No.20-1302

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

REPLY BRIEF OF PETITIONER
CAPITAL CASE

Benjamin Rosenberg
Counsel of Record
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500
benjamin.rosenberg@dechert.com

Robert C. Newman
THE LEGAL AID SOCIETY
199 Water Street
New York, New York 10038
(212) 577-3354

Sam H. Franklin
LIGHTFOOT, FRANKLIN & WHITE, LLC
The Clark Building
400 20th Street North
Birmingham, Alabama 35203
(205) 581-0720

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Statute

INTRODUCTION

Every criminal defendant is entitled to an impartial jury and adequate counsel. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). Casey McWhorter had neither. Unbeknownst to him, his jury contained a juror, Juror Linda Burns, whose father had been murdered. While McWhorter's jury was deliberating during the penalty phase, Burns told her fellow jurors of the pain she felt on seeing her father's killer walk free after serving his sentence. Compounding the constitutional infirmities, McWhorter's trial counsel failed to understand the role of mitigation evidence in a capital case, a failure that pervaded and undermined counsel's entire mitigation-phase investigation and strategy. Respondent has repeatedly avoided these fundamental defects in McWhorter's prosecution, and its opposition to McWhorter's petition for certiorari does so again. But when viewed properly, the fatal flaws in the prosecution are clear.

First, the Eleventh Circuit was required to consider *all* the evidence before the Alabama Court of Criminal Appeals ("CCA"), not just the evidence that supported the CCA's decision. It failed to do so because, by its own admission, it refused to consider the testimony of April Stonecypher, which strongly contradicted the CCA's factual findings.

Second, the Eleventh Circuit let stand the CCA's analysis, which did not ask the constitutionally required question: Whether, had the truth about Burns been known, McWhorter would have had a valid basis for a challenge for cause. Instead, the court focused, erroneously, on whether McWhorter had been prejudiced by Burns's falsehood,

and decided that McWhorter had not been prejudiced, largely on the grounds that Burns testified many years after the verdict that her vote to convict and to put McWhorter to death had been based on her view of the evidence.

Third, the Eleventh Circuit sanctioned trial counsel's mitigation investigation even though the court's observations established that trial counsel misunderstood the law of mitigation evidence. Trial counsel assumed that obviously relevant evidence was either irrelevant or inadmissible, and then conducted a faulty investigation based on those assumptions. Counsel who do not understand the first principles of mitigation in capital cases cannot provide constitutionally adequate representation.

Each of these errors warrants review. The first two strike at the heart of the federal courts' basic obligation to properly weigh all of the evidence before resolving a habeas petition and of the standard for juror challenges set forth in *McDonough*. The third goes to the question of whether capital defendants are entitled to counsel that know the basic law of mitigation in capital cases.

ARGUMENT

A. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT REVIEW UNDER 28 U.S.C. § 2254(D) MUST CONSIDER THE ENTIRE RECORD, AND NOT MERELY WHETHER THERE WAS EVIDENCE SUFFICIENT TO SUPPORT THE STATE COURT'S FACTUAL FINDINGS.

The critical question throughout the state and federal collateral proceedings has been whether Burns lied during voir dire when she stated that she did not have a relative who was a crime victim. It is clear that Burns did have such a relative—her father—and so the question was whether she had merely forgotten about her

father's death, was confused by the question on the prospective juror questionnaire, or lied.

Juror Stonecypher's testimony in the state collateral proceeding answers this question: Stonecypher testified that during the jury's penalty phase deliberations, which was only eight days after the voir dire, Burns spoke passionately about how her father was murdered, and the pain she felt upon seeing the man who had killed her father walk freely following his term of incarceration. Stonecypher's evidence strongly supported McWhorter's contention that Burns had neither forgotten about, nor been confused about, her father's death: At the time of McWhorter's trial, Burns knew that her father had been a murder victim.

The Eleventh Circuit did not even attempt to reconcile Stonecypher's testimony with Respondent's position. Instead, the Eleventh Circuit concluded that ***it need not reach*** Stonecypher's testimony because other evidence in the record supported respondent. App. 20. That is like saying the courts need not consider compelling and unimpeached eyewitness testimony because other eyewitness testimony supports a conviction. But § 2254(d) requires the federal court to consider all of the evidence before the state court, not only the evidence that supports the state court's findings.

1. Respondent first argues that the Eleventh Circuit was correct in not considering Stonecypher's testimony because, according to Respondent, that testimony was not part of the record. Respondent Br. at 18-19. But while the Alabama trial court ruled that Stonecypher's testimony could not be used to advance

McWhorter's argument that there had been extraneous evidence before the jury, it admitted the testimony for the purpose of determining Burns's state of mind. App. 474-75, 484-89. (McWhorter abandoned the extraneous evidence argument in federal court.) As the CCA plainly and unequivocally stated when discussing the merits of McWhorter's juror-bias claim: "In ruling on the discovery motions, the [trial court] allowed Juror [Stonecypher] *to testify on a limited basis*." App. 143 n.12, at 174. The CCA did not disturb the trial court's ruling. *Id.*

Respondent misleadingly cites to only those portions of the state court decisions that dealt with McWhorter's extraneous evidence claim, *see* Respondent Br. at 18 (citing App. 185-86 n.2.; App. 66), and ignores the Alabama trial court's ruling that it could "allow [Stonecypher's testimony] to show what Ms. Burns had said to prove what Ms. Burns believed." App. 473-74. *See also* App. 478. Respondent's claim is thus simply untrue.

2. Respondent defends the Eleventh Circuit's error by saying that its decision not to consider Stonecypher's testimony was an exercise in "deference and comity by refusing to unnecessarily review state law matters." Respondent Br. at 17. That is nonsense: AEPDA empowers federal courts to review only federal constitutional issues, 28 U.S.C. § 2254, and federal courts collaterally reviewing a state criminal judgment have no authority to review or correct state court decisions about state rules of evidence, *Leverett v. Spears*, 877 F.2d 921, 925 (11th Cir. 1989). Respondent cannot justify ignoring Stonecypher's testimony by empty gestures towards federalism and comity.

3. Respondent also claims that the Eleventh Circuit did, in fact, weigh Stonecypher's testimony. But the Eleventh Circuit stated that it did not need to reach *whether* it could consider Juror Stonecypher's testimony. App. 20. It is plain that the Eleventh Circuit did not actually consider or weigh Juror Stonecypher's testimony—because it did not even reach the threshold issue of whether that testimony was properly within its purview.

4. Finally, Respondent argues that Stonecypher's testimony itself could not "alter the outcome" of McWhorter's petition, and thus whether the Eleventh Circuit considered the testimony or not does not matter. Respondent Br. at 17. In support of its position, Respondent points to Burns' flimsy and self-serving testimony at the Rule 32 hearing, occurring years after the trial. *Id.*

But, as Justice Brennan explained in *McDonough*, *see* 464 U.S. 558 (Brennan, J., concurring), and as stands to reason, a juror's testimony after the fact about her own state of mind and *bona fides* must be viewed with special scrutiny—and that should be especially true here where there is contradictory, contemporaneous evidence of the juror's state of mind. Respondent's reasoning only underscores the Eleventh Circuit's error: The reasonableness of a state court's factual findings turns on *all* the evidence, including both supportive and contradictory evidence, and the Eleventh Circuit declined to consider a critical piece of evidence that contradicts the state court's factual finding. *Brumfield v. Cain*, 576 U.S. 305, 314 (2015).[1]

[1] Thus, in *Brumfield*, this Court held that a state court's "factual determinations were unreasonable" after reviewing the entire record, even though there was some evidence that "may have cut against [petitioner] Brumfield's claim." *Id.* at 314, 320. Despite the "countervailing evidence,"

B. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE *MCDONOUGH* STANDARD.

McDonough required the CCA to consider whether an honest answer from Burns during voir dire—her father had been murdered—would have provided a "valid basis for a challenge for cause." 464 U.S. at 556; *Warger v. Shauers,* 574 U.S. 40, 45 (2014). But the CCA instead asked whether Burns's deceit "might have . . . prejudiced'" McWhorter. App. 140. The CCA's standard was more onerous for McWhorter than the *McDonough*-mandated standard, and the Eleventh Circuit erred by concluding otherwise.

The CCA and the Eleventh Circuit focused on the question of whether McWhorter "might have been prejudiced" by Burns's deceit, as measured almost exclusively by her years-later, self-serving testimony at the Rule 32 hearing, instead of the question of whether, had the truth been known, McWhorter would have had a valid basis for a challenge for cause. The only evidence on that (correct) point was the testimony of one of McWhorter's trial counsel, who testified that had he known the truth he "probably would have challenged [Burns] for cause," and Respondent does not dispute that such a challenge would have had a "valid basis."

Respondent notes that the CCA recited the correct standard in its statement of the law. Respondent Br. at 19 (citing *McWhorter*, 142 So. 3d at 1211). But though the CCA mentioned challenges for cause (in a block quotation from a different opinion) at the outset of its opinion, *see* App. 134, it never returned to that question,

there was enough to establish the petitioner's claim and confirm "an unreasonable determination of the facts." *Id.* at 321, 322.

or asked whether McWhorter could have established a valid challenge for cause. Instead, it focused on determining whether Burns's presence on the jury prejudiced McWhorter, and on that point it relied almost entirely on Burns's testimony that her father's death had not influenced her actions as a juror 15 years earlier. *See* App. 141. Respondent also cites to other cases from the Alabama courts that recite the *McDonough* standard. Respondent Br. at 19 (citing App. 22; App. 134; *Ex Parte Dobyne*, 805 So. 2d 763, 773 (Ala. 2001)). But regardless of how the CCA has enforced juror-bias claims in other cases, *in this* case it did not apply a standard meeting the constitutional threshold of *McDonough*'s challenge-for-cause test, and the Eleventh Circuit's conclusion that it had applied the correct test ("[t]he CCA's analysis appears to be in accordance with *McDonough,*" App. 22) is wrong.[2]

C. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT TRIAL COUNSEL WHO FUNDAMENTALLY MISAPPREHEND THE LAW OF MITIGATION CANNOT BE EFFECTIVE IN A CAPITAL CASE.

This case presents a clear legal error by the Eleventh Circuit, and an opportunity for this Court to state clearly a legal principle that lies at the heart of a capital defendant's rights: Trial counsel cannot conduct a constitutionally-adequate mitigation investigation when counsel fundamentally misunderstands what mitigation evidence is. App. 30 n.4. An attorney who does not understand the scope of acceptable mitigation evidence and fails to investigate leads that would provide

[2] Although McWhorter understood and represented in the state courts that Alabama law was at least as favorable to defendants as federal law was, in fact the CCA applied a harsher test in his case.

such evidence cannot be said to have made a reasonable professional judgment any more than a blind critic can assess whether a painting is finished.

The recognized purpose of a capital sentencing is to humanize the defendant, to show his history and circumstances. Trial counsel 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. Referring to this testimony, the Eleventh Circuit noted 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" and the precedent of "*Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2965 (1978)." App. 30 n. 4.

Due to their ignorance about what mitigation evidence was, counsel started its mitigation investigation only eleven days before trial.[3] And, lacking adequate time to develop a mitigation presentation, trial counsel "only interviewed the people that McWhorter or his family recommended might offer testimony favorable to him." Respondent Br. at 12. But it was not for McWhorter's family to tell his counsel what information or witnesses would be useful for a mitigation case. It was plainly for counsel, with their putatively greater knowledge of what the law requires, to ask questions to elicit useful information and then develop those leads. If anything, trial

[3] While Respondent notes that trial counsel prepared for trial for over a year, Respondent Br. at 2, McWhorter has never disputed trial counsel's overall work on the case; his ineffective assistance of counsel claim has always rested upon trial counsel's inadequate investigation and representation in the penalty phase.

counsel's failure in this respect only underscores how their lack of basic understanding permeated their investigation and stunted it.

The result was a mitigation presentation consisting of only two family members and two people who barely knew McWhorter. The jury was left with the impression that no one aside from his mother and aunt really cared about McWhorter, when in fact there were many more people in McWhorter's life who were willing to testify on his behalf if trial counsel had attempted to find them.

Respondent attempts to argue that McWhorter's counsel did not misunderstand mitigation evidence. Respondent Br. at 31. But that attempt is belied by the testimony of trial counsel himself, quoted above. And though Respondent also notes that trial counsel had prior experience with capital murder cases, Respondent Br. at 25, that experience cannot overcome the record here, which establishes trial counsel's ignorance of the fundamental principle of mitigation law.

Respondent also mistakenly argues that, even if trial counsel did misunderstand the nature of proper mitigation evidence, the additional evidence presented to the Rule 32 court would not have made a difference.[4] But the evidence that trial counsel did not develop is precisely the type of evidence that the Supreme Court has regularly held relevant to mitigation. *E.g.*, *Rompilla v. Beard*, 545 U.S. 374, 390-91 (2005) (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

---

[4] The Eleventh Circuit did not analyze the prejudice prong of *Strickland*. Opinion at ECF 35.

fumes). 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 access to evidence showing that 18-year-old Mr. McWhorter was a product of his circumstances, a showing that likely would have humanized McWhorter and garnered enough sympathy to convince even just one more crucial member of the jury to spare his life.

Here, the panel erred by acknowledging trial counsel's limited understanding of mitigation evidence but failing to take that error to its proper legal conclusion—that trial counsel "abandoned their investigation at an unreasonable point," *Daniel v. Comm'r, Alabama Dep't of Corr.*, 822 F.3d 1248, 1272 (11th Cir. 2016), because they did not understand what kind of mitigation evidence they should develop and present to the jury.

CONCLUSION

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

Respectfully submitted,

Dated: May 24, 2021

Benjamin Rosenberg
Counsel of Record
DECHERT LLP
Three Bryant Park
1095 Avenue of the Americas
New York, New York 10036
Tel: 212-698-3500
Fax: 212-698-3599
benjamin.rosenberg@dechert.com

Sam H. Franklin
LIGHTFOOT, FRANKLIN &
WHITE, LLC
The Clark Building
400 20th Street North
Birmingham, Alabama 35203
Tel: 205-581-0720
Fax: 205-380-9120

Robert C. Newman
THE LEGAL AID SOCIETY
199 Water Street
New York, New York 10038
Tel: 212-577-3354
Fax: 212-509-8481

Attorneys for Petitioner