No. 20-1302

In the Supreme Court of the United States

CASEY A. MCWHORTER,
Petitioner,
v.
COMMISSIONER, Alabama Department of Corrections
Respondent.

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

BRIEF IN OPPOSITION

STEVE MARSHALL
Alabama Attorney General

Edmund G. LaCour Jr.
Alabama Solicitor General

James Roy Houts*
Deputy Attorney General

Morgan Shelton
Assistant Attorney General
OFFICE OF ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
James.Houts@AlabamaAG.gov
*Counsel of Record

Counsel for Respondent

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CAPITAL CASE
QUESTIONS PRESENTED
(Rephrased)

1. At the time of Casey McWhorter's trial, Juror Linda Burns was 43 years old, and she had a 10th-grade education. The juror questionnaire asked if she knew anyone who had been a victim of a crime, and she listed only her brother-in-law who, rather than being a victim of a crime, had been arrested for "drugs." More than thirty years prior, her father died under mysterious circumstances, but no one was ever arrested in connection with his death. Burns testified that for a time she thought her father had been murdered, but that by the time of McWhorter's trial she was not sure. She testified that she did not think to list her father when filling out the questionnaire, in part because no one had been arrested for his murder. The state court found that Burns had not lied on the questionnaire, and the appellate court affirmed. Was that determination unreasonable?

2. To prevail on his juror bias claim, McWhorter needed to prove not only that Juror Burns lied, but that "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). At McWhorter's urging, the state court looked to state law to conduct a more petitioner-friendly prejudice analysis of McWhorter's claim and then rejected the claim. Was the state court's decision contrary to clearly established federal law?

3. Did the state court unreasonably apply *Strickland v. Washington*, 466 U.S. 668, 690 (1984)?

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STATEMENT OF THE CASE

A. McWhorter ambushes, robs, and murders Williams.

Petitioner Casey McWhorter, Lee Williams, and two other friends conspired to rob and murder Lee's father, Edward Williams. *Ex parte McWhorter*, 781 So. 2d 330, 333 (Ala. 2000). McWhorter and his co-conspirators spent three weeks planning the murder and, around 3:00 p.m. on February 18, 1993, Lee and one of the other conspirators dropped McWhorter and the fourth conspirator off at Edward Williams's home. *Id.* at 333. Knowing that Williams would not be home for three to four hours, McWhorter and his friend passed the time finding the rifles they would use to kill Williams, creating makeshift silencers for those rifles, test-firing them into a mattress, and pillaging through the house for items they wanted to steal. *Id.* When Williams arrived at his home, McWhorter shot first. He and his co-conspirator ultimately shot Williams at least eleven times. *Id.* One of those shots came as Williams was lying helpless on the floor, when McWhorter fired a shot directly into Williams's head.

After killing Williams, McWhorter methodically gathered items from the home, including retrieving Williams's wallet from his dead body, before driving away in Williams's pick-up truck. *Ex parte McWhorter*, 781 So. 2d at 333. The co-conspirators met at a pre-arranged spot in the woods, divided the stolen items, and stripped the truck. *Id.* McWhorter's only concern was that Edward Williams did not have as much money on him as his son had promised. CA11 Supp. App. Doc. 6 at 19-20, 24-45; CA11 Supp. App. Doc. 7 at 2.

After the co-conspirators separated, McWhorter hid his "take" from the robbery. CA11 Supp. App. Doc. 6 at 1-18. Another co-conspirator almost immediately went to the police and reported the crime. *Id.* at 27-30. The day after the murder, police found McWhorter; he confessed and was arrested. CA11 Supp. App. Doc. 2.

B. McWhorter's trial counsel investigates mitigation evidence and chooses a strategy based on sympathy for McWhorter's family, his youth, clean-cut appearance, and lack of criminal history.

On May 14, 1993, McWhorter was indicted for capital murder. Two counsel were appointed to represent him at trial. Lead counsel had been practicing for 11 years and had handled around 25 felony trials, eight to ten of which had been murder trials. CA11 App. Doc. 13 at 218-19. The second-chair had been practicing for three to four years and had handled around two hundred criminal cases, with five to ten going to trial—one of those being a capital case where the defendant received a life sentence. *Id.* at 702-03.

Counsel began preparations for trial over a year in advance. CA11 Supp. App. Doc. 3 at 2. They met with McWhorter and his family—specifically his mother, aunt, and sister—many times over the course of the investigation. *Id.* at 2-4. After one of those interviews with McWhorter's mother, aunt, and sister, counsel completed a client background information form, which covered McWhorter's "early childhood development, his environmental factors; such as, living conditions, medical issues as a youth, and relationship information; his institutional data; such as, education history, his medical and mental health history, his substance abuse history, his criminal history, and his family history." CA11 App. Doc. 10 at 46. Throughout the

entire process, both McWhorter and his family were fully cooperative. CA11 App. Doc. 13 at 245-46, 735-36, 745-46.

In June and July 1993, the probation office conducted a background investigation into McWhorter in preparation for his youthful offender status hearing. CA11 Supp. App. Doc. 5 at 1. That report covered McWhorter's juvenile record, his personal/social history (including any alcohol or drug use, mental-health issues, education- and employment-history), his family (including that his father had been convicted of statutory rape and had terminal cancer), as well as his reputation in the community. CA11 Supp. App. Doc. 1 at 3-5. Counsel reviewed the report in early June 1993, spoke with the probation officer who authored it, and carefully went over it with McWhorter. CA11 Supp. App. Doc. 5; CA11 App. Doc. 13 at 184-85. McWhorter affirmed in open court that everything in the report was correct. CA11 Supp. App. Doc. 5 at 3.

In July 1993, counsel subpoenaed McWhorter's medical records, which detailed his suicide attempt, and after reviewing those records, met with McWhorter for at least an hour and a half at the jail to discuss those records. CA11 Supp. App. Doc. 3 at 2. In October 1993—five months before trial—counsel hired a neuropsychologist to perform a psychiatric exam and evaluate all aspects of McWhorter's mental health, including competency and anything that might be helpful in mitigation. *Id.* at 2-3; CA11 App. Doc. 13 at 200-01, 372, 762-63. The neuropsychologist performed an all-day examination of McWhorter, found he had an IQ of 88, and stated, "[t]here is no evidence of psychological distress/confounding mental disorder." CA11 App. Doc. 13

at 378; CA11 Supp. App. Doc. 9; CA11 Supp. App. Doc. 10 at 2. Nor did any of the information from McWhorter's family or any of McWhorter's behaviors indicate mental-health problems. CA11 App. Doc. 13 at 181, 230.

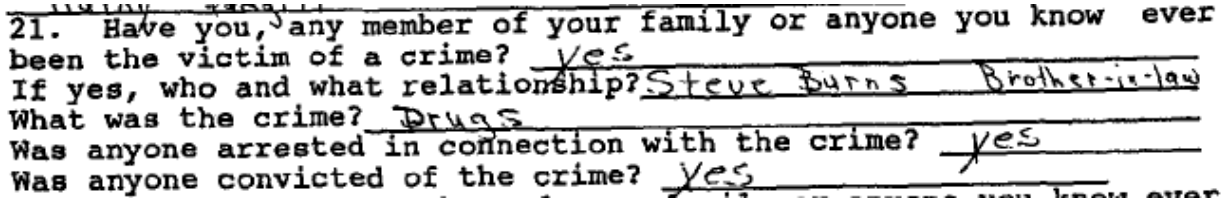
McWhorter's confession, guilty pleas by two of his co-conspirators, graphic photos and a graphic video of the crime scene, as well as evidence that McWhorter was involved in a gang created a penalty-phase deficit. App. Doc. 13 at 738-41. Even so, based on the extensive investigation they had performed, counsel decided on a strategy for both the guilt and the penalty phases: they would use McWhorter's youth and lack of criminal history to argue that he was a good kid who had gotten involved with the wrong crowd and, specifically in the penalty phase, play on sympathy for his family. CA11 App. Doc. 13 at 240, 737.

C. McWhorter's counsel extensively questions the juror venire and chooses a jury panel that includes Juror Linda Burns

The trial began on March 13, 1994 with voir dire, which lasted four days. CA11 Supp. App. Doc. 8. First, counsel had the potential jurors answer a 34-question questionnaire. Next, they questioned them in-person, both as a group and privately. Linda Burns, who did not complete high school, CA11 App. Doc. 13 at 53, struggled to complete the questionnaire. Eventually court personnel had to assist her because everyone else was finished and had left. *Id.* at 158. Relevant here is her answer to question 21, which asked: "Have you, any member of your family or anyone you know ever been the victim of a crime?" CA11 App. Doc. 24 at 2. That question was followed

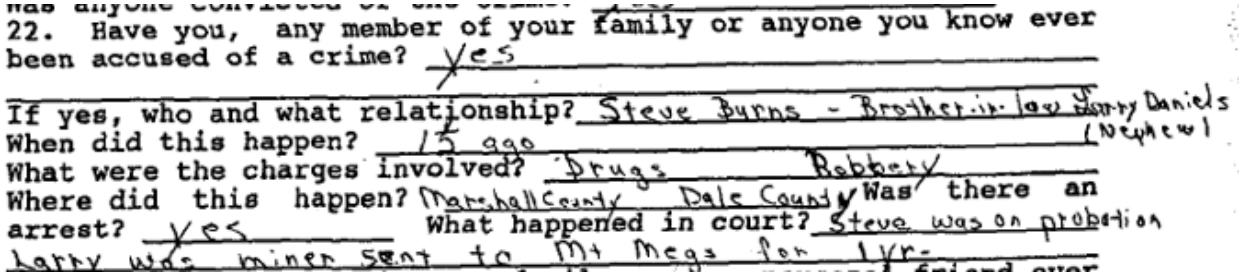
by sub-questions asking, if yes, who, what crime, and had been an arrest or conviction. *Id.*

Burns answered question 21 affirmatively, writing her brother-in-law's name, that the crime was "drugs," and that someone was arrested and convicted:


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

Id.

Question 22 asked: "Have you, any member of your family or anyone you know ever been accused of a crime?" Burns again answered, "yes," and again identified her brother-in-law, Steve Burns, for "drugs." She also listed her nephew:


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 given sent to Mt Meg for 1yr-

Id.

In light of Burns's confused answer to question 21, McWhorter's trial counsel questioned Burns privately. CA11 App. Doc. 23 at 1-2. But they asked only if she could be fair and impartial given that her brother-in-law had been convicted in a drug case. *Id.* at 2. They never asked any questions about whether Burns knew anyone

who had been the victim of a crime. *Id.* at 2-5; CA11 App. Doc. 13 at 152. In the end, a jury was chosen, and Burns was on it.

D. McWhorter is convicted of murder in the course of a robbery and sentenced to death.

The guilt phase of the trial began on March 17, 1994, and continued for five days. After a day of deliberations, McWhorter was convicted of capital murder for an intentional killing in the course of a robbery. CA11 App. Doc. 26 at 4-7. The penalty phase of trial began later that same day. McWhorter presented four witnesses, all of whom offered testimony supporting trial counsel's strategy to depict McWhorter as a good kid who had gotten involved with the wrong crowd while evoking sympathy for his family. McWhorter's mother testified that he "had never got into anything until he got in with [the co-conspirators]. He was a good kid." *Id.* at 39-40. Similarly, his aunt testified that McWhorter was "a very bright … young man" and "one of the most compassionate young men [she] ha[d] ever seen." *Id.* at 31. And although "[h]e had got[ten] involved with the wrong people[,] [he was] not a bad boy at heart." *Id.* McWhorter also presented evidence from a former employer and a former co-worker. Both testified that McWhorter was a good kid, hard-working, and dependable. *Id.* at 17-24. His co-worker explained how he would go out of his way to be kind, relaying a story about how he would massage one of the older worker's shoulders when she complained that her back hurt. *Id.* at 19. The State offered no new evidence.

After closing arguments and instructions, the jury retired to deliberate. Two-and-a-half hours and one *Allen*-charge later, the jury returned, recommending the

sentence of death by a vote of 10-2. *Id.* at 98. A little over a month later, after hearing testimony from three witnesses, the trial judge agreed with the jury's recommendation. The judge focused on the premeditated and calculated nature of McWhorter's crime and how he had shown no remorse, CA11 App. Doc. 28 at 11-12, and the judge found that "the aggravating circumstance in this case far outweighs the mitigating circumstances and that the punishment should be death," CA11 App. Doc. 21 at 11. McWhorter appealed his conviction and sentence and the Alabama Court of Criminal Appeals affirmed. *McWhorter v. State*, 781 So. 2d 257 (Ala. Crim. App. 1999). The Alabama Supreme Court, on certiorari review, affirmed. *Ex parte McWhorter*, 781 So. 2d 330 (Ala. 2000). And this Court denied certiorari. *McWhorter v. Alabama*, 532 U.S. 976 (2001).

E. The state postconviction court conducts an evidentiary hearing and denies relief, and the state appellate court affirms.

McWhorter then sought collateral relief in state court under Alabama Rule of Criminal Procedure 32. The circuit court on collateral review (the "Rule 32 court") held a hearing on McWhorter's impartial-jury and ineffective-assistance-of-counsel claims. During those three days, McWhorter presented many witnesses to try to meet his burden: both of McWhorter's trial counsel, the neuropsychologist who had examined him, two jurors (including Burns), a former coach and teacher, and a collection of relatives and friends, including his aunt (who testified at the penalty phase of his trial).

McWhorter's impartial-jury claim was based on the premise that Burns had improperly failed to state on question 21 that her father—who died when Burns was a young girl—had been the victim of a crime. During the hearing, Burns consistently testified that she was not sure how her father died. When asked if she could describe what happened to him, she responded, "Well, I can tell you what I was told." CA11 App. Doc. 13 at 56. She then explained that when she was a child she had been told (and believed) that her father had been killed by a man who had murdered her father's friend, *id.* at 61, 65, 77, but as she got older, doubt crept in.

Burns relayed how before McWhorter's trial, she had dated a law student who investigated her father's case. He concluded that her father had not been murdered.[1] He told her that her father's autopsy report showed that her father had drowned. *Id.* at 68. After that, she admitted that she continued to believe that the man who murdered her father's friend had something "indirectly" to do with her father's death

[1] McWhorter's collateral review counsel repeatedly and unsuccessfully tried to get Burns to say the opposite. First, he asked if the lawyer had concluded that "even though he couldn't get enough evidence to prove [her] father was murdered, that having worked on the case he did believe it." CA11 App. Doc. 13 at 67. Burns, confused, asked for clarification: "[b]elieve that my father was murdered or that he drowned?" *Id.* Counsel clarified that he meant that the lawyer had believed he had been murdered. *Id.* Burns responded, "No. You got it backwards." *Id.* at 68. A few questions later she again stated, "[The lawyer I dated] told me that my father had drowned." *Id.* McWhorter's counsel tried again: "[D]id he explain that because the autopsy showed that your father had drowned they were unable to prove that he had been murdered?" *Id.* at 68-69. And again: "[I]sn't it true that the man we're talking about, the lawyer, said that because the autopsy couldn't prove the murder because it said drowned, that he still believed, based on all the evidence he knew about, that it was a murder?" *Id.* at 69. Burns answered both questions with a single word—"No." *Id.*

and, when pushed, that her father "*could have been* [intentionally drowned]," but she stated that she no longer believed he had been murdered. *Id.* at 77, 146. She was asked directly, "[A]t the time you served on the jury in Casey McWhorter's case, did you believe that your father had been murdered?" She answered, "No. Q. You did not? A. No." *Id.* at 68. And shortly after, when asked a substantially similar question, she replied, "I do not know. Only God knows that." *Id.* at 77. McWhorter then argued—ultimately unsuccessfully—that the court should also consider statements Burns made during jury deliberations. *Id.* at 82-83. McWhorter also elicited testimony from his trial counsel that if Burns had believed her father was murdered and he had known it, he "probably would have challenged her for cause." *Id.* at 171.

McWhorter also introduced additional mitigating evidence that he contends should have been presented, which generally fell into one of three categories: his childhood and family life, his substance abuse, and his reputation at school.

McWhorter's father abandoned McWhorter at an early age. *Id.* at 289-90, 466-67. But McWhorter considered his stepfather to be his real father. *Id.* at 229; App. Doc. 29 at 3. And his stepfather treated him as such. He took McWhorter fishing and played baseball with him; he cooked out for family barbecues; he tried to adopt McWhorter; he took him to his dentist appointments; he went to his basketball games; he loved McWhorter. CA11 App. Doc. 13 at 482-85, 492. On the weekends, McWhorter would visit his cousins, who lived with his grandfather. Occasionally he would choose to spend the night. *Id.* at 503. Sometimes his cousins would spend the night at his house. *Id.* at 507, 516.

Evidence revealed one occasion in which McWhorter's mother gave him a disciplinary whipping that left bruises on his legs and buttocks. *Id.* at 203-04. McWhorter's aunt reported the incident to the state Department of Human Resources ("DHR"), which performed a brief investigation, found no need for further action, and closed the case. *Id.* at 204, 300-01. McWhorter's Rule-32-hearing mitigation specialist opined that McWhorter's punishments were mostly appropriate to what he had done wrong, and even when they were not, they were normal. *Id.* at 831.

As McWhorter got older, he became an increasingly difficult child to manage, *Id.* at 307-09, 468, but his family remained supportive. His stepfather bought McWhorter a car—when McWhorter totaled it, his stepfather bought him a second car so that he could continue attending the school of his choice (only to find out later that he was actually skipping class so often he failed that grade). *Id.* at 477-79, 488. His stepfather allowed McWhorter and some friends to camp at his farm. Instead, McWhorter and his friends absconded to Bay Minette, stole a Porsche on the way, and got arrested. *Id.* at 318, 476. His parents paid to send McWhorter to reform school. *Id.* at 473. But it did not help. *Id.* After McWhorter stole his stepfather's truck, McWhorter's aunt, who had a son around the same age, asked to take McWhorter in because she thought she could "help get him on the right path." *Id.* at 357, 475.

Concerning substance abuse, the testimony showed that McWhorter drank often. *Id.* at 313, 430, 655. He huffed gasoline and freon with his cousins starting at a young age. *Id.* at 469-71, 504-05. Although one witness testified that McWhorter used hard drugs, *id.* at 655, other evidence suggested that McWhorter's only drug use

was occasional use of marijuana, *id.* at 208, 352-54, 367, 435, 474; CA11 App. Doc. 26 at 28; CA11 Supp. App. Doc. 1 at 3. Importantly, the neuropsychologist who had examined McWhorter at the time of trial explained that there was no "evidence of substance abuse related brain damage" or any evidence of brain damage of any kind. App. Doc. 13 at 365, 394. In fact, "[t]he neuropsychological testing in total was fairly unremarkable and didn't suggest anything, in terms of significant impairment, in terms of neurological function." *Id.* at 221-22, 364-65. And more tellingly, the neuropsychologist that McWhorter retained for the Rule 32 proceedings admitted that he had not tested McWhorter and had no idea whether he had any brain damage. *Id.* at 936.

At school, McWhorter was an average student who worked hard and did not cause too much trouble. *Id.* at 545-46, 548, 561-62. A friend from school explained how he had been a good friend and would still write her supportive letters, even from prison. *Id.* at 581. But his ex-girlfriend commented that he had cheated on her with one of her friends. *Id.* at 434. McWhorter's teacher also began to testify about McWhorter's behavior on certain Mondays, but that testimony was excluded as outside the scope of the pleadings. *Id.* at 562-63.

Trial counsel testified that, given their experience with Marshall County juries, they would not have introduced evidence about McWhorter's substance abuse or his father's and grandfather's criminal histories. *Id.* at 227, 235, 242, 747-49. And they made clear that they already knew about McWhorter's drinking, *id.* at 746, the DHR incident, *id.* at 203-04, his father's criminal history, *id.* at 204, McWhorter's

history of huffing gas and freon, *id.* at 205-06, 224, his lack of serious drug use or any permanent problems from drug use, *id.* at 208, 225, his grandfather's drinking, App. Doc. 29 at 25, his car theft and sentence of probation, *id.* at 10-11, and that his parents' divorce was not "a big thing in Mr. McWhorter's life," CA11 App. Doc. 13 at 234-35, and that his father's absence was "never presented as anything that was significant," *id.* at 265-66, before they made their decision about penalty-phase strategy. They explained that they only interviewed the people that McWhorter or his family recommended might offer testimony favorable to him, *id.* at 197-98, 250, a list that did not include any of McWhorter's friends, *id.* at 184, 227-28.

Further, at the hearing, McWhorter refused to waive attorney-client privilege, so his trial counsel were unable to reveal exactly what McWhorter had told them during their many conversations with him. *Id.* at 719-20. Thus, they could say only generally that McWhorter told them "about his family, his background his education. He told [them] all about himself leading up to this event. … Just an all-around, thorough discussion of everything that [they] considered might have even been relevant." *Id.* at 735-36.

Much of the Rule 32 record is taken up by arguments about whether statements made during jury deliberations are admissible under Alabama law. At first the Rule 32 court excluded all of Burns's statements made during jury deliberations. CA11 App. Doc. 13 at 51. Later, because Burns had not answered as McWhorter wished, he asked the court to reconsider its earlier ruling, *id.* at 82, but the court refused, *id.* at 91. Just a short while later, McWhorter again tried to elicit

testimony from Burns about her jury-deliberation statements, despite the court's ruling. After the objection, McWhorter pleaded, "I do firmly believe that the Court should reconsider its earlier ruling." *Id.* at 107.

Realizing the import of the testimony to McWhorter and accepting its uncertainty about the correct answer in the throes of the hearing, the court modified its earlier ruling. Out of an abundance of caution, it stated, "I am going to allow you to let these other two jurors testify." *Id.* at 116. But the court made very clear, "I am not going to say that I am going to consider it. I will let you guys submit, you know, any law on just this issue in brief, but I am going to let you go ahead and present it during this, and we'll pick it up from there." *Id.* The court also clarified that even this provisional grant was only as to whether "Ms. Burns had shared" the statements "to prove what Ms. Burns believed;" *id.* at 587-88, the statements were not even provisionally accepted to prove prejudice, *id.* at 587, 592. When the State asked for an exception to preserve the issue, the court answered, "Absolutely. And I certainly understand. And you may be right," and added that they might "find out [the correct answer] at the close of this on appeal." *Id.* at 142-43. And McWhorter agreed that, if the court was unsure, "the proper course would be to admit the testimony with the understanding that the Court can always decide later that it should not properly be the subject of consideration rather than exclude the testimony and run the risk that it was improperly excluded." *Id.* at 591.

After reviewing the law, the Rule 32 court held that Burns's statements during jury deliberations were not "extraneous evidence" and were thus not admissible

under Alabama Rule of Evidence 606(b). In its order, the Rule 32 court explained that it had McWhorter to elicit testimony about "so-called extraneous evidence"—Burns's story about her father during jury deliberations. The court then held, however, that "Juror Burns's story was not extraneous evidence under Alabama law," and was therefore "inadmissible under Rule 606(b) of the Alabama Rules of Evidence." App. Doc. 10 at 1124-25 n.2 (quoting *Bethea v. Springhill Mem'l Hosp.*, 833 So. 2d 1, 8 (Ala. 2002)). The court then analyzed the evidence without considering that improper testimony and concluded that McWhorter had not met his burden to prove either that Burns had intentionally lied during voir dire or that he had been prejudiced by that lack of information. The trial court denied McWhorter's state post-conviction petition and McWhorter appealed to the Alabama Court of Criminal Appeals.

On the impartial-jury claim, the Court of Criminal Appeals agreed with the Rule 32 court both that McWhorter had failed to prove that Burns had not responded truthfully, *McWhorter v. State*, 142 So. 3d 1195, 1218-19 (Ala. Crim. App. 2011), and that he "failed to establish prejudice," *id.* at 1219-20. The court therefore affirmed the decision below and held McWhorter was "due no relief on this claim." *Id.* at 1220. The Court of Criminal Appeals also held that McWhorter "was due no relief on his claim that his trial counsel was ineffective" at the penalty phase. *Id.* at 1250. It stated that "[t]he circuit court's finding [were] supported by the record and law," distinguished *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000), and found "no error in the circuit court's conclusion that counsel's performance was not deficient." *Id.* at 1245, 1249. It then independently reweighed the aggravating

and mitigating circumstances—including the evidence that was presented at the Rule 32 hearing—and found it "would have had no impact on the sentence." *Id.* at 1250.

The Court of Criminal Appeals also explicitly affirmed the Rule 32 court's conclusion that Burns's statements during jury deliberations were inadmissible and could not be considered: "Juror [Burns's] story about her father does not qualify under the exception for 'extraneous information.' Therefore, it is insulated from inquiry and cannot form the basis of a valid claim for postconviction relief under Rule 32." *Id.* at 1223 (citing Ala. R. Evid. 606(b)).

Although McWhorter sought discretionary certiorari review in the Alabama Supreme Court, his petition was denied.

F. The federal courts deny habeas relief.

McWhorter sought habeas corpus relief through a petition filed in the United States District Court for the Northern District of Alabama. The federal district court denied relief on both McWhorter's impartial-jury and ineffective-assistance-of-counsel claims. The district court found that the State courts' findings that McWhorter had failed to establish intentional deception and had failed to establish prejudice were "consistent with both *Irvin* and *McDonough*" and that McWhorter "ha[d] not shown that the decision of the Alabama Court of Criminal Appeals was contrary to, or an unreasonable application of either case." *McWhorter v. Dunn*, No. 4:13-CV-02150-RDP, 2019 WL 277385, at *26 (N.D. Ala. Jan. 22, 2019). In reaching that conclusion, the district court noted the state-law evidentiary ruling excluding jury-deliberation statements and did not consider such statements in its analysis.

The district court also denied relief for the McWhorter's ineffective-assistance-of-counsel claim, holding that "[t]he state court's determination [that counsel's investigation and strategic choice were reasonable] was not unreasonable" and that it was "not unreasonable to conclude that the additional evidence offered by [McWhorter] would not have resulted in a different sentence." *Id.* at *47-48. The district court declined to issue a certificate of appealability.

The Eleventh Circuit granted a certificate of appealability on two issues: whether McWhorter's constitutional right to an impartial jury was violated because Ms. Burns was a biased juror and whether trial counsel conducted an inadequate penalty phase mitigation investigation. After briefing and oral argument, the Eleventh Circuit affirmed.

REASONS FOR DENYING THE WRIT

McWhorter's petition does not invoke any of the compelling reasons for granting certiorari review set forth in Rule 10 of this Court's rules.

I. The Eleventh Circuit's Decision's Decision Plainly Establishes That the Court Reviewed the Entire State Court Record.

McWhorter's first question presented is premised on a plain mischaracterization of the Eleventh Circuit's decision. McWhorter insists that the Eleventh Circuit "ignored" "key evidence" in the habeas record (Pet. at 17), but the court's opinion clearly identified the evidence that McWhorter contends was ignored: the testimony of juror Stonechypher (App. 5, 19-20). While the Eleventh Circuit did hold that it did not have to decide the underlying evidentiary question of whether

Stonecypher's testimony could be considered under Alabama Rule of Evidence 606(b), the court's determination rested on the fact that "Ms. 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," based on "Ms. Burns's lack of understanding, both at trial and years later at the Rule 32 hearing." (App. 18-20.)

The Eleventh Circuit's decision clearly outlined and identified the substance of Stonecypher's testimony—the evidence McWhorter contends was ignored. (App. 5, 19-20.) Rather than ignore this evidence, the Eleventh Circuit observed that it need not resolve the propriety of the state evidentiary ruling because Stonecypher's testimony would not change the outcome (i.e., the other evidentiary support for the state court's juror bias ruling in the state court record required affirmance). Such analysis is plainly indicative of the court's consideration of the weight and importance of the Stonecypher evidence.

The Eleventh Circuit's tack was akin to avoiding the resolution of an exhaustion defense when the underlying claim clearly lacks merit. *See* 28 U.S.C. § 2254(b)(2). Rather than decide an issue involving application of a state court evidentiary rule to evidence, the court determined that it need not address the state court's procedural rulings because doing so would not alter the outcome of the federal proceeding. This was not the Eleventh Circuit ignoring evidence in the state court record; rather, it was the Eleventh Circuit exercising appropriate deference and comity by refusing to unnecessarily review state law matters in a federal habeas proceeding. The court was right not to do so, because invading the province of

Alabama's evidentiary rules and rulings would not have advanced a legitimate federal interest or purpose.

As correctly noted by the Eleventh Circuit, a state court reaches an "unreasonable determination of the facts" only "when the direction of the evidence, viewed cumulatively, was 'too powerful to conclude anything but [the petitioner's factual claim],' and when a state court's finding was 'clearly erroneous.'" App. 14 (quoting *Landers v. Warden*, 776 F.3d 1288, 1294 (11th Cir. 2015), *quoting in turn*, *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005); *Wiggins v. Smith*, 539 U.S. 510, 529 (2003)). The court's determination that the other evidence in the state court record would require affirmance of the district court's denial of relief as to McWhorter's juror-bias claim, within this proper legal standard, constituted an ordinary application of law to the facts that is not appropriate for this Court's certiorari review.

Finally, pursuant to this Court's Rule 15(2), the State notes that McWhorter's assertion (at 19) that "the Alabama trial court admitted [Stonecypher's] testimony for the limited purpose of determining Burns's state of mind" ignores the finding in the state court's final ruling that this testimony was not admissible under Alabama Rule of Evidence 606. As the court explained, McWhorter's juror-bias claim was "based on the same so-called extraneous evidence: Juror Burns's story of the circumstances surrounding her father's death," but her "story was not extraneous evidence under Alabama law," and was thus inadmissible. App. 185-86 n.2; *see also* App. 66 ("Juror [Burns's] story about her father" was inadmissible under Rule 606(b) and thus was

"insulated from inquiry and [could] not form the basis of a valid claim for postconviction relief under Rule 32.").

II. The State Court's Ruling on Whether the Prejudice Prong of McWhorter's Juror Bias Claim Was Not Contrary to Federal Law.

In affirming the denial of relief as to McWhorter's juror-bias claim, the Eleventh Circuit recognized that the state court resolution was based on "the nondisclosure's 'effect, if any, to cause the party to forgo challenging the juror for cause or exercising a peremptory challenge to strike the juror.'" App. at 22 (quoting *McWhorter*, 142 So. 3d at 1211). This standard is more favorable than the one set forth in *McDonough*. Alabama law says a challenger need show only that the disclosure of the missing information "would have caused the party either to (successfully) challenge the juror for cause *or to exercise a peremptory challenge* to strike the juror." *Ex parte Dobyne*, 805 So. 2d 763, 773 (Ala. 2001) (emphasis added). Federal law affords relief to only those defendants who could have successfully challenged for cause. That is precisely why McWhorter told the state postconviction trial court that "Alabama law is at least as favorable to Casey [McWhorter]'s claim as federal law on this point, and therefore we have not cited to federal cases in [our juror-bias claim]." CA11 App. Doc. 17 at 25 n.6.

At its core, *McDonough* establishes that an impartial jury is one "capable and willing to decide the case solely on the evidence before it." *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554 (1984). The Eleventh Circuit's decision plainly establishes that both its decision and the state court decision were rooted in ensuring

the integrity of this definition. App. at 21-24. Further, the Eleventh Circuit's decision paid the appropriate deference to the trial court's discretion as mandated in both *McDonough* and 28 U.S.C. § 2254. *See McDonough*, 464 U.S. at 556 (quoting *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940)).

Finally, certiorari review is unwarranted because the Eleventh Circuit's approval of the state court's application of *McDonough*'s second prong was only an additional ground for affirmance. This is because "Mr. McWhorter failed to carry his burden on the first prong of the *McDonough* test" and the court "need not reach the merits of whether there would have been a valid basis to challenge Ms. Burns for cause." App. at 24. Under these circumstances, certiorari review of this aspect of the Eleventh Circuit's case would be wasteful of the Court's time, as review is unnecessary to an affirmance of the lower court's decision.

III. McWhorter's Ineffective-Assistance-of-Counsel Claim Lacks Merit and Does Not Present a Compelling Issue Warranting Certiorari Review.

In support of his final question presented, McWhorter claims that his trial counsel's mitigation investigation was inadequate. This fact-bound request for error correct presents no ground for certiorari review, not least of all because the state court reasonably applied this Court's precedent.

To overcome the strong presumption that counsel acted competently, *Strickland v. Washington*, 466 U.S. 668, 690 (1984), a petitioner must show both that his counsel failed to perform "reasonabl[y] considering all circumstances," *id.* at 688, and must prove the "reasonable probability that, absent the errors, the

sentencer … would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," *id.* at 695. And the AEDPA-overlay creates a doubly deferential standard that precludes federal habeas relief if even one fair-minded jurist could believe that even one competent counsel could have performed as McWhorter's counsel did under the circumstances at the time. *See Harrington*, 562 U.S. 86, 102 (2011); *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000). This case clears that hurdle with ease.

A. The state court reasonably concluded that McWhorter's counsel formed a reasonable mitigation strategy based on a reasonable investigation.

Counsel has a duty to conduct reasonable investigations, basing strategic choices on those reasonable investigations. *Strickland*, 466 U.S. at 691. After even a preliminary investigation, counsel can make strategic decisions about which lines of mitigation evidence to investigate further. *See Chandler*, 218 F.3d at 1318 ("[C]ounsel need not always investigate before pursuing or not pursuing a line of defense. Investigation (even a nonexhaustive, preliminary investigation) is not required for counsel reasonably to decline to investigate a line of defense thoroughly."). These kinds of strategic decisions are virtually unchallengeable, *Strickland*, 466 U.S. at 690, especially when they are made by experienced trial counsel. Thus, to assess the reasonableness of counsel's strategic decisions, the state court correctly started with the steps counsel took to investigate.

The Rule 32 court found, and the CCA affirmed, that in this case "[e]xperienced trial counsel collected the comprehensive background information … and [then]

formulated a reasonable strategy that they believed could save McWhorter's life." *McWhorter v. State*, 142 So. 3d 1195, 1237 (Ala. Crim. App. 2011) (quoting C. 1163–64). Both the investigation and resulting decision were reasonable. The investigation involved interviewing McWhorter multiple times as well as his mother, his aunt, and his sister—more than once in person as well as through follow-up conversations on the phone. App. Doc. 13 at 246, 716, 744-46. From the interviews with McWhorter's family, counsel learned about "McWhorter's family history, his medical and mental-health history, his substance-abuse history, his criminal history, and his education history." *McWhorter*, 142 So. 3d at 1233; *see also* CA11 App. Doc. 10 at 46. Though McWhorter refused to waive attorney-client privilege so specifics were not divulged, CA11 App. Doc. 13 at 719-20, McWhorter generally told his counsel about "his family, his background his education … all about himself leading up to the event. … Just an all-around, thorough discussion of everything that [counsel] considered might have been relevant," *id.* at 735-36.

Counsel also employed a neuropsychologist to examine McWhorter and began conferencing with him in October 1993, nearly five months before trial. *Id.* at 223; CA11 Supp. App. Doc. 3 at 2-3. The neuropsychologist's evaluation found "no evidence of psychological distress/confounding mental disorder," CA11 App. Doc. 13 at 378; CA11 Supp. App. Doc. 10 at 2, no evidence of brain damage, CA11 App. Doc. 13 at 364-65, 394-95, and no other useful mitigation evidence, *id.* at 221-226; CA11 App. Doc. 10 at 47. Further, counsel learned from the evaluation that McWhorter had an IQ of 88—with a performance IQ of 90 and a verbal IQ of 87. CA11 App. Doc. 13 at

233, 918-19; CA11 Supp. App. Doc. 9; *cf. Grayson v. Thompson*, 257 F.3d 1194, 1227 (11th Cir. 2001) (explaining that "a verbal IQ score of 88, a performance IQ of 80, and a full scale IQ of 83, which suggests average intellectual functioning" could be harmful at the mitigation stage). Counsel obtained medical records from McWhorter's suicide attempt, which revealed that McWhorter had never before been hospitalized nor had surgery. CA11 Supp. App. Doc. 11 at 1. They also had McWhorter's youthful offender investigation report, which detailed his juvenile record as well as a brief health, educational, and employment history, Supp. App. Doc. 1 at 3-5, and spoke to the probation officer who authored it, CA11 App. Doc. 13 at 184-85. Counsel also tried to speak to the mother of one of McWhorter's friends who he had lived with for a little while shortly before the murder, *id.* at 262, and the other boys who had pleaded guilty to the murder, *id.* at 717-18, but counsel's attempts proved unsuccessful.

In short, the investigation was thorough and reasonable. This Court has cautioned that "[b]eyond the general requirement of reasonableness, specific guidelines are not appropriate." *Cullen v. Pinholster*, 563 U.S. 170, 195 (2011) (quoting *Strickland*, 466 U.S. at 688). And this case mirrors cases that found investigations reasonable, such as *Strickland*, where counsel could "reasonably surmise" that certain evidence "would be of little help," 466 U.S. at 699, and *Burger v. Kemp*, 483 U.S. 776 (1987), where counsel's investigation was reasonable because he interviewed all the witnesses brought to his attention, 483 U.S. at 794. Similarly, here counsel reasonably investigated by relying on McWhorter and his three family members and interviewing people the family members recommended counsel contact.

CA11 App. Doc. 13 at 197-98, 250. Counsel also "reasonably surmise[d]" that testimony of McWhorter's friends would have been unhelpful as, according to his family, his friends were either in jail or part of the "Fo[]r Our Lord King Satan" gang, *id.* at 227-28, and testimony about his father's or grandfather's alcoholism and criminal history, about which counsel already knew, App. Doc. 29 at 25, would also have been unhelpful because in Marshall County "[a] lot of people would uncharitably view that as, well, like father, like son, or just came from the bad family," App. Doc. 13 at 235, or think "the apple doesn't fall too far from the tree," *id.* at 749. As to McWhorter's substance abuse, counsel knew of it but also knew that it had not caused any impairment. Counsel thus "reasonably surmised" that "the simple fact that a person has used—has consumed alcohol or used drugs or supposedly huffed gas [does not] in itself help[]. … [M]ost people who sit on juries [do not] find that to be a virtue." *Id.* at 227.

Thus, as the Rule 32 court found, trial counsel's investigation yielded "comprehensive background information." App. at 74. McWhorter suggests that counsel should have found more, faulting counsel for "not even discuss[ing] the information elicited from the interview with McWhorter." Pet. 25. That accusation is particularly surprising, however, because counsel was precluded from eliciting that information based on *McWhorter's* refusal to waive attorney-client privilege. *See* CA11 App. Doc. 13 at 719-20. McWhorter's decision precluded his counsel from answering "any of [the] questions pertaining to anything that [they] talked about,"

id. at 725. McWhorter thus cannot meet his burden to show that his counsel made unreasonable investigative decisions.

Based on trial counsel's reasonable investigation and their experience—a combined 15 years and 35 felony trials, *id.* at 218-19, 702-03—they strategically decided to focus on evoking sympathy for McWhorter's family and arguing that he was a good kid until he got involved with the wrong crowd, *id.* at 236-40, 245-46, 737. Such strategy decisions were reasonable in light of the reasonable investigation upon which they were based. *Cf. Cullen*, 563 U.S. at 197 ("[I]t certainly can be reasonable for attorneys to conclude that creating sympathy for the defendant's *family* is a better idea because the defendant himself is simply unsympathetic."). And the testimony at the penalty phase tracked that strategy. His mother and aunt testified that he was a good kid until he started hanging out with the co-conspirators. App. Doc. 26 at 31, 38-40. McWhorter's former employer and a former co-worker both testified that McWhorter had been a good kid, hard-working, and dependable. *Id.* at 17-24. Such a strategy was reasonable, especially given the uphill battle counsel faced—the confession, guilty pleas by two of his co-conspirators, graphic photos and a graphic video of the crime scene, as well as evidence that McWhorter and his friends were involved in a gang. App. Doc. 13 at 738-41.

The federal courts below correctly concluded that the state court reasonably applied this Court's precedent when it determined that counsel had performed a reasonable investigation and then chose a reasonable mitigation strategy based on that investigation. In short, at least one fair-minded jurist could believe that at least

one competent counsel could have performed as McWhorter's counsel did under the same circumstances.

B. The state court reasonably concluded that McWhorter was not prejudiced by the lack of additional evidence during his penalty phase.

To show prejudice a petitioner must show that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. When the ineffectiveness is alleged to have occurred during the penalty phase of trial, a court must reweigh "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding" against the evidence in aggravation. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000). Only if there is a reasonable probability that after the reweighing the sentencer would have concluded that the new balance did not warrant death can a court find prejudice. *Strickland*, 466 U.S. at 695. Here the state court reasonably determined that there was not a reasonable probability that the outcome would have been different if the additional evidence had been presented at McWhorter's penalty phase. The state court's prejudice determination was reasonable for three reasons: (1) the additional evidence was weak, cumulative, or double-edged; (2) the unknown, additional evidence would not have altered counsel's decision about what evidence to present or strategy to employ; and (3) the state court properly considered the nature of the crime in its prejudice assessment.

1. All of the additional evidence presented to the Rule 32 court was either weak or cumulative or double-edged such that it did not alter the balance of aggravating

and mitigating circumstances. McWhorter argues that the jury should have been presented with evidence of McWhorter's "dire family situation when he was a young child" and his gas-huffing. Pet. at 27. But nearly all of that evidence is double-edged. Juries react different ways to a disadvantaged childhood. *See Burger v. Kemp*, 483 U.S. 776, 794 (1987). And a "showing of alcohol and drug abuse … can harm a capital defendant as easily as it can help him at sentencing." *Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1247 (11th Cir. 2010). Counsel testified that in Marshall County juries are not sympathetic to defendants who abuse drugs or alcohol, especially when, as here, there is no lasting brain damage from the abuse. App. Doc. 13 at 227. Counsel also testified that Marshall County juries often view evidence of familial criminal history negatively, concluding that "that apple must not have fallen too far from the tree." *Id.* at 749.

And some of the evidence was not only double-edged, it also undercut the picture of McWhorter's life that he now tries to paint for this Court. For instance, McWhorter's step-father's testimony described a supportive family that struggled with a difficult child. *Id.* at 307-09, 357, 468, 475, 482-85, 492. The stepfather cared for McWhorter as if he were his own son; he even tried to adopt him. *Id.* at 482-84. He described how he loved McWhorter and went out of his way to help him, and also testified about how McWhorter's aunt did everything she could to keep McWhorter on the straight and narrow. *Id.* at 473-75, 492. Thus, McWhorter's stepfather's testimony cast McWhorter as someone who took advantage of a far from perfect but loving family. For example, when his stepfather allowed McWhorter and some friends

to camp at his farm, they instead absconded to Bay Minette, stole a Porsche on the way, and got arrested. *Id.* at 318, 476. This testimony would have cut sharply against the victim-of-an-unloving-family narrative McWhorter now promotes. It was reasonable for the state courts to determine that this weak and uneven mitigation evidence would not have altered the outcome of this case.

McWhorter did submit (though he did not argue before this Court that it was relevant to the prejudice analysis) some evidence that would have been compatible with the reasonable strategy that counsel chose, such as the teacher and coach who testified that he was a hard-working, good kid. *Id.* at 545-46, 548, 561-62. But that evidence was cumulative of evidence that was presented during the penalty phase of trial. And "counsel is not required to present all mitigation evidence, even if additional mitigation evidence would have been compatible with counsel's strategy." *Putman v. Head*, 268 F.3d 1223, 1244 (11th Cir. 2001). A petitioner cannot establish prejudice if the additional mitigating evidence is cumulative of the mitigation evidence presented. *See Wong v. Belmontes*, 558 U.S. 15, 22-23 (2009).

And as the Eleventh Circuit noted, there is no reason to think counsel should have known to contact these additional witnesses:

> It does not appear counsel knew to contact Ms. Battle, Mr. Baker, or Mr. Burns. Rather, when counsel met with Mr. McWhorter's family to gather information, the family explained that McWhorter "had a lot of friends" and his friends' parents "bragged about how well-behaved he was." These family members did not, however, provide any additional information. Nor is there other information in the record that shows counsel should have plausibly known to pursue these specific witnesses.

App. at 29-30. Therefore, the court could "not say the failure to investigate the potential mitigation testimony of Ms. Battle, Mr. Burns, and Mr. Baker was unreasonable." *Id.*

Given that nearly all the additional evidence is double-edged, some of it contradicts the picture McWhorter now tries to paint, and the rest is either cumulative or weak, the CCA reasonably concluded that there was no reasonable probability that the additional evidence would shift the balance.

Moreover, to show prejudice, McWhorter must show that the jury would have actually heard the additional evidence, *Gilreath v. Head*, 234 F.3d 547, 551 n.12 (11th Cir. 2000) ("[T]o show prejudice, Petitioner must show that—but for his counsel's supposedly unreasonable conduct—helpful character evidence would have been heard by the jury."), or that it would have caused his counsel to change their penalty-phase strategy, *id.* ("[When] a defendant alleges that his counsel's failure to investigate prevented his counsel from making an informed tactical choice, he must show that knowledge of the uninvestigated evidence would have altered his counsel's decision." (quoting *Gray v. Lucas*, 677 F.2d 1086, 1093 (5th Cir. 1982)). The record is devoid of any evidence showing that any of the unknown, additional evidence would have been presented or would have caused his counsel to change their strategy. In fact, all the evidence points the other way. Counsel testified that they would not have offered evidence of huffing or alcohol or drug abuse absent lasting mental health issues, CA11 App. Doc. 13 at 226-27, 747, that they would not have offered evidence that McWhorter's father and grandfather were violent alcoholics who had been

convicted of rape and murder respectively, *id.* at 235, 748-49, 766, that they would not have hired or used a mitigation specialist, *id.* at 248, 766. In sum, none of "the bases underlying his counsel's tactical choice to pursue or forego a particular course would have been invalidated." *Gray*, 677 F.2d at 1093. Because McWhorter failed to meet his burden to show that the evidence would have been presented, he cannot argue that he was prejudiced because it was not admitted.

Finally, given the cold and calculated nature of McWhorter's murder (he planned for three weeks and waited in his victim's home for three hours while preparing for the murder, CA11 Supp. App. Doc. 6 at 26), his depraved behavior when shooting the victim (firing the first shot as well as the kill-shot directly to the head, *id.* at 25), his callousness following the murder (he was upset only because there was not more money, CA11 Supp. App. Doc. 7 at 2), and the overwhelming evidence of his guilt (his confession, guilty pleas of his co-conspirators, testimony of his friend, and video of the crime scene, CA11 App. Doc. 13 at 738-41), the CCA was not unreasonable when it found, after an independent and complete review, "that the mitigating evidence presented at the postconviction hearing—but omitted from the penalty phase of McWhorter's capital-murder trial—would have had no impact on the sentence in this case." *McWhorter*, 142 So. 3d at 1250. Under AEDPA, this Court should defer to that reasonable conclusion and deny McWhorter's claim.

McWhorter claims that the Eleventh Circuit found that trial counsel "did not even understand the meaning of mitigation evidence." Pet. at 24-25. McWhorter again obviously misreads the opinion. The court merely stated in a footnote "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." App. 30 n.4. But the court never found, because McWhorter never proved, that counsel labored under any misconception of the law. The record showed that counsel understood the purpose of mitigation evidence, they spent considerable time gathering such evidence, and they presented a reasonable mitigation case to the jury. That the jury and judge still decided that McWhorter's crime warranted the death penalty speaks only to the heinousness of his actions, rather than the performance of his counsel.

Thus, unlike in *Wiggins*, or *Burger v. Kemp*, 483 U.S. 776 (1987), counsel's determination that some mitigation evidence would be double-edged determination was made by defense counsel *after* their mitigation investigation had discovered the potential mitigation evidence. Here, the fact that the mitigation evidence would have "been at odds with the defense's strategy," *Burger*, 483 U.S. at 793, was a decision made by informed trial counsel, not by a court attempting to weigh previously unknown mitigation evidence. Whereas this Court has taken issue with strategic decisions made without adequate investigation, that is clearly not the situation in this case. The Eleventh Circuit's footnote simply clarified that the sort of evidence counsel did not put forward cannot be deemed categorically outside the universe of mitigation evidence, not that McWhorter's counsel took that view nor that such evidence must always be presented. Here, McWhorter's counsel made a strategic decision to forego certain types of *known* mitigating evidence (including extent and

severity) based on a reasonable judgment that the evidence would not be mitigating *in this case*, rather than a belief that it could never be mitigating.

For example, turning to McWhorter's claim that trial counsel missed information in mitigation pertaining to child abuse, substance abuse, difficult home life, and mental health, the lower court noted that McWhorter's counsel did have knowledge of this information. As the lower court "easily" conceded, counsel made a strategic decision not to introduce it:

> We can easily do away with Mr. McWhorter's claim that substance abuse evidence and evidence of his biological father's problems should have been presented. Counsel testified that they chose not to present evidence of Mr. McWhorter's substance abuse, or about his family members' substance abuse, or of his biological father's personal problems because it may have done more harm than good. This "strategy choice was well within the range of professionally reasonable judgments." *Strickland*, 466 U.S. at 699, 104 S. Ct. at 2070. Similarly, counsel testified about their reasons for not presenting mental health evidence. Even though they hired a neuropsychologist, counsel did not have Dr. Robbins testify because, in Robbins's opinion, Mr. McWhorter's neuropsychological testing results were "unremarkable." Counsel worried that if Dr. Robbins testified "there's absolutely nothing wrong" with Mr. McWhorter, that would undermine the possibility that the jury might think he "must have been crazy" to commit such a senseless crime.

Id. at 788 (App. at 32). For these reasons, the court held that counsel's "choice to present evidence consistent with their 'good kid, wrong crowd' theory and their choice not to call Dr. Robbins were each tactical . . . and counsel's investigation into these witnesses was not unreasonable." *Id.* at 788–89 (App. at 33).

In sum, every state and federal court to address McWhorter's *Strickland* claim has rejected it. Counsel conducted a reasonable mitigation investigation and made a reasonable presentation of evidence as the product of sound, strategic choices.

Counsel made strategic decisions to present evidence that would support a "good boy, wrong crowd" strategy. McWhorter's fact-specific complaints of misapprehension or misapplication of *Strickland* do not implicate a circuit split, do not implicate a failure to follow this Court's clearly established holdings, and do not present an opportunity for this Court to advance federal habeas corpus or Sixth Amendment jurisprudence. For these reasons, McWhorter's case is not the rare case in which certiorari is appropriate.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

STEVE MARSHALL
Alabama Attorney General

EDMUND G. LACOUR JR.
Alabama Solicitor General

/s James R. Houts
JAMES ROY HOUTS*
Deputy Alabama Attorney General
James.Houts@AlabamaAG.gov

MORGAN B. SHELTON
Assistant Alabama Attorney General
Morgan.Shelton@AlabamaAG.gov
OFFICE OF THE ALA. ATTY GEN.
501 Washington Avenue
Montgomery, Alabama 36130
(334) 242-7300
Counsel for Commissioner/Respondent

**Counsel of Record*

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