No._____

IN THE
Supreme Court of the United States

CASEY A. MCWHORTER,
Petitioner,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL OF THE STATE OF ALABAMA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI
CAPITAL CASE

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CAPITAL CASE
QUESTIONS PRESENTED

This case presents important issues concerning a criminal defendant's constitutional rights to an impartial jury and to the effective assistance of counsel in a death penalty mitigation proceeding. Petitioner respectfully presents three issues for review, each of which warrants the involvement of this Court:

1. Whether a federal court violates 28 U.S.C. § 2254(d)(2) when, in determining whether a state court's factual findings were reasonable, it expressly declines to consider evidence in the record that contradicts the state court's findings.

2. Whether *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), which established the standard for whether the presence of a biased juror deprived the defendant of an impartial jury, requires the defendant to establish that the juror's bias actually affected her judgment about the case.

3. Whether a federal court violates 28 U.S.C. § 2254(d)(2) when it concludes that counsel conducted an adequate penalty phase investigation even though trial counsel fundamentally misunderstood what mitigation evidence was.

LIST OF PARTIES

The parties involved are listed in the caption.

STATEMENT OF RELATED PROCEEDINGS

McWhorter v. State, No. CC-93-77A (Ala. Cir. Ct.) (issuing sentencing order on May 14, 1993).

McWhorter v. State, No. CR-93-1448 (Ala. Crim. App.) (affirming conviction and sentence on Aug. 27, 1999, as reported at 781 So.2d 257; later denying rehearing in unreported decision on Dec. 3, 1999).

Ex Parte McWhorter, No. 1990427 (Ala.) (affirming conviction and sentence on Aug. 11, 2000, as reported at 781 So.2d 330; later denying rehearing in unreported decision on Oct. 27, 2000).

McWhorter v. Alabama, No. 00-8327 (U.S.) (denying certiorari for the direct appeal of McWhorter's conviction and sentence on April 16, 2001, as reported at 532 U.S. 976).

McWhorter v. State, No. CC-93-77.60 (Ala. Cir. Ct.) (issuing final order denying McWhorter's petition under Alabama Rule of Criminal Procedure Rule 32 in unreported decision on March 29, 2010).

McWhorter v. State, No. CR-09-1129 (Ala. Crim. App.) (affirming denial of Rule 32 petition on Sept. 30, 2011, as reported at 142 So.3d 1195; later denying rehearing in unreported decision on Feb. 10, 2012).

McWhorter v. State, No. 1110609 (Ala.) (denying certiorari regarding denial of Rule 32 petition in unreported decision on Nov. 22, 2013).

McWhorter v. Comm'r, Alabama Dep't of Corr., No. 4:13-cv-2150-RDP (N.D. Ala.) (denying petition for writ of habeas corpus on Jan. 22, 2019, as reported at 2019 WL 277385).

McWhorter v. Comm'r, Alabama Dep't of Corr., No. 19-11535 (11th Cir.) (affirming denial of habeas petition on issues certified for appeal on Aug. 18, 2020, as reported at 824 F. App'x 773; later denying petition for rehearing in unreported decision on Oct. 20, 2020).

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The opinion of the United States Court of Appeals for the Eleventh Circuit affirming the denial of habeas corpus is available at *McWhorter v. Commissioner, Alabama Department of Corrections*, 824 F. App'x 773 (11th Cir. 2020). App. 1-35. The Eleventh Circuit's denial of panel rehearing and rehearing en banc is unpublished. App. 36. The district court's opinion denying habeas corpus is available at *McWhorter v. Dunn*, No. 4:13-cv-2150-RDP, 2019 WL 277385 (N.D. Ala. Jan. 22, 2019). App. 40-124.

The Alabama Court of Criminal Appeals' decision affirming the denial of post-conviction relief is reported at *McWhorter v. State*, 142 So.3d 1195 (Ala. Crim. App. 2011), App. 127-75, but the Alabama Circuit Court's decisions denying post-conviction relief are unpublished. App. 176-253. The Alabama Supreme Court's decision affirming the conviction and sentence on direct appeal is reported at *Ex Parte McWhorter*, 781 So.2d 330 (Ala. 2000), App. 255-71, and this Court's order denying certiorari for McWhorter's appeal of that decision is reported at *McWhorter v. Alabama*¸ 121 S. Ct. 1612 (April 16, 2001). The Alabama Court of Criminal Appeal's decision affirming the conviction and sentence on direct appeal is reported at *McWhorter v. State*, 781 So.2d 257 (Ala. Crim. App. 1999). App. 272-345. The Alabama Circuit Court's sentence and conviction are unpublished. App. 346-57.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit issued an opinion affirming the denial of McWhorter's habeas petition on August 18, 2020, App. 1, and on October 20, 2020, denied McWhorter's timely motion for rehearing, App. 36.[1] In March 2020, this Court extended the time for filing all certiorari petitions due on or after March 19, 2020, to 150 days from the date of, as relevant here, the order denying rehearing. 589 U.S. (order dated March 19, 2020). This petition is filed within 150 days of October 20, 2020.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . , and to have the Assistance of Counsel for his defence.

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254, provides, in 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; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[1] On August 25, 2020, the Eleventh Circuit extended McWhorter's time to file a petition for panel rehearing until September 14, 2020. App. 37. McWhorter then timely filed the petition for rehearing.

INTRODUCTION

Petitioner Casey McWhorter sits on death row, convicted of a crime committed a few weeks after his eighteenth birthday. The Alabama state court jury recommended the death penalty in a vote of 10-2, the minimum vote threshold to recommend imposition of a death sentence, and the judge imposed that sentence.

Measured against the clearly established standards set forth by this Court, McWhorter's criminal proceedings were constitutionally deficient. As this Court has instructed, a defendant is denied his constitutional right to an impartial jury if a "juror failed to answer honestly a material question on *voir dire*," and "a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). Likewise, this Court has time and again reiterated that a defendant is denied the constitutional right to effective assistance of counsel if his counsel fails to conduct a satisfactory mitigation investigation in connection with a capital trial. *Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005); *Williams v. Taylor*, 529 U.S. 362, 390 (2000); *see also Strickland v. Washington*, 466 U.S. 668, 690-92 (1984). McWhorter's conviction and sentence violated each of these precedents, and these errors "undermine confidence in the fundamental fairness of the state court adjudication." *Williams*, 529 U.S. at 375.

1. Juror dishonesty: During voir dire juror Linda Burns lied in response to a questionnaire to earn a seat on the jury of a murder trial. In response to the question about whether any of her family members had been crime victims, Burns did not disclose that her father had been a murder victim. Instead, she listed only her

brother-in-law, whom she described as a victim in connection with "drugs." She then explained in colloquy that her brother-in-law had in fact been charged with a crime but was not a crime victim.

Evidence adduced at the state collateral proceeding established that when answering the voir dire questionnaire, Burns had her father's murder in mind and dishonestly withheld it. A fellow juror, April Stonecypher, testified that mere days after the voir dire, Burns unequivocally described her father as a crime victim. According to Stonecypher, Burns tearfully told her fellow jurors about her father's murder and that she had been emotionally devastated upon seeing her father's murderer walk freely down a street in her hometown following his release from prison.

In its review of the record, the Eleventh Circuit expressly declined to consider Stonecypher's testimony in evaluating whether Burns had lied during the voir dire. In doing so, the Eleventh Circuit effectively abdicated its responsibility to conduct judicial review, running afoul of AEDPA's instruction to measure the state court's fact findings "in light of the evidence presented at the State court proceeding." 28 U.S.C. § 2254(d)(2); *see also Brumfield v. Cain*, 576 U.S. 305, 314 (2015).

2. Actual bias: The Eleventh Circuit erred by requiring a showing beyond that set by this Court to establish that a juror was biased. The Eleventh Circuit effectively held that McWhorter needed to show that Burns, the lying juror, had "actual bias"—*i.e.*, that McWhorter was prejudiced by Burns's presence on the jury. *See* App. 22-23 ("[B]oth Alabama's might-have-been prejudiced standard and *McDonough* depend on

whether the juror's bias may have influenced the verdict against the defendant."). The Eleventh Circuit's "actual bias" requirement is contrary to this Court's holding that the defendant need demonstrate only that, had the truth about Burns been known at the time of voir dire, there would have been a valid basis to challenge her for cause. *McDonough*, 464 U.S. at 556. In other words, the Eleventh Circuit and the CCA impermissibly converted *McDonough*'s *ex ante* element into an *ex post* requirement.

3. Mitigation investigation: The Eleventh Circuit highlighted that McWhorter's counsel did not understand the role of mitigation evidence in the penalty phase of a death penalty case. As a consequence of their misunderstanding, counsel conducted less than the bare minimum of investigation: A single, joint interview of three of McWhorter's family members, just eleven days before the trial, without any follow up on information from the interview, and without any effort to locate the 18-year old's friends or mentors. Theirs was a textbook case of inadequate assistance of counsel.

STATEMENT OF THE CASE

A. MCWHORTER'S CONVICTION AND SENTENCE

McWhorter was the sole defendant in a week-long murder trial in Marshall County Circuit Court in Alabama (the "Trial Court"). At the time of McWhorter's trial,[2] Alabama capital criminal trials included a guilt phase, a penalty phase, and a

[2] The operative version of the relevant portions of the Alabama Code during McWhorter's trial were passed in 1981. Ala. Acts 1981, No. 81-178. Subsequently, these have been revised. Ala. Acts 2017-131.

sentencing phase. Ala. Code § 13A–5–46. If the jury found the defendant guilty during the guilt phase, the same jury sat as an advisory panel during the penalty phase. *Id.* In the penalty phase, the jury evaluated eight statutory aggravating circumstances, and seven non-exclusive mitigating circumstances. *Id.* With respect to mitigation evidence, Alabama law specifically required the jurors to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death." Ala. Code § 13A–5–52. At least ten out of twelve juror votes were required to recommend a death sentence; only a majority of juror votes were required to recommend life without parole. Ala. Code § 13A–5–46. In rendering its sentence, the trial court was required to consider the recommendation of the jury. Ala. Code § 13–A5–47(e).

The guilt phase of McWhorter's trial began on March 17, 1994, and the jury found McWhorter guilty of capital murder five days later. App. 365, 368. The same day the jury rendered the guilty verdict, the trial court held the penalty phase of the trial. App. 371, 374. Defense counsel offered no documentary evidence in the penalty phase and called only four witnesses, whose combined testimony—including cross-examination—took up a total of about 26 pages of transcript. App. 380-407. The witnesses were McWhorter's mother, aunt, former co-worker from a local grocery store, and former boss from McWhorter's brief employment at a local restaurant. *Id.* McWhorter's mother and aunt testified, predictably, that they hoped McWhorter's life would be spared. App. 389, 395-96, 404. The co-worker testified that McWhorter was

"one of the better bag boys," App. 384, and the restaurant owner testified that McWhorter had worked at the restaurant as a busboy for "a month or so," "on weekends," a "few years ago," and had been "a good kid." App. 387. The defense counsel did not call—and had never even interviewed—18-year-old McWhorter's stepfather or a single one of his teachers, classmates, friends, aunts, uncles, or cousins.

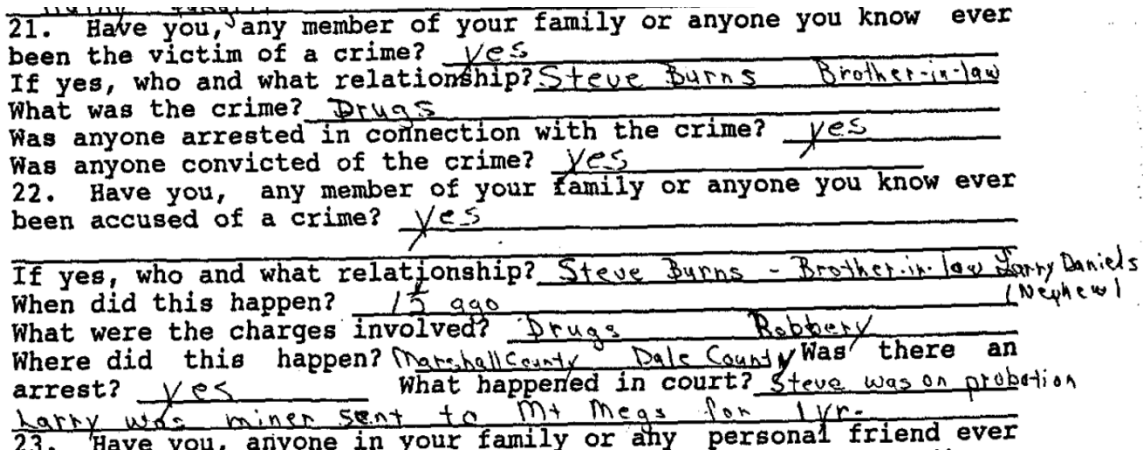
Despite the paltry mitigation evidence, the jury quickly informed the Trial Court that it could not reach a verdict with regard to punishment. App. 456-58. The Trial Court responded with an *Allen* charge, explaining that the jury's failure to reach a verdict would cause substantial expense, as it would require a new jury to be selected, sequestered, and presented with evidence. App. 458-61. When the jurors returned to deliberations, Burns tearfully informed her fellow jurors of her father's murder, and of her pain when she saw her father's killer walk freely down the street in her town after his release from prison. App. 488-89. The jury then returned a vote of 10-2 in favor of the death penalty. App. 461-62. After a brief sentencing hearing, the Trial Court, "having given careful consideration to the jury's advisory recommendation," sentenced McWhorter to death. App. 356. His direct appeals were denied, and this Court denied his petition for certiorari in connection with his direct appeal in 2001. *See generally* App. 254-345; *McWhorter v. Alabama*, 532 U.S. 976 (2001). McWhorter is currently on death row at the William C. Holman Correctional Facility.

B. MCWHORTER'S BIASED JURY AND INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

In 2002, McWhorter collaterally challenged his conviction in the Marshall County Circuit Court of Alabama (the "Circuit Court"[3]) pursuant to Alabama Rule of Criminal Procedure 32 (the "Rule 32 Petition"). Relevant here, McWhorter advanced two challenges: (1) that he was denied an impartial jury ("Biased Jury Claim") and (2) that he was denied effective assistance of counsel during the penalty phase of trial ("Ineffective Assistance Claim"). In 2009, the Circuit Court held a hearing on the Biased Jury and Ineffective Assistance of Counsel Claims (the "Rule 32 Hearing"). App. 190.

1. The Biased Jury Claim turned on Burns's failure to answer questions during voir dire honestly. During voir dire, prospective jurors for the capital case were presented with a questionnaire. Burns deliberated over the questionnaire—she was, in fact, the last person in her jury room to complete it—precisely recounting her educational and employment history, the newspapers to which she subscribed, and the news programs to which she regularly listened. App. 365-67. The form also asked questions about her and her family members' experience with crime. Question 21 asked whether any of Burns's family members had "ever been the victim of a crime." App. 363. Question 22 asked whether any of Burns's family members had "ever been accused of a crime." *Id.* In response to both, Burns listed her brother-in-law, but failed to divulge that her own father had been murdered:

[3] Both the trial and the Rule 32 petition were heard before the Marshall County Circuit Court of Alabama. This brief refers to that court as "Trial Court" when discussing the trial proceedings, and as the "Circuit Court" when referring to post-conviction, Rule 32 proceedings.


21. Have you, any member of your family or anyone you know ever been the victim of a crime? yes
If yes, who and what relationship? Steve Burns Brother-in-law
What was the crime? Drugs
Was anyone arrested in connection with the crime? yes
Was anyone convicted of the crime? yes
22. Have you, any member of your family or anyone you know ever been accused of a crime? yes
If yes, who and what relationship? Steve Burns - Brother-in-law Larry Daniels (Nephew)
When did this happen? 15 ago
What were the charges involved? Drugs Robbery
Where did this happen? Marshall County Dale County Was there an arrest? yes What happened in court? Steve was on probation
Larry was minor sent to Mt Meigs for 1yr.
23. Have you, anyone in your family or any personal friend ever

Id. Burns also left blank the question on the form asking whether there was "any other information that you believe might be important for the court or for the lawyers to know about you as a possible juror." App. 364. Burns was then selected as a juror and served on the jury.

Burns's answers on the form concealed from McWhorter's counsel any clues about a traumatic event of her childhood, directly relevant to her ability to sit on a capital jury: Burns's father, Olive Daniels, had been the victim of a homicide. As established at the Rule 32 proceedings, one night when Burns was twelve-years old, Daniels went out with two other men, Langford Crawley and Charles Taylor, to a pond in an abandoned rock mine. App. 58. Only Crawley returned from the outing. Taylor was found beaten to death. Daniels was found dead at the bottom of the pond, and Burns was told there were bruises around his neck. *Id.* Crawley was convicted for the murder of Taylor. Although no charges were brought against Crawley for the death of Burns's father, Burns "always thought" that Crawley had killed her father. App. 58; *accord* App. 60 ("I just always thought that my father was killed.").

At the Rule 32 Hearing, Burns testified that her feelings about her father's death had been very strong even in 1994, when she sat as a juror in McWhorter's trial. App. 60; *see also* App. 59 (agreeing that her "memories of what happened to [her] father were and still are traumatic"). And she admitted that she had discussed with fellow jurors her feelings about "the man that that had killed [her] father—[she] thought that had killed [her] father and another man did not serve the full time that he was in there," and that she believed that Crawley had been insufficiently punished. App. 60. When pressed about her failure to disclose these beliefs during voir dire, she offered multiple inconsistent explanations. She testified that: (i) her father was not in her mind when she completed the questionnaire; (ii) she thought he was not a crime victim because he was drowned, not murdered; (iii) she thought he was not a crime victim because no one was charged or convicted with his murder. And she testified that, in any event, she had voted for McWhorter's guilt and for the imposition of the death penalty based on the evidence presented during the guilty phase, not on account of any thoughts about her father. App. 62.

At the Rule 32 Hearing, however, a second juror, April Stonecypher, offered testimony that contradicted Burns's post-hoc claims that, at the time of McWhorter's trial, she did not believe her father was a murder victim. Stonecypher recounted in detail that Burns had emotionally told her fellow jurors of her father's murder:

> Linda [Burns] was standing, and she started telling a story about how ***years before . . . her father had been murdered***, and that, to my best recollection, he wasn't—I'm not sure if he went to jail or he didn't go to jail, but ***she now had to walk around in the same town where this man was that killed her father***. And she was crying . . . She had made a comment that, basically, you just don't know how it feels to have

> to walk around and be around this person that has done this . . . ***[r]eferring to the person that had killed her father***.

App. 488-89 (emphasis added). The State objected to the admission of Stonecypher's testimony, but the Circuit Court admitted it to establish Burns's state of mind, and the testimony was neither controverted nor impeached. App. 475-79, 484-89. Although the Alabama Court of Appeals took note of the State's objection to the admission of the evidence, it did not reverse the order of the Circuit Court admitting it, even over the State's argument that the evidence should have been excluded. App. 139.

2. McWhorter's Ineffective Assistance Claim stemmed from his trial counsel's failure to conduct a reasonable mitigation investigation. As established at the Rule 32 Hearing, aside from speaking with McWhorter himself, trial counsel's mitigation investigation consisted of a single, two-hour interview, eleven days before trial was set to begin (more than nine months after counsel had been appointed) in which counsel jointly interviewed McWhorter's mother, aunt, and 16-year-old half-sister. Trial counsel did not pursue leads generated during the interview.

Nor did trial counsel conduct any other mitigation investigation. Trial counsel did not hire a mitigation specialist or investigator or to seek McWhorter's medical records, school records, juvenile offender records, or social services records; trial counsel likewise failed to obtain the criminal records of McWhorter's family members,[4] trial counsel did not speak with McWhorter's friends, coaches, or

[4] Counsel received documents from the State as part of standard discovery procedures, and separately obtained the medical records from the evening after the crime, when McWhorter was hospitalized due to an apparent suicide attempt.

schoolteachers—four of whom (Amy Battle (friend), Tiffany Long (friend), Frank Baker (coach), and Ken Burns (teacher))—testified at the Rule 32 Hearing about McWhorter's background, friendships, and kindness, and would have been willing to testify had they been called at the penalty phase of McWhorter's trial. In fact, counsel testified that they did not see any purpose in learning about their client from his friends and teachers:

> Q: So did you go back and talk to, for example, Mr. Baker, his junior high school coach? Mr. Baker?
>
> A: No.
>
> Q: Did you go back and talk to any of the homeroom teachers he had who could have talked about Casey?
>
> A: ***Sir, I don't know how his homeroom teachers would have anything to do with this, but, no, I did not speak to them.***
>
> Q: . . . At the time, it didn't occur to you that his homeroom teachers in his school year would have had something to say that he had been a good guy in the past; is that right?
>
> A: ***I saw no reason to believe that his homeroom teachers would have contributed in any way pro or con to the commission of a capital murder.***

App. 491-92. Likewise, even though counsel knew that McWhorter had a number of girlfriends, counsel did not so much as learn their names, let alone attempt to talk to them. And counsel's misunderstanding that "[m]ost of [McWhorter's] friends were charged with murder," App. 490, prevented them from putting on any meaningful mitigation case and was attributable to their demonstrated disinterest in their client.

Trial counsel testified that their "strategy" was to present McWhorter as a "good kid [in a] bad crowd." The sole basis for their decision was McWhorter's youth and clean-cut appearance, rather than any aspect of McWhorter's background (about

which counsel knew virtually nothing). Had trial counsel conducted an adequate mitigation investigation, they would have uncovered evidence that could have garnered sympathy for McWhorter during the penalty and sentencing phases of the trial by showing that he was a gentle, guileless boy. McWhorter established as much at the Rule 32 Hearing, marshalling medical and school records, records from the Department of Human Resources, and eight new and previously un-interviewed mitigation witnesses. These records and witnesses were all available at the time of sentencing, and many of these witnesses would have provided substantial support to trial counsel's "good kid, bad crowd" theme, which was otherwise little more than a slogan. They revealed that McWhorter, despite difficult family circumstances that contributed to his self-destructive behavior that included "huffing" gasoline from age eight, had been a dedicated student and athlete in junior high and remained a kind and loyal friend even during the time that he was detained pending trial in this case.

C. ALABAMA COURTS DENY POST-CONVICTION RELIEF

The Circuit Court and the Alabama Court of Criminal Appeals ("CCA") rejected McWhorter's arguments. With respect to the Biased Jury Claim, the courts concluded that Burns had not intentionally lied on the voir dire questionnaire, and that, in any event, Burns's presence on the jury did not cause actual prejudice to McWhorter. App. 139-42, 197-200. With respect to the Ineffective Assistance Claim, the courts determined that the trial counsel developed an appropriate strategy and additional mitigation evidence would not have changed the result. App. 160-63, 227-52.

D. THE FEDERAL DISTRICT AND APPELLATE COURTS DENY HABEAS RELIEF

The District Court denied McWhorter's habeas petition, concluding that the Alabama courts had not made unreasonable fact findings or run afoul of clearly established federal law. App. 40, 62, 81. The Eleventh Circuit affirmed and denied rehearing. App. 20, 24, 34-35.

With respect to the Biased Jury Claim, in evaluating whether the CCA reasonably found that Burns was honest in response to the voir dire question (the first step in the *McDonough* analysis), the Eleventh Circuit explicitly refused to consider Stonecypher's testimony. App. 20. Referring to the State's argument that Stonecypher's testimony could not be considered by the Court "under Alabama Rule of Evidence 606(b)," the court opined that "[w]e need not reach that issue here," because "Burns's testimony about her state of mind during voir dire provides evidence to support the Rule 32 court's factual findings and credibility determinations." *Id.* In deciding whether the CCA applied a constitutionally sufficient standard in its evaluation of McWhorter's Biased Jury Claim, the Eleventh Circuit concluded that the Alabama courts' requirement that McWhorter show prejudice caused by the presence of a biased juror was consistent with *McDonough*. App. 22-23.

With respect to McWhorter's Ineffective Assistance Claim, the Eleventh Circuit held that trial counsel's mitigation investigation had been sufficient, excusing counsel's failure to contact a teenage defendant's friends, teachers, and half of his family, on the ground that counsel were not specifically told to do so by the members of McWhorter's family whom counsel interviewed. App. 29, 31. In a footnote,

however, the Eleventh Circuit highlighted that trial counsel had misunderstood the nature of mitigation proceedings:

> We take a moment to note, however, that to the extent Mr. McWhorter's trial counsel suggested this sort of evidence fell outside the universe of acceptable mitigation evidence, ***that understanding is at odds with our precedent***. The rule is that mitigating evidence includes any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

App. 30 n.4 (emphasis added).

REASONS FOR ALLOWANCE OF THE WRIT

Three errors in this capital case merit this Court's attention and correction. The first two stem from McWhorter's Biased Jury Claim. First, by declining to consider evidence considered by the state court, the Eleventh Circuit violated the fundamental principle that a federal court considering a *habeas* petition must consider all the evidence that was considered by the State court when evaluating the reasonableness of related fact findings.

Second, the Eleventh Circuit's misinterpreted *McDonough*'s second step (namely, that "a correct response would have provided a valid basis for a challenge for cause," *McDonough,* 464 U.S. at 556), to require McWhorter to establish that he was actually prejudiced by the presence of the challenged juror, Burns. This error impermissibly converted *McDonough*'s *ex ante* element into an *ex post* requirement, focusing on Burns's after-the-fact testimony that her father's status as a murder victim had not influenced her deliberations as a juror.

Third, under clearly established precedent of this Court, a defendant is denied effective assistance of counsel if trial counsel fails to "conduct a thorough investigation of the defendant's background" to prepare for the penalty phase of proceedings. *Rompilla v. Beard*, 545 U.S. 374, 393 (2005); *Williams v. Taylor*, 529 U.S. 362, 396, 399 (2000); *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Here, counsel undertook a cursory investigation just days before the trial was to begin, likely because counsel did not understand what mitigation evidence was, and therefore never bothered to consider speaking with the most obvious players in McWhorter's life such as his friends, teachers, and coaches.

A. THE DECISION BELOW FAILED TO CONSIDER THE WHOLE RECORD IN EVALUATING *MCDONOUGH*'S FIRST PRONG

To establish a juror bias claim, a defendant must prove (1) "that a juror failed to answer honestly a material question on *voir dire*," and (2) "that a correct response would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556. Thus, "[i]f a juror was dishonest during *voir dire* and an honest response would have provided a valid basis to challenge that juror for cause, the verdict must be invalidated." *Warger v. Shauers*, 574 U.S. 40, 45 (2014) (internal citation omitted).

The Eleventh Circuit erred in its evaluation of the first step of the *McDonough* test by failing to consider the most important and undisputed evidence in the record: Stonecypher's testimony about exactly what Burns had told the rest of the jury about her father's murder. Stonecypher's testimony goes to the heart of whether Burns lied during voir dire. The Eleventh Circuit declined to consider Stonecypher's testimony because it found that there was other "evidence to support" the State courts'

determination that during the jury selection Burns had either forgotten about her father's murder or was unaffected by it. App. 20.

1. By ignoring Stonecypher's testimony, the Eleventh Circuit abdicated its duty under AEDPA. AEDPA's text requires an assessment of whether the state court's factual determination was *reasonable* "in light of the evidence presented in the State court proceedings"—not in light of only *some* of the evidence. 28 U.S.C. § 2254(d)(2). By ignoring the key evidence in McWhorter's Rule 32 presentation, the Eleventh Circuit's analysis of the factual findings was inherently flawed based on the statutory language standing alone.

2. Furthermore, the Eleventh Circuit's analysis flies in the face of this Court's precedents interpreting the Section 2254(d)(2) standard. When articulating the Section 2254(d)(2) standard, this Court has spoken to the review of the reasonableness of the state court's fact findings based on review of "the record," not portions of the record. *E.g.*, *Brumfield v. Cain*, 576 U.S. 305, 314 (2015) ("Here, our examination of the record before the state court compels us to conclude that both of its factual determinations were unreasonable."). Consistent with this stated standard, when deferring to a state court's factual findings, this Court has done so after "reviewing *all of the evidence*." *Wood v. Allen*, 558 U.S. 290, 303 (2010) (emphasis added). By stopping its inquiry at Burns's word alone, and refusing to consider unimpeached evidence that contradicted her post-hoc explanation of her prior beliefs, the Eleventh Circuit failed to carry out AEDPA's review standard. Accepting the Eleventh Circuit's error would improperly transform habeas deference

into "abdication of judicial review," *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003), permitting a federal court to close the book as soon as it found *any* evidence that could arguably support a state court's fact findings regardless of whether the state court's findings were reasonable in light of the record as a whole.

3. This failure to consider Stonecypher's testimony was critical. The Eleventh Circuit noted that Burns's testimony about her belief as to her father's death "was equivocal." App. 16. Stonecypher's testimony was not. It revealed that, at the time of McWhorter's trial, Burns believed that her father was murdered. In other words, consideration of Stonecypher's testimony compels the conclusion that the CCA acted unreasonably by finding that Burns told the truth during voir dire. During the Rule 32 Hearing, Burns offered internally inconsistent explanations for failing to disclose her father's death, including that she had forgotten about her father's murder and that she was not sure he had been murdered. Stonecypher's testimony makes clear that it was unreasonable for the state court to accept Burns's characterizations, and to find that Burns had not lied to get on the jury. *See Miller-El*, 537 U.S. at 340 ("[A] federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence."). Stonecypher confirmed that, mere days after the voir dire, Burns was acutely aware of her father's status as a murder victim. Crying, Burns stood up in the jury room and "started telling a story about how years before her father had been murdered," and that she had seen the murderer eventually walk free down a city street. App. 488-89. And she told the rest

of the jurors that "[they] just don't know how it feels to have to walk around and be around . . . *the person that had killed her father*." *Id.* Stonecypher's testimony about the incident has never been contradicted, nor has anyone offered any explanation about how Stonecypher could have known these details unless told them by Burns herself at the time of the trial. And no one—not the State, not the Alabama courts, and not the Eleventh Circuit—has explained how Burns could have honestly failed to answer "my father was a crime victim," and yet just days later tell the entire jury, "my father was murdered, and his murderer walked free." Instead, each court pretended that the testimony never happened.

4. There is simply no justification for ignoring this evidence. At the Rule 32 Hearing, the State objected to the admission of Stonecypher's testimony on the grounds that the testimony was barred by Alabama Rule of Evidence 606(b). App. 474-75. But the Alabama trial court admitted the testimony for the limited purpose of determining Burns's state of mind, and—despite arguments by the State that the Circuit Court had erred by considering the evidence—the Alabama Court of Criminal of Appeals did not find error in the trial court's admission of the testimony. App. 139, 474-75, 484-89. Even if the State courts considered Stonecypher's testimony in violation of *Alabama* evidence law, the Eleventh Circuit would still be required to consider it because federal courts "are not empowered" to examine or correct those state court decisions about an Alabama Rule of Evidence. *Leverett v. Spears*, 877 F.2d 921, 925 (11th Cir. 1989). Because Stonecypher's testimony was part of the record, it had to be considered. And when the Eleventh Circuit stated that it would not "reach"

the State evidentiary law "issue" of the admissibility of Stonecypher's testimony because it could affirm based solely on Burns's own testimony, the court merely highlighted that it was failing to consider the entire record. App. 20.

The Eleventh Circuit's error on a fundamental and recurring issue regarding the proper review under Section 2254(d)(2) merits granting certiorari.

B. THE DECISION BELOW ERRONEOUSLY APPLIED *MCDONOUGH*'S SECOND STEP

The CCA erred in another fundamental way at *McDonough*'s second step: In evaluating McWhorter's Biased Jury Claim, the CCA never asked the constitutionally required question of whether an honest answer from Burns would have provided a "valid basis for a challenge for cause." 464 U.S. at 556. Instead, the CCA asked whether Burns's deceit "might have . . . prejudiced" McWhorter. App. 140. The Eleventh Circuit determined that the CCA's inquiry was "in accordance with *McDonough*," App. 22, but it was not. *McDonough* asks whether, measured *prospectively*, a dishonest answer would provide grounds for a for-cause challenge. 464 U.S. at 556. The test that the CCA applied in this case was a *retrospective* test, which asked whether the dishonest answer had an effect on the verdict actually rendered. App. 141-42.

1. As demonstrated above, the entire record (*i.e.*, the record including Stonecypher's testimony) establishes that Burns was dishonest when she said during voir dire that she had no family members who were crime victims. Under *McDonough*, the CCA should then have asked whether a correct answer in voir dire would have provided McWhorter "with a valid basis [to] challenge [Burns] for cause."

464 U.S. at 556. But the CCA never asked that question. Instead, it engaged in a freewheeling "interests" "balanc[ing]" inquiry, asking whether McWhorter "might have been prejudiced" by Burns's lie. App. 139-41.[5] In answering this question, the CCA focused almost exclusively on Burns's years-later testimony at the Rule 32 Hearing that she had, in fact, been an unbiased juror. App. 141. The CCA's near-exclusive reliance on Burns's testimony ignores that the "the bias of a juror will rarely be admitted by the juror himself, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it," and thus bias often "necessarily must be inferred from surrounding facts and circumstances." *McDonough*, 464 U.S. at 558 (Brennan, J., concurring) (internal quotations and citation omitted); *see generally* David Yokum et. al., *The Inability to Self-Diagnose Bias*, 96 DENV. L. REV. 869 (2018).[6]

2. The CCA test was more demanding than *McDonough*'s second prong. The most relevant record evidence regarding the second *McDonough* step came from McWhorter's principal trial counsel, who testified that had Burns answered honestly, he would "probably have challenged her for cause." And had Burns admitted that her father was a murder victim during voir dire for a capital murder case, there is nothing to suggest that trial counsel's unmade challenge would have lacked "a valid basis."

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[5] Though the CCA decided that Burns had not lied (while failing to address Stonecypher's testimony), as explained above, it addressed the second prong of *McDonough* as an alternative holding. App. 140.

[6] And, of course, if Burns lied to get herself onto McWhorter's jury, that necessarily impacts any analysis of prejudice, as implicitly recognized by the Eleventh Circuit itself. *See* App. 17 ("Often, the juror's dishonesty in and of itself is 'a strong indication' that she was not impartial." (quoting *United States v. Perkins*, 748 F.2d 1519, 1532 (11th Cir. 1984)).

Id. at 556; *see id.* at 554 ("Demonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause."); *cf. Wainwright v. Witt*, 469 U.S. 412, 424 (1985) ("[T]he proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with the instructions of his oath.'").

3. The question of whether a challenge for cause would have had a "valid basis" is plainly an *ex ante* inquiry, focusing on whether trial counsel would have had a valid basis at the time of voir dire. The test does not involve asking whether the juror's bias actually changed the result of the trial, or whether their years-later testimony could assuage any concerns with the outcome. Rather, like the standard for judicial bias, the inquiry is into whether—had the truth been known—the juror objectively appeared to hold a relevant bias such that she could have been challenged for cause. *Cf. Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 872 (2009) ("Under our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'"); *Gacho v. Willis*, 986 F.3d 1067, 1068 (7th Cir. 2021) ("Evidence that the presiding judge was actually biased is sufficient to establish a due-process violation but it's not necessary."). Nothing about *McDonough* suggests that defendants must establish *ex-post* prejudice.

4. But that is precisely what the CCA demanded. It did not focus on what occurred during voir dire, or even what would have occurred had Burns given an

honest answer. App. 142. Not once did the Alabama Court of Criminal Appeals even pose the question of whether McWhorter would have had a valid basis to challenge Burns for cause, and not once did it explain how Burns could not have been challenged for cause if the truth had been known. Instead, it focused exclusively on whether Burns's presence on the jury had *in fact* prejudiced McWhorter, based on her years-later testimony that she had not allowed her feelings to affect her vote. *Id.*

5. The Eleventh Circuit wrongly stated that the CCA's "might-have-been-prejudiced standard" "mirror[ed]" prior Eleventh Circuit case law. App. 22 (quoting *United States v. Carpa*, 271 F.3d 962, 967 (11th Cir. 2001) (per curiam)). But as shown above, the CCA asked a fundamentally different question than that posed by *McDonough* or those Eleventh Circuit cases. The severe consequences of changing an *ex ante* question to an *ex post* one cannot be overstated. What juror would say, after the fact, that they allowed their feelings to influence their vote? Sanctioning the use of a post-hoc "actual bias" requirement would completely eviscerate *McDonough* and the right to an impartial jury. Such a requirement offends this Court's established constitutional threshold for an impartial jury.

C. COUNSEL'S MITIGATION INVESTIGATION COULD NOT HAVE BEEN ADEQUATE WHERE COUNSEL DID NOT UNDERSTAND THE MEANING OF MITIGATION EVIDENCE

It is now hornbook law that a penalty-phase strategy is only as reasonable as the investigation that gave rise to it. *See Strickland*, 466 U.S. at 690-91. Strategic choices made after a "less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 691. Yet as acknowledged by the Eleventh Circuit's opinion,

trial counsel did not even understand the meaning of mitigation evidence. Thus, trial counsel's reasons for declining to pursue obvious leads were plainly not "supported by reasonable professional judgments"—or even an understanding of what mitigation evidence was. That misunderstanding then led trial counsel to perform a less than complete investigation. Indeed, as the Eleventh Circuit recognized, the purpose of a mitigation investigation "is to find witnesses to help humanize the defendant, given that a jury has found him guilty of a capital offense. App. 30 n.4 (citing *Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003)). But at the Rule 32 Hearing, trial counsel openly testified that he "saw no reason to believe that [McWhorter's teachers] would have contributed in any way pro or con to the commission of capital murder," and that he saw "[no] reason at all" that any of McWhorter's friends would have had anything relevant to say about McWhorter's character. App. 492. Such testimony fundamentally contradicts the notion that trial counsel's mitigation investigation was reasonable.

1. For ineffective assistance of counsel claims like McWhorter's, courts must consider "whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . *was itself reasonable*." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (emphasis in original). The reasonableness of the investigation is "objective," measured against "'prevailing professional norms.'" *Id.* (quoting *Strickland*, 466 U.S. at 688).

2. Here, trial counsel's mitigation investigation was paltry: A two-hour, simultaneous interview of McWhorter's mother, aunt, and half-sister, which took

place a mere eleven days before trial began and was not followed by further interviews, document subpoenas, or investigation. Counsel did not even discuss the information elicited from the interview with McWhorter. Trial counsel first settled on a purported strategy—"good boy, wrong crowd"—without doing any meaningful investigation, and then barely looked for supporting evidence. As a consequence, trial counsel's presentation at the penalty phase was a token effort rather than a compelling portrait of a good kid who fell in with the wrong crowd. Setting aside McWhorter's aunt and mother, who the jury could easily infer had obvious bias, the two other mitigation witnesses were not friends, mentors, or teachers, but mere acquaintances. One, who owned a local restaurant where McWhorter briefly worked as a busboy for "a month or so," "on weekends," a "few years ago," hardly knew McWhorter.[7] App. 387. The other had worked with McWhorter at a grocery store, though she did not recall when McWhorter had worked there. App. 382. And although she testified that he was "one of the better bag boys" and a hard worker, App. 382, she did not say that his life deserved to be spared. In fact, she did not have any comments at all when asked, at the conclusion of her brief testimony, whether there was anything more she wanted the jury to know. App. 385. The presentation of witnesses with so little contact with McWhorter necessarily suggested to the jury that there was no one else in his life who could speak to his credit—which could not be further from the truth.

[7] The Eleventh Circuit took issue with McWhorter's "conclusory" statement that McWhorter's former boss and co-worker "barely" knew McWhorter, App. 28, but the witness testimony corroborates McWhorter on this point. App. 382-85, 386-89.

3. Trial counsel's decisions were not supported by "reasonable professional judgments." *Strickland*, 466 U.S. at 690-91. To the contrary, those decisions were fatally uninformed because trial counsel did not understand what mitigation evidence was. Nor is this a case where, despite their fundamental misunderstanding of mitigation evidence, counsel accidentally conducted a reasonable mitigation investigation. Rather, their ignorance led them to fail to investigate even the most obvious mitigation leads, resulting in a plainly constitutionally inadequate mitigation investigation.

4. The consequences to McWhorter were dire. There was a significant amount of mitigation evidence available had counsel known to, and chosen to, look for it. At the post-conviction hearing, McWhorter presented four witnesses—Frank Baker (coach), Tiffany Harper Long (former girlfriend), Amy Battle (friend), and Ken Burns (teacher)—who would have much more strongly supported the "good kid, wrong crowd" theory. Their testimony would have been completely different from the restaurant owner and grocery store worker who barely knew McWhorter. It would have given insight into what McWhorter was like growing up and what kind of a friend he was, even under the most difficult circumstances. For example, Battle rode a school bus with McWhorter for three hours every day when they were teenagers. They were drawn to each other because they both had stepfathers. She described him as "funny and outgoing and flirty," a "great kid," and a "very protective" brother to his half-sister. Unlike the restaurant owner and grocery store worker, Battle had no trouble providing personal details and moving testimony about McWhorter.

5. At the Rule 32 Hearing, McWhorter also presented other witnesses who could have engendered sympathy for him by testifying about his dire family situation when he was a young child, including his potentially brain-debilitating gas-huffing from the age of eight. Counsel never sought out any of these witnesses because—although "[t]he primary purpose of the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant," *Cunningham v. Zant*, 928 F.2d 1006, 1019 (11th Cir. 1991)—counsel could not see the witnesses' relevance. App. 492.

6. Trial counsel's basic misapprehension of mitigation evidence law itself belies any suggestion that their decision not to pursue mitigation evidence was reasonable. As the Eleventh Circuit noted, counsel was under the fundamental misimpression that basic evidence about McWhorter's background and personality from people who knew him and cared for him—somehow "fell outside the universe of acceptable mitigation evidence." App. 30 n.4. That trial counsel had so basic a misunderstanding of the relevant law for mitigation evidence when investigating a death penalty case establishes that their investigation was constitutionally deficient.

7. The jury—which voted by the thinnest possible margin in favor of the death penalty, and even then, only after being told by the judge that further delay would impose costs on the state—was deprived of evidence showing that 18-year-old McWhorter was a victim of his circumstances, a showing that likely would have humanized McWhorter and garnered enough sympathy to convince the jury to spare his life. Such evidence would have elicited sympathy for, or at least an understanding

of, McWhorter. This is precisely the type of evidence that both the Supreme Court and the Eleventh Circuit have regularly held relevant to mitigation. *E.g.*, *Rompilla*, 545 U.S. at 390-91 (faulting petitioner's trial counsel for failing to discover evidence of the petitioner's traumatic childhood); *Hitchcock v. Dugger*, 481 U.S. 393, 397, 399 (1987) (faulting the court for refusing to consider the petitioner's history of inhaling fumes); *Hardwick v. Crosby*, 320 F.3d 1127, 1164, 1189 (11th Cir. 2003) ("[W]e have decided that failure to present mitigation evidence as to a defendant's family background . . . and drug abuse at the penalty phase of a capital case constitutes ineffective assistance of counsel . . . ."). Instead, here, as in *Rompilla*, trial counsel's actual mitigation presentation was little more than "few naked pleas for mercy." 545 U.S. at 393.

8. Trial counsel's failure to present available but unsearched for mitigation evidence deprived the jurors of a fuller understanding of McWhorter. By virtue of trial counsel's basic misapprehension of the law of mitigation evidence, they failed to investigate the most obvious facets of McWhorter's life. And that failure, in turn, led counsel to present almost no relevant evidence at the penalty phase, effectively assuring that the facts of the crime, rather than the compelling circumstances of McWhorter's entire life, would be foremost in the jury's deliberations.[8]

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

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[8] The Eleventh Circuit did not analyze the prejudice prong of *Strickland*. App. 34-35.

Respectfully submitted,

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