No. _____
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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Leslie Galloway III was sentenced to death after his trial counsel conducted a constitutionally inadequate investigation that failed to uncover his excruciating life history and resulting serious impairments, including Post-Traumatic Stress Disorder. The Mississippi Supreme Court excused trial counsel's failure to conduct even a minimally adequate investigation by hypothesizing that he may have had an "alternate strategy" of "humanizing" Mr. Galloway, and thus deemed the failure to investigate not deficient performance.

The question presented is:

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, flouted this Court's precedents and conflicted with decisions other federal circuits and state high courts requiring counsel to conduct sufficient investigation to inform a strategic decision?

PARTIES TO THE PROCEEDING

Petitioner is Leslie Galloway III. Respondent is the State of Mississippi. No party is a corporation.

RELATED PROCEEDINGS

Circuit Court of Harrison County, First Judicial District, *State v. Galloway*, No. B2401-09-00468 (Sept. 24, 2010) (entering judgment of conviction and sentence of death after jury trials).

Mississippi Supreme Court, *Galloway v. State*, No. 2010-DP-01927-SCT (June 6, 2013) (affirming trial court judgment).

Mississippi Supreme Court, *Galloway v. State*, No. 2013-DR-01796-SCT (Oct. 22, 2015) (staying post-conviction review pending post-conviction proceedings for a prior carjacking conviction, which was used as an aggravating factor in the death sentence).

Circuit Court of Jackson County, *Galloway v. State*, No. 2015-00,095(1), (Sept. 5, 2018) (denying post-conviction relief for the carjacking conviction).

Mississippi Supreme Court, *Galloway v. State*, No. 2018-CA-01427-SCT (May 7, 2020) (affirming the denial).

United States District Court, Southern District of Mississippi, Southern Division, *Galloway v. Cain*, No. 1:20CV271-HSO-RPM (July 26, 2021) (recommending dismissal of habeas relief for the carjacking conviction as untimely), voluntarily dismissed on Aug. 9, 2021.

Mississippi Supreme Court, *Galloway v. State*, No. 2013-DR-01796-SCT (Oct. 5, 2023) (denying post-conviction relief for capital conviction and sentence).

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PETITION FOR A WRIT OF CERTIORARI

Leslie Galloway respectfully petitions for a writ of certiorari to review the judgment of the Mississippi Supreme Court.

OPINIONS BELOW

The Mississippi Supreme Court's opinion denying post-conviction relief is reported at 374 So.3d 452 (Miss. 2023) and appears in the appendix at App. 001a.[1]

JURISDICTION

The Mississippi Supreme Court entered its judgment on October 5, 2023, and denied rehearing on December 7, 2023. App. 001a, 102a. Justice Alito has granted an extension of time until April 5, 2024, to file this petition. *See* Dkt. No. 23A796.

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Mississippi Supreme Court had jurisdiction under Miss. Code Ann. §§ 99-39-5, 7.

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the Constitution of the United States provides, in relevant part, that: "In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

[1] "App." refers to the appendix to this petition. Other citations employ the abbreviations used in the Mississippi Supreme Court: "Ex." refers to the exhibits submitted with Mr. Galloway's amended petition for postconviction relief, and "R." refers to the trial record.

INTRODUCTION

The Sixth Amendment guarantees criminal defendants the effective assistance of counsel, which imposes on counsel a duty to investigate before making strategic decisions. This duty is most exacting in capital cases, where the prevailing professional norms call for a thorough investigation of mitigation evidence, including in particular the defendant's life history and mental health, which are often the core of a mitigation case. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003); *Porter v. McCollum*, 558 U.S. 30, 39–40 (2009). This Court's precedents have clearly established that counsel's failure to discharge that duty to investigate cannot be justified by *post hoc* rationalizations, because sufficient investigation must be conducted in order to inform a strategic decision. *Wiggins*, 539 U.S. at 526–27.

But in this case the Mississippi Supreme Court did just that. The court concluded that Mr. Galloway's appointed counsel's failure to investigate his client's excruciatingly abusive childhood and post-traumatic stress disorder, despite obvious red flags in readily available records, was not deficient performance and did not prejudice Mr. Galloway, because it hypothesized, without record basis, that trial counsel employed an "alternate strategy" of "humanizing" Mr. Galloway. App. 030a. Counsel himself never offered that strategy as a reason for his failure to investigate. This decision directly conflicts with this Court's precedents, as well as decisions of other state high courts and federal circuit courts, holding that *post hoc* strategic rationalizations, even where supported in the record, cannot support a failure to do sufficient investigation to inform a strategic choice in the first place.

While the majority of courts of appeals and state high courts have faithfully applied this principle, the decision below, and the decisions of several other state high courts and federal courts of appeals, have reached a conflicting result, excusing failures to investigate based on "strategies" that may or may not have been advanced, and that in any event were not informed by basic investigation. This case cleanly presents the important question whether *post hoc* speculation about strategy can excuse counsel's failure to conduct the minimal investigation reasonably necessary to make an informed strategic choice. It provides an ideal vehicle to address it, as the Mississippi Supreme Court directly addressed both the performance and prejudice prong on the merits, and no procedural bars are implicated.

This Court should grant certiorari and reverse.

STATEMENT

I. Procedural Background

Mr. Galloway was indicted and charged with capital felony murder for the homicide of Shakeylia Anderson, with an alleged sexual battery as the underlying felony. *See* Miss. Code Ann. § 97-3-19(2)(e). Following a jury trial in the Circuit Court of Harrison County, Mr. Galloway was convicted on September 23, 2010. He was sentenced to death the next day, on September 24, 2010.

The Mississippi Supreme Court affirmed Mr. Galloway's conviction and death sentence on June 6, 2013, and denied rehearing on September 26, 2013. App. 106a. This Court denied Mr. Galloway's petition for a writ of certiorari on May 27, 2014. *Galloway v. Mississippi*, 572 U.S. 1134 (2014).

On October 3, 2014, Mr. Galloway filed in the Mississippi Supreme Court a Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief. App. 338a. This motion invoked Mississippi's two-tiered post-conviction process, which in some cases requires an order from its Supreme Court before the petitioner can move for relief in the Circuit Court or obtain an evidentiary hearing. *See* Miss. Code Ann. § 99-39-7.

While that motion was pending, Mr. Galloway sought post-conviction relief in the Circuit Court of Jackson County, Mississippi, from an independent 2007 carjacking conviction that had been used as an aggravating factor in his capital murder trial. On October 22, 2015, the Mississippi Supreme Court issued an order granting a stay of post-conviction proceedings in this capital case to await the outcome of the carjacking post-conviction challenge. App. 281a.

The Jackson County Circuit Court denied relief, and the Mississippi Supreme Court affirmed that order on May 7, 2020. App. 283a. Mr. Galloway then filed a federal habeas petition in the United States District Court for the Southern District of Mississippi requesting relief in the carjacking case. App. 317a. On July 26, 2021, the Magistrate Judge assigned to the habeas case issued a report and recommendation for dismissal of the petition as untimely filed, also noting that the "carjacking conviction had not yet expired at the time of his 2010 conviction and sentence for murder" and thus the claim could have been raised previously. App. 324a. Mr. Galloway voluntarily dismissed his federal habeas petition in the carjacking case on August 9, 2021. App. 335a.

Mr. Galloway then returned to the Mississippi Supreme Court and filed an amended petition for post-conviction relief in the capital case. App. 338a. He argued, among other things, that he was deprived of his Sixth Amendment right to the effective assistance of trial counsel, in part because counsel failed to conduct reasonable investigation and preparation for the penalty phase of his trial. App. 361a, 412a, 423a.

The Mississippi Supreme Court denied relief on October 5, 2023. App. 001a–02a. The court held that the ineffective assistance claims were not procedurally barred but ruled on the merits that trial counsel did not provide ineffective assistance. App. 010a-43a. The court denied Mr. Galloway's motion for stay of the mandate and petition for rehearing on December 7, 2023. App. 102a.

On February 29, 2024, Justice Alito granted Mr. Galloway an extension of time to file a petition for certiorari, setting a due date of April 5, 2024. *See* Dkt. No. 23A796.

II. Statement of Facts

A. The Trial Preparation and Presentation

Glenn Rishel, then the Public Defender for Harrison County, Mississippi, represented Mr. Galloway at trial along with two attorneys from his staff, Charles Stewart and Dana Christensen. The team had a staff investigator, Damon Reese, but did not seek the assistance of a mitigation specialist. Ex. 17, pp. 1–2, Exs. 19, 20. Mr. Rishel took responsibility for the penalty phase preparation and presentation. Ex. 17, p. 1.

Mr. Rishel secured the appointment of Beverly Smallwood, Ph.D., a clinical psychologist, to evaluate Mr. Galloway before trial. Although the court order appointing her indicated she would "prepare a mitigation study," she made clear to Mr. Rishel that mitigation investigation fell outside the scope of her practice and he would need to hire someone else for that function. Ex. 3, par. 2, 3. The only documents Dr. Smallwood received from counsel were a single high school record and a collection of police reports. Ex. 4, pp. 1–2. Counsel asked her to conduct only a limited evaluation to determine if Mr. Galloway was insane, incompetent, or intellectually disabled. Dr. Smallwood answered all those questions "no." Ex. 4, pp. 1, 11. She concluded her report, however, with a request for a mitigation investigation. She asked that the court "appoint another qualified forensic psychologist to conduct a mitigation study or that the defense counsel enlist the mitigation services of the Office of Capital Defense in Jackson." Ex. 3, par. 2, 3, Ex. 4, p. 11.

Counsel took no steps to obtain a mitigation specialist. Trial counsel and/or their investigator met with only a handful of family witnesses and asked only the most cursory of questions about Mr. Galloway's background and life history. Ex. 22, ¶ 72; Ex. 23, ¶ 39; Ex. 44, ¶ 19. Counsel relied solely on Mr. Galloway and his mother to identify potential mitigation witnesses, and then never met with many of those they named. Ex. 17, p. 3; Ex. 24, ¶¶ 6, 59; Ex. 46, ¶ 29; Ex. 22, ¶ 69; Ex. 23, ¶ 35, Ex. 63, ¶ 9.

Nor did trial counsel make any reasonable attempt to collect record evidence of Mr. Galloway's background. The team bafflingly ignored the abundance of publicly

available records on Mr. Galloway and his family, including medical records, Youth Court records, and incarceration records. The only record they obtained was a transcript from Green County High School, and that is also the only background record they gave to Dr. Smallwood. *See* Ex. 18 (Trial Counsel File Excerpts, at Bates-002).

Mr. Rishel advanced no strategic reason for not conducting even a minimally adequate background investigation, stating only that "[w]e relied on Mr. Galloway and his family to give us a history of Mr. Galloway's life." Ex. 17, p. 3. He said that during sentencing he wanted to show that Mr. Galloway's family loved him, would visit him in prison, and did not want him to die. *Id*. He did not say that doing so was inconsistent with conducting a minimally adequate investigation of his background.

Having conducted no meaningful preparatory investigation, counsel had little evidence to present at sentencing. Mr. Rishel previewed the defense mitigation case as "eight or nine witnesses, but they're like five minutes each. They're going to talk about their relationship with the defendant, and you, basically say that they hope the jury won't kill him, you know, essentially." R. 795.

The witness presentation was as scant as Mr. Rishel had predicted. The defense called five family members and a friend, each of whom responded to two to four pages of direct examination questions eliciting only their ties to him and hopes that the jury would not kill him. In addition, Mr. Rishel called two guards who said he had given them no trouble. No one said a word about Mr. Galloway's abusive upbringing or resulting mental impairments—presumably because Mr. Richel's

deficient investigation disclosed nothing about those facts. Including cross-examination, the defense penalty phase testimony spanned only twenty-two pages of the transcript. R. 815–21; 826–40. And, although Mr. Rishel had told the jurors in opening that they would hear from Dr. Smallwood, R. 812, the defense never called her.

At no time did Mr. Rishel explain that he made a strategic choice not to investigate Mr. Galloway's upbringing, not to obtain readily available records, or not to retain a mitigation specialist after Dr. Smallwood explained that she could not provide that service.

B. The Readily Available Mitigating Evidence

An adequate investigation would have yielded first-hand accounts of the trauma and poverty Mr. Galloway suffered growing up and of the symptoms of traumatic stress that began in his childhood. It would have uncovered voluminous background records that trial counsel could have readily obtained. This evidence, in turn, could have led to informed expert opinion and testimony about his post-traumatic stress disorder ("PTSD") and other severe impairments.

Witnesses who had known Leslie "Bo" Galloway beginning in infancy could have offered vivid descriptions of his violent home life. For his first seven years, his father, Red, drank heavily, "beat the holy hell" out of Bo's mother Ollie, and regularly whipped Bo and two of his three siblings. The fourth, Bo's eldest sister, escaped beatings but not her father's persistent sexual molestation. *See* Exs. 22, 23, 24, 26.

After an occasion when Red beat Ollie bloody, one of the children called the police, and Red was arrested. After that, the marriage broke up. Ex. 24.

Left on her own with four traumatized children, Ollie was emotionally erratic, unreliable, and neglectful, sometimes disappearing for days at a time or withdrawing to her room for hours, leaving the children unattended. Exs. 24, 31, 22, 23. She punctuated the periods of neglect with unpredictable angry outbursts marked by screaming and threats of physical punishment. Ex. 22.

Bo's brother Melvin was five years older than Bo. As Melvin grew up, he, like his father before him, began to abuse the family. Eventually he was diagnosed with schizophrenia and later sentenced to life in prison for murder. Exs. 22, 24, 31, 33, 39, 73. He subjected the family to years of terror. He threw his mother across the room and attacked her with a garden tool. He forced Bo and their sister Mary to fight one another and then beat up the loser. He set fire to Mary's mattress and closet. One morning, Mary awoke to find Melvin pointing a gun at her face. Exs. 22, 23, 24, 25, 27, 31, 32, 33, 35, 36.

Readily available records, none of which counsel obtained, confirmed Bo's brother's many behavioral problems, showing that he was repeatedly in and out of mental institutions and juvenile detention centers. *See, e.g.*, Ex. 33 (M. Anderson – Youth Court Records, at Bates-111137) (noting a one-year detention at Columbia Training School, a facility for juvenile offenders); *id.* at 111167 (noting a hospitalization at Sand Hill Hospital in Gulfport); *id.* at 111180 (noting a Singing River Hospital inpatient psychiatric admission); *id.* at 111183 (noting Melvin will be

transported for admission to East Mississippi State Hospital); *id.* at 111223 (same); *id.* at 111191 (noting Melvin's stay at Oakwood Training School, a juvenile correctional facility); *id*. at 111213 (same); *id.* at 111196 (noting Melvin's stay at the Northshore Psychiatric Hospital); id. at 111218 (same); *id.* at 111207 (noting transport from Singing River Hospital back to youth court detention facility); *id.* at 111221 (noting transport from Northshore to Singing River); Ex. 27 (M. Anderson – SRH Mental Health, at Bates 8994, 8998).

Readily available hospital records document the physical danger in which Bo grew up. He had numerous visits to the Singing River Hospital Emergency Department for suspicious injuries as well as several documented violent encounters in the community. *See, e.g.*, Exs. 21 at 65, 101, 150, 115–16, 170–72, 195–96, 221, 245–53, 254–57, 300, 495. Signs of trauma came early; Ollie recalled that Bo began having panic attacks and hyperventilating by the time he was five or six years old. Ex. 22, ¶ 19. He was terrified that he would be taken away like his brother, and he would desperately cling to Ollie when she was home. *Id*. ¶ 34. Ollie rushed Bo to the hospital at eight years old because he was having an anxiety attack after an altercation with his siblings. Ex. 21 at 134. At fourteen years old, Bo appeared at the emergency department shaking in panic, with a heavy, elevated heartbeat. *Id.* at 231–40. Family members and friends also recalled that Bo had blackouts and periods when he isolated himself and refused food. Ex. 23, 24, 28, 39, 40. A friend described an occasion when he had to intervene when Bo locked himself in the bedroom and threatened to kill himself. Ex. 42, par. 12.

Experts provided with this background information—had trial counsel bothered to obtain any of it—could have given detailed opinions with potential to move the jury on the question of mitigation. Dr. Smallwood, the psychologist trial counsel retained for a limited evaluation of insanity and competence and then never called as a witness, could have provided substantial mitigating opinions. After reviewing the affidavits and social history records collected by post-conviction counsel, Dr. Smallwood concluded that she "would have diagnosed Leslie with PTSD" had that information been provided to her pretrial. Ex. 3, ¶ 16. She also "would have testified that Leslie met the criteria for Major Depressive Disorder" and told the jury about his history of dissociation. *Id.* ¶¶ 17, 26. In her view these records "painted a very different picture of Leslie's social history and . . . family dynamics" than she was aware of at the time of her pretrial evaluation, when trial counsel gave her only a single page of school records and information related to the crime. *Id.* ¶¶ 7, 11.

Other experts were readily available. Had they not failed to investigate Mr. Galloway's upbringing and resulting mental impairments, counsel could have presented a psychologist such as Frederick J. Sautter, Ph.D., who determined during post-conviction proceedings that Mr. Galloway had PTSD. Ex. 2, par. 22. Specifically, Mr. Galloway had demonstrated patterns of re-experiencing traumatic incidents, severe anxiety, hyperarousal, numbing, avoidance, and dissociation. *Id.*, par. 15–20, 24–26. Mr. Galloway also suffered from depressive disorder at the time of Dr. Sautter's evaluation; in the past his depression had met criteria for the far more serious Major Depressive Disorder. *Id.*, par. 29; *see also* Ex. 5. Moreover,

Mr. Galloway had experienced auditory hallucinations and met criteria for a psychotic disorder NOS (not otherwise specified). Ex. 2, par. 29. Dr. Sautter could have testified that at the time of the offense these impairments likely had a strong influence on Mr. Galloway's thinking and behavior, by "decreas[ing] his ability to exercise conscious control over his own behavior and increas[ing] his perceptions of threat while rendering him less capable of controlling his trauma-related emotions and anger." *Id*. at par. 32.

Had they conducted even minimal investigation, trial counsel could also have presented a neuropsychiatrist such as Bhushan Argharkar, M.D., who found substantial evidence that Mr. Galloway suffered from trauma, including severe sleep disturbances and impaired verbal recall and fluency, and that these symptoms could indicate brain damage. Ex. 7, par. 5, 6. Counsel could have investigated the brain damage by obtaining neuropsychological testing from an expert like Dale Watson, Ph.D. Dr. Watson found "signs of a significant attentional disorder," possible "lateralized brain dysfunction," impairments in auditory processing, and short-term verbal recall in the "severely impaired range." Ex. 5, ¶ 7. Dr. Watson concluded that Mr. Galloway's "pattern of performance on the battery was most similar to that of individuals with mild traumatic brain injury." *Id*.; *see also* Ex. 6, par. 3, 5–6 (behavioral imaging assessment by Ruben Gur, Ph.D.).

The Mississippi Supreme Court rejected Mr. Galloway's ineffective assistance claim, in large part, because it speculated that trial counsel may have had a strategy to "humanize" their client rather than risk the introduction of harmful evidence.

App. 030a. The court relied on an entirely separate case in which different counsel had such a "humanizing" strategy, App. 027a–30a (discussing *Walker v. State*, 303 So.3d 720 (Miss. 2020)), but pointed to no evidence that Mr. Galloway's counsel declined to conduct a minimally adequate investigation for this reason. In fact, trial counsel never made any such claim about their strategy.

REASONS FOR GRANTING THE WRIT

I. The Mississippi Supreme Court Violated This Court's Precedents in Excusing Counsel's Failure to Conduct Reasonable Investigation on the Basis of a Hypothesized *Post Hoc* Strategy.

This Court's precedents establish that trial counsel for a criminal defendant has a Sixth Amendment duty to investigate, and that a failure to discharge this duty cannot be justified by *post hoc* rationalizations. *Wiggins v. Smith*, 539 U.S. 510, 526–27 (2003). The Mississippi Supreme Court, however, justified such a failure by precisely that—a *post hoc* "strategy" never used by trial counsel and only surmised by the court in post-conviction review. App. 30a.

A. The Sixth Amendment Requires Counsel to Conduct Adequate Investigation to Inform Trial Strategy.

The Sixth Amendment ensures a criminal defendant's right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To succeed on a claim of ineffective assistance, the defendant bears the burden of showing deficient performance and prejudice. *Id.* at 687. Counsel's performance is deficient if the representation "fell below an objective standard of reasonableness." *Id.* at 688. This standard is relatively deferential: strategic choices during representation are "virtually unchallengeable" if they were actually considered and made by counsel "after thorough investigation of law and facts." *Id.* at 690.

On the other hand, strategic choices must be informed by sufficient investigation. Thus, the Court has subjected counsel's performance to closer scrutiny where they failed to fulfill the duty to *investigate* in order to make an informed strategic choice. *Id.* at 690–91. Counsel has a constitutional duty to conduct

reasonable investigations, or to make a reasonable decision that particular investigations are unnecessary. *Id.* This decision must be directly assessed for "reasonableness considering all the circumstances . . . from counsel's perspective at the time." *Id.* at 688–89. "Strategic" choices made after "less than complete investigation" are reasonable only if "reasonable professional judgments support the limitations on investigation." *Id.* at 691.

As a corollary, a "strategic choice" will not excuse an unreasonable failure to conduct an adequate investigation. Applying this concept in *Wiggins*, this Court rejected the State's attempt to rely on strategy to defend non-investigation. 539 U.S. at 534. Trial counsel in *Wiggins* failed to investigate "the sordid details" of the defendant's life beyond "a narrow set of sources" despite obvious red flags. *Id.* at 524, 536. The State argued that trial counsel made a "'tactical decision' to 'retry guilt'" instead of mitigation in the sentencing phase. *Id.* at 518–19. The Court rejected that defense, holding that if a strategic choice is made "after less than complete investigation," it warrants deference only insofar as it is supported by "the adequacy of the investigations" supporting it. *Id.* at 521. By "abandon[ing] their investigation at an unreasonable juncture," trial counsel had made "a fully informed decision with respect to sentencing strategy *impossible*." *Id.* at 527–28 (emphasis added). Counsel's alleged "strategic decision," therefore, "resemble[d] more a *post hoc* rationalization" than "an accurate description" of their pre-sentencing strategy. *Id.* at 526–27; *see also Williams v. Taylor*, 529 U.S. 362, 396 (2000) ("[T]he failure to introduce . . . [favorable]

evidence . . . was not justified by a tactical decision to focus on [defendant's] voluntary confession.").

This intolerance of *post hoc* rationalizations as a justification for insufficient investigation has been clearly established ever since. This Court explained in *Sears v. Upton*, 561 U.S. 945 (2010), that trial counsel's cursory investigation cannot be "justified by a tactical decision" to "focus on one potentially reasonable trial strategy." *Id.* at 952–54. As the Court explained, "that a theory might be reasonable, in the abstract, does not obviate the need to analyze" whether counsel's inadequate investigation "before arriving at this particular theory" caused prejudice. *Id.* at 953; *see also Wiggins*, 539 U.S. at 521.

Most recently, in *Andrus v. Texas*, 580 U.S. ___, 140 S. Ct. 1875 (2020), this Court reaffirmed that trial counsel's failure to conduct a constitutionally adequate investigation of the defendant's life history or the State's case in aggravation "cannot 'be justified as a tactical decision.'" *Id.* at 1883.

B. In Excusing Trial Counsel's Failure to Conduct Reasonable Investigation on the Basis of a Hypothesized Strategy, the Mississippi Supreme Court Flouted This Court's Precedents.

Although the Mississippi Supreme Court acknowledged these precedents, it condoned the state's later-proposed "alternate strategy" of "humanizing" Mr. Galloway to justify trial counsel's failure to conduct even minimally adequate investigation. App. 30a.

Mr. Galloway argued that trial counsel provided ineffective assistance by failing to conduct a constitutionally adequate investigation of, or to present, readily

available mitigating evidence. App. 358a. Trial counsel presented an almost entirely pro forma mitigation case, spanning only 22 pages of transcript. Five family members and a friend testified merely that they knew Mr. Galloway and would visit him in prison, and two guards said he had given no trouble in the county lockup. Defense counsel never learned, and thus the jury never knew, about Mr. Galloway's violence-dominated, abusive upbringing or its devastating impact on his mental health. App. 358a, 361a, 391a.

The Mississippi Supreme Court nonetheless denied relief, claiming without citation to anything in the record that Mr. Galloway's counsel had pursued an "alternate strategy" of "humanizing" Mr. Galloway in order to avoid eliciting "double-edged" evidence. It wrote that "Galloway's attorneys made a strategic choice to humanize Galloway rather than risk harmful evidence being presented to the jury on cross examination of mitigation witnesses." App. 030a. Mr. Galloway's counsel never stated that they chose to "humanize" their client, or explained how that desire would justify not even investigating his upbringing and its effects. Rather than cite anything counsel said or did in this case, the Mississippi Supreme Court simply cited to a previous decision in which it had excused an attorney's conduct on the ground that he had chosen to "humanize" his client.

The court relied on the same speculation about trial counsel's strategy to excuse counsel's failure to provide readily available mitigation to their mental health expert:

> Galloway asserts that counsel should have presented Dr. Smallwood with a complete history of his life. As discussed above, defense counsel's

> decision to humanize Galloway in mitigation rather than delve into his "life story" and present mitigating evidence that would potentially expose damaging evidence the defense knew it did not want the jury to hear, was reasonable and strategic performance, not deficient performance.

App. 039a. This reasoning not only relies on the same unsupported speculation about trial counsel's strategy but makes no sense. The court did not explain how providing information about Mr. Galloway's abusive upbringing and resulting impairments *to the mental health expert* would somehow compromise any strategy about what counsel presented *to the jury*. This was a failure to investigate without any proffered or indeed conceivable justification.

Because trial counsel did not even investigate the facts of Mr. Galloway's upbringing, he was not in a position to make an informed strategic decision to "humanize" him rather than present that evidence to the jury, much less the mental health expert. *See Wiggins*, 539 U.S. at 527–28. None of Mr. Galloway's attorneys articulated the strategy the court attributed to them. *See* Ex. 17 at 3–4; Ex. 19 at ¶ 6; Ex. 20 at ¶ 5. Mr. Rishel indicated that the defense team wanted to prevent the jury from learning that Mr. Galloway's brother was serving a life sentence for murder, but never advanced that as a reason for not conducting any background investigation. Ex. 17, at 3–4. He said only that his conversations with family members did not reveal anything that would "shock the conscience of the jury in terms of mitigation." *Id.* Yet many of Mr. Galloway's family and friends were not even contacted, and the few who were contacted were not asked about his background. *See* Ex. 17, p. 3; Ex. 22, ¶¶ 69, 72; Ex. 23, ¶¶ 35, 39; Ex. 24, ¶¶ 6, 59; Ex. 44, ¶ 19; Ex. 46, ¶ 29. But the Mississippi

Supreme Court never ordered a hearing, instead relying on its unsupported speculation about what counsel may have been trying to do. As in *Wiggins*, "the 'strategic decision' the state court[] . . . invoke[ed] to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." 539 U.S. at 526–27.

The court's reliance on a hypothesized strategy also infected its assessment of Mr. Galloway's independent challenge to trial counsel's deficient performance respecting mental health evaluations, and of the prejudice caused by counsel's failure to investigate. Dr. Smallwood pointedly advised counsel that she had *not* conducted a mitigation investigation and recommended that counsel retain a specialist to conduct one. Ex. 4, p. 12. The Mississippi Supreme Court relied on Dr. Smallwood's statement that she needed nothing more to assess insanity, incompetency, and intellectual disability, and on attorney Rishel's claim that he "provided Dr. Smallwood with everything she requested." App. 034a, 041a. But that begs the question whether, provided with the fruits of an adequate background investigation, she could have provided opinions that counsel could have presented in mitigation. She plainly could have. *See* Ex. 3.

The court ultimately relied on the same hypothesized strategy to find no deficient performance respecting the mental health investigation:

> Because counsel were not deficient for failing to further develop Galloway's childhood and social history in mitigation after tactically deciding to humanize Galloway instead, they should not be found to

> have performed deficiently here when the argument hinges on the same potential evidence counsel chose to forgo.

App. 041a.

Having found no deficient performance respecting mental health investigation, App. 041a, the Mississippi Supreme Court never considered any of the mitigating evidence available through mental health experts—even though it summarized it later on—in reweighing the aggravating and mitigating evidence and concluding that a different outcome was "not reasonably likely." App. 033a (weighing evidence), App. 0034a–38a (summarizing expert evidence). While the court noted some "damaging" evidence the mitigation investigation had uncovered, App. 031a–33a, it failed to consider the readily available opinions from Dr. Smallwood and other experts that Mr. Galloway suffers PTSD resulting from his violence-drenched upbringing, along with depression and other ailments. Those factors could well have led the jury to choose life over death, yet the court below failed even to consider them in its retrospective re-weighing process.

A proper weighing would have compelled the conclusion that, had the jury been presented with the full picture of Mr. Galloway's upbringing and resulting disorders, the result might well have been different. An adequate background investigation and mental health assessment would have allowed trial counsel to show that Bo Galloway survived a chaotic, impoverished, and violent upbringing, and suffers PTSD, depression, and other ailments as a result. There is a reasonable probability that presenting witnesses who could describe this life history from personal knowledge, along with adequately informed experts, would have caused one or more of his jurors

to vote for life. *See Lockett v. Anderson*, 230 F.3d 695, 716 (5th Cir. 2000) (citing Miss. Code Ann. § 99-19-103; "[i]f we can conclude that a juror could have reasonably concluded that the death penalty was not an appropriate penalty in this case based on the mitigating evidence, prejudice will have been established."); *see also Wiggins*, 539 U.S. at 537 ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance . . . and the death penalty cannot be imposed") (internal citations omitted). A proper reweighing would have shown that counsel's deficient investigation and development of background and mental health evidence prejudiced Mr. Galloway at the penalty phase of his trial.

In short, the Mississippi Supreme Court's disregard of this Court's precedents on the importance of investigation to inform strategy tainted both aspects of its ruling on trial counsel's failure to conduct a constitutionally adequate background and mental health mitigation investigation. As described below, moreover, it has taken a similarly flawed approach in other cases. And other state high courts and federal circuit courts are divided on the role "strategy" can play in excusing the failure to conduct a constitutionally adequate investigation. This Court should grant certiorari to clarify that hypothesized *post hoc* speculation about strategy cannot justify a failure to conduct reasonable investigation in the first place.

II. State High Courts and Federal Circuit Courts are Divided on Whether Hypothesized *Post Hoc* Strategic Justifications Can Excuse a Failure to Conduct Sufficient Investigation.

The state high courts and federal circuit 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. Many circuits and state courts adhere to this Court's ruling that counsel must conduct sufficient investigation to inform their strategic choices. The Mississippi Supreme Court, by contrast, has repeatedly used a *post hoc* "strategy" that it hypothesized to excuse counsel's failure to conduct even minimal investigation. Several other state high courts and circuit courts have similarly erred.

A. Several courts have faithfully followed this Court's guidance that an attorney must conduct sufficient investigation to make an informed strategic choice.

The Third Circuit, for example, has explained that "[c]ounsel can make a strategic decision to halt an avenue of investigation if he has completed a foundation of investigation to reach that decision, but decisions not to investigate certain types of evidence cannot be called 'strategic' when counsel 'fail[s] to seek rudimentary background information." *Abdul-Salaam v. Sec'y Pa. Dep't of Corrections*, 895 F.3d 254, 268 (3d Cir. 2018). The court deemed deficient trial counsel's failure to consult mental health experts or to obtain the defendant's educational and juvenile records. *Id.* It rejected a later-proffered explanation that counsel was worried about "warring experts or a relitigation of the trial." *Id.*

The Ninth Circuit similarly adhered to this Court's guidance that "[w]hether strategic judgments are owed deference depends on the 'adequacy of the investigations supporting those judgments.'" *Noguera v. Davis*, 5 F.4th 1020, 1040 (9th Cir. 2021) (quoting *Wiggins*, 539 U.S. at 521). In *Noguera*, trial counsel failed to "explore [defendant's] family situation," his "emotionally impoverished history," or his "mental state," despite his knowledge of defendant's turbulent upbringing. *Id.* at 1041, 1043. The Ninth Circuit rejected the State's "attempt[] to justify counsel's limited investigation as a 'strategic choice' to pursue a 'positive light' defense strategy." *Id.* at 1042. Absent further investigation, "counsel could not reasonably have evaluated the benefit—or possible detriment—of" further evidence, and thus could not have the failure to investigate "immunized from Sixth Amendment challenges simply by attaching to it the label of 'trial strategy.'" *Id.; see also Andrews v. Davis*, 944 F.3d 1092, 1104, 1116 (9th Cir. 2019) (en banc) (finding counsel's failure to investigate defendant's difficult upbringing, incarceration records, and mental health issues could not be rationalized as "strategic" or "tactical").

The Seventh Circuit adopted similar reasoning in *Pruitt v. Neal*, 788 F.3d 248 (7th Cir. 2015). While "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste," they "could not reasonably have ignored mitigation evidence or red flags." *Id.* at 271 (citing *Rompilla v. Beard*, 545 U.S. 374, 391 n. 8 (2005)). In *Pruitt*, trial counsel ignored red flags pointing to the defendant's schizophrenia, including his own expert's recommendation for additional evaluation. 788 F.3d at 272. The Seventh Circuit

rejected the Indiana Supreme Court's "surmise[] that trial counsel made a deliberate, strategic decision to concentrate on the [defendant's] intellectual disability rather than his mental illness." *Id.* Even assuming this *post hoc* rationalization was a "strategic decision," the court concluded "that choice was made after a less than thorough investigation, and as a result, the decision was not fully informed and was unreasonable." *Id.* at 273.

The Court of Criminal Appeals of Texas has similarly heeded this Court's teaching that "an attorney's failure to uncover and present voluminous mitigating evidence at sentencing is not a reasonable tactical decision where counsel has not 'fulfilled their obligation to conduct a thorough investigation of the defendant's background.'" *Ex parte Garza*, 620 S.W.3d 801, 824 (Tex. Crim. App. 2021) (quoting *Wiggins*, 539 U.S. at 522). Trial counsel's failure to investigate the defendant's life history independently and to look into mental health issues despite evident red flags "fell below an objective standard of reasonableness." *Id.* at 823–24.

B. The Mississippi Supreme Court and several other state high courts and federal circuits have invoked "strategy" not supported by the record to excuse a failure to investigate basic facts necessary to inform a defense strategy.

The Mississippi Supreme Court, by contrast, has repeatedly invoked strategy as a justification to excuse constitutionally inadequate investigation. The case below is not alone. In *Walker v. State*, 303 So.3d 720 (Miss. 2020), trial counsel thought that the defendant would be offered a plea deal and conducted no mitigation investigation until a few days before trial, which resulted in a death sentence. *Id.* at 731 (Kitchens, P.J., concurring in result). During post-conviction proceedings, trial counsel, having

significant memory problems after a stroke, could not recall his actual representation of the defendant. *Id.* at 724. Instead, he testified that he "would have spoken with the penalty phase witnesses" and would do his "thing in death penalty cases" to "humanize" the defendant. *Id.* The witnesses testified, however, that counsel never spoke with them before they took the stand. *Id.* at 731. The court nonetheless accepted trial counsel's "humaniz[ing]" strategy—described by the concurrence as "cobbled together[]at the last moment"—as a reasonable justification for his utter failure to investigate. *Id.* at 728, 733–34.

Invoking the same "humanizing" strategy, the Mississippi Supreme Court rejected another ineffective assistance of counsel claim in *Ambrose v. State*, 323 So.3d 482 (Miss. 2021). The mitigation specialist started, but was not allowed to complete, her mitigation investigation. *Id.* at 487. The defense team never contacted the witnesses she listed, nor retained the experts she suggested. *Id.* The court, however, accepted this incomplete mitigation investigation, again citing an after-the-fact assertion of a "humaniz[ing]" strategy to justify counsel's failure to investigate further. *Id.* at 490.

Again, in *Keller v. State*, 306 So.3d 706 (Miss. 2020), trial counsel failed to "conduct a mitigation study" as the psychologist who evaluated competency and intellectual functioning recommended. *Id.* at 712–13. Relying on *Walker*, the court stamped such performance as reasonable, stating that any further mental health investigation could have "compromise[] the trial strategy of humanizing defendant." *Id.* at 713.

Other state high courts and federal courts of appeals have similarly excused deficient investigation on the basis of such after-the-fact rationalizations. In *Burns v. Mays*, 31 F.4th 497 (6th Cir. 2022), the Sixth Circuit summarily upheld the Tennessee Court of Criminal Appeals in justifying counsel's lack of investigation and witness preparation as a reasonable strategy to focus on the defendant's "religious background and other signs of good character." *Id.* at 502, 505. As the dissent pointed out, "the penalty-phase strategy, if one existed at all, was an afterthought," as trial counsel did not discuss mitigation with the defendant's parents or even talk to other mitigation witnesses before calling them to the stand. *Id.* at 507–08 (Stranch, J., dissenting).

Similarly, in *Frederick v. Quick*, 79 F.4th 1090 (10th Cir. 2023), trial counsel failed to contact family members who would have testified about the defendant's troubled childhood and loving behavior, and admitted that he lacked a strategic reason for this failure. *Id.* at 1114–16. He also failed to investigate the defendant's brain damage, despite knowing about a prior, serious car accident that left the defendant unconscious for four days. *Id.* at 1121. The Oklahoma Court of Criminal Appeals excused both failures as "strategy." It concluded that "trial counsel made 'reasonable, strategic decisions not to present' [defendant's] family members," out of concerns for "availability and credibility." *Id.* at 1116. It also determined that trial counsel "made 'a strategic choice'" to terminate the investigation into brain damage evidence because the defendant was not cooperative. *Id.* at 1123. The Tenth Circuit

affirmed the death sentence. *Id.* The defendant's petition for a writ of certiorari is pending before this Court. *Frederick v. Quick*, No. 23-6888 (docketed Mar. 4, 2024).

C. Still other state high courts and federal circuit courts have rendered conflicting decisions within their jurisdictions on whether *post hoc* strategy can excuse a failure to investigate.

The conflict over how to assess strategy with respect to inadequate investigation is not merely between the circuits and state high courts, but has also led to intra-jurisdiction conflicts. For example, the Eleventh Circuit, in two decisions one year apart involving similar facts, granted relief for one defendant but not the other. In *Jefferson v. GDCP Warden*, 941 F.3d 452 (11th Cir. 2019), the State argued that trial counsel's failure to investigate brain injury "should be regarded as strategic because they pursued a residual doubt defense at the penalty phase." *Id.* at 478–79. The Eleventh Circuit rejected the argument, finding that trial counsel presented a "halfhearted mitigation case" that touched on both direct responsibility and difficult upbringing, and the failure to investigate was deficient because "the very evidence they failed to pursue would have powerfully bolstered the limited mitigation case they did present." *Id.* at 480.

In *Jenkins v. Comm'r, Alabama Dep't of Corrections*, 963 F.3d 1248 (11th Cir. 2020), by contrast, the Eleventh Circuit excused trial counsel's lack of investigation as a reasonable choice "to pursue a penalty-phase strategy of residual doubt and good character." *Id.* at 1261. There, evidence of severe childhood abuse did not surface until post-conviction review. *Id.* at 1259. The defendant's family members testified to the defendant's abusive childhood, and said they would have given the same testimony

at trial but had never been contacted. *Id.* at 1259–62. Trial counsel handling the penalty phase did not testify or explain why he failed to contact them in the post-conviction proceeding; later, he passed away. *Id.* at 1259. The other counsel handling guilt observed that trial counsel "'didn't appear prepared' for the penalty phase." *Id.* In spite of this, the Eleventh Circuit accepted the state court's *post hoc* justification of the very strategy it had rejected a year earlier. *Id.* at 1268. The court reasoned that the late attorney was "entitled to the presumption that" the failure was a strategic decision, and "this strategic decision was reasonable." *Id.*

Other courts have reached similarly inconsistent results on the propriety of hypothetical *post hoc* justifications excusing a failure to investigate. *See, e.g.*, *State v. Allen*, 861 S.E.2d 273, 283–84, 293–94 (N.C. 2021) (refusing to justify counsel's failure to investigate the crime scene as a strategy of focusing on witness's lack of credibility, but excusing counsel's failure to investigate the defendant's mental health or to talk to his family and friends as that evidence would not fit counsel's mitigation strategy), *abrogated on other grounds by State v. Walker*, No. 202PA22, 2024 WL 1222539 (N.C. Mar. 22, 2024); *compare Neal v. Vannoy*, 78 F.4th 775, 791–92 (5th Cir. 2023) (rejecting the State's argument to justify counsel's failure to investigate serology and shoeprint analysis as "strategic"), *with United States v. Scott*, 11 F.4th 364, 372 (5th Cir. 2021) (excusing counsel's failure to investigate admissibility of evidence and pursue exclusion as part of her "defensive strategy to proceed with the plea process").

Given this patchwork of conflicting decisions, some adhering to this Court's admonition that strategic decisions must be informed by adequate investigation,

others excusing patently inadequate investigation on the basis of after-the-fact "strategy," real or imagined, the Court should grant certiorari and reaffirm that effective assistance of counsel requires reasonable investigation, and "strategy" cannot be invoked after the fact to excuse a failure to conduct the basic investigation needed to inform a strategic decision in the first place.

III. The Constitutional Question Whether *Post Hoc* Speculation About Strategy Can Excuse a Failure to Conduct Reasonable Investigation Is Important, and Cleanly Presented.

The question presented is important, and this case presents it squarely. The Court's rule against invoking strategy retrospectively to justify inadequate investigation is essential to ensuring effective assistance of counsel, and nowhere is that more important than in capital cases.

As the Court itself has recognized, only with the fruits of reasonable investigation can counsel make sound strategy decisions. Without sufficient investigation, counsel will "not [be] in a position to make a reasonable strategic choice." *Wiggins*, 539 U.S. at 536.

Moreover, without a requirement to conduct sufficient investigation to make an informed strategic judgment, it is all too easy for the State to speculate about possible strategic judgments that were never made. *Sears*, 561 U.S. at 953–54. The "distorting effects of hindsight" work both ways. *Strickland*, 466 U.S. at 689. Just as a defendant may not "second-guess counsel's assistance" in a manner that is divorced from counsel's perspective at the time, *id.*, the State may not excuse a trial counsel's deficient investigation by advancing a hypothetical strategy later.

This case provides a good vehicle to decide the question. Mr. Galloway has diligently pursued his ineffective assistance of trial counsel claim, and this case poses no procedural default issues. Moreover, the record is clear here that counsel conducted only minimal investigation and did not seek to justify it by invoking the "humanizing" theory the Mississippi Supreme Court hypothesized. Thus, the case cleanly presents the question whether courts can excuse a failure to conduct even minimal investigation on the basis of after-the-fact strategic judgments that were not actually even advanced to justify the failure to investigate in the first place.

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons stated above.

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Respectfully submitted,

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