No. 23-7187
CAPITAL CASE

IN THE

Supreme Court of the United States

LESLIE GALLOWAY III,

Petitioner,

—v.—

STATE OF MISSISSIPPI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The State's opposition, like the decision of the court below, rests on a fiction: namely, that counsel made a strategic decision to "humanize" Mr. Galloway that justified their failure to conduct the minimal investigation that would have revealed their client's severely abusive upbringing and mental illness. But this Court has held that counsel must conduct sufficient investigation to inform a reasonable strategic decision. *See, e.g., Sears v. Upton*, 561 U.S. 945, 952 (2010). Here, the court imputed to Mr. Galloway's counsel a strategy they never had and then relied on that fiction to excuse investigation that they never did—even though nothing about the imputed strategy even conceivably precluded the foregone investigation. In doing so, it deepened a split of authority over whether such a *post hoc* rationalization can justify a failure to conduct the foundational investigation that should precede any strategy decisions. Pet. 14, 16, 22.

The Court should grant certiorari and reverse.

ARGUMENT

I. In excusing counsel's failures to investigate and present critical mitigating evidence, the court below relied on an imputed "strategy" never advanced by counsel.

Like the court below, the State rests its defense of counsel's failure to develop and present critical mitigating evidence about Mr. Galloway's abused childhood and mental illness as a "strategic judgment" purportedly adopted to "humanize" him. BIO 13. But notably, the only source the State cites for

this "strategy" is the text of the decision below—not anything counsel himself actually said or did. The court below, in turn, cited no statement or judgment by Mr. Galloway's counsel, but simply borrowed the language from *another case* involving a different client and a different attorney. BIO 11–12 (quoting Pet. App. 30a, 41a, 42a).

There are two fundamental problems with the State's position. First, there is no evidence that counsel made the strategic choice the court below attributed to him. And second, even if he had, it would not excuse the failure to conduct the reasonable investigation necessary *before* such a strategic judgment is made.

First, neither lead counsel nor his co-counsel ever said that they made a strategic judgment to "humanize" their client and therefore did not pursue evidence regarding his childhood and current mental health; indeed, counsel never even used the word "humanize." *See* Ex. 17, 19, 20. Attorney Rishel instead sought to explain his failure to investigate Mr. Galloway's childhood abuse by asserting that, based on what the family told him, there were "no other records" besides a high school transcript, and "there was nothing" in Mr. Galloway's background that would "shock the conscience." He never said he made a strategic decision not to pursue evidence of childhood trauma or current medical problems because these would somehow conflict with a purported strategy to "humanize" him. Nor does this even make sense as a justification for limiting investigation, as there is no conceivable contradiction

between investigating a client's childhood victimization and current mental health problems and a purported desire to "humanize" him.

Nor did counsel ever say that he chose not to develop or present information about Mr. Galloway's childhood or current medical problems out of fear that this somehow would have opened the door to the introduction of harmful evidence. BIO 16. Attorney Rishel mentioned a single fact he did not want the jury to know, namely, that Mr. Galloway's brother was in prison for murder. Ex. 17, p.3. But he never asserted that he cut short his *investigation* out of concern that doing so would open the door to evidence of the brother's murder conviction. *Id.* This strategic "concern" not only is made up of whole cloth but does not even make sense.

Second, even if counsel had made the judgment the court below inaccurately attributed to him, it would not excuse his failure to conduct a basic investigation into Mr. Galloway's upbringing and mental health. The State does not dispute the general rule that trial counsel must conduct reasonable investigation before adopting a strategy, because the strategy must be informed by the facts. *Sears*, 561 U.S. at 952 ("counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision ... because counsel had not fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background") (quoting *Wiggins v. Smith*, 539 U.S. 510, 522 (2003), and *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (internal quotation marks

omitted)). Instead, the State asserts that talking to Mr. Galloway's mother and family members several times and a limited mental health examination were adequate, because they revealed no useful evidence of an abusive childhood or serious mental health problems. But as Mr. Galloway's post-conviction counsel have shown, there was easily available, abundant evidence that Mr. Galloway was repeatedly abused as a child and that he has serious mental health disabilities, none of which trial counsel was even aware of.

The State insists that the question of deficient investigation is not presented here, because Mr. Galloway's counsel did conduct an investigation that was adequate to support the purported "humanizing" strategy. BIO 13–15. In doing so, however, it makes multiple assertions that are unsupported by the record. First, it makes a conclusory assertion that trial counsel conducted "many interviews" that led them to conclude that "common lines of mitigation" were "not promising." BIO 13, 16–17, 18. While trial counsel Rishel stated the defense met with Mr. Galloway's mother "seven or eight times" and "talked to other members of Mr. Galloway's family," Ex. 17, p. 3, the few family members he met, including his mother, said that counsel asked only cursory questions, and never met with many others the family suggested. Ex. 17; Ex. 22 ¶¶ 65–68; Ex. 23 ¶¶ 35, 39; Ex. 24 ¶¶ 6, 59; Ex. 44 ¶ 19; Ex. 46 ¶ 29; Ex. 63 ¶ 9. The mother stated that counsel and the investigator enlisted her to urge her son to take a plea and asked her to beg for his life on the

witness stand, but did not recall *any* questions about "my family or Bo's life growing up." Ex. 22 ⁋⁋ 65–67.

Similarly, the State asserts that trial counsel gave the mental health expert "everything she requested," and reasonably relied on her assessment to foreclose any further investigation into Mr. Galloway's mental health. BIO 18. But counsel asked Dr. Smallwood only to assess whether Mr. Galloway was incompetent, insane, or intellectually disabled, not whether he had mental health problems that might be relevant to mitigation, a distinct and much broader question. Ex. 4, p. 1. Dr. Smallwood said that "no further forensic evaluation [was] needed" to answer the limited questions that counsel asked. Ex. 4, p. 11. But she expressly noted that she was *not* addressing the distinct question of mitigation, and in fact urged counsel to secure the assistance of a mitigation investigator. *Id*. They never did.

Moreover, because of their own deficient investigation, counsel provided Dr. Smallwood only Mr. Galloway's high school transcript and police records; they did not provide any of the voluminous medical, mental health, youth court, or institutional records that were readily available. Ex. 4, p. 11; Ex. 3 ⁋⁋ 3, 7. If Dr. Smallwood had received before trial the readily available background information that she saw for the first time only during postconviction proceedings, she would have diagnosed Mr. Galloway as suffering from PTSD and other severe ailments, and she would have testified

in support of mitigation at trial. Ex. 3 ⁋⁋ 11–32. But counsel never provided that information, and never asked her about mitigation.

On this record, then, the question squarely presented is whether a "strategy" hypothesized by a court after the fact, and unsupported by any actual strategy decision of counsel, can excuse a lawyer's failure to investigate and present basic mitigating evidence. The Court should grant review to make clear that while a reviewing court should defer to counsel's strategic decisions when a reasonable investigation supports them, a court may not paper over deficient investigation by concocting a *post-hoc* strategy to excuse a lawyer's deficient performance—especially where the strategy has never been asserted and does not even make sense as a rationale for failing to conduct sufficient investigation.

II. Trial counsel's deficient performance prejudiced the defense.

The State argues that certiorari is unwarranted because trial counsel's failure to develop and present basic mitigating evidence did not prejudice Mr. Galloway. BIO 20–23. The state court's reliance on a hypothesized strategy to excuse counsel's performance also infected its assessment of the prejudice caused by counsel's failure to investigate. Specifically, the court first relied on the strategy to excuse the deficient mental health investigation, and then excluded the readily available mental health evidence from its reweighing of the undiscovered mitigating evidence against the aggravating evidence to assess prejudice. Pet. 19. There is a reasonable probability that, had the jury

known of Mr. Galloway's abusive upbringing and contemporaneous mental health issues, at least one juror would have voted for life rather than death. Pet. 19–21.

A. The aggravating facts

The State maintains that Mr. Galloway could not show prejudice because of "the horrific facts of [the] crime." But that is wrong for two reasons.

First, Mr. Galloway does not question the Mississippi Supreme Court's assessment of the aggravating evidence, nor does he dispute that a court assessing prejudice must weigh both the aggravating and mitigating circumstances. Rather, he maintains that the state court's constitutional error caused it to omit or discount mitigating evidence that should have carried weight in its assessment. The court gave insufficient weight to the undiscovered background evidence and completely omitted the mental health evidence from its reweighing. If this Court were to rule that the court below erred in excusing the failure to develop and present mitigating evidence, the state court would have to conduct an evidentiary hearing, make fact-findings, and "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534.

Second, even the most horrendous facts cannot foreclose a life sentence by a jury or sentencing relief by a court. Juries across the country have voted for life in cases that were far more aggravated, including the recent case of the Parkland High School mass shooter in Florida. *See, e.g.*, Tim Craig,

Parkland school shooting jury spares gunman death penalty in 2018 massacre (Oct. 13, 2022), https://www.washingtonpost.com/nation/2022/10/13/nikolas-cruz-spared-death-penalty-parkland-shooting/ (last visited June 13, 2024); *see also* Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases,* 46 Hofstra L. Rev. 1161, appendices at 1229–56 (2018) (cataloguing nearly 200 aggravated capital trials that resulted in life sentences, including thirteen cases with teenage victims); Stetler, McLaughlin & Cook, *Mitigation Works: Empirical Evidence of Highly Aggravated Cases Where the Death Penalty Was Rejected at Sentencing*, 51 Hof. L.R. 89, appendices at 109, 134, 149 (2022) (updating 2018 article in late 2021 with 350 new aggravated cases that resulted in life sentences, including 57 cases with teenage victims).

This Court has itself found prejudice resulting from counsel's failure to investigate and introduce mitigating evidence even in highly aggravated cases. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 31, 42 (2009) (counsel's failure to investigate mitigation prejudiced defense although petitioner convicted of double murder of former girlfriend and her new boyfriend); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (counsel's failure to investigate state's case in aggravation prejudiced defense although petitioner convicted of stabbing bar owner repeatedly and setting body on fire); *Wiggins*, 539 U.S. at 514, 524–25 (counsel's failure to investigate mitigation prejudiced defense

although petitioner convicted of drowning 77-year-old victim in bathtub in ransacked apartment); *Williams*, 529 U.S. at 367–68, 370–71 (counsel's failure to investigate mitigation prejudiced defense although petitioner convicted of killing victim with a mattock); *cf. Buck v. Davis*, 580 U.S. 100, 123–24 (2017) (counsel's introduction of damaging racially charged evidence prejudiced defense although petitioner convicted of double homicide committed in front of children of one victim). While a reviewing court must weigh the aggravating circumstances, they do not rule out a life sentence.

In this case, the jurors found four aggravating circumstances, and heard detailed testimony about the victim's severe injuries. But the jurors had no idea that Mr. Galloway endured a violent, impoverished upbringing that left him with PTSD, depressive disorder, and brain damage. Had they done so, there is a reasonable probability that they would not have sentenced him to death.

B. "Opening the door"

The State also maintains that the wholesale absence of evidence concerning Mr. Galloway's childhood trauma and mental health problems was not prejudicial because, had it been introduced, it would have opened the door to other damaging evidence concerning Mr. Galloway's brother, and Mr. Galloway's other criminal charges. BIO 21–22. But as noted above, that simply does not follow. Presentation of evidence about the beatings Mr. Galloway suffered as a child and his current mental health problems would not under any plausible theory have opened the door to evidence about his

brother's current incarceration for murder, or Mr. Galloway's prior offenses. BIO 21. This argument defies common sense and cannot be squared with this Court's decision in *Rompilla*, 545 U.S. at 381–82, 384, 390–91 (2005) (finding counsel's failure to investigate defendant's prior convictions, upbringing, and mental health both deficient and prejudicial).

First, while attorney Rishel stated that the defense did not want the jury to know that Mr. Galloway's brother is serving a life sentence for murder, he did not offer that as a reason not to investigate or present mitigating evidence regarding Mr. Galloway's childhood abuse or mental problems. Reasonable investigation would have disclosed that Mr. Galloway, his mother, and his siblings suffered severe domestic violence from Mr. Galloway's brother for years. Ex. 22 (Aff. of O. Varghese, ¶¶ 35–36, 41); Ex. 23 (Aff. of M. Stanton, ¶¶ 16–17); Ex. 63 (Aff. of T. Norman, ¶ 22); Ex. 31 (Aff. of R. Nathan, ¶ 12); Ex. 39 (Aff. of C. McCorvey, ¶ 10). Nothing about Mr. Galloway's childhood abuse at the hands of his brother would open the door to evidence that his brother committed a murder.

Second, even if Mr. Rishel had made the judgment the court hypothesizes, he would have made it without doing the investigation even to be aware of the helpful mitigating evidence he was passing up. Mr. Galloway endured extreme poverty, family dysfunction, domestic violence inflicted by his brother and father, and mental illness, yet strove to be a good father himself. Ex. 17 (Aff. of P. Bell, ¶ 13); Ex. 22 (Aff. of O. Varghese, ¶¶ 7, 16–26,

43, 48); Ex. 23 (Aff. of M. Stanton, ¶¶ 10–13, 26–33); Ex. 24 (Aff. of L. Taylor, ¶¶ 6–24, 37, 45–49); Ex. 28 (Aff. of P. McCorvey, ¶¶ 7, 12–14, 24). None of this history, if introduced, would have invited evidence about his brother's current incarceration. Yet as in *Rompilla*, this evidence "would have destroyed the benign conception of [Petitioner's] upbringing" and prompted further investigation, "add[ing] up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury." 545 U.S. at 391–93.

Third, any door for Mr. Galloway's prior convictions was already open, and was not somehow kept closed by failing to *investigate*, much less present, evidence of his abusive upbringing and mental health. As counsel knew beforehand, the State used the carjacking conviction at trial as an aggravating factor and presented an exhibit that included others.

The State argues that the jury would discount any mental health evidence because the defense expert concluded that Mr. Galloway was competent to stand trial. BIO 21–22. But, as noted above, that conclusion rested on the scant background record trial counsel provided to the expert. Ex. 3 (Aff. of Dr. Smallwood, ¶ 30)., The same expert would have diagnosed Mr. Galloway with post-traumatic stress disorder and other impairments after reviewing evidence from a proper investigation.

In short, there is neither a factual nor a logical basis to the State's assertion that the introduction of the additional mitigating evidence would

have opened the door to evidence that would have undermined its mitigating effect to such an extent as to vitiate any prejudice.

III. State high courts and federal circuit courts are divided in their application of *Strickland*/*Wiggins* to counsel's failure to investigate.

This Court announced in *Strickland* and *Wiggins* that a strategic choice made by counsel "after less than complete investigation" warrants deference only when it is supported by the "adequacy of the investigations" supporting it. Pet. 23. As recounted in the petition, the Third, Seventh, and Ninth Circuits, as well as the Texas Court of Criminal Appeals, have faithfully followed this guidance and refused to stamp trial counsel's inadequate investigation as adequate because of "strategic" considerations, real or imagined. Pet. 22–24. In contrast, the Sixth and Tenth Circuits and the Mississippi Supreme Court have accepted "*post hoc* rationalization[s]" of the failure to investigate in the name of "strategy." *Wiggins*, 539 U.S. at 526–27; Pet. 24–26. And other courts, including the Eleventh and Fifth Circuits and the North Carolina Supreme Court, have rendered conflicting decisions within their jurisdictions on this issue. Pet. 27–28. Deepening the split, courts in some cases, as in Mr. Galloway's, have excused trial counsel's inadequate investigation by imputing to them a strategy never articulated by counsel and unsupported by record. Pet. 24–26.

Nothing the State says undermines this divergence of authority. Rather, it tries to brush away the split by either committing the same mistake of imputing a strategy when there was none, or hand-picking factual

distinctions immaterial to the question whether an imputed, unsupported "strategy" can excuse the failure to conduct the investigation necessary to make a strategic decision in the first place.

The State claims, for example, that the Mississippi Supreme Court did not "rely on a hypothesized [humanizing] strategy," when it invoked a "strategic" excuse for a failure to investigate in several cases. BIO 26; Pet. 24–25. Yet none of the counsel in the Mississippi Supreme Court cases petitioner cited had articulated such a strategy as a reason not to conduct a full investigation. Counsel in *Walker v. State*, 303 So. 3d 720 (Miss. 2020), having memory problems, speculated after the fact that he "must have done" his "thing" to "personalize" the defendant through testimony of defendant's mother and sister. *Id.* at 724, 727. But the family members testified that they never spoke with him. The Mississippi Supreme Court excused counsel's "scanty" investigation in *Walker* under the label of a "humanizing" strategy. *Id.* at 731 (Kitchens, P.J., concurring in result only). The court imputed the same strategy to counsel in *Ambrose*, *Keller*, and ultimately *Galloway*, with no record basis whatsoever. *See Ambrose v. State*, 323 So. 3d 482, 487 (Miss. 2021) (extrapolating a humanizing strategy solely from counsel's opening statement about defendant "ha[ving] some value," despite the fact that counsel advanced no reason why they did not let the mitigation specialist complete her investigation, leaving numerous witnesses unexplored); *Keller v. State*, 306 So. 3d 706, 713 (Miss. 2020) (justifying counsel's failure to

investigate by simply cutting-and-pasting the humanizing sentence from *Walker*, untethered to any facts specific to the case); App. 27a–31a (court below adopting same "humanizing" strategy and imputing it to Galloway's counsel without record support). The Sixth Circuit adopted the same approach, substituting "good character" for "humanizing," and using a made-up strategy to excuse deficient investigation and presentation at sentencing. *Burns v. Mays*, 31 F.4th 497, 504 (6th Cir. 2022) (excusing counsel's minimal investigation, resulting in a mere fourteen-page mitigation transcript consisting of testimony from witnesses who he spoke with for the first time, as a strategy of "good character").

Nor can the sharp contrast between *Jefferson v. GDCP Warden*, 941 F.3d 452 (11th Cir. 2019) and *Jenkins v. Commissioner, Alabama Department of Corrections*, 963 F.3d 1248 (11th Cir. 2020), be brushed away as factual variations. BIO 27–28. Trial counsel in *Jefferson* knew of defendant's "serious head injury" yet "turned a blind eye" to the "red flags," and was found deficient, as the court rejected his alleged "residual doubt" strategy as an excuse. 941 F.3d at 481. Trial counsel in *Jenkins* similarly knew of Jenkins's severe childhood abuse but conducted no investigation beyond a conversation with his grandmother. 963 F.3d at 1268. Yet the *Jenkins* panel, facing a "virtually silent" record "as to what actions were or were not taken [by counsel] . . . and why," simply "assumed" that counsel acted reasonably under the same "residual doubt" strategy. *Id.* at 1281 (Wilson, J., dissenting).

This Court has repeatedly rejected "*post hoc* rationalizations." *See Wiggins*, 539 U.S. at 526–27. Yet there is a clear split among the federal circuit courts and state high courts on whether a *post hoc* "strategy" can justify counsel's failure to investigate, particularly where, as here, it is unsupported by the record and was never advanced by counsel. This case provides an opportunity to clarify that courts owe deference only to counsel's reasonable performance and may not hypothesize strategies to immunize a failure to do the investigation necessary to develop a strategy in the first place.

CONCLUSION

For the reasons above and in the petition for writ of certiorari, the petition should be granted.

Dated: July 11th, 2024

Respectfully submitted,

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