No. _____

In the
Supreme Court of the United States

KIM THOMAS, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Petitioner,
v.
DERRICK ANTHONY DEBRUCE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented (Capital Case)

Derrick DeBruce robbed a store, murdered a customer, and was sentenced to death after an 11-1 jury vote. On post-conviction review, the state courts held a three-day evidentiary hearing, in part so that DeBruce's new counsel could prove that the two lawyers on his trial team were ineffective for failing to offer additional mitigating evidence at the penalty phase of trial. But DeBruce failed to introduce evidence about what his trial counsel did to prepare for the penalty phase or why. In fact, during this three-day evidentiary hearing, DeBruce did not even account for the attorney on his trial team who made the opening and closing arguments at the penalty phase. The state courts found that DeBruce had not met his burden to show that his trial counsel were ineffective.

On federal habeas review, a panel of the Eleventh Circuit reversed DeBruce's sentence over the dissent of that court's longest-serving active member. This petition raises the following two questions:

(1) Were the state courts objectively unreasonable when they held that DeBruce failed to establish that his counsel performed deficiently at the penalty phase of his trial?

(2) Were the state courts objectively unreasonable when they held that DeBruce had not been prejudiced by his counsel's performance?

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INTRODUCTION

In conflict with this Court's precedents, the court of appeals found ineffective assistance of counsel without applying the "double deference" required by *Strickland v. Washington*, 466 U.S. 668 (1984), and the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254. Judge Tjoflat's dissenting opinion explains that "[t]he majority sets the State court ruling aside without mentioning, much less applying, § 2254" of AEDPA. App. 67a. At a three-day state-court evidentiary hearing, "[o]ne of DeBruce's lawyers [wa]s totally unaccounted for, . . . the other lawyer was not questioned 'about what investigations he and [his colleague] conducted,' and no one at any point asked the lawyers about their overall strategy." App. 42a-43a (citations omitted) (Tjoflat, J., dissenting). The majority thus overturns "a reasoned State court decision . . . on little more than a hunch." App. 45a (Tjoflat, J., dissenting).

As Judge Tjoflat's opinion catalogues, the majority's "approach marks a tiresome revival of errors for which our sister circuits have been repeatedly and pointedly reversed." App. 44a. Indeed, this Court unanimously reversed the Sixth Circuit for committing the very same errors in *Burt v. Titlow*, 134 S. Ct. 10 (2013), and reversed the Ninth Circuit for similar errors in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). Here, as in *Burt* and *Cullen*, the court of appeals did not presume that the defendant's counsel acted reasonably as *Strickland* requires. And it did not defer to the state courts as AEDPA requires. The Court should grant the writ and reverse, either summarily or after full briefing and argument.

OPINIONS BELOW

The district court's amended opinion and order denying DeBruce's habeas petition is unreported and reprinted in the appendix at 135a-409a. The relevant portion is 199a-235a. The Eleventh Circuit's opinion reversing in part and affirming in part is reported at *DeBruce v. Comm'r, Alabama Dep't of Corr.*, 758 F.3d 1263 (CA11 2014), and reprinted in the appendix at 1a-134a. The Alabama Court of Criminal Appeals' opinion, which forms the basis of DeBruce's federal habeas petition, is reported at *DeBruce v. State*, 890 So. 2d 1068 (Ala. Crim. App. 2003), and is reprinted in the appendix at 412a-488a.

STATEMENT REGARDING JURISDICTION

Jurisdiction is proper. *See* 28 U.S.C. § 1254(1). The Eleventh Circuit issued the opinion under review on July 15, 2014. App. 1a. We filed a timely application for rehearing 21 days later, on August 5, 2014, which the Eleventh Circuit denied on September 10, 2014. *See* App. 410a. On September 19, Justice Thomas granted an extension of time up to January 8, 2015 to file this petition, and we have sought certiorari within that time. *See* App. 489a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

The pertinent section of AEDPA states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

I. Statement of the Facts

DeBruce committed murder while he and five fellow gang members robbed an Auto Zone store in 1991. App. 2a. The robbery was the culmination of a series of robberies and holdups, in which DeBruce and his gang had been involved. App. 48a-50a. In the middle of the robbery, Doug Battle entered the store and was told to get down on the ground. He got to his knees, threw his wallet at one of DeBruce's accomplices, and was knocked to the ground with a pistol. *See* App. 9a. While Battle lay face-down on the floor, DeBruce shot him in the back. *See* App. 46a.

DeBruce was charged with capital murder. He was initially appointed counsel, but a month or so

before trial he retained an experienced and successful capital-defense lawyer, Erskine Mathis. *See* App. 51a, 199a-200a. Mathis had tried "10 or 12" capital cases, none of which had resulted in the death penalty. App. 52a. Mathis associated another equally experienced attorney, Bill DelGrosso, as his co-counsel. App. 52a-53a.

The jury found DeBruce guilty of capital murder, and the penalty phase of the trial immediately followed. DelGrosso gave the opening and closing arguments at the penalty phase. DeBruce called his mother to offer mitigation evidence. App. 60a-62a, 65a. She testified that DeBruce graduated from high school and then attended some college. App. 60a. She assured the jury that there was "good" in DeBruce and that if given the opportunity he would do better. App. 60a-61a. As her testimony came to a close, she also "made passing mention" of an unidentified "mental disorder." App. 15a. *See also* 202a-04a (quoting testimony). Mainly though, she pleaded for her son's life: "I'm asking y'all to please think about me and my child. I love him and you love yours and I'm begging y'all try not to give him the death penalty. Let him live." App. 99a.

DeBruce also gave a statement and asked the jury for mercy. App. 62a. Underscoring the theme of family and mercy, DeBruce personally asked the jury to sentence him to life without parole so that he could be a father to his own son. App. 62a.

The jury recommended a death sentence by a vote of 11 to 1, and the judge later imposed that sentence. App. 62a-63a. The Alabama appellate courts affirmed. *DeBruce v. State*, 651 So. 2d 599 (Ala. Crim. App. 1993); *Ex parte DeBruce*, 651 So. 2d

624 (Ala. 1994). Mathis has since represented several other members of DeBruce's family. App. 51a n.2.

II. Course of Proceedings and Disposition

A. State post-conviction proceedings

With new counsel, DeBruce filed a state-court post-conviction petition challenging his conviction and sentence. App. 142a. Among many other things, DeBruce argued that counsel had been ineffective during the penalty phase by failing to investigate and present additional mitigation evidence. App. 14a. DeBruce argued that his counsel should have gone further in the penalty phase by (1) calling family members to contradict his mother's testimony about his good family life, (2) introducing school records to show that DeBruce was not a good student and did not go to college, as he and his mother claimed, (3) presenting evidence of a purported mental disorder, and (4) presenting evidence of a digestive-tract ailment that was first diagnosed *after* the conviction. App. 15a-18a; 439a-40a; 452a-53a.

After a three-day evidentiary hearing,[1] the state court denied the ineffective-assistance claims on the merits. App. 42a. DeBruce did not establish what Mathis did to prepare for the penalty phase, nor did he present any testimony about what DelGrosso, who gave the opening and closing at the penalty phase, did to prepare for that portion of the trial. *See* State Court—Collateral Transcript, Vol. 15, Tab R-45 &

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[1] The transcript of the evidentiary hearing is approximately 700 pages of the post-conviction record. On the habeas checklist filed with the district court, Doc. 12-1, the evidentiary hearing is listed as Volume 15 and Volume 16 of the record at Tab R-45 and Tab R-46. The evidentiary hearing was held on July 8, July 9, and October 28, 1999. *See* Doc. 12-1 at 4.

Vol. 16 Tab R-46. The State also presented evidence that DeBruce was "faking" his purported mental problems. App. 211a-12a (quoting App. 453a). For these and other reasons, the state court concluded that DeBruce had "not established deficient performance or prejudice arising therefrom." App. 209a (quoting 452a).

DeBruce appealed. The Alabama Court of Criminal Appeals also rejected DeBruce's claim, concluding instead that "Mathis did an admirable job of defending DeBruce." App. 451a. The Court of Criminal Appeals explained that there was simply no evidence about what investigation DeBruce's legal team performed or why:

> DeBruce was represented by two attorneys at trial; however, only one attorney testified at the postconviction hearing. DelGrosso did not testify or execute an affidavit for purposes of the postconviction proceedings. We do not know the extent of his involvement in the case or what investigation he conducted in preparation for trial. Neither was Mathis questioned about what investigations that he and DelGrosso conducted.

App. 443a-44a.

Nonetheless, the Court of Criminal Appeals explained that there were many reasons for DeBruce's defense team to have presented the mitigation case that they did. Specifically, the court noted that Mathis "had no reason to doubt DeBruce's mental competency after reviewing the preliminary report" on DeBruce's mental state; that since both DeBruce and his mother claimed that he had

completed high school and attended some college, Mathis had no reason to "disregard[] DeBruce's statements and his mother's statements and check[] the school records for himself"; and finally, "[g]iven DeBruce's mother's testimony, DeBruce's own comments," and the testimony of the state's expert in the post-conviction hearing, "Mathis was not ineffective for failing to investigate further into DeBruce's mental health." App. 217a-20a.

The Alabama Supreme Court denied certiorari. *Ex parte DeBruce*, No. 1030617 (Ala. Apr. 30, 2004).

B. Federal habeas corpus proceedings

DeBruce filed a timely petition for a writ of habeas corpus that asserted a litany of claims. App. 144a, 154a-55a, 221a. As to DeBruce's penalty-phase ineffective assistance claim, the district court concluded that the state court's judgment was not unreasonable under AEDPA. The district court explained that DeBruce and his mother had repeatedly painted a picture of his childhood as a relatively good one and of DeBruce himself as coming from a loving family. App. 226a. The only testimony that contradicts this picture of a loving family was that of DeBruce's two sisters, who were also convicted felons by the time of the state post-conviction hearing. *See* App. 226a-229a. The district court noted that there are no "hospital, social services or school records" that reveal abuse or "medical records" that show attempted suicide or mental problems. App. 229a, 231a-32a. Regarding DeBruce's mental health, the district court noted that the state court had found as a factual matter that DeBruce did not suffer from a mental disorder, and "DeBruce cannot base his claim on a condition

that does not exist." App. 233a. The district court also held that evidence of "DeBruce's borderline intelligence [was not] particularly weighty mitigation evidence" in any event. App. 234a.

DeBruce appealed. A divided panel granted habeas relief on DeBruce's penalty-phase claim. *See* App. 1a. Judge Martin wrote a brief concurring opinion in which she assured any reader that the judges in the majority had "honestly assessed this case to the best of our ability." App. 41a (Martin, J., concurring). Judge Tjoflat wrote a lengthy dissent in which he criticized the majority for, among other things, "embellish[ing] the record, disregard[ing] AEDPA, and succumb[ing] to the all too tempting impulse for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission . . . was unreasonable." App. 44a (Tjoflat, J., dissenting) (quotation marks and citation omitted).

REASONS THE COURT SHOULD GRANT THE WRIT

The Eleventh Circuit's judgment conflicts with numerous decisions of this Court. When habeas petitioners attack their state convictions on the grounds of having received ineffective assistance of counsel, federal courts must give "double deference." *See Burt v. Titlow*, 134 S. Ct. 10 (2013). First, *Strickland* mandates that federal courts presume counsel was effective and burdens habeas petitioners with affirmatively proving ineffective assistance. *Id.* (quoting *Strickland v. Washington,* 466 U.S. 668 (1984)). Second, AEDPA compounds this deference by requiring that habeas relief be granted only when a state court has applied the law or determined the facts in an unreasonable manner. This "highly

deferential" standard is "difficult to meet." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (internal citations omitted).

The court of appeals failed to apply either level of deference and committed the same errors that have led this Court to reverse in comparable cases. The court of appeals simply "assumed that counsel was ineffective where the record was silent." *Burt*, 134 S. Ct. at 12. The court of appeals "treated the unreasonableness question as a test of its confidence in the result it would have reached under *de novo* review." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011). And the court of appeals relied on its "own sense of 'prudence' and what appears to be [its] belief that the only reasonable mitigation strategy in capital cases is to 'help' the jury 'understand' the defendant." *Cullen*, 131 S. Ct. at 1407. In short, "[b]ecause the [panel] had little doubt that [DeBruce's] *Strickland* claim had merit, the [panel] concluded the state court must have been unreasonable in rejecting it." *Harrington*, 131 S. Ct. at 786. The Court should grant the petition and reverse, either summarily or after plenary review.

I. The court of appeals did not apply *Strickland's* presumption of effectiveness.

In *Strickland* and its progeny, the Court recognized a presumption in favor of counsel's effectiveness and placed the burden of proof squarely with the defendant who is challenging the effectiveness of his counsel. *Strickland*, 466 U.S. at 687. The Court "established that counsel should be 'strongly presumed to have rendered adequate

assistance' . . . [and that] [t]o overcome that presumption, a defendant must show that counsel failed to act 'reasonabl[y] considering all the circumstances.'" *Cullen*, 131 S. Ct. at 1403 (quoting *Strickland*, 466 U.S. at 690). Lest there be any doubt as to what kind of evidence the defendant must present to meet this burden, this Court has specifically held that he must submit actual proof—not its absence—to support his claims. *See, e.g.*, *Burt*, 134 S. Ct. at 17. In other words, it is up to the petitioner to develop the record to prove his point; he cannot simply allege ineffectiveness and shift the burden to the State to refute it. *See id.* at 19 (Sotomayor, J., concurring) ("Had [the petitioner] made a better factual record—had she actually shown, for example, that [the defense attorney] failed to educate himself about the case . . . then she could well have prevailed.").

This rule is worth belaboring because it is one that the court of appeals ignored. The court of appeals' theory—that DeBruce received ineffective assistance of counsel because his lawyers failed to investigate potentially mitigating evidence—rests on a gross misapplication of the *Strickland* standard.

A. There is no evidence about what DelGrosso did to prepare for sentencing or why.

The court of appeals wrongly inferred that DelGrosso—one of DeBruce's two retained lawyers—did not investigate mitigating evidence. App. 64a. There is no support for this inference in the record because DeBruce made no allegations about

DelGrosso in his filings, DelGrosso did not testify in person or by affidavit at the state post-conviction hearing, and the other lawyer—Mathis—was not even asked about what DelGrosso did or did not do. App. 65a-67a (Tjoflat, J., dissenting). This absence is significant because: (1) DelGrosso was co-counsel at DeBruce's trial, and (2) DelGrosso gave the opening and closing statements at the penalty phase of the trial, which is the phase of trial where the court of appeals found there was deficient performance. App. 65a, 443a-44a.

The court of appeals considered the absence of evidence about DelGrosso's work to be irrelevant because he played a "minor role" in the trial. App. 22a-23a. But there are two problems with this reasoning. First, the premise that DelGrosso played a "minor role" is based on, effectively, nothing. The court of appeals determined that DelGrosso played a minor role because: (1) he joined the trial team roughly two weeks before the trial; (2) his name did not appear on pretrial motions; and (3) he did not examine witnesses during the guilt phase of the trial. *Id.* But these facts show only that DelGrosso was associated by Mathis, who himself was hired only a month before trial, and that DelGrosso had more involvement during the penalty phase than the guilt phase. DeBruce never submitted time or billing records, notes, or any other documents to account for his attorneys' work. *See* App. 81a (Tjoflat, J., dissenting). There is no evidence about what DelGrosso did behind the scenes, which is where investigations and interviews occur.

The second problem with the court of appeals' reasoning is that these facts strongly support the

inference that DelGrosso took the *lead* at the penalty phase, not that he played a minor role in it. Given that DelGrosso did not examine witnesses at the guilt phase, but gave the opening and closing at the penalty phase, it would be reasonable to infer that DelGrosso took the lead role at the penalty phase, just as Mathis took the lead role in the guilt phase. The fact that "DelGrosso appears to have focused his energies on the penalty phase," App. 69a (Tjoflat, J., dissenting), in comparison with the guilt phase, underscores that he is the lawyer whose work we should care about *the most* for the purposes of DeBruce's penalty-phase ineffective assistance claim.

Regardless, a litigant cannot prove ineffective assistance at the penalty phase without at least explaining what the lawyer who gave the opening and closing statements did to prepare. Even if DelGrosso played a "minor role" in the guilt phase, it does not follow that DelGrosso played a minor role in the penalty phase. But even if we further assume that DelGrosso played a "minor role" in every phase of the trial, it does not follow that DelGrosso did not investigate mitigating evidence or adopt some other perfectly reasonable penalty-phase strategy. "It should go without saying that the absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Burt,* 134 S. Ct. at 17 (internal marks omitted). *Accord id.* at 18 (Sotomayor, J., concurring).

B. There is similarly no evidence about what Mathis did or why, although we do know that he did not hire an investigator or subpoena records.

The gaping hole in the record about DelGrosso was enough, by itself, for the state courts to reject DeBruce's ineffectiveness claim. Nonetheless, the court of appeals also improperly inferred—in the absence of evidence—that Mathis was incompetent because he purportedly made no investigation into DeBruce's childhood and mental health history. App. 20a, 25a-27a. Here, the record shows only that Mathis declined to take *certain* investigative steps—but it does not follow that Mathis failed to investigate at all or in a competent manner.

The court of appeals' theory of Mathis' deficient performance is as follows. Before trial, Mathis ordered a pre-trial mental competency evaluation to be performed by a mental-health worker. He ordered that evaluation expressly to use at sentencing. App. 92a. Ultimately, the mental-health worker generated a report that recounted the mental-health worker's interview with DeBruce and concluded that he had no serious mental problems. In that interview, according to the mental-health worker, DeBruce described struggles in school, attempted suicide, and substance-abuse problems. App. 18a-19a.[2] This report—the court of appeals reasoned—should have put Mathis on notice of the need to investigate

[2] The report was never offered into evidence at the state post-conviction hearing, but the magistrate judge made it a part of the federal record. *See* App. 207a n.35; Docs. 27 & 29.

further for additional mitigating evidence. App. 24a-25a. All of this is well and good.

But the court of appeals then concludes, without any evidence, that Mathis did no such investigation. *See* App. 27a ("fail[ed] to take even the first step of asking DeBruce and his mother about the information"). Instead, the record shows only that Mathis did not hire an outside investigator and that he did not personally subpoena DeBruce's school or medical records. App. 77a-78a (Tjoflat, J., dissenting). Mathis was not asked about whether he used other means to investigate mitigating evidence. *Id*. The court of appeals maintains throughout its opinion—with absolutely no support in the record—that Mathis did not follow up on the pre-trial mental health report that he ordered. *But the court of appeals never explains how it reaches this conclusion*. *See* App. 87a (Tjoflat, J., dissenting) ("there is exactly zero testimony to that effect, and DeBruce did not make the claim in his brief"). Instead, the court of appeals simply presumes that "DeBruce's seasoned capital-defense lawyers walked into the penalty phase of trial without knowing *anything* about the man they were defending," even though they stated on the record that they had interviewed him and his family many times. App. 43a, 63a, 81a (Tjoflat, J., dissenting).

During the three-day state post-conviction hearing, Mathis was *never questioned about the competency report nor was that report offered into evidence*. *See* App. 65a (Tjoflat J., dissenting); App. 207a n.35 (district court opinion). Based on the record, it is entirely possible and highly likely that Mathis discussed the report with DeBruce and his

family and decided that its contents did not warrant further investigation. "DeBruce knows what he said to his lawyers and what they said to him, and he has not shared that information" with the State or any court. App. 82a-83a (Tjoflat, J., dissenting). It is possible that "DeBruce and his mother . . . told Mathis that the report was nonsense." App. 87a (Tjoflat, J., dissenting). After all, they both testified under oath that DeBruce had done well in school and came from a happy family[3]—facts at odds with what DeBruce apparently told the person who interviewed him for the mental-health report.

In fact, the District Attorney tried to introduce the report at the penalty phase and DeBruce's defense team argued to keep the report *out*. *See* App. 132a (Tjoflat, J., dissenting) ("There is some irony in the fact that DeBruce's lawyers worked so hard to exclude the testimony that DeBruce now, in hindsight, calls mitigating."). There was obviously something in that report that the defense team did not want the jury to see—perhaps various lies that their client told the mental-health worker who interviewed him. Although we can only speculate

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[3] The district court explained: "DeBruce told the probation officer preparing his youthful offender report in December 1991 that he had an average childhood and had attended [college]. His own mother confirmed this history. Moreover, during a mid-trial suppression hearing concerning the voluntariness of his statement, DeBruce again testified that he had graduated from high school and attended some college. Finally, after trial, it appears that DeBruce may have made the same representation yet again to the probation officer during pre-sentence proceedings." App. 226a. We do not know why DeBruce apparently told the interviewer something different than he told everyone else or, more importantly, which version he told his attorneys.

about why the defense team did not want to use the report at sentencing, a court must "affirmatively entertain the range of possible reasons [defendant's] counsel may have had for proceeding as they did." *Cullen,* 131 S. Ct. 1388 at 1407 (citations and internal quotation marks omitted).

Finally, the court of appeals erred by concluding that Mathis' reason for not hiring an investigator—a lack of time—established incompetence. Hiring an outside investigator is not a constitutional requirement for effective representation, without regard to the context. And no reasonable lawyer ignores time constraints. All lawyers face time constraints and thus must decide which avenues of inquiry to prioritize. Prioritizing some avenues of preparation over others is a hallmark of expertise, not negligence. Moreover, it is not trial counsel's fault—nor damning to their performance—that DeBruce waited until a month before trial to hire Mathis and DelGrosso.

DeBruce did not meet his burden of proving what Mathis did, and why, with regard to mitigating evidence. Mathis ordered the mental health report, and there is no evidence to establish that he did not follow up on the report *that he ordered*. Silence in the record does not overcome the strong presumption that counsel performed proficiently.

II. The court of appeals failed to defer to the reasonable determinations of the state courts.

As explained above, the Eleventh Circuit's *Strickland* analysis is erroneous standing on its own, but it is particularly egregious in light of the deference that AEDPA commands. As in *Harrington v. Richter,* "[h]ere it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA." 131 S. Ct. 770 at 786. Under AEDPA, a federal court must ask whether a state court's application of federal law or determination of fact was unreasonable. *See id.* at 785. A state court's application of federal law is only unreasonable if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [Supreme Court] precedents." *Id.* at 786. "If this standard is difficult to meet—and it is—that is because it was meant to be." *Burt*, 134 S. Ct. at 16 (citation and quotation marks omitted).

The court of appeals failed to defer to the state courts' determination on both prongs of *Strickland*: deficient performance and prejudice.

A. The state courts were not objectively unreasonable when they found that counsel's performance was not deficient.

We have already explained why the court of appeals' reasoning on the performance prong is flatly contrary to *Strickland.* The state courts' primary reason for rejecting DeBruce's claim was that he

offered almost no evidence about what his attorneys did or why. As the state court explained, neither one of DeBruce's attorneys "was . . . questioned about what investigations" he had conducted or why. App. 443a-44a. They were not questioned about their decisions regarding the mental competency report *at all*. They were not questioned about their communications with DeBruce and his family *at all*. "The record on [the sentencing phase issue] is almost laughably thin, taking up at most a few pages of the collateral hearing transcript," which otherwise consumes approximately 700 pages of the record.[4] App. 42a (Tjoflat, J., dissenting). It was not objectively unreasonable for the state courts to hold DeBruce to the same burden of proof that this Court applied in *Burt v. Titlow*. "It should go without saying that the absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Burt*, 134 S. Ct. at 17.

The court of appeals' contrary reasoning is materially identical to the Ninth Circuit's flawed reasoning in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). In that case, after their client was convicted of murder, the lawyers chose to call only one witness during the sentencing phase of the trial: the defendant's mother. Even though they had previously consulted with a psychiatrist who diagnosed their client with certain antisocial personality disorders, they chose not to present this evidence, nor did they present additional evidence about the defendant's troubled childhood. *Id.* at

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[4] The hearing transcript is at Vol. 15, Tab R-45 and Vol. 16, Tab R-46.

1396. The state courts denied the defendant's ineffective assistance claim, but the Ninth Circuit held that the lawyers should have presented this additional evidence.

This Court, in turn, reversed the Ninth Circuit, noting that absent evidence to the contrary, the court must assume that the "family sympathy" mitigation strategy that the defense used was chosen "for tactical reasons rather than through sheer neglect." *Id.* at 1404 (citations omitted). It then chided the Ninth Circuit for failing to "affirmatively entertain the range of possible reasons [defendant's] counsel may have had for proceeding as they did." *Id.* at 1407 (citations and internal quotation marks omitted). Emphasizing that "'[t]here are countless ways to provide effective assistance in any given case," *id.* at 1403 (quoting *Strickland*, 466 U.S. at 689), the Court noted that "'[t]he current infatuation with 'humanizing' the defendant as the be-all and end-all of mitigation disregards the possibility that this may be the wrong tactic in some cases because experienced lawyers conclude that the jury simply won't buy it,'" *id.* at 1408 (citations omitted).

The panel here fell into the same trap. Like the Ninth Circuit, it failed to entertain the possible reasons that Mathis and DelGrosso chose the strategy they did and instead concluded that their performance was deficient. Acting once again like the Ninth Circuit, the panel insisted that any reasonable lawyer would have instead (or in addition) chosen to humanize DeBruce instead of trying to create sympathy for his family through his mother's testimony. App. 37a-38a. Once it determined this, it then held that because the state

courts did not come to the same conclusion, their holdings must be such an incorrect application of *Strickland* that they are unreasonable. App. 38a-39a. This is not the law. As this Court has explained, "[i]t bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington,* 131 S. Ct. at 786.

It was actually the state courts that correctly applied the *Strickland* standard because they—unlike the court of appeals—considered why DeBruce's lawyers may have done what they did. *See* App. 467a. Finding that the lawyers' "strategy in the penalty phase was to beg for mercy," the Court of Criminal Appeals held that "[t]his strategy, given the facts of this case, was not deficient." *Id.* In his dissent, Judge Tjoflat elaborates why this was so: "The defense team had to pick: they could appeal to the jury's sympathy for DeBruce's family, suggesting that as parents they should spare this 'kid' who had done something 'stupid,' . . . or they could try to manufacture sympathy for DeBruce himself, thereby inviting the State to introduce evidence that this 'kid' was in fact a committed criminal." App. 101a (Tjoflat, J., dissenting). They could introduce evidence that DeBruce had a bad childhood by extensively criticizing DeBruce's parents or they could put the parents themselves on the stand to beg for mercy. App. 101a-102a.

Just as in *Harrington* and *Burt*, the state courts were not objectively unreasonable when they held that DeBruce had not established deficient performance.

B. The state courts were not objectively unreasonable when they found no prejudice.

The court of appeals similarly failed to defer to the state court's determination that the omission of mitigating evidence had no prejudicial effect on DeBruce's sentencing. Although in general "[t]he question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," a federal habeas court asks only whether the state court's finding of no prejudice was reasonable. *Cullen*, 131 S. Ct. at 1408.

Here again, the court of appeals conducted what appears to be *de novo* review and merely concluded that the state courts had been unreasonable. The weakness of the court of appeals' mistaken approach is highlighted by the fact that it relied in large part on its own cases, not clearly established Supreme Court law as AEDPA requires. *See* App. 28a-31a. (quoting *Johnson v. Sec'y, Dep't of Corr.,* 643 F.3d 907, 935 (CA11 2011); *Williams v. Allen*, 542 F.3d 1326 (CA11 2008); and *Brownlee v. Haley*, 306 F.3d 1043, 1074 (CA11 2002)). Regardless of the correctness of those opinions, they are "not worth anything for AEDPA purposes: § 2254(d)(1) is concerned with 'clearly established Federal law, as determined by the Supreme Court,' not by panel decisions of the Eleventh Circuit." App. 123a (Tjoflat, J., dissenting).

The court of appeals also based its prejudice finding on cases where the mitigating evidence was

much stronger. *See* App. 34a-36a. As the district court explained, "DeBruce's childhood . . . pales in comparison to the nightmarish childhoods experienced by the petitioners in the line of Supreme Court cases he relies upon to support a prejudice argument." App. 129a-30a. For instance, DeBruce's "parents did not 'frequently [leave him] and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage.' His mother did not have 'sex with men while her children slept in the same bed' or 'force[ ] [his] hand against a hot stove burner.' DeBruce was not 'repeatedly molested and raped' by a foster parent. He was not 'gang-raped . . . on more than one occasion' or 'sexually abused by his supervisor' at work." App. 129a-131a (Tjoflat, J., dissenting) (quoting *Wiggins v. Smith*, 539 U.S. 510, 516-517 (2003)) (internal quotations omitted) (alterations in the original).

DeBruce comes from an intact nuclear family, his purported mental problems proved to be a sham at the state post-conviction hearing, and his gastro-intestinal ailment (although apparently real) was first diagnosed *after* his murder trial. In one of the most fanciful parts of its opinion, the court of appeals takes Mathis and DelGrosso to task for failing to offer mitigation evidence about DeBruce's supposed "resistance to joining gangs," App. 31a, which ignores the fact that he committed this murder as a part a gang-related crime spree. This evidence is several orders of magnitude weaker than the mitigation evidence that this Court found persuasive in *Wiggins* and similar cases. *See* App. 230a-32a (district court opinion).

The state courts weighed the total aggravating evidence against the total mitigating evidence as instructed by *Wiggins*. The courts reasonably determined that the strong aggravating evidence (the violent character and senseless nature of the crime and DeBruce's prior robberies and gang affiliation) outweighed the totality of the mitigating evidence of DeBruce's fake mental health issues, purportedly difficult upbringing, and belatedly diagnosed gastro-intestinal disorder. App. 466a. The court of appeals failed to show—as AEDPA requires—how the state court's determination violated this Court's precedent.

III. The case is a good vehicle for summary reversal or plenary review.

This case is a good candidate for summary reversal or plenary review. As explained above, the court of appeals' decision flatly contradicts *Burt*, *Harrington*, *Strickland*, and *Wiggins*. Other considerations also underscore that the Court should grant the writ.

First, the majority does not even attempt to justify its reasoning by identifying errors in the state courts' or district court's analyses. Instead, the majority simply vouches for the correctness of its opinion. Judge Martin's concurrence expressly assures the reader that the majority "has honestly assessed this case" and is "sincere[ly]" trying to "perform the role required of us as judges." App. 41a. The majority is "[p]rotesting perhaps a little too much." App. 70a. (Tjoflat, J., dissenting). *See* WILLIAM SHAKESPEARE, HAMLET, Act III, Sc. 2.

Second, this penalty issue is the last issue in this case. Of all the myriad constitutional claims that the state courts and district court had to address, only two were appealed. Because the court of appeals affirmed the district court's denial of DeBruce's ineffective assistance of counsel claim as it related to the guilt phase of the trial, App. 13a, DeBruce's only remaining habeas claim is ineffective assistance of counsel at the penalty phase. Had the court of appeals properly applied the law, DeBruce's conviction and sentence would have been upheld completely and this protracted 25-year litigation would be over.

Third, the court of appeals' decision undermines the entire point of AEDPA. AEDPA review is highly deferential because habeas review of state court convictions "frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights" and "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington*, 131 S. Ct. at 786. The court of appeals' opinion leaves state-court jurists to ask: What is the point of holding a three-day evidentiary hearing and issuing a 100-page written decision if the federal courts will not hold a habeas petitioner to his burden of proof?

Fourth, as Judge Tjoflat explained, the court of appeals' opinion "will do damage beyond this particular case." App. 45a. Specifically, it creates an unusual and arguably unjust situation in which the ringleader of DeBruce's gang—a man names Charles Burton—has had his death sentence affirmed, although DeBruce, the triggerman, has not. *See*

Burton v. Comm'r, Ala. Dep't of Corr., 700 F.3d 1266 (CA11 2012) (affirming Burton's death sentence based on the same murder). Moreover, because the decision imposes the burden on the State to establish what a petitioner's attorneys did or did not do, the State must begin to attack attorney-client privilege in a broad and extensive way whenever a petitioner makes a claim of ineffective assistance. In short, the court of appeals' decision will ripple through the justice system unless it is reversed.

CONCLUSION

The Court should grant certiorari and reverse the court of appeals.

Respectfully submitted,

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