No. _____

In the Supreme Court of the United States

BRYAN P. STIRLING, Director, South Carolina Department of Corrections; WILLIE D. DAVIS, Warden of Kirkland Correctional Institution,
Petitioners,

v.

CHARLES CHRISTOPHER WILLIAMS,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
Counsel of Record

Office of the Attorney General
State of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305
mbrown@scag.gov

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

** CAPITAL CASE **
QUESTION PRESENTED

During the sentencing phase of this capital case, respondent's experienced defense team argued that respondent suffered from a one-time emotional deterioration of mental state that resulted in the murder of a former girlfriend. Aided by several experts, they introduced evidence of respondent's major depressive episode and obsessive compulsive disorder, along with evidence of his chaotic background, broken home, limited intelligence, and prison adaptability. They chose not to introduce evidence they possessed that respondent had brain damage. On post-conviction review, the state court concluded that counsel was not ineffective for not additionally pursuing potential fetal alcohol syndrome mitigation evidence. It found that neither prong of *Strickland v. Washington*, 466 U.S. 668 (1984), was met. A federal district court granted habeas corpus relief, and the Fourth Circuit affirmed. On the issue of prejudice, the Fourth Circuit acknowledged that evidence of brain damage "can be a double-edged sword, given that it may also indicate future dangerousness to the jury." For that reason, the court further acknowledged that respondent's counsel may not wish to introduce evidence of fetal alcohol syndrome in future proceedings. Yet the Fourth Circuit nonetheless held that respondent was prejudiced by his counsel's failure to introduce fetal alcohol syndrome evidence, and the state court was objectively unreasonable in not reaching that conclusion. The question presented is:

Is a state court objectively unreasonable, for purposes of 28 U.S.C. § 2254(d)(1), when it concludes

that a capital defendant was not prejudiced by his counsel's failure to introduce evidence that a federal habeas court concludes is a "double-edged sword" that might "indicate future dangerousness" and which counsel may well choose not to introduce in any further proceedings.

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The Director of the South Carolina Department of Corrections and the Warden over Death Row (collectively, "the State") respectfully petition for a writ of certiorari to review the Fourth Circuit Court of Appeals Opinion in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is reported at 914 F.3d 302 (4th Cir. 2019). (App. 269-300). The decision of the Federal District Court granting resentencing relief may be found at 2018 WL 1240310 (D.S.C. Mar. 8, 2018). (App. 222-266). The decision of the state post-conviction relief court denying relief on the merits is unreported. (App. 1-64).

JURISDICTIONAL STATEMENT

The Fourth Circuit Court of Appeals issued its opinion on January 28, 2019, and amended its opinion on February 5, 2019. (App. 267-300). A timely petition for rehearing was denied February 25, 2019. (App. 301-302). The State invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right to counsel as secured by the Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defence." U.S. Const. amend VI.

This case also involves a portion of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), as reflected in Section 2254 of Title 28 of the United States Code, in particular, the following pertinent part:

…

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

STATEMENT OF THE CASE

A. Facts of the Murder

On September 3, 2003, respondent Charles Christopher Williams began to execute his plan to murder his former girlfriend, Maranda Williams. He went to the grocery store where she worked, held her hostage from shortly after 10 am to approximately noon. Police attempted to negotiate, but to no avail. Maranda attempted to run away, an act Williams would not allow. He shot her with his twelve gauge shotgun, approached her while she was on the ground pleading for mercy, then shot again, a total of five times. The shooting was captured on the store

surveillance tapes. (App. 2; 68; 72-74). The investigation showed a relationship that had soured, and Williams' inability to let Maranda go. (App. 68-71). While being interviewed after arrest, he explained he had planned violence against her for approximately two months, he had intended to also kill himself, and stated, "I did not feel sorry for her when she was pleading for her life." (Trial Tr. 1774 -80).

B. State Procedural History

Williams was tried by a jury February 7-15, 2005, with sentencing held February 17-19, 2005. (App. 2-4; 74-78). He was represented by experienced capital litigation attorneys, John Mauldin and William Nettles, along with Mark MacDougall and Collen Coyle of the Washington D.C. office of Akin Gump Strauss Hauer & Feld, LLP. (App. 2-3; 58-59; 74).[1] Counsel, with the help of several experts, focused on developing a mitigation defense that emphasized a "change" in

[1] Neither the District Court's Order nor the Fourth Circuit's opinion includes MacDougall or his associates in their listing, but he was actively involved in the development of the mitigation case. At trial, he and his associates handled several important mitigation witnesses including Dr. Seymour Halleck, a well-credentialed forensic psychiatrist. (App. 58-59). The state court noted Nettles' testimony "that he was satisfied with the work of these attorneys and their presentation of the mitigation experts was consistent with the defense's theory of the case. (App. 59). MacDougall has received awards for his work in death penalty cases. See https://www.akingump.com/en/lawyers-advisors/mark-j-macdougall.html (ABA Death Penalty Project's John Paul Stevens Award; NAACP's Foot Soldier Award; National Legal Aid and Defender Association Exemplar Award for his *pro bono* representation of criminal defendants in death penalty cases in South Carolina).

Williams before the murder. (Trial Tr. 2037-39 (MacDougall); 2131(Mauldin)). In closing, counsel argued that a life sentence was appropriate because his mental illness had been untreated, but he could be and would be treated in prison. (Trial Tr. 2392-94 (Nettles)).

Counsel presented background evidence reflecting the mother's use of alcohol, a broken home, and learning issues. Williams' father, sister, a former school teacher, and a social worker testified, along with a retired police officer who testified to domestic disputes between Williams' mother and stepfather. (App. 171-173; 234-236). Counsel also presented a forensic psychologist who testified as an expert in violence risk assessment. He opined that because of a total lack of "serious violence" prior to the murder, and given that his mental illness would be treated in prison, Williams' likelihood to commit violence in prison was "extremely low." (Trial Tr. 2281-83). Counsel presented a former warden who testified after his assessment that "Williams can be safely confined…." (Trial Tr. 2301). A forensic psychiatrist, Dr. Seymour Halleck, testified that Williams "was a highly disturbed and sick young man during those months" leading up to the crime. (Trial Tr. 2309). He opined that Williams suffered from obsessive compulsive disorder and that "[h]e had a major depressive episode" at the time of the murder. (Trial Tr. 2309). Dr. Halleck explained that the conditions "fed on each other" to "contribute[] to a powerful sense of hopelessness, which" he opined "was a factor in Chris committing a violent act." (Trial Tr. 2313). Counsel argued that Williams did not have a supportive, stable family, that he was mentally ill and

that "something changed" in Williams at the time of the murder, and told the jury that "what cause[d] that two-month period in his life" where he was losing Maranda, then planned her death, was "something that can be treated." (Trial Tr. 2384-2391). The jury found Williams should be sentenced to death for Maranda's murder. (App. p. 78; see also Trial Tr. 2417).

The state court affirmed the conviction and sentence on direct appeal, *State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010), and this Court denied certiorari, 562 U.S. 899 (2010).

Williams then began state post-conviction relief (PCR) proceedings. In the PCR, Williams was granted two new attorneys who claimed (among other things) that trial counsel was ineffective for failing to recognize, develop and present evidence of fetal alcohol syndrome. (App. at 83 and 86). The PCR court found no deficient performance, and no prejudice under *Strickland v. Washington*. (App. pp. 48-63).

In finding Williams failed to carry his burden of showing deficient performance, the state court judge found that counsel "put together a highly qualified defense team," "carefully investigated the social, education, familial, and mental health background," and "developed a cogent mitigation defense, offered an array of compelling evidence, and presented the poignant testimony of a number of lay and expert witnesses." (App. 56-57). He noted that defense consulted with "Dr. Halleck [who] concluded that Petitioner knew right from wrong and was able, though with difficulty, to conform his behavior to the requirements of law," had evidence Williams' "mother

drank during pregnancy," knew a possible result from that could be brain damage, and knew Williams "possibly suffered brain damage, based on Dr. Evans's reports," though the MRI results were in the normal range. (App. 57-60). The PCR court resolved that counsel made a "strategic decision to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reasons for that decision)." (App. 59-60).

The PCR court also found that Williams failed to carry his burden of showing prejudice. The court found that trial counsel "presented a well-reasoned mitigation defense, which included compelling evidence of …[a]… troubled childhood" and also "evidence of [Williams'] mental illness based on multiple expert opinions." (App. 61-62). The state court reasoned the additional evidence may have produced a "fancier" case but did show a reasonable probability of a different result. (App. 62). The PCR court also noted death sentences in other jurisdictions where jurors had considered similar evidence. (App. 62-63).

In the appeal from denial of relief, the Supreme Court of South Carolina originally granted Williams' petition for certiorari review, but, after argument, it dismissed as improvidently granted. (App. at 65-66). This Court subsequently denied a petition for certiorari. *Williams v. South Carolina*, 137 S. Ct. 1812 (2017).

C. Federal Procedural History

Williams raised the mitigation evidence ineffective assistance claim in Ground VI of his federal habeas petition. (App. p. 96). The magistrate recommended finding deficient performance and prejudice. (App. 168-197). The U.S. District Court for the District of South Carolina agreed, holding the state court unreasonably applied *Strickland*. The court held that counsel performed deficiently because, for no apparent reason, counsel failed to investigate whether Williams had fetal alcohol syndrome, (App. 232-260), and ordered a new sentencing proceeding for failure to develop and present evidence of brain damage due to fetal alcohol syndrome, (App. 265).

The Fourth Circuit affirmed. (App. 269-300). As to the first *Strickland* prong, the court acknowledged "that most of trial counsels' decisions and actions on issues unrelated to FAS *did* bear the hallmarks of effective assistance: trial counsel had experience in capital cases; counsel consulted with numerous experts in developing a mitigation case; and counsel spent a significant amount of time developing mitigation arguments." (App. 287) (emphasis in original).[2] But the

[2] Though the opinion references "FAS," Dr. Adler testified in the PCR hearing that he "diagnosed" Williams "with PFAS and cognitive disorder not otherwise specified." (App. 178). Other designations were discussed and may be categorized as follows: FASD stands for Fetal Alcohol Syndrome Disorders; FAS, Fetal Alcohol Syndrome, designates facial features are noted; FAE, Fetal Alcohol Effects, indicates some or no facial features are identified; PFAS is Partial Fetal Alcohol Syndrome indicates some features are identified. (App. 175). The testimony at trial "indicated that FASD by definition is 'brain damage.'" (App. 175).

court agreed with the district court that the record showed no strategic basis for not investigating fetal alcohol syndrome. And counsel ought to have done so, the court ruled, because "FAS could have established both *cause and effect* for Williams' criminal acts whereas other mitigation evidence went more to effects on behavior." (App. 291) (emphasis in original).

As to prejudice, the court concluded that Williams satisfied the "reasonable probability test" because the FAS evidence could have countered the jury's assumption that Williams "was generally responsible for his actions" and therefore more morally culpable. (App. 291-292). The court acknowledged, however, that "a FAS diagnosis can be a double-edged sword, given that it may also indicate future dangerousness to the jury." (App. 297 n. 8). The court therefore said it "cannot presuppose FAS evidence must be presented or will prevail in further proceedings." *Id.* Still, the court concluded that "*if* counsel had chosen to present this evidence, the jury *may have* returned a different verdict." The court then reiterated that "[n]othing in this opinion should be taken to conclude that counsel, after a proper investigation, is compelled to present FAS evidence in another sentencing proceeding." *Id.* (emphasis in original).

Finally, the Fourth Circuit held that the PCR court's prejudice determination was objectively unreasonable within the meaning of 28 U.S.C. § 2254(d)(1). The court held that since "the State only presented one aggravating factor: that the murder occurred in the commission of a kidnapping" then "had this solitary aggravating evidence been weighed

against the totality of the mitigating evidence presented during … there is a reasonable probability the jury would have determined the balance of factors did not warrant a death sentence." (App. 298). The Fourth Circuit also criticized the state court for not "weighing" the evidence against the aggravating evidence in context of the specific case, and also for "relying on a survey of jury verdicts," and not considering the evidence in aggravation and mitigation in context of the case. (App. at 298-99). The Fourth Circuit then considered the "mixed" mitigation evidence only as to the one statutory aggravating circumstance. (App. p. 299).

REASONS THE PETITION SHOULD BE GRANTED

Some evidence a capital defendant considers introducing in mitigation may also have aggravating aspects. This evidence is commonly referred to as "double-edged sword" evidence. Whether to introduce it requires a difficult, case-specific judgment call for defense counsel. Double-edged mitigation evidence also presents challenges to federal habeas courts, which have struggled with assessing the prejudicial impact of a failure to introduce such evidence while applying the restrictions of AEDPA review. This case exemplifies that struggle and highlights the need for guidance by this Court.

The Fourth Circuit granted habeas relief to a state capital defendant whose counsel failed to introduce evidence so double-edged that the court acknowledged counsel might not wish to introduce the evidence on retrial. But surely a fair-minded jurist could reach the

opposite conclusion—that respondent was not prejudiced by mitigation evidence that could have exploded the rest of the mitigation case and shown him to be a future danger. The Fifth and Eleventh Circuits are right to hold that the double-edged nature of the evidence supports denial of relief under deferential AEDPA review.

This Court's review is necessary to clarify how federal habeas courts applying AEDPA restrictions should assess double-edged mitigation evidence that defense counsel failed to introduce at trial. The State is not advocating a *per se* rule that failure to introduce such evidence may never be prejudicial. Rather, the State submits the Fifth and Eleventh Circuits are correct that AEDPA will usually require that relief be denied. The Fourth Circuit's decision here—which could produce a second sentencing proceeding that is identical to the original proceeding—cannot be correct.

I. The Fourth Circuit defied AEDPA by upsetting a state capital sentence upon evidence it found to be "double-edged" and need not be introduced in subsequent proceedings.

In habeas review of an issue decided by a state court, AEDPA greatly restrains the standard for relief. "When reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show

that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter,* 562 U.S. 86, 103 (2011). This restraint is missing from the Fourth Circuit's opinion on an issue that, by its nature, calls for deference – the prejudicial impact of double-edged mitigation evidence.

A. The Fourth Circuit failed to acknowledge that if new evidence may be dangerous to the defense—undermining much of its prior mitigation case—fairminded jurists could disagree as to error.

"In making [the prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. In collateral review, courts assess the "reasonable probability of a different result by "consider[ing] 'the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding'" which is compared to "the evidence in aggravation." *Porter v. McCollum,* 558 U.S. 30, 41 (2009) (quoting *Williams v. Taylor,* 529 U.S. 362, 397–98 (2000)). *See also Wiggins v. Smith,* 539 U.S. 510, 534-537 (2003) (courts tasked with "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence").

Applied here, that means recognizing that Williams' post-conviction evidence added to the previously presented mental health defense in a way to damage that defense. As the state court observed, Williams'

mitigation was premised on the contention that the murder and kidnapping were a deviation from who Williams really is, aberrational events that occurred as a result of a short-term mental deterioration. Trial counsel explained the alleged "cause" of the murder through presentation of Williams' major depressive episode. Counsel presented evidence that there was no pattern of violence or significant criminal behavior before the murder. This one-time-event defense was supported by the mental health experts.

The Fourth Circuit was right that the evidence was double-edged. The addition of fetal alcohol syndrome evidence to the defense would introduce the possibility of organic, immutable damage that if paired with cause could matter for Williams, but not in a good way.

The very feature of that diagnosis upon which the Fourth Circuit relied—that it shows the cause of his criminal behavior—is precisely what makes it so damning. It is a cause that is not temporary and is not curable—all of which means the mental state that produced his heinous criminal behavior was not aberrational. In fact, trial counsel had evidence of brain damage but decided not to use it. That makes good sense. Evidence of permanent damage would undermine counsel's strategy to underscore a "change" in Williams before the murder, (Trial Tr. 2037-39 (MacDougall); 2131(Mauldin)); and that his mental illness had been untreated, but could be and would be treated in prison, (Trial Tr. 2392-94 (Nettles)).

All this is exactly why the Fourth Circuit recognized and cautioned that it "cannot presuppose FAS evidence must be presented or will prevail in any further

proceedings." (App. 297 n. 8). Yet the Fourth Circuit barely paused to consider the impact the post-conviction evidence would have had on the remainder of Williams' mitigation case when applying the reasonable-probability standard and AEDPA deference. A fair-minded jurist could readily conclude that counsel's failure to present evidence that would undermine the rest of the mitigation case was not prejudicial.

Indeed, "it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA." *Richter,* 562 U.S. at 101. The court found that the reasonable probability standard was met and that, "given the balance of aggravating and mitigating factors, the jury would have returned a different sentence." (App. 297). Though South Carolina is not a "weighing" state, the court went on to independently "weigh" the one statutory aggravating circumstance (not all aggravating circumstances) against the "mitigating evidence" to find a "reasonable probability" of a different sentence, stating merely that "the PCR court assigned unreasonable weight to the sole aggravating factor." (App. 298-299).[3]

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[3] South Carolina is not a "weighing" state. *State v. Bellamy*, 359 S.E.2d 63, 65 (S.C. 1987), *overruled on other grounds by State v. Torrence*, 406 S.E.2d 315 (S.C. 1991) ("A jury should not be instructed to 'weigh' the aggravating circumstances against the mitigating circumstances"). At any rate, as this Court has noted, "… we have held that in *all* capital cases the sentence must be allowed to weigh the fact and circumstances that arguably justify a death sentence against the defendant's mitigating evidence." *Brown v. Sanders,* 546 U.S. 212, 217 (2006) (emphasis in original).

The Fourth Circuit ultimately disagreed with the state PCR court on the speculated weight the jury would have placed on the post-conviction evidence. But it failed to show that the PCR court was objectively unreasonable to find that the additional mental health evidence was merely an expansion of what was already found.[4] As the Fourth Circuit acknowledged, the "value" is to identify a *possible* cause "for Williams' criminal behavior," (App. 291), which counsel had already explained by psychiatric diagnosis.[5]

The Fourth Circuit also failed to consider that the state court found the evidence largely cumulative of the brain damage evidence counsel had uncovered pretrial, and found the additional PCR evidence not likely to have changed the verdict: "Petitioner's fetal alcohol argument would have 'merely resulted in a "fancier" mitigation case, having no effect on the outcome of the trial." (App.62, citing *Jones v. State,* 504 S.E.2d 822 (S.C. 1998)).

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[4] Dr. Brown testified at the post-conviction relief hearing, when asked if the behavior was "all cause of the FASD brain damage," that "I wouldn't exactly say all caused by. The brain damage underlies all of that, yes. But we're not immune from environmental influences, even when we have brain damage." (PCR Tr. 703; CA JA 608).

[5] According the Center for Disease Control, "The term FASDs is *not* meant for use as a clinical diagnosis." https://www.cdc.gov/ncbddd/fasd/facts.html (last visited May 19, 2019) (emphasis in original). "FASDs refer to the whole range of effects that can happen to a person whose mother drank alcohol during pregnancy. These conditions can affect each person in different ways, and can range from mild to severe." *Id*. The damage is permanent, though "early intervention" may "improve a child's development." *Id*.

What the Fourth Circuit got right was recognizing that the evidence would be "double-edged": the defense team could reasonably decide it would not be credible or persuasive to argue both permanent injury and single episode of violence or low risk of violence in prison based on treatable mental health. A fairminded jurist could certainly find no prejudice where a reasonable attorney could just as well decide to introduce the evidence as not. Instead, the Fourth Circuit would have this case retried—even though it may permissibly be tried again the same way it was tried in 2005. AEDPA restrictions do not allow that result.

B. The Fifth and Eleventh Circuits properly recognize double-edged evidence is rarely sufficient to justify relief under AEDPA.

The Fifth Circuit expressly recognizes the difficulty in assessing the precise balance of helpful compared to harmful impact *is* support for denying relief under AEDPA deference. In *Charles v. Stephens*, 736 F.3d 380, 394 (5th Cir. 2013), the Fifth Circuit wrote that considering prejudice based on doubled-edged evidence often "boils down to an assessment of the degree" and admitted "[t]hat is a difficult question." *Id.* The Fifth Circuit reasoned that "is precisely why it is hard to portray the state habeas court's decision against Charles as unreasonable." *Id.* It affirmed under restrictive AEDPA review.

The Eleventh Circuit, in *Evans v. Sec'y, Dep't of Corr.,* 703 F.3d 1316, 1326-28 (11th Cir. 2013), considering double-edged evidence in the confines of AEDPA review, explained it could not find the state

court denial of relief "was so objectively unreasonable that it was 'beyond any possibility of fairminded disagreement.'" (citations omitted). The Eleventh Circuit, in a case where it reversed a grant of relief under AEDPA, said generally, "We have repeatedly ruled that this sort of post-conviction evidence is usually insufficient to warrant habeas relief." *Peede v. Attorney General,* 715 F. Appx. 923, 931–32 (11th Cir. 2017), *cert. denied sub nom. Peede v. Jones,* 138 S. Ct. 2360, 201 L. Ed. 2d 1087 (2018). *See also Ledford v. Warden, Georgia Diagnostic & Classification Prison,* 818 F.3d 600, 651 (11th Cir. 2016) (declining to grant habeas relief when decision to present mental health evidence was double-edged which "is often the case with mental health evidence"); *Reed v. Sec'y, Fla. Dep't of Corr.,* 593 F.3d 1217, 1248–49 (11th Cir. 2010) (denying habeas relief because the state court decision was not unreasonable where double-edged evidence "would not have been so mitigating as to raise a reasonable probability that Reed would have received a different sentence.").

The Fourth Circuit, having identified the evidence could be "double-edged" in context of this case was bound to answer the question whether the state court decision on prejudice "was so lacking in justification that there was there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," *Richter,* 562 U.S. at 103, in the negative. The failure to do so is contrary to AEDPA.

II. This is an important and recurring issue that warrants this Court's immediate attention.

The need to evaluate "doubled-edged sword" evidence is common. Two Justices have recently recognized that this issue needs attention by their statements regarding denial of petitions in an Eleventh Circuit case and a Fifth Circuit case. In *Peede v. Jones,* 138 S. Ct. 2360 (2018), Justice Sotomayor, joined by Justice Ginsburg, criticized the Eleventh Circuit's "blanket rule foreclosing a showing of prejudice because the new evidence is double edged," and contended that it "flatly contradicts this Court's precedent." *Id*. at 2361. In *Trevino v. Davis,* 138 S. Ct. 1793 (2018), they likewise criticized the Fifth Circuit's "truncated approach" to "double-edged" mitigation evidence in capital cases. 138 S. Ct. at 1794. The different posture of the two cases is instructive.

Peede was a habeas action reviewing a state decision. Even while disagreeing with the Eleventh Circuit's approach as a whole, Justices Sotomayor and Ginsburg recognized AEDPA's import. Explaining why they did not dissent from the denial of certiorari in that case (in contrast to *Trevino*), they noted the posture of the case: "Considering the posture of this case, under which our review is constrained by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2254(d)(1)-(2), I cannot conclude the particular circumstances here warrant this Court's intervention." 138 S. Ct. at 2361.

Similar to *Peede*, the evidence in this case had been presented to the state court in post-conviction relief, and the state court found respondent had not shown

Strickland prejudice. Unlike *Peede*, the federal court failed to afford the state decision the deference due under AEDPA.

Given the frequency with which the issue arises, and the difference between the circuits in their approach to double-edged evidence reviewed within AEDPA limitations, this Court's intervention is warranted to instruct the lower federal courts on proper AEDPA review. *See, e.g., Harrington v. Richter, supra; Porter v. McCollum, supra.*

CONCLUSION

For all the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
Counsel of Record

Office of the Attorney General
State of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305
mbrown@scag.gov

Counsel for Petitioners