No. 23-7187

IN THE
Supreme Court of the United States

LESLIE GALLOWAY, III,
Petitioner,

v.

THE STATE OF MISSISSIPPI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

BRIEF IN OPPOSITION

LYNN FITCH
Attorney General

PARKER A. PROCTOR JR.
Special Assistant
Attorney General
Counsel of Record
MISSISSIPPI ATTORNEY
GENERAL'S OFFICE
P.O. Box 220
Jackson, MS 39205-0220
Parker.Proctor@ago.ms.gov
(601) 359-3747
Counsel for Respondent

CAPITAL CASE
QUESTION PRESENTED

Petitioner raped, tortured, and murdered a 17-year-old girl. To spare him from the death penalty, petitioner's trial counsel sought at the penalty phase to humanize petitioner by stressing his connections to and support from his family. The jury nevertheless sentenced petitioner to death. On state post-conviction review, petitioner claimed that his counsel conducted an inadequate mitigation investigation and should have pursued and presented evidence on petitioner's troubled childhood and mental-health issues. Applying the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984), and this Court's decisions following it, the Mississippi Supreme Court rejected that argument, ruling that counsel adequately investigated based on a reasonable strategic decision to humanize petitioner (and so counsel performed adequately) and that the new mitigation evidence on which petitioner relied was damaging to him and was not reasonably likely to have changed petitioner's sentence (and so counsel's performance did not prejudice petitioner).

The question presented is whether this Court should review the Mississippi Supreme Court's fact-bound rejection of petitioner's ineffective-assistance-of-counsel claim, when that decision applies legal standards that have been settled for 40 years, those standards and their application are uniform across the lower courts, and the decision soundly applies those standards to correctly reject petitioner's claim.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes

OPINION BELOW

The Mississippi Supreme Court's opinion denying post-conviction relief (Petition Appendix (App.) 1a-101a) is reported at 374 So. 3d 452.

JURISDICTION

The Mississippi Supreme Court's judgment was entered on October 5, 2023. App.1a. That court denied rehearing on December 7, 2023. App.102a. On February 29, 2024, Justice Alito extended the time to file a petition for a writ of certiorari to April 5, 2024. The petition was filed on April 5, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT

In 2008, petitioner Leslie Galloway III raped, tortured, and murdered 17-year-old Shakeylia Anderson in Harrison County, Mississippi. A jury convicted him of capital murder and, after finding four aggravating circumstances, sentenced him to death. The Mississippi Supreme Court affirmed. The petition here arises from that court's denial of petitioner's application for post-conviction relief.

1. On the evening of December 5, 2008, Shakeylia Anderson was at her grandmother's house with her cousin, Dixie Brimage. App.2a. Anderson's uncle, Alan Graham, stopped by. *Ibid.* Anderson's phone rang, and Graham saw on the caller I.D. that the call was from "Bo." *Ibid*. Graham told Anderson about the call and then heard her make plans to meet someone. *Ibid.* At about 10:00 pm, a white Ford Taurus arrived. App.3a. Anderson left the house, she walked to the Taurus, and, after speaking with the driver, she got in and the car drove away. *Ibid.*

The next night, a hunter discovered Anderson's naked body in a secluded wooded area in Harrison County. App.3a. The body had scrapes, gouges, and lacerations. *Ibid.* It was missing hair, was smeared with blood and dirt, and appeared partially burned. *Ibid.* The body had at least three tire marks, and the surrounding area was covered in tire tracks in a turning pattern. *Ibid.*

Law enforcement arrived, determined that the body was Anderson's, and learned from Brimage that Anderson was last seen with a black man who went by "Bo" and drove a white Ford Taurus. App.3a-4a. Officers matched that description to petitioner and arrested him on an outstanding warrant. App.4a, 207a.

Officers obtained warrants to search petitioner's Ford Taurus and home. App.4a-5a. On the car's exterior they found tissue matching Anderson's DNA. App.4a. From the home they seized a Burger King shirt with the nametag "Bo," along with shoes and a hat that had Anderson's DNA on them. App.4a-5a.

Anderson's autopsy revealed stretching wounds, abrasions, and a tear to the anus, which the medical examiner determined was characteristic of forceful anal penetration. App.5a. A vaginal swab revealed the presence of petitioner's DNA. *Ibid.* The tire marks on Anderson's body showed that she had been run over by a car. App.3a. Tire tracks from the scene matched petitioner's Ford Taurus. App.4a.

Petitioner admitted to law enforcement that his nickname was "Bo," that he had had sex with Anderson, and that he picked her up on December 5 in a white Ford Taurus. App.5a. Phone records showed that he and Anderson exchanged at least 14 calls on December 5, but that he did not call her after 11:12 p.m. that night. *Ibid.*

2. Petitioner was tried for capital murder. App.5a. The State introduced evidence (described above) showing that he raped Anderson, set her on fire, ran her over with his car, and killed her. App.3a-6a. The jury found him guilty. App. 5a-6a.

The State sought the death penalty. App.6a. At the penalty phase, the trial judge told the jury to consider four aggravating circumstances: whether petitioner was under a sentence of imprisonment when he committed the murder; whether he had previously been convicted of a felony involving a threat of violence to another person; whether he committed the murder while also committing sexual battery; and whether the murder was especially heinous, atrocious, or cruel. App.1a-2a, 33a. To impose the death penalty, the jury needed to find only one aggravating circumstance. Miss. Code Ann. § 99-19-101(3)(b).

Petitioner was represented at trial by Harrison County Public Defender Glen Rishel and two assistant public defenders. App.19a. Rishel was responsible for the penalty phase. App.19a-20a. The defense retained psychologist Dr. Beverly Smallwood to evaluate petitioner before trial. App.20a.

The defense faced a formidable challenge at the penalty phase. The jury had just found petitioner guilty of a horrific murder. App.6a. There was no doubt that the jury would find multiple aggravating circumstances, and likely all four: petitioner was indisputably under a sentence of imprisonment when he killed Anderson (he was on supervised release for carjacking); his carjacking conviction involved a threat of violence (petitioner had admitted as much in pleading guilty to that crime); the evidence showed that petitioner raped Anderson in the course of killing her; and the murder was manifestly heinous, atrocious, and cruel. App.1a-2a, 2a-5a, 17a-19a. And

two months after murdering Anderson, petitioner was indicted for sexual battery and burglary. App.24a. Those charges were pending during his capital-murder trial. *Ibid.*

The defense's investigation also showed that two common lines of mitigation—emphasizing to the jury the defendant's particularly bad childhood and features of his mental health—were not promising for the defense. App.20a-24a.

Dr. Smallwood's examination did not reveal fruitful lines of mitigation on petitioner's childhood or mental health. Petitioner "denie[d] any abuse or trauma in his childhood." App.21a. He said that "his mother loved him and tried to raise him right." *Ibid.* As he put it, his mother "tried to keep me away from wrong activities. If there was something I needed or wanted, she'd try to get it for me." *Ibid.* He denied any family history of alcoholism. App.22a. He denied "any significant medical history" or "any significant problems with depression." App.21a, 34a. And he showed no signs of "clouded consciousness or dissociation." App.34a. After meeting with petitioner and reviewing every document that she asked for, App.20a, 41a, Dr. Smallwood found "no indication" that, when he killed Anderson, petitioner "was experiencing any mental problems that would have rendered him unable to distinguish between right and wrong." App.22a. Rather, he "was functioning normally." *Ibid.* Dr. Smallwood concluded, "to a reasonable degree of psychological certainty," that petitioner "did not have a mental disorder at the time of the alleged crimes which prevented him from knowing right from wrong," was "competent to assist counsel in his defense," and was "not impaired intellectually." *Ibid.* She also determined that petitioner's IQ was 106, within the "Average" range. *Ibid.* She did say that a full mitigation study was outside the scope of her practice and suggested obtaining such a study from a forensic

psychiatrist. App.22a-23a. But she did not point to fruitful lines of mental-health inquiry, "did not see a need for neuropsychological testing," and determined that "[n]o further forensic evaluation [was] needed to determine competency or legal sanity at the time of the alleged crimes." App.22a, 35a. Dr. Smallwood told defense counsel that calling her at the penalty phase "would not help [petitioner]." App.23a.

Defense counsel's further investigation likewise signaled that petitioner's childhood and mental health were not strong avenues for mitigation. That investigation instead suggested that humanizing petitioner—by stressing his connections to and support from his family—could be a basis for mitigation.

The defense team repeatedly met with petitioner, met with his mother 7 or 8 times, and spoke with other members of petitioner's family. App.23a. Counsel "d[id] not recall being told about any ... records" on petitioner's upbringing besides some "school records from Greene County," which counsel obtained. App.24a. Counsel therefore worked with petitioner and his family to provide a history of petitioner's life and upbringing. Neither petitioner nor any of his family members told counsel about any "domestic violence issues." *Ibid.* To the contrary, counsel "was led to believe by [petitioner] and his mother that [petitioner] had no remarkable history of any kind." *Ibid.* Neither petitioner nor any of his family members gave any "indication that [petitioner] suffered from any kind of disability or mental health problems." *Ibid.* Rather, the conversations aligned with Dr. Smallwood's assessment and indicated that petitioner "had average or above average intellectual functioning and no psychosis." *Ibid.* So, based on counsel's investigation, "there was nothing in [petitioner's] history that would shock the conscience of the jury in terms of

mitigation." *Ibid.* Indeed, the investigation suggested that presenting evidence on petitioner's upbringing would harm the mitigation effort. App.20a-24a. Evidence on petitioner's background could be countered by evidence of his extensive criminal history. App.24a, 32a. Beyond the carjacking conviction, petitioner had two drug-related convictions stemming from the carjacking and pending indictments for sexual battery and burglary. App.29a. And any presentation about his background could lead the prosecution to tell the jury that petitioner's brother was serving a life sentence for murder—a fact that defense counsel feared would further harden the jury against petitioner. App.23a, 27a. Against all these findings adverse to a strong mitigation case, however, counsel did learn that petitioner's relatives still loved him, hoped to continue visiting him in prison, and expected that he "could still have a positive impact on his family and on his children." App.23a.

Based on all this investigation, defense counsel determined that the best way to convince the jury to reject the death penalty was to stress petitioner's connections to his family, his ability to have a positive impact on his children, and the likelihood that he would be a good inmate. App.23a-24a. Counsel therefore focused on getting "as many witnesses as they could find" to support those themes. App.23a.

Defense counsel ultimately called several witnesses to support this effort to humanize petitioner. Two corrections officers testified to petitioner's good behavior while incarcerated. Deborah Whittle, who oversaw offender services at petitioner's detention center, testified that she had known petitioner for two years and that he was "very quiet," was "never ... disrespectful," and had only one "very minor" rule violation (for talking to an inmate in an unauthorized area). App.24a-25a. Corrections

officer Dawn Denise Catchings, who interacted with petitioner daily for a year, testified that he never lost his temper or got in trouble. App.25a. Counsel also called several of petitioner's family members and friends to testify about their desire to visit petitioner in prison and about his love for his children. App.25a-26a. Jeles Galloway, petitioner's then-13-year-old sister, testified that she loved her brother and that "it would be good for her to go visit him in prison as often as she could." App.25a. Vincent Bishop, petitioner's brother-in-law, testified that he visited petitioner every few months and planned to continue doing so if petitioner were sentenced to prison. *Ibid.* He said that petitioner was an "excellent father" to his three children. *Ibid.* Angelo Ash, petitioner's long-time friend, testified that he would visit petitioner in prison and that petitioner loved his children and treated them with respect and kindness. *Ibid.* Red Galloway, petitioner's father, testified that he loved his son, wanted him to live, and would visit him in prison, and that petitioner had a good relationship with his children. *Ibid.* Mary Taylor, petitioner's older sister, testified that she was close to petitioner, that they loved each other, that she had left her own children in petitioner's care, and that she and her children would continue to visit petitioner in prison. App.25a-26a. And Ollie Varghese, petitioner's mother, testified that her son was a good father, described the love he and his children had for each other, and said that she wanted her son to live and that she would visit him in prison. App.26a.

At the close of the penalty phase, the jury found that the State had proved all four aggravating circumstances and that those factors outweighed petitioner's mitigation case. App.6a. The jury found, first, that petitioner was under a sentence of imprisonment—for carjacking—when he committed murder. App.18a, 33a. Second,

the jury found that petitioner was previously convicted of a felony involving the use of threat of violence. App.33a. In the carjacking, petitioner had admitted, he "took [a] car by force" and left the victim injured. App.32a. Third, the jury found that petitioner committed murder while committing sexual battery: he brutally raped Anderson. App.33a; *see* App.3a-5a. Fourth, the jury found that the capital offense was especially heinous, atrocious, or cruel. App.33a. Petitioner not only raped Anderson but also tortured her by running her over with his car, setting her on fire, and inflicting many other injuries on her. App.3a-5a. The jury sentenced petitioner to death. App.6a.

The Mississippi Supreme Court affirmed. 122 So. 3d 614 (Miss. 2013). This Court denied certiorari. 572 U.S. 1134 (2014).

3. a. Petitioner applied to the Mississippi Supreme Court for post-conviction relief. He claimed ineffective assistance of counsel at the penalty phase, arguing that counsel conducted an inadequate mitigation investigation and so failed to fully inform the jury about his "difficult childhood history" and "mental illness." App.10a-11a.

Petitioner offered affidavits from family, friends, and childhood girlfriends who claimed that he had a "traumatic upbringing" involving "poverty, trauma, family dysfunction, abandonment, neglect, domestic violence, and the sexual abuse of his sister by [petitioner's] step-father." App.11a-12a. Affiants said that petitioner "suffered from panic attacks" in his youth, was at times "sad and/or depressed," had difficulty "manag[ing] his emotions," and once "threatened to kill himself." App.12a. Petitioner also offered affidavits from medical professionals stating that he "suffer[ed] from" "Post-Traumatic Stress Disorder (PTSD)," "complex PTSD," and "Depressive Disorder and Psychotic Disorder." App.33a-34a. A clinical psychologist

said that petitioner "had significant exposure to traumatic events," including: "domestic violence" by petitioner's father against petitioner's mother and his father's girlfriend; "physical violence" by petitioner's father against petitioner and his siblings; "physical violence" against petitioner by his grandfather; "fights" resulting in trips to the emergency room; and suicide threats by petitioner's brother. App.36a. A psychologist likened petitioner's "neuropsychological testing" results to those "of people with mild Traumatic Brain Injury." App.35a. A neuropsychiatrist said that petitioner reported "severe sleep disturbances" and "exhibited slow processing speed" that could mean that he had "serious mental health problems, including brain damage." App.37a-38a. And a "[p]ost-conviction expert" said that a behavioral analysis showed that petitioner had "abnormalities" implicating "brain systems that are important for regulating behavior." App.38a.

After seeing these affidavits, Dr. Smallwood "changed her position" on petitioner's mental health. App.34a. She signed an affidavit saying that she now "would have testified that [he] met the criteria for Major Depressive Disorder" and PTSD. App.35a. She "admit[ted] that when she evaluated [petitioner], she did not see a need for neuropsychological testing." *Ibid.* But she now said that "such testing would have been appropriate and should have been employed." *Ibid.* She concluded that she "did the best [she] could with what was available to [her] at the time of [petitioner's] trial, but [she was] disappointed that [she] had only a fraction of this powerful and compelling story with which to work." App.36a.

Petitioner argued that his counsel's deficient investigation left him—and the jury—in the dark about all of these "relevant and mitigating facts." App.11a. He

claimed that if the jury had learned about his childhood and mental health, it "would have sentenced him to life in prison rather than death." *Ibid.*

b. The Mississippi Supreme Court denied post-conviction relief, rejecting (as relevant here) petitioner's ineffective-assistance claim. App.26a-43a.

The court began by recognizing the legal standards, set forth in this Court's cases, that govern petitioner's claim. A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." App.26a (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). Counsel must "make reasonable investigations or ... make a reasonable decision that makes particular investigations unnecessary," and "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference." App.29a (quoting *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003)). "Defense counsel is not required to pursue an investigation that would be fruitless, much less one that might be harmful to the defense." App.30a. And "[t]he reasonableness of counsel's actions" in investigating "may be determined or substantially influenced by the defendant's own statements or actions." *Ibid.* (quoting *Strickland*, 466 U.S. at 691). Last, an ineffective-assistance claim requires showing not only that counsel performed deficiently but also that the deficiency "prejudiced the defense"—that is, it must be "reasonably likely" that "the result would have been different" with adequate assistance of counsel. App.8a, 31a.

Applying these principles, the court rejected petitioner's claim. *First*, the court held that petitioner failed to show that counsel's mitigation investigation and presentation was "objectively deficient and unreasonable." App.26a; *see* App.26a-31a,

33a-43a. On petitioner's childhood: Counsel met with petitioner and his mother repeatedly and spoke with other family members. App.23a. None of these discussions suggested that petitioner had a "remarkable history of any kind." App.24a, 30a. Nor did anything from Dr. Smallwood's investigation. App.20a-22a. What counsel did learn of petitioner's background suggested that it could hurt the mitigation case. Counsel "was aware of [petitioner's] history of criminal convictions and pending criminal charges." App.27a. And they knew that petitioner's "brother was serving a life sentence for murder," which counsel "did not want the jury to hear." App.27a, 32a. Given what counsel learned after reasonable investigation, the court ruled that counsel reasonably ended the investigation into petitioner's upbringing and "made a strategic choice to humanize [petitioner] rather than risk harmful evidence being presented to the jury on cross-examination of mitigation witnesses." App.30a.

On petitioner's mental health: Counsel retained Dr. Smallwood, a mental-health expert, whose assessment indicated that petitioner "denied any significant medical history," "denie[d] any abuse or trauma in his childhood," "denied any significant problems with depression," and showed no signs of "clouded consciousness or dissociation." App.34a. Dr. Smallwood "concluded that ... [n]o further forensic evaluation [was] needed to determine competency or legal sanity." *Ibid.* (formatting omitted). Although in post-conviction proceedings petitioner claimed that counsel "fail[ed] to provide Dr. Smallwood with sufficient information to conduct a comprehensive analysis," App.38, counsel in fact "provided Dr. Smallwood with everything she requested" and was "unaware of any information that Dr. Smallwood needed that she did not have in order to make her evaluation" of petitioner, App.20a,

41a. And although Dr. Smallwood later "changed her position" on petitioner's mental health, App.34a, "nothing" in her original report "signal[ed] an incomplete medical diagnosis." App.40a. In light of Dr. Smallwood's original findings—which aligned with the information provided directly to counsel by petitioner and his family members—the court ruled that counsel reasonably did not pursue mental-health mitigation further and instead reasonably made the "tactical[ ] deci[sion] to humanize" petitioner. App.41a. For similar reasons, the court ruled that counsel did not act unreasonably by not hiring a mitigation specialist. App.41a-42a. Dr. Smallwood's report "did not signal to defense counsel that further medical diagnosis was necessary" and counsel made the reasonable "strategic decision to humanize [petitioner]" instead of delving further into his mental health. App.42a.

Second, the court held that petitioner could not "show prejudice" from counsel's performance. App.31a; *see* App.31a-33a, 33a-43a. Although petitioner's "difficult childhood" involved "mitigating circumstances," his background "was also damaging." App.31a, 32a. Sharing his upbringing with the jury "may well have exposed" his "felony drug convictions," his "pending burglary and sexual assault charges," and his brother's murder conviction. App.32a. And information about petitioner's childhood contrasted "starkly" with the circumstances of the murder: petitioner "anally raped seventeen-year-old Anderson, cut her throat, and burned her before ultimately ending her life by repeatedly running her over with an automobile." App.32a-33a. When weighed against the "aggravating evidence"—including the four aggravating circumstances—the "new mitigating evidence" was "not reasonably likely" to have changed petitioner's sentence. App.33a.

REASONS FOR DENYING THE PETITION

Petitioner asks this Court to decide whether the Mississippi Supreme Court, "by excusing trial counsel's failure to conduct a minimally adequate investigation on the basis of an attribution of trial strategy," departed from caselaw "requiring counsel to conduct sufficient investigation to inform a strategic decision." Pet. i. This case does not present that question, the decision below is correct, and this case does not satisfy any of the traditional certiorari criteria. The petition should be denied.

1. This case does not present the question that petitioner urges this Court to decide. The petition rests on the view that the Mississippi Supreme Court "excus[ed]" trial counsel's penalty-phase performance by "attribut[ing]" to counsel a "hypothesiz[ed]" strategy that counsel never had: to "humaniz[e]" petitioner. Pet. i. That is wrong. The Mississippi Supreme Court did not engage in "*post hoc* speculation about strategy" or "excuse" counsel's performance based on a "hypothetical strategy." Pet. 29 (capitalization and formatting omitted). Rather, the court correctly recognized, based on the record, that counsel "made a strategic choice to humanize" petitioner and shaped the mitigation investigation accordingly. App.30a.

Counsel's investigation showed that two common lines of mitigation—the defendant's bad childhood or mental-health challenges—were not promising. App.20a-24a. The defense knew this based on many interviews with petitioner and his family (which showed no "domestic violence" or "remarkable history," App.24a), on Dr. Smallwood's examination (where petitioner "denie[d] any abuse or trauma," App.21a), on Dr. Smallwood's findings (including that petitioner was not "experiencing any mental problems" when he killed Anderson, "did not have a mental

disorder at [that] time" that "prevented him from knowing right from wrong," and had "no evidence of clouded consciousness or dissociation," App.20a-22a), and on Dr. Smallwood's failure to identify a fruitful line of further mental-health inquiry (she said that "[n]o further forensic evaluation [was] needed to determine competency or legal sanity," App.22a). Besides the absence of anything helpful on petitioner's background, counsel learned of petitioner's criminal history (including his drug convictions and pending indictment for sexual battery and burglary) and his brother's life sentence for murder—which showed significant downside to using his background in mitigation. App.27a, 32a. But counsel did learn of one possible line of mitigation. The investigation disclosed that petitioner's relatives still loved him, hoped to continue visiting him, and expected that he "could still have a positive impact on his family and on his children." App.23a. So counsel decided to focus the investigatory efforts on finding "as many witnesses" as possible "to testify that [petitioner] would have visitors [in] prison," "would be a good prisoner," was "loved" by his "family," and "could still have a positive impact" on his family and children. *Ibid.*

Which is to say: Counsel made a strategic decision to investigate and present a mitigation case that sought to "humanize" petitioner to the jury, without exposing him to rebuttal evidence on his prior felony convictions, pending criminal charges, or brother's murder conviction. App.27a, 39a; *see* App.26a-31a, 33a-43a. The Mississippi Supreme Court's characterization is not "hypothesized *post hoc* speculation." Pet. 21; *see* Pet. 2-3, 12-13, 16-21. It correctly describes counsel's strategy—of focusing on petitioner's connections to his family, ability to have a positive impact on his children, and likelihood that he would be a good inmate—to humanize him and thus (counsel

hoped) spare him from execution. App.23a-24a. So this case does not present a question about a hypothetical, post hoc attribution of strategy. The question that petitioner presses is not presented. *Contra* Pet. 29.

2. The decision below is correct. Petitioner's counsel provided the penalty-phase assistance that the Constitution requires. App.26a-43a; *contra* Pet. 14-21.

a. Counsel performed adequately at the penalty phase. App.26a-31a, 33a-43a.

Defense counsel must meet "an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). At the penalty phase, counsel thus has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691; *see Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (same). "[W]hat investigation decisions are reasonable depends critically" "on information supplied by the defendant." *Strickland*, 466 U.S. at 691. And "the need for further investigation may be considerably diminished or eliminated altogether" "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful." *Ibid.*

The Mississippi Supreme Court recognized the governing legal standards, App.26a, 28a-29a, 30a-31a—as petitioner acknowledges, Pet. 16; *see* Pet. 14-16. And, as that court concluded, counsel's performance met those standards. As explained: Counsel investigated petitioner's mental health and upbringing—two often important lines of mitigation—but neither was promising. App.20a-24a. Counsel reached that assessment based on Dr. Smallwood's examination of petitioner and on counsel's many interviews with petitioner, his mother, and his other family members. App.20a-23a, 30a, 35a. The mental-health examination did not yield helpful lines of

further mitigation investigation. Dr. Smallwood found that petitioner was not "experiencing any mental problems" when he killed Anderson, that he "did not have a mental disorder" that "prevented him from knowing right from wrong" at that time, and that "[n]o further forensic evaluation [was] needed to determine competency or legal sanity at the time of the alleged crimes." App.20a-22a. What counsel learned of petitioner's upbringing was even more disheartening. Far from aiding the mitigation case, that information appeared to harm that case by showing that petitioner was violent, dangerous, and irredeemable. App.24a, 29a. But counsel did find one potential lifeline: counsel learned that petitioner's family still loved him, hoped to continue visiting him in prison, and expected that he "could still have a positive impact on his family and on his children." App.23a.

Given what reasonable investigation uncovered, counsel "made a strategic choice to humanize [petitioner] rather than risk harmful evidence being presented to the jury on cross-examination of mitigation witnesses." App.30a. So counsel ended the investigation into petitioner's mental health and upbringing and instead focused on his connections to his family, ability to have a positive impact on his children, and likelihood that he would be a good inmate—to humanize him and (counsel hoped) persuade the jury to spare him the death penalty. App.23a-24a. Counsel presented a mitigation case consistent with that strategy. App.24a-26a.

Counsel's performance was reasonable. Counsel retained an experienced mental-health expert and conducted many interviews with petitioner, his mother, and his family members. App.20a-24a. That investigation gave "no indication" that petitioner had any history of "abuse or trauma" or any "mental disorder[s]." App.21a,

22a; *see* App.24a. None of what the investigation uncovered "would lead a reasonable attorney to investigate further" on petitioner's childhood or mental health. *Wiggins*, 539 U.S. at 527. Rather, "[t]rial counsel could reasonably surmise"—including from "conversations with" and "information supplied by" petitioner—that "psychological evidence" and evidence of petitioner's background "would be of little help." *Strickland*, 466 U.S. at 691, 699. So counsel reasonably pursued a mitigation case centered on humanizing petitioner. App.30a. "[A]pplying a heavy measure of deference to counsel's judgments," the court below was right to conclude that the decision "not to [further] investigate" petitioner's childhood and mental health was "reasonable[ ]" under "all the circumstances." *Strickland*, 466 U.S. at 691.

Petitioner does not contest that an attorney can perform adequately yet not discover mitigating evidence. He does not dispute that counsel may rightly end one line of mitigation investigation to pursue what appears to be a more promising line of investigation—even if that causes counsel not to uncover helpful evidence that the abandoned line of investigation may have disclosed. *E.g.*, *Strickland*, 466 U.S. at 691; *Wiggins*, 539 U.S. at 533. But, in faulting his counsel's performance, petitioner claims that that is not what happened here. His arguments lack merit.

To start, petitioner claims that the Mississippi Supreme Court attributed to counsel—without basis—a strategy of "humanizing" petitioner and that only through this flawed attribution of strategy was the court able to rule that counsel did not need to further investigate petitioner's "upbringing" and its effects on his "mental health." Pet. 16, 17; *see* Pet. 16-18. But again, the court was right that counsel's strategy was to "humanize" petitioner. App.30a; *supra* pp. 13-15. Petitioner claims otherwise by

stressing that counsel did not use the word "humanize." *E.g.*, Pet. 17 (counsel "never stated that they chose to 'humanize' their client"). But counsel's failure to intone that word does not erase the manifest strategy of focusing on petitioner's connections to and ability to have a positive impact on his family—in a word, to "humanize" petitioner—to persuade a juror to spare his life. App.19a-26a, 29a-30a.

Petitioner relatedly claims that the Mississippi Supreme Court excused counsel for not giving Dr. Smallwood information on petitioner's "upbringing and resulting impairments," based on reasoning that "makes no sense": that providing that information "*to the mental health expert* would somehow compromise any strategy about what counsel presented *to the jury*." Pet. 18; *see* Pet. 17-18; *cf.* Pet. 19-20 (similar argument). But the court did not excuse counsel for holding back information: the court recognized that counsel "provided Dr. Smallwood with everything she requested." App.20a. Rather, the court credited counsel's decision not to *further investigate* petitioner's upbringing, given what counsel's reasonable investigation uncovered and the strategy that counsel reasonably pursued based on that investigation. App.20a-24a, 32a, 39a; *supra* pp. 13-15, 16-17.

Petitioner also contends that counsel "did not even investigate" petitioner's upbringing and so "was not in a position to make an informed strategic decision to 'humanize' him rather than present that evidence to the jury." Pet. 18; *see* Pet. 18-19. The record belies that claim. Counsel investigated petitioner's upbringing through Dr. Smallwood's examination of petitioner and through many interviews with petitioner, his mother, and his other family members. App.20a-23a, 30a, 35a. None of that disclosed any violence or abuse in petitioner's past: it instead suggested that

he "had no remarkable history." App.24a. Petitioner faults counsel for not contacting more people or probing deeper. Pet. 18. But counsel reasonably halted investigation into petitioner's upbringing to pursue a more promising investigation into humanizing him. "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless," "counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691. Given what counsel had learned and what little of it was promising, counsel made "reasonable professional judgments" to "limit[ ]" part of the investigation while expanding another. *Ibid.*; *Wiggins*, 539 U.S. at 533 (same).

Counsel's performance here contrasts sharply with performances this Court has faulted. In *Wiggins*, this Court faulted a mitigation investigation where (unlike here) counsel "abandoned their investigation" of the defendant's background "after having acquired only rudimentary knowledge of his history from a narrow set of sources" and despite knowing facts that should have prompted them to investigate further—including about the defendant's "chronic alcoholic" mother, many foster-care placements, "lengthy absences from school," and "emotional difficulties." 539 U.S. at 524-25. Counsel also (unlike here) "uncovered no evidence" that a mitigation case "would have been counterproductive" or that more investigation "would have been fruitless." *Id.* at 525. And (again unlike here) counsel avoided a defense based on the defendant's troubled background even though the defendant "d[id] not have a record of violent conduct that could have ... offset [the] powerful mitigating narrative." *Id.* at 537. Similar points distinguish other cases (Pet. 15-16) on which petitioner relies. *See Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (State "barely

disputed" that counsel performed deficiently when, among other things, counsel: "did not begin to prepare for" the penalty phase "until a week before the trial"; failed "to conduct an investigation that would have uncovered extensive records graphically describing [defendant's] nightmarish childhood"—because of an "incorrect[ ]" belief "that state law barred access to such records" rather than "because of any strategic calculation"; and failed to introduce "available evidence" that defendant was "borderline mentally retarded"); *Andrus v. Texas*, 140 S. Ct. 1875, 1881-83 (2020) (per curiam) (counsel was advised "well before trial" that defendant had been "diagnosed with affective psychosis" and other mental-health issues "[y]et counsel disregarded, rather than explored, the[se] multiple red flags," "performed almost no mitigation investigation," was "barely acquainted with" the mitigation witnesses, and offered no "tactical rationale for the pervasive oversights and lapses" in his "nonexistent" mitigation investigation); *Sears v. Upton*, 561 U.S. 945, 952 (2010) (per curiam) ("facially inadequate mitigation investigation" that was "limited to one day or less").

The Mississippi Supreme Court correctly held that petitioner did not overcome the "strong presumption" that his counsel's performance "f[ell] within the wide range of reasonable professional assistance." App.26a (quoting *Strickland*, 466 U.S. at 689).

b. Counsel's performance did not prejudice petitioner. App.31a-33a, 33a-43a.

The case for imposing the death penalty on petitioner was overwhelming. The State established—and the jury found—four aggravating factors. Any one of those factors justified a death sentence. Miss. Code Ann. § 99-19-101(3)(b). And those factors made a powerful case for the death penalty. They showed that petitioner was irredeemable and despicable: he murdered Anderson while he was under a sentence

of imprisonment, his crime for that sentence involved yet more violence, he raped Anderson in the course of killing her, and he tortured her before he killed her. App.32a-33a; *see supra* pp. 2, 3-4, 7-8. Petitioner does not contend that the evidence presented at trial failed to justify a death sentence.

Petitioner's new mitigation case does not remotely overcome that case for the death penalty. App.31a-33a. Evidence of petitioner's "difficult childhood"—involving "violence [and] extreme poverty"—paled against "the circumstances surrounding the" murder, which was clearly "especially heinous, atrocious, or cruel." App.32a, 33a. Indeed, evidence of petitioner's childhood "was ... damaging" to the mitigation case. App.31a. That evidence would have opened the door to a presentation about his brother's life sentence for murder and exposed petitioner's "prior felony drug convictions" and "burglary and sexual assault charges," as well as the injuries suffered by petitioner's carjacking victim. App.19a, 32a. So evidence on petitioner's background would have reaffirmed that he is irredeemably violent. Nor would his new mental-health evidence have helped him. He now offers reports claiming that he suffered from mental disorders, PTSD, and brain abnormality. App.33a-38a; *see* Pet. 11-12. But the jury would have had strong reason to discount those reports. The defense's mental-health expert who examined petitioner before trial (Dr. Smallwood) concluded that he was "not impaired intellectually," showed no signs of "clouded consciousness or dissociation," and, ultimately, "did not have a mental disorder" that would have "prevented him from knowing right from wrong" when he murdered Anderson. App.21a-22a. Jurors would have heard that petitioner told Dr. Smallwood that he did not have "any significant problems with depression" (App.21a, 34a) and

that petitioner's family members also gave "no indication" that he "suffered from any kind of disability or mental health problems" (App.24a). Dr. Smallwood did "change[ ] her position" on petitioner's mental health years later after being shown reports selected by post-conviction counsel. App.34a. But the jury would have heard that "nothing" in her original report "signal[ed] an incomplete medical diagnosis" and that her contemporaneous examination showed no "need for neuropsychological testing" or "further forensic evaluation." App.22a, 35a, 40a. "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances." *Strickland*, 466 U.S. at 700.

Petitioner argues only briefly that the Mississippi Supreme Court erred in assessing prejudice. Pet. 19-21. Yet he never confronts the horrific facts of his crime: his 30-page petition devotes one grudging sentence to what he did to Anderson. Pet. 3. So he makes no real attempt to show how his new evidence could have overcome what he did. Instead, he faults the court below for purportedly not considering his new mental-health evidence "in reweighing the aggravating and mitigating evidence." Pet. 20; *accord* Pet. 19. But the court thoroughly reviewed that evidence (App.33a-38a; *see* App.12a-13a, 38a-43a) and recognized that it "may have" given petitioner some "benefit[ ]," but found that the aggravating evidence substantially outweighed it, App.31a, 32a-33a. And petitioner disregards that his new mitigation evidence "contrasts sharply with"—and is doomed by—"the strength of the aggravating circumstances." *Thornell v. Jones*, No. 22-982, slip op. 13-14 (S. Ct. May

30, 2024). He cannot show what he must: a "substantial," not just "conceivable," "likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011).

3. Last, this case does not implicate any lower-court conflict or satisfy any of the other traditional certiorari criteria. *Contra* Pet. 22-30.

a. Petitioner claims that lower courts are divided on whether "a hypothesized *post hoc* strategy justification can excuse trial counsel's failure to conduct sufficient investigation to inform any strategic decision they might actually make." Pet. 22; *see* Pet. 22-29. He says that some courts hold that counsel "must conduct sufficient investigation to inform their strategic choices," but other courts (including the Mississippi Supreme Court) "excuse counsel's failure to conduct even minimal investigation" based on a "hypothesized *post hoc* strategy." Pet. 22.

Even if lower courts were divided over whether "a hypothesized *post hoc* strategy justification can excuse trial counsel's failure to conduct sufficient investigation," Pet. 22, this case does not present that issue. Again, the court below did not "invoke[ ] 'strategy' not supported by the record to excuse a failure to investigate." Pet. 24 (formatting omitted). Rather, the court recognized that counsel made the strategic decision to focus additional investigation on finding "as many witnesses" as possible "to testify that [petitioner] would have visitors if he went to prison," "would be a good prisoner," was "loved" by his "family," and "could still have a positive impact on his family and on his children." App.23a; *supra* pp. 13-15, 16-17. So this case does not provide an opportunity to resolve a conflict over whether "a hypothesized *post hoc* strategy" can excuse a failure to investigate. Pet. 22.

In any event, there is no lower-court conflict on that issue. Lower courts apply the decades-old legal standards set forth by this Court: counsel must meet "an objective standard of reasonableness" (*Strickland*, 466 U.S. at 688); counsel thus must "make reasonable investigations or ... make a reasonable decision that makes particular investigations unnecessary" (*Wiggins*, 539 U.S. at 521); and, when courts assess a mitigation investigation, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments" (*id.* at 521-22). Each case that petitioner invokes, Pet. 22-29, applies those standards to reach the result the facts demand. Fact-based differences in outcomes do not amount to a lower-court conflict.

Start with the cases that, petitioner says, "faithfully followed this Court's guidance that an attorney must conduct sufficient investigation to make an informed strategic choice." Pet. 22 (formatting omitted); *see* Pet. 22-24. The court in each case invoked both *Strickland* and *Wiggins* in ruling that counsel performed deficiently by conducting a woefully inadequate mitigation investigation that could not be justified as a reasonable strategic decision. *See Abdul-Salaam v. Sec'y of Pa. Dep't of Corr.*, 895 F.3d 254, 267-69 (3d Cir. 2018) (counsel: (a) failed to pursue expert mental-health testimony even though he had "no basis to presume that" expert reports would hurt the mitigation case and so no strategic reason not to seek them; and (b) "interview[ed] only three family witnesses" for the mitigation case—"seem[ingly]" "due to a lack of preparation and not for any strategic reason"); *Noguera v. Davis*, 5 F.4th 1020, 1041-42 (9th Cir. 2021) (by counsel's "admission," they "settled on a penalty-phase strategy" despite "having conducted no investigation into [defendant's] 'family

situation or background'" and "despite" "know[ing]" of defendant's "turbulent upbringing"—failures that could not be excused by a State-offered "post hoc rationalization" that was "inconsistent with" counsel's "admitted failure to investigate"); *Andrews v. Davis*, 944 F.3d 1092, 1108, 1112-16 (9th Cir. 2019) (en banc) (counsel "performed almost no [penalty-phase] investigation," and so "simply did not *know* about [defendant's] background" and thus "could not have intelligently chosen one strategy over another"); *Pruitt v. Neal*¸ 788 F.3d 248, 270-73 (7th Cir. 2015) (counsel knew that defendant had been diagnosed with schizophrenia and had been prescribed "anti-psychotic medication," and was advised by "the defense's own expert" to contact an expert "in dealing with psychosis"—yet counsel "did not contact such an expert" and "offered no reason for failing to do so," even though part of counsel's strategy was to show that defendant did not deserve the death penalty because of his mental illness); *Ex Parte Garza*, 620 S.W.3d 801, 823-24 (Tex. Crim. App. 2021) (counsel outsourced investigation to Garza's mother (who had a conflict of interest) and failed to investigate Garza's mental health despite many "red flags").

Petitioner next cites cases where, he says, courts invoked "strategy" that was "not supported by the record" to "excuse a failure to investigate basic facts necessary to inform a defense strategy." Pet. 24 (formatting omitted); *see* Pet. 24-27. These cases, he claims, show that courts "are divided on the extent to which a hypothesized *post hoc* strategy justification can excuse trial counsel's failure to conduct sufficient investigation to inform any strategic decision they might actually make." Pet. 22.

The five cited cases establish no such thing. One case does not assess counsel's mitigation performance and instead upholds, on federal habeas review, a state-court

ruling that counsel's allegedly deficient performance did not prejudice the defendant. *Frederick v. Quick*, 79 F.4th 1090, 1116, 1119-20 (10th Cir. 2023), *cert. denied*, No. 23-6888 (June 10, 2024). In the other four cases the courts applied the legal standards that petitioner agrees are correct, in none did the court rely on a hypothesized strategy to excuse a failure to investigate, and in all the court credited a mitigation investigation because—in contrast to the cases just addressed—the facts showed that the investigation was reasonable. *See Walker v. State*, 303 So. 3d 720, 724, 726-28 (Miss. 2020) (counsel made "very clear that he pursued a tactical decision to humanize" Walker; Walker did not show a failure to investigate; and counsel reasonably pursued his strategy rather than post-conviction attorneys' "alternative reasonable strategy" of showing that Walker had a troubled childhood); *Ambrose v. State*, 323 So. 3d 482, 490-91 (Miss. 2021) (counsel adopted a reasonable "strategy ... to humanize" Ambrose—rather than present or pursue more mental-health evidence—where counsel performed a "thorough" investigation that produced nine penalty-phase witnesses and the defense's psychologist concluded that Ambrose "needed no further psychological evaluation"); *Keller v. State*, 306 So. 3d 706, 711, 712-13 (Miss. 2020) (although counsel did not obtain the "mitigation study" that an expert recommended, counsel investigated Keller's "mental status" and presented evidence on it, consistent with counsel's strategy); *Burns v. Mays,* 31 F.4th 497, 504-05 (6th Cir. 2022) (after "a fair amount of investigation" that disclosed Burns' extensive criminal history and "did not uncover anything" that "should have prompted further investigation," counsel reasonably adopted "a strategy of focusing on" Burns' "good character" and made a "deliberate decision" not to further

investigate Burns' upbringing where counsel feared "a narrative that risked opening the door to character evidence that" could harm the mitigation presentation). These cases confirm that lower courts apply the same legal standards, that each result turns on the facts, and that there is no lower-court conflict.

That reality is driven home by the last group of cases that petitioner cites. Pet. 27-29. Petitioner claims that some courts "have rendered conflicting decisions within their jurisdictions on whether *post hoc* strategy can excuse a failure to investigate." Pet. 27 (formatting omitted). That is not so. These cases apply the same legal standards as the cases addressed above and their outcomes turn on the facts.

Start with the Eleventh Circuit. In *Jefferson v. GDCP Warden*¸ 941 F.3d 452 (11th Cir. 2019), that court ruled that counsel performed deficiently when he "inexplicably" "turned a blind eye" to the many "red flags" demanding further mental-health investigation—the "serious head injury" that Jefferson had suffered as a child, the many oddities in his behavior, and "crystal clear" expert advice that "further neuropsychological testing would be worthwhile." *Id.* at 478, 481-82. Counsel failed to cite "anything remotely suggesting that further testing would have impaired their case" or a "strategic reason" not to pursue that testing. *Id.* at 479, 482; *see id.* at 477-81. In *Jenkins v. Commissioner, Alabama Dep't of Corrections*, 963 F.3d 1248 (11th Cir. 2020), by contrast, the Eleventh Circuit rejected an ineffective-assistance claim because "[t]he limited record" developed by the defendant supported the conclusion that trial counsel reasonably and adequately pursued "a penalty-phase strategy of residual doubt." *Id.* at 1266; *see id.* at 1264-70. In the Fifth Circuit cases that petitioner cites (Pet. 28), the court applied the same legal standard but the facts

demanded different outcomes. *Compare Neal v. Vannoy*, 78 F.4th 775, 789-93 (5th Cir. 2023) (counsel deficient when—as "the result of neglect" and in defiance of his "actual trial strategy"—he failed to review and investigate forensic analyses that could have "impeach[ed]" a key witness), *with United States v. Scott*, 11 F.4th 364, 372-73 (5th Cir. 2021) (counsel adequate when she limited a line of investigation based on a reasonable strategy to limit defendant's exposure to more serious charges). And the same is true of *State v. Allen*, 861 S.E.2d 273 (N.C. 2021), which credits one ineffective-assistance claim but rejects another—based on the facts. *Compare id.* at 283-84 (counsel deficient if he failed—without "reasonable strategic" basis—to investigate possible "inconsistencies between" witness testimony and crime-scene evidence despite "red flags" demanding such investigation), *with id.* at 293-94 (counsel adequate in mitigation investigation where he retained mental-health experts who examined the defendant and interviewed others but did not uncover support for a "mental health disorder that would assist [the] defense").

In sum, petitioner has not cited any case ruling that "a hypothesized *post hoc* strategy justification can excuse" counsel's "failure to conduct sufficient investigation to inform" a "strategic decision." Pet. 22. He has identified no lower-court conflict.

b. This case does not satisfy any of the traditional certiorari criteria. *Contra* Pet. 29-30. It is a poor vehicle for resolving the question the petition presses. *Supra* pp. 13-15. And the absence of any lower-court conflict underscores that the petition does not seek review of a recurring legal question—let alone one of nationwide importance—but instead asks this Court to address petitioner's fact-bound disagreement with a decision that applies decades-old, settled legal standards and

aligns with a legion of cases from this Court and other courts. This case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LYNN FITCH
Attorney General

Parker A. Proctor Jr.
Special Assistant
Attorney General
Counsel of Record
STATE OF MISSISSIPPI
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 220
Jackson, Mississippi 39205-0220
(601) 359-3747
Parker.Proctor@ago.ms.gov
Counsel for Respondent

June 10, 2024