful and it was something that we thought that we could have done, then probably we would have.").

This testimony from the officers would have had a tremendous impact on the jury's decision.[6] But

[6] Officer Horn described Petitioner, a homeless nineteen-year-old with a seventh grade education, as someone who "never had a chance." H.T. 455, *et seq*. He further explained, "I certainly can't remember a case in which an eighteen year old was involved and a 36 year old man was involved and in which the eighteen year old was the leader. This led me to be skeptical of Mr. Braxley's story blaming the crimes on Mr. Bishop." H.T. 465-467.

In *Roper v. Simmons*, this Court held that penological interests are not served by executing persons whose culpability is diminished by intellectual disability or "youth and immaturity." 543 U.S. 551, 571-572 (2005). This Court further explained, that "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose

(Continued on following page)

Respondent posits that there is no way trial counsel could have compelled a witness to testify. BIO at 28. First, counsel did not even have to compel testimony.[7] Counsel mistakenly believed that he was not allowed to cross-examine the officers on their mitigating beliefs about Mr. Bishop. H.T. 211. These officers were already on the stand during both the guilt and sentencing phases of Petitioner's capital trial.

Moreover, counsel had access to testimony that would have greatly helped their client at trial and did not use it. Captain Rusty Wagner, head of the city

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extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568, quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). *See also Hall v. Florida*, 134 S.Ct. 1986, 2001 (2014) ("The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.").

While Petitioner is not entitled to Eighth Amendment relief on grounds of his age or mental capacity, at 19 and with a Verbal IQ in the 70's, Mr. Bishop is only very narrowly in the class of defendants who are eligible for a death sentence. Trial counsel's failure to present powerful law enforcement testimony related to Petitioner's relative culpability, remorse, and involvement in the crimes was all the more harmful in light of Bishop's youth and mental capacity.

[7] Additionally, Respondent wonders "what 'authority' exists that would give trial counsel the ability to 'compel' any witness." BIO at 28. This authority is the same one that Respondent uses ubiquitously in habeas proceedings – a subpoena. *See, e.g.,* Ga. Code Ann. § 24-13-20, *et seq*. (2013). In the event a witness does not comply with a subpoena, the judge retains sanctioning power. *See* Ga. Code Ann. § 24-13-26 (2013).

jail, explained that he told trial counsel he was willing to testify at trial but that he was never called. H.T. at 477. Failing to call a willing mitigation witness to testify does not comport with the "realities of trial litigation." BIO at 28. Rather, the fact that Mr. Bishop's counsel could have called Captain Wagner as a witness and felt that he could not do so constitutes an "inexcusable mistake of law." *Hinton v. Alabama,* 134 S.Ct. 1081, 1089 (2014).

This ignorance of trial counsel does not amount to strategy. Counsel did not know of the ways to compel testimony and did not even understand that law enforcement could be cross-examined regarding Mr. Bishop's character. Counsel's misunderstanding of law regarding how to get fundamental mitigation evidence in front of the jurors "combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland.*" *Hinton*, 134 S.Ct. at 1089.

Rather than focusing on this mistake of law, the Eleventh Circuit Court of Appeals held that the officers' testimony would not have "undercut" Mr. Bishop's involvement in the murders or "would not have undermined in any way the statutory aggravator found by the jury." App. 20.[8] This analysis does not reference the jury instructions given to Petitioner's sentencing jury; the Georgia death penalty statute; or

[8] The lower court did not address whether defense counsel performed deficiently. App. 20.

Georgia appellate court decisions describing the process by which a capital sentencing jury is empowered to deliberate on such evidence. *See generally* App. 20-24. Under those considerations, whether the mitigating evidence "undercut" or "undermined" the State's aggravating factors was not the relevant inquiry. *Stringer*, 503 U.S. at 229-230; *Zant,* 462 U.S. at 872.

The Court's analysis precluded meaningful review of the state court's determination, which was patently unreasonable in light of the fact that "the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Mr. Bishop's] moral culpability." *Wiggins v. Smith*, 539 U.S. 510, 538 (2003). *See also Porter v. McCollum,* 558 U.S. 30, 41 (2009).

B. The Eleventh Circuit Court of Appeals Failed to Properly Analyze Petitioner's Sixth Amendment Claim Related to Expert Forensic Testing and Testimony.

After Petitioner's death sentence, at the request of state habeas counsel, a forensic expert testified that newly-tested evidence demonstrated that Petitioner's co-defendant, who denied any meaningful involvement in the crimes, "took an active part" in the assault of Leverett Morrison. H.T. 675. The expert also admitted that "the physical evidence [was] entirely consistent with Mr. Bishop's statement to police that both he and Mr. Braxley assaulted the victim. . . ." H.T. 675.

The Eleventh Circuit erred in focusing its analysis of the potential impact of this new evidence on the fact that "no one at trial ever disputed Braxley's involvement in the murder of Morrison." App. 24. This approach sidestepped the issue presented: whether Mr. Bishop was *prejudiced* – during the sentencing phase – by counsel's unreasonable failure to obtain the only physical evidence to support the defense strategy on Mr. Bishop's culpability as it related to his co-defendant's. *See Strickland,* 466 U.S. at 695. In a capital case, omitted forensic evidence need not have been the "linchpin" related to guilt or innocence (BIO at 38); it needs only to have prejudiced the Petitioner in the jury's consideration of his sentence. *Rompilla v. Beard*, 545 U.S. 374, 388 (2005); *Porter,* 558 U.S. at 41.

In reviewing the state habeas court's decision, the Eleventh Circuit applied an analysis contrary to clearly established law when it found the presentation of this testimony would not have "undermined in any way the statutory aggravator found by the jury." App. 20. The federal court of appeals neglected that a guilty verdict – and in many cases, the presence of at least one aggravating circumstance – is presumed at the sentencing phase. After all, "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." *Lowenfield v. Phelps*, 484 U.S. 231, 244-245 (1988).

The question in Sixth Amendment challenges is the relative importance of mitigation that was available but not presented to the sentencing jury. *See Wiggins,* 539 U.S. 510; *Stringer*, 503 U.S. at 229-230 ("In Georgia . . . aggravating factors as such have no specific function in the jury's decision whether a defendant who has been found to be eligible for the death penalty should receive it under all the circumstances of the case.").

Fundamentally, the Eleventh Circuit conflated the application of the *Strickland* standard to a sentence rendered in Georgia with application to sentences rendered in other states within the Eleventh Circuit. By reducing the prejudice prong of the *Strickland* analysis to an examination of the testimony's mitigating effect upon guilt or aggravating circumstances, the Eleventh Circuit denied Petitioner meaningful Sixth Amendment review of his capital sentence.

IV. Petitioner's Claims Are Properly Before This Court.

Finally, Petitioner's challenge to the opinion below is properly before this Court for review. Under Supreme Court Rule 10, this Court may grant a petition for a writ of certiorari if "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . ." S. Ct. R. 10(a). As articulated in Petitioner's brief, the

Eleventh Circuit's failure to consider Georgia's specific capital sentencing scheme in its analysis of prejudice under *Strickland* is in direct conflict with federal circuit courts of appeals decisions which properly tailor penalty-phase prejudice analysis in accordance with state-specific capital sentencing schemes.

Further, Respondent's assertion that Petitioner failed to raise this issue in the Eleventh Circuit Court of Appeals, while correct, is illogical. While Petitioner has brought timely state and federal habeas claims on these issues since his conviction became final, it is impossible for Petitioner to have challenged the Eleventh Circuit's improper prejudice analysis prior to receiving the opinion of that court. *See* App. 20-24. Petitioner did not perceive the variety of approaches to *Strickland*'s application among the federal appellate courts until it began the process of challenging the improper analysis here.

CONCLUSION

After *Furman*, states that chose to retain capital punishment re-wrote applicable laws to specify the procedures required for a jury to impose a capital sentence. *See Gregg v. Georgia*, 428 U.S. 153, 180 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972). This Court explained, "[n]o longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines." *Gregg,*

428 U.S. at 206-207. Likewise, federal appellate courts must accord those "legislative guidelines" when analyzing whether omitted mitigation testimony or evidence would have led to a different outcome of the capital defendant's sentencing proceedings.

The issue presented by Petitioner's case is larger than a distinction between weighing and non-weighing states; the issue is one of respect by federal appellate courts for state capital sentencing procedures. It is therefore appropriate that this Court accept the Petitioner's case to consider the question presented.

Respectfully submitted, 17th day of June, 2014.

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