No. 20-5802

In the Supreme Court of the United States

TIMOTHY WADE SAUNDERS,
Petitioner,
v.
WARDEN, HOLMAN CORRECTIONAL FACILITY,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED
(Restated)

For ten years, an inmate was represented in state and federal habeas by pro bono counsel from a prominent Alabama law firm. The Alabama Court of Criminal Appeals held that the inmate's state postconviction claim that his trial counsel were per se ineffective was both insufficiently pleaded and failed to state a claim for relief, and dismissed it pursuant to Rules 32.6(b) and 32.7(d) of the Alabama Rules of Criminal Procedure.

1. Did the federal courts err by affording AEDPA deference to this state-court holding where the Eleventh Circuit considers dismissals under Rule 32.6(b) to be merits determinations?

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INTRODUCTION

Timothy Saunders beat his septuagenarian neighbor to death with a crowbar, gained access to the murdered man's home by faking an asthma attack in front of his wife, and injured her so badly while holding her hostage that she went into heart failure during her subsequent hospitalization. Faced with a confessing defendant, damning forensic evidence, and a sympathetic surviving victim, trial counsel employed a strategy this Court recognized as valid in *Florida v. Nixon*:[1] being candid with the jury about their client's actions in an attempt to avoid a capital conviction or death sentence.[2] That this strategy failed was not counsel's fault, but rather the consequence of Saunders's senseless crimes against his kindly neighbors.

Still, Saunders takes issue with the way in which his trial counsel presented their case: allowing him to testify, then asking him pointed questions about harmful facts that would have come out on cross-examination. His direct appeal counsel raised an ineffective assistance claim on the subject garbed in the language of abandonment—though as the support for the claim came from opinions regarding ineffective assistance, the legal underpinnings were clear to the Alabama Court of Criminal Appeals (CCA). His pro bono state and federal postconviction counsel, attorneys from one of the finest law firms in Alabama, contended that trial counsel had been per se ineffective, though their claim was deemed insufficiently pleaded and meritless. The federal courts likewise rejected this claim.

1. 543 U.S. 175, 190–92 (2004).

2. *Saunders v. Warden, Holman Corr. Facility*, 803 F. App'x 343, 347–48 (11th Cir. 2020).

Now represented by new counsel, Saunders asks this Court to find that the state court's decision as to his postconviction claim is due no deference under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). His petition does not detail a claim deserving of certiorari, but rather offers a litany of complaints about Alabama's postconviction scheme, which he presents for the first time in this Court, and about his pro bono counsel's alleged failings. The truth of the matter is that Saunders brutally murdered a man, was rightly convicted and sentenced to death, and has been grasping at straws for the past fifteen years. As this claim is fact-based and meritless, it does not warrant certiorari.

STATEMENT OF THE CASE AND FACTS

A. Saunders's capital convictions

Melvin and Agnes Clemons lived on a wooded property abutting a trailer park in Foley, Alabama.[3] On July 9, 2004, Melvin loaned a crowbar to Timothy Saunders, who claimed he needed to pry his motorcycle from around a tree.[4] By nightfall, when Saunders had yet to return the crowbar, Melvin set off to investigate.

What followed, as set forth in the CCA's opinion on direct appeal, was horrific. Saunders beat Melvin to death with his own crowbar, leaving him with multiple skull fractures, and strangled him. One of these fractures was so deep that the medical examiner could see brain tissue. Once Melvin was dead, Saunders went to the Clemonses' home and faked an asthma attack. Concerned, Agnes let him inside and

3. *Saunders v. State*, 10 So. 3d 53, 61–63 (Ala. Crim. App. 2007).

4. *Id.* at 62.

tried to assist him, but Saunders turned on her, striking her, demanding money to buy more crack cocaine, and dragging her around the house. He held her captive in a bathroom while he smoked crack and asked her to pose like the women on his deck of risqué playing cards. Finally, when he dropped his crack pipe, seventy-four-year-old Agnes was able to chase him from the house with a shotgun. She recognized and described her assailant. Still, Agnes was hospitalized for several days with contused lungs, fractured ribs, and severe bruising about her head and neck. She lost hearing from a concussion, her eyes nearly swelled shut, and she went into heart failure as a result of her injuries.

Saunders was found hiding under a mobile home. He eventually confessed, claiming that he had purchased $150 worth of crack on July 9 and smoked it behind the Clemonses' hedge so that his mother would not see. Melvin caught him, told him to leave, and mentioned calling the police, and Saunders flew into a rage and hit him in the head with the borrowed crowbar. He then faked an asthma attack to gain access to the house to look for valuables, but he had not intended to kill or rape Agnes.

Beyond Saunders's confession and Agnes's eyewitness account, forensic evidence linked Saunders to the murder. His shorts were recovered from the mobile home where he was found, and they tested positive for both his blood and Melvin's. The crowbar also bore traces of Melvin's DNA.[5]

Saunders was indicted on two counts of capital murder and one count each of

5. *Id.* at 62–71.

attempted murder, attempted rape, and burglary.[6] The trial court appointed Thomas Dasinger and Samuel Jovings to represent him.[7] Mr. Dasinger had been a practicing attorney for nine years, while Mr. Jovings had been practicing for more than five years.[8] Saunders initially pleaded not guilty by reason of mental disease or defect, but after evaluation, counsel withdrew that plea and entered a plea of not guilty.[9]

The trial began in August 2005.[10] Faced with a mountain of damning evidence, counsel made the "reasonable, tactical decision" to admit the facts that could not be denied but argue that Saunders was unable to form the specific intent to commit capital murder because of his drug use.[11] As counsel stated in opening:

> I'm not going to get up here and suggest to you that this isn't a serious matter. It is. It's very serious. It's a tragic loss that it happened to the Clemons [sic] and nobody deserves that.
>
> What I am going to suggest to you is that Tim should only be convicted of what we feel like the charges should be against him. He's not asking to be acquitted of this. He's not saying he's—he shouldn't be severely punished, he is. But under the laws of Alabama, just like every one of you would deserve if you were in the same or similar situation, he has a right to be represented, he has a right to be heard from, and a right to have evidence prove the allegations against him.
>
> [. . .]
>
> I suggest to you he was in such a state of mind from smoking crack cocaine that he wanted more at that point. Didn't know what to do after something like that had happened, and he was thinking of ways to get more crack cocaine, and after the incident happened is when he goes into the house and does these other things.

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6. Tab P-41 at 19–20, *Saunders v. State*, 1:10-cv-00439 (S.D. Ala. Nov. 27, 2017), ECF No. 41-46. Tab numbers refer to the habeas record, and unless otherwise specified, ECF numbers refer to documents filed in the district court habeas proceedings.

7. *See* Tab P-41 at 5, 10–11, 147.

8. This information was found in the member database of the Alabama State Bar. *Find a Member*, ALA. STATE BAR, https://www.alabar.org/find-a-member (last accessed Sept. 25, 2020).

9. Tab P-41 at 177–78.

10. *Saunders*, 10 So. 3d at 92–93.

11. *Id.* at 8; *see* Tab P-1, ECF No. 41-3.

> I'm not condoning Tim's actions and neither is he, what happened once he goes into the house. There will be evidence of the assault. We're not denying that. Tim made statements that he never intended to murder Ms. Clemons, never intended to rape her.[12]

Following a colloquy about his rights,[13] Saunders testified at the guilt phase of his trial. He apologized for his actions,[14] and then counsel walked him through the facts. Saunders admitted that he had a criminal record for receiving stolen property[15] and that he smoked crack.[16] He said that he had wanted to borrow Melvin's crowbar to build a clubhouse in the woods, "a place for me to go and smoke my crack and for neighborhood children around there."[17] Counsel's questioning then turned to the events surrounding the crime:

> Q. While you were smoking crack, what happened next?
> A. At that point, Mr. Clemons—
> Q. Let me ask you this: Were you going there to burglarize these people?
> A. No, sir.
> Q. Were you going to steal their home?
> A. No, sir.
> Q. Steal from them?
> A. No, sir.
> Q. You had no right to be there, did you?
> A. No, sir, I did not.
> Q. You were there to smoke crack, though?
> A. That's all I was doing.[18]
>
> [. . .]
>
> Q. What happened next?
> A. Then he turned around and I heard him say something about the

12. Tab P-3 at R. 376–78, ECF No. 41-6.
13. Tab P-5 at R. 907, ECF No. 41-10.
14. *Id.* at R. 908–09.
15. *Id.* at R. 910. Saunders also had a youthful offender charge in South Carolina. *Id.* at R. 935.
16. *Id.* at R. 910–11, 912–13.
17. *Id.* at R. 915.
18. *Id.* at R. 919.

law or police maybe. And I had gotten scared at that point, and I hit Mr. Clemons in the back of the head with the crowbar.

Q. You did what?
A. I hit Mr. Clemons in the back of the head with the crowbar.
Q. What did he do to deserve that?
A. Nothing in this world.
Q. Nothing?
A. No, sir.
Q. Did you go over there to steal from them at that time?
A. No, sir.
Q. Then why did you hit him? He's given you peaches, he's been nice to your family?
A. I was scared, and when you're on crack, you're not thinking right. And anybody who's ever had any dealings with crack cocaine or cocaine in their life can testify to that.[19]

[. . .]

Q. Do you remember hitting him with the crowbar?
A. Yes, sir, I do.
Q. Do you realize how hard you hit him?
A. At the time all the—
Q. Look, look, look at this picture. Do you see that?
A. Yes, sir.
Q. Do you realize how hard you hit this man?
A. Yes, sir, I do now.
Q. And what has he done to you, nothing?
A. Nothing at all.
Q. The State's also showing bruises on his face. Do you recall hitting him or punching him or anything like that?
A. No, sir, I do not.
Q. Look over here. Do you see the bruises and abrasions from hitting somebody?
A. I do not recall doing that.
Q. You're accepting responsibility for that?
A. Yes, sir, I am.[20]

[. . .]

Q. All right. Tell us why you went to the door.
A. I don't truly know why I went to the door. I knocked on the door

19. *Id.* at R. 920–21.
20. *Id.* at R. 921–22.

and Ms. Clemons come to the door.

Q. What did you do to get inside?

A. Well, I had faked an asthma attack and she brought me a glass of water, and then at that time she let me in the house to use the rest room.

Q. You've just beaten her husband and now you're going inside of her house?

A. Yes.

Q. Why?

A. I truly don't know.

Q. More money for crack?

A. That would have to have been the only reason maybe. I don't—I don't see any other reason.[21]

[. . .]

Q. Tell us what happened next, Tim.

A. Then after that, after she picked up the phone, I told her to put the phone down and I grabbed her around her neck. And then from that time, I believe I led her through the house from room to room. And I had asked her about money. I remember that. I remember sitting out there smoking crack at the table with her. And I remember showing her the cards.

Q. These are your cards?

A. Yes, sir, they are.

Q. They have naked women on them?

A. Yes, sir.

Q. [Are] those yours?

A. Yes, sir, they are.

Q. Is it appropriate to pull that out around a 75-year-old woman?

A. No, sir. No, it's not.

Q. But you're smoking crack inside the house in front of her?

A. Yes, sir.

Q. That's wrong, too, isn't it?

A. Yes, sir, it is.

Q. Are you ashamed of that?

A. If you only knew.[22]

[. . .]

Q. You took money from the wallet?

21. *Id.* at R. 924.

22. *Id.* at R. 926–27.

A. Yes, sir, I did.
Q. You took money from the purse?
A. Yes, sir.
Q. It wasn't yours?
A. No, sir, it wasn't.
Q. Absolutely no right to be there, did you?
A. No, I did not.[23]

While counsel's direct examination brought out unfavorable information, it did so in a way that allowed Saunders to be candid about his wrongdoing and admit his shame for his actions, but also discuss how high he supposedly was that night. As Saunders stated on cross-examination, "I never claimed what I did wasn't wrong. I'm accepting that."[24] The defense carried this theme into their closing argument:

> As I told you folks from the very beginning, we're not denying what happened out there. We agree with the State what happened out there was criminal. There's no excuse for that. There's no excuse for what Ms. Clemons had to go through. Lord knows there's no excuse for what Mr. Clemons had to go through. That was an awful, awful situation. It was a tragedy, it was a horrible set of facts. You can paint whatever other words you want to add to it it [sic] was.
>
> And I'm not trying to take away from the tragedy of these folks.
>
> You hear about crack cocaine and the use and abuse and the effects that it has on people in our society. And I think everyone would agree that if Mr. Saunders never used crack cocaine or never smoked it, we probably wouldn't be here, we probably wouldn't be here.
>
> [. . .]
>
> From the very beginning we—as Ms. Newcomb suggested, we're not questioning who did it. We've admitted his responsibility from the very beginning. From the very beginning of this we said, yes, Tim did that. The question this comes down to is the question that revolves around intent.
>
> [. . .]
>
> Mr. Saunders didn't have to get up on the stand to testify. He didn't have to. He had a perfect right not to. But he did.[25]

23. *Id.* at R. 930.
24. *Id.* at R. 946.
25. Tab P-7 at R. 1018–20, ECF No. 41-12.

Despite counsel's best efforts, the jury convicted Saunders of two counts of capital murder and one count of attempted murder,[26] and they unanimously recommended the death penalty.[27]

The final sentencing hearing was held on October 21 before the trial judge.[28] At that time, Saunders stated:

> Your Honor, I know what I did was wrong. There's no excuse for what I've done. I've ruined people's lives here. I'm willing to accept the punishment of the Court [you're] willing—which you give. I'd just like to apologize to Ms. Clemons and the family because I know it's taken a great toll on everybody. I'm sorry.[29]

He also wrote three letters to the court, asking for death in two of them.[30] The court accepted the jury's recommendation, sentencing Saunders to death for his capital convictions and life for his attempted murder conviction.[31]

B. Direct appeal

Saunders was thrice appointed counsel for his direct appeal. His first attorney asked to withdraw in November 2005 because of the expense.[32] His second attorney filed an *Anders* brief in March 2006.[33] The CCA then appointed Joe W. Morgan III, who filed an eighty-page brief in July 2006.[34]

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26. Tab P-41 at 8, 142–45; *see* Tab P-10, ECF No. 41-15.
27. Tab P-18 at R. 1338, ECF No. 41-23; Tab P-19, ECF No. 41-24 (verdict form).
28. Judicial override was prospectively abolished in 2017. Ala. Laws Act 2017-131.
29. Tab P-20 at R. 1348, ECF No. 41-25.
30. *Id.* at R. 1348–49; *see* Tab P-42, Part 2, at C. 230–32.
31. Tab P-20 at R. 1357–58, 1361.
32. Tab P-41 at C. 196, ECF No. 41-46.
33. Tab R-43, ECF No. 47-2.
34. Tab P-24, ECF No. 41-29.

Of relevance to Saunders's petition, the brief raised an ineffective assistance claim with "abandonment" language. The claim stated, "During [Saunders's] testimony, Defense Counsel abandoned the defense of Timothy Saunders and cast his lot with the State Prosecutor,"[35] then cited portions of Saunders's direct examination.[36] Allegedly, "at this point in the trial, Defense Counsel bailed out and Timothy Saunders was left to fend for himself, with one exception. Defense Counsel practically begged for a guilty verdict, and instilled hatred in the minds of the jury. This conviction was obtained while Timothy Saunders had no lawyer."[37] The claim's only support came from two ineffective assistance cases, *Thompson v. Haley*[38] and *State v. Hamlet*.[39]

Thus, the CCA properly treated this as an ineffective assistance claim, not an abandonment claim. The court set forth the *Strickland v. Washington*[40] standard, then held that counsel "made a reasonable, tactical decision to admit to the underlying facts of the crimes, and then to argue that Saunders did not commit capital murder because he was under the influence of crack cocaine and, therefore, unable to form a specific intent."[41] Considering the first prong of *Strickland*, the court noted, "The portion of defense counsel's direct examination of Saunders to which

35. *Id.* at 67.

36. *Id.* at 67–68.

37. *Id.* at 69.

38. 255 F.3d 1292, 1303 (11th Cir. 2001).

39. 913 So. 2d 493, 499 (Ala. Crim. App. 2005).

40. 466 U.S. 668 (1984).

41. *Saunders*, 10 So. 3d at 92–93.

Saunders now objects was entirely consistent with defense counsel's strategy to admit to certain facts, but to challenge the prosecution's theory regarding intent and to urge the jury to convict Saunders of lesser-included offenses."[42] Moreover, the court explained that there was no "abandonment:"

> Defense counsel cannot be said to have "abandoned" his client by making such strategic choices as part of the adversarial process. Counsel here did not abandon Saunders; rather, he made a reasonable tactical decision to elicit from Saunders his admission that he had struck Mr. Clemons and had stolen money from Mr. Clemons's wallet and from Mrs. Clemons's purse and then ran home. This was consistent with the defense strategy—a strategy that was dictated, to a large extent, by Saunders's own confession to the police—that focused on Saunders being so impaired by his ingestion of crack cocaine that he could not have formed the specific intent to kill.[43]

Turning then to the second *Strickland* prong, the court found no prejudice, explaining, "The evidence against Saunders was overwhelming, and Saunders has not shown a reasonable probability that defense counsel's questions affected either the jury's verdicts at the guilt phase or the jury's recommendation that Saunders receive the death sentence."[44]

Saunders raised this claim in the Alabama Supreme Court, contending that the CCA's decision was in conflict with *Strickland*.[45] The state court denied certiorari in 2008,[46] as did this Court in 2009.[47]

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42. *Id.* at 93.

43. *Id.* at 93–84 (citation omitted).

44. *Id.* at 94.

45. Tab R-45 at 60–61, ECF No. 47-4.

46. Tab R-46, ECF No. 47-5.

47. *Saunders v. Alabama*, 129 S. Ct. 2433 (2009) (mem.).

C. Rule 32 (state postconviction) proceedings

For state postconviction, Saunders acquired pro bono counsel from Balch & Bingham LLP, one of the preeminent law firms in Alabama. His attorneys were not novices: Michael L. Edwards was admitted to practice in 1966 and has been a "Mid-South Super Lawyer" since 2008,[48] while John G. Smith was admitted to practice in 1992 and had then been practicing at Balch for five years.[49]

Balch counsel filed a Rule 32 petition on November 24, 2009.[50] Among other claims, they argued that trial counsel had rendered per se ineffective assistance by conceding Saunders's guilt. In toto, this claim alleged:

> 97. Inexplicably, trial counsel placed Mr. Saunders on the stand and not only allowed him to admit killing the deceased victim but also, in effect, took on the role of prosecutor in questioning Mr. Saunders. Trial counsel's actions caused Mr. Saunders to provide the State with the functional equivalent of a guilty plea. Trial counsel's concession of guilt also likely impacted their performance at every stage of the trial.
>
> 98. Trial counsel's concession of guilt violated not only Mr. Saunders [sic] right under the due process clause to plead not guilty, but also his right to "hold the government to strict proof beyond a reasonable doubt" and "have his guilt or innocence decided by the jury." *Wiley v. Sowders*, 647 F.2d 642, 650 (6th Cir. 1981). *See also Francis v. Spraggins*, 720 F.2d 1190, 1194 (11th Cir. 1983). Such conduct is per se ineffective assistance of counsel and "triggers a presumption of prejudice." *United States v. Williamson*, 53 F.3d 1500, 1511 (10th Cir. 1995). *Accord*, *Brown v. Rice*, 693 F. Supp. 381, 396 (W.D.N.C. 1988) ("[counsel's concession of guilt is ineffective assistance] regardless of the weight of the evidence of defendant"), reversed on other grounds, *Brown v. Dixon*, 891 F.2d 490 (4th Cir. 1989); *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504, 507–08

48. *Michael L. Edwards*, BALCH & BINGHAM LLP, https://www.balch.com/people/e/edwards-michael-l (last accessed Sept. 25, 2020).

49. *John G. Smith*, BALCH & BINGHAM LLP, https://www.balch.com/people/s/smith-john-g (last accessed Sept. 25, 2020).

50. Tab P-29, ECF No. 41-34.

> (1985) ("[W]hen counsel . . . admits his client's guilt, the harm is so likely and so apparent that . . . prejudice need not be addressed.") Accordingly, Mr. Saunders [sic] conviction must be reversed. *United States v. Swanson*, 943 F.2d 1070, 1071 (9th Cir. 1991) (finding that counsel's concession of guilty is "a deprivation of . . . due process and the effective assistance of counsel").[51]

The circuit court, which had also served as the trial court—typical for Rule 32 proceedings[52]—summarily dismissed the petition in February 2010, finding Saunders's ineffective assistance claims insufficiently pleaded or meritless.[53] Due to a mishap in service, the parties did not become aware of this order until July. Saunders's unopposed motion for out-of-time appeal was denied.[54] But when Saunders appealed from the denial of that motion, the CCA dismissed the appeal in June 2011 because it deemed the circuit court's February 2010 order void, as the appellate court mistakenly believed that Saunders had neither paid the filing fee nor applied to proceed in forma pauperis.[55] Saunders twice applied for rehearing[56] before petitioning for certiorari,[57] which was denied in June 2012.[58]

While the appeal from the first Rule 32 petition was moving through the courts, Balch counsel filed a second Rule 32 petition asking for an out-of-time appeal from the February 2010 order.[59] The circuit court granted permission in February 2011,

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51. *Id.* ¶¶ 97–98.
52. *See* ALA. R. CRIM. P. 32.6(d).
53. Tab P-32, ECF No. 41-37.
54. Tab R-47 at 38, ECF No. 47-6.
55. *Id.* at 116; *see* ALA. R. CRIM. P. 32.6(a). Saunders contended in his petition for rehearing that he paid a filing fee for the 2009 petition, though he did not pay for the motion for out-of-time appeal, and the State concurred. Tab R-47 at 140–41.
56. Tab R-47 at 117–66.
57. *Id.* at 167–200.
58. *Id.* at 201.
59. *Id.* at 202–16.

though the order was not recorded until that May.[60] The CCA stayed the proceedings until July 2012, then dismissed the appeal because the circuit court had not had jurisdiction to grant the petition in February 2011, as the first appeal was then still pending.[61]

But Balch counsel had a third Rule 32 petition in the works, which they filed in June 2011, again requesting an out-of-time appeal from the February 2010 order.[62] The CCA ordered the circuit court to hold this petition in abeyance,[63] and in August 2013, the three petitions were consolidated for appeal.[64]

Finally, in December 2016, the CCA affirmed the summary dismissal.[65] Concerning the claim of per se ineffective assistance, the CCA held that Saunders had not met the pleading requirements of Rule 32.6(b), which "are more stringent than those required for civil actions,"[66] and further held that the claim was due to be dismissed pursuant to Rule 32.7(d) for lack of a material issue of fact or law entitling him to relief. The court wrote:

> Initially, we note that Saunders has mischaracterized counsel's actions at trial. Although counsel did concede that Saunders did commit the act that resulted in Mr. Clemons's death, counsel argued that Saunders could not form any specific intent to kill because he was under the influence of crack cocaine at the time of the killing. Counsel did not concede Saunders's entire guilt as Saunders's argues in his brief to this Court. Moreover, even if counsel did concede Saunders's guilt, Saunders would be entitled to no relief on this claim.

60. *See id.* at 223–24.
61. *Id.* at 324–26.
62. *Id.* at 327–33.
63. *Id.* at 334.
64. *Id.* at 335–36.
65. *Saunders v. State*, 249 So. 3d 1153 (Ala. Crim. App. 2016).
66. *Id.* at 1162.

[. . .]

Alabama has held that it is not "per se" ineffective assistance for counsel to concede a defendant's limited guilt. . . . Because the presumed-prejudice standard would not apply in Saunders's case, Saunders was required to plead how he was prejudiced by counsel's concession of guilt; however, Saunders failed to do so. Therefore, according to Rule, 32.6(b), Ala. R. Crim. P., Saunders failed to meet his burden of pleading the full facts in support of this claim.

Moreover, the trial record clearly shows that Saunders made a detailed confession to police in which he gave a minute-by-minute account of the murder, that his confession was admitted into evidence over counsel's vigorous objections, and that the direct evidence connecting Saunders to the murder was overwhelming. Although it is true that counsel did concede that Saunders committed the act that resulted in Clemons's death, counsel did not concede that Saunders had any intent to kill. Counsel's entire defense was that Saunders was under the influence of crack cocaine at the time of the murder, that he was incapable of forming the specific intent to kill Clemons, and that he was guilty, at most, of manslaughter. In fact, enough evidence was presented on this defense to warrant a jury instruction on voluntary intoxication.

More importantly, this Court on direct appeal found that trial counsel was not ineffective for conceding Saunders's guilt and for questioning Saunders in the manner that he did.

[. . .]

Based on Alabama law, counsel was not "per se" ineffective for conceding that Saunders was guilty of killing Clemons. Also, given the overwhelming evidence of Saunders's guilt, Saunders could have suffered no prejudice as a result of counsel's questioning. Accordingly, there was no material issue or law or fact that would entitle Saunders to relief; therefore, this claim was correctly summarily dismissed. *See* Rule 32.7(d), Ala. R. Crim. P.[67]

The CCA denied rehearing in May 2017,[68] and the Alabama Supreme Court denied certiorari that September.[69]

67. *Id.* at 1163–66 (footnote and citation omitted).

68. Tab P-38, ECF No. 41-43.

69. Tab P-40, ECF No. 41-45.

D. Federal habeas proceedings

Saunders's habeas litigation began in the Southern District of Alabama in August 2010, while he was trying to secure an out-of-time appeal from the denial of his Rule 32 petition.[70] Balch counsel continued to represent him pro bono. The district court held the petition in abeyance until October 20, 2017,[71] and Saunders filed an amended petition the following month.[72]

The amended petition raised an ineffective assistance claim about trial counsel's decision to call Saunders and their line of questioning. The claim made several allegations:

- Counsel "failed to adequately prepare and question Mr. Saunders to elicit helpful testimony,"[73]
- Counsel asked questions "seemingly designed to elicit evidence tending to establish Mr. Saunders's culpability," leading Saunders to concede his guilt to the capital murder and inflaming the jury against him, which was per se ineffective,[74] and
- The Rule 32 petition was sufficiently specific.[75]

The district court denied the claim. First, the court held that the claim was only partially exhausted, as Saunders's allegation that trial counsel inadequately prepared him to testify was not properly presented in his Rule 32 petition.[76] Second, the court agreed with the CCA that trial counsel were not per se ineffective, as

70. Petition for Writ of Habeas Corpus, *Saunders v. Stewart*, 1:10-cv-00439 (S.D. Ala. Aug. 12, 2010), ECF No. 1.

71. Order, *Saunders v. Stewart*, 1:10-cv-00439 (S.D. Ala. Oct. 20, 2017), ECF No. 39.

72. Amended Petition for Writ of Habeas Corpus, *Saunders v. Stewart*, 1:10-cv-00439 (S.D. Ala. Nov. 27, 2017), ECF No. 41-1.

73. *Id.* ¶ 75.

74. *Id.* ¶¶ 76–79.

75. *Id.* ¶ 80.

76. Order at 25, *Saunders v. Stewart*, 1:10-cv-00439 (S.D. Ala. Feb. 1, 2019), ECF No. 51.

counsel's performance was not presumptively prejudicial under *United States v. Cronic*.[77] As such, Saunders was obligated under *Strickland* to show both deficient performance and resulting prejudice,[78] but the CCA had held that Saunders failed to plead how he was prejudiced and failed to demonstrate that he was actually prejudiced by counsel's questioning due to the "overwhelming evidence" of his guilt."[79]

The district court quoted Saunders's two-paragraph Rule 32 claim and found that the CCA was not unreasonable in holding that he failed to plead how he was prejudiced.[80] As for the CCA's holding that Saunders failed to plead facts showing actual prejudice, the district court found:

> The CCA's conclusion that counsel's questioning, which included Saunders's admitting that he killed Mr. Clemons, did not prejudice Saunders due to the "overwhelming evidence" concerning Saunders's guilt is not unreasonable under *Strickland*. In *Fla. v. Nixon*, 543 U.S. 175 (2004), the Supreme Court held "[a] presumption of prejudice is not in order based solely on a defendant's failure to provide express consent to a tenable strategy counsel has adequately disclosed to and discussed with the defendant." *Id.* at 179. Absent this presumption, *Strickland* demands a petitioner demonstrate (or, in this case plead) that, but for the unprofessional error, a reasonable probability exists that the result of the proceeding would be different. *Strickland*, 466 U.S. at 694. Saunders[] has failed to show that the CCA's holding was contrary to or an unreasonable application of clearly established federal law. Considering the plethora of evidence implicating Saunders, the Court concludes the CCA has not unreasonably applied, or reached a decision contrary to, clearly established federal law. As the Eleventh Circuit has held in a similar case,
>
> > Under such circumstances, it would be very difficult to see how the outcome of the trial would have been different had [trial counsel] not conceded [the petitioner's] guilt, as charged in the indictment. *See Nixon*, 543 U.S. at 192, 125 S. Ct. at 563

77. 466 U.S. 648 (1984); *see Castillo v. Fla. Sec'y of DOC*, 722 F.3d 1281, 1286 (11th Cir. 2013).
78. Order at 26, ECF No. 51.
79. *Id.* at 26–27 (citing *Saunders*, 249 So. 3d at 1165–66).
80. *Id.* at 27.

> ("[C]ounsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade' [by failing to concede overwhelming guilt]." (quoting *Cronic*, 466 U.S. at 656 n.19, 104 S. Ct. at 2046 n.19)).
>
> *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1252 (11th Cir. 2011). Saunders failed to demonstrate that the CCA's holding was contrary to or involved an unreasonable application of clearly established federal law.[81]

The district court granted a certificate of appealability solely as to this claim,[82] and the Eleventh Circuit declined to expand the COA.[83]

Saunders raised only one portion of his habeas claim before the circuit court: "that trial counsel elicited harmful information from him while failing to ask him more helpful questions about his mental state at the time he committed the crimes."[84] Affirming in February 2020, the Eleventh Circuit noted that its review was governed by AEDPA because the CCA denied Saunders's claim on the merits, and prevailing on a *Strickland* claim in habeas after a merits determination requires overcoming the double deference standard.[85] "[L]ike the state court and the district court," the circuit court found neither *Strickland* prong.[86]

First, the circuit court held that the CCA's finding of no deficient performance was neither contrary to clearly established federal law nor unreasonable. Counsel were not deficient for asking Saunders questions about his actions "'to draw the sting out of the prosecution's argument and gain credibility with the jury by conceding the

81. *Id.* at 27–28.
82. *Id.* at 99–100.
83. Order, *Saunders v. Warden, Holman Corr. Facility*, No. 19-10817-P (11th Cir. Aug. 26, 2019).
84. *Saunders v. Warden, Holman Corr. Facility*, 803 F. App'x 343, 346 (11th Cir. 2020).
85. *Id.* at 346–47.
86. *Id.* at 347.

weaknesses of his own case,'" which is a reasonable strategy in a case like Saunders's with overwhelming evidence against the defendant.[87] Moreover, the court noted, "Saunders does not allege that his trial counsel elicited incorrect facts or false statements. Nor does he assert that the facts counsel brought out on direct would not have come out on cross-examination anyway. And in view of his confession, they surely would have."[88] Further, the court found that counsel asked an appropriate number of questions about Saunders's mental state, concluding:

> There was good reason for counsel's strategy. Had he asked more pointed questions about Saunders' mental state at the time of the crime, as Saunders argues he should have, one wrong answer could have destroyed the defense's case (for example, if Saunders said that he knew what he was doing was wrong when he did it). Conspicuously, Saunders has never said how he would have answered more pointed questions. *See Harrington v. Richter*, 562 U.S. 86, 108 (2011) (concluding it is a reasonable strategy to avoid introducing evidence that may harm the defense).[89]

Second, the circuit court found that even if it deemed the CCA's performance analysis deficient, it "couldn't say the same about its decision on prejudice":

> As the Supreme Court has made clear, a "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). That means to prevail, Saunders must show that *every* fairminded jurist would agree that the state court erred in concluding that there is no "reasonable probability that the result of the proceeding would have been different." *Johnson v. Sec'y, DOC*, 643 F.3d 907, 928 (11th Cir. 2011). Saunders cannot do that.
>
> As we have already explained, Saunders does not dispute any of the harmful facts that came out during direct examination, and he has not explained how delaying the disclosure of those facts until cross-

87. *Id.* at 347–48 (quoting *Smith v. Spisak*, 558 U.S. 139, 161 (2010) (Stevens, J., concurring in part and concurring in the judgment)).

88. *Id.* at 348.

89. *Id.* (citation edited).

> examination would have helped him. Nor has Saunders proven that his answers to any of the questions that he asserts counsel should have asked would have been helpful at all, much less significantly helpful. Considering those problems and the overwhelming evidence proving his guilt (including his own confession and Agnes Clemons' testimony), we cannot say that every fairminded jurist would disagree with the state court's decision that Saunders did not suffer prejudice.[90]

The Eleventh Circuit denied rehearing and rehearing en banc on April 22.[91]

While the circuit court's decision was pending, Balch counsel withdrew.[92] Saunders is now represented by the Federal Defenders for the Middle District of Alabama. His January Rule 60(b)(1) motion, based on Balch counsel's failure to raise *Martinez v. Ryan*[93] claims, was denied in March[94] and remains pending in the Eleventh Circuit.[95] His July Rule 60(b)(6) motion, based on Balch counsel's concurrent representation of the Alabama Department of Corrections in an unrelated matter, was denied in August;[96] the motion to alter or amend remains pending in the district court. Saunders also filed a 42 U.S.C. § 1983 petition against the State and Balch counsel in June 2020 concerning counsel's alleged conflict and Saunders's failure to timely elect a method of execution.[97]

REASONS THE PETITION SHOULD BE DENIED

Saunders presents the Court with a meritless, fact-bound claim attacking the

90. *Id.* at 349 (citations edited).
91. Order, *Saunders v. Warden, Holman Corr. Facility*, No. 19-10817-P (11th Cir. Apr. 22, 2020).
92. Motion to Withdraw as Counsel, *Saunders v. Stewart*, 1:10-cv-00439 (S.D. Ala. Feb. 3, 2020), ECF No. 60.
93. 566 U.S. 1 (2012).
94. Order, *Saunders v. Stewart*, 1:10-cv-00439 (S.D. Ala. Mar. 12, 2020), ECF No. 65.
95. *Saunders v. Warden, Holman Corr. Facility*, No. 20-12427-P (11th Cir.).
96. Order, *Saunders v. Stewart*, 1:10-cv-00439 (S.D. Ala. Aug. 20, 2020), ECF No. 84.
97. Complaint, *Saunders v. Dunn*, 2:20-cv-00456 (M.D. Ala. June 30, 2020), ECF No. 1.

validity of the state court's reasonable judgment—an attack on Alabama's postconviction scheme that was not presented to the lower courts. His trial counsel were not ineffective in "drawing the sting" by questioning him about harmful information that the prosecution would have brought out. While Saunders framed his complaint against trial counsel as "abandonment" on direct appeal, he relied on decisions concerning ineffective assistance to support his claim, and the CCA properly considered the claim through the *Strickland* lens. In Rule 32, Saunders instead offered a claim of per se ineffective assistance, but this was likewise rejected, and as the claim provided insufficient factual allegations to support a standard claim of ineffective assistance, the CCA properly affirmed the dismissal on Rule 32.6(b) and Rule 32.7(d) grounds. Finally, the district court and the Eleventh Circuit correctly analyzed the habeas claim through the doubly deferential lens of AEDPA plus a merits *Strickland* determination from the state court. As Saunders has raised no claim worthy of review, the Court should deny certiorari.

I. The Court should deny certiorari because the federal courts correctly accorded deference to the state-court decision.

At this outset, the claims Saunders presents in his petition concerning the validity of Alabama's postconviction scheme were not properly raised below, and this Court has stated that ordinarily, it "does not decide questions not raised or resolved in the lower courts."[98] His claims are not so extraordinary that the Court should consider them when the lower courts were not afforded a proper opportunity to do so.

98. *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

Moreover, Saunders's claim that the federal courts erred by granting AEDPA deference to the state-court decision is unfounded and not cert-worthy.

A. Rule 32's full-fact pleading requirement is not unduly burdensome.

Saunders contends that Alabama's postconviction pleading requirements are "harsh" and trapped Balch counsel.[99] While Rule 32 does require more than mere notice pleading, its pleading requirement is not an insurmountable obstacle, nor is it particularly different from the pleading required in federal habeas.

Rule 2(c) of the habeas rules provides that a properly pleaded § 2254 petition must "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground."[100] As the Court noted in 1977, "Notice pleading is not sufficient, for the petition is expected to state facts that point to a real possibility of constitutional error."[101] This is a more stringent requirement than what is necessary in civil pleading.[102]

Federal courts have rejected habeas claims for failure to comply with Rule 2(c)'s pleading requirement.[103] As the Eleventh Circuit noted:

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99. Pet. 18–19.

100. FED. HABEAS R. § 2254 2(c)(1), (2).

101. *Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977) (quoting Advisory Committee Note to Rule 4, Rules Governing Habeas Corpus Cases) (cleaned up).

102. *Mayle v. Felix*, 545 U.S. 644, 649 (2005).

103. *E.g.*, *Bush v. Gray*, No. 19-3309, 2019 WL 4943765, at *1 (6th Cir. Sept. 10, 2019) (affirming denial of petition in which claims were "vague, conclusory, and unsupported by any facts"); *Samples v. Ballard*, 860 F.3d 266, 275 (4th Cir. 2017) (holding that district court did not need to hear new claims raised in objection to magistrate's recommendation because they were not pleaded in petition, citing Rule 2(c)); *Hittson v. GDCP Warden*, 759 F.3d 1210, 1265 (11th Cir. 2014) ("These generalized allegations from Hittson's motion to further amend do not satisfy Rule 2(c)'s requirements; Hittson has not alleged any facts to support his allegations that his state habeas attorneys were incompetent for failing to raise the four 'new' claims.").

> The reason for the heightened pleading requirement—fact pleading—is obvious. Unlike a plaintiff pleading a case under Rule 8(a), the habeas petitioner ordinarily possesses, or has access to, the evidence necessary to establish the facts supporting his collateral claim; he necessarily became aware of them during the course of the criminal prosecution or sometime afterwards. . . . The evidence supporting an ineffective assistance of counsel claim is available following the conviction, if not before. Whatever the claim, though, the petitioner is, or should be, aware of the evidence to support the claim before bringing his petition.[104]

Like Rule 2(c), Rule 32.6 of the Alabama Rules of Criminal Procedure requires specificity in postconviction pleading:

> Each claim in the petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.

Rule 32.3 echoes this requirement, noting, "The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Failure to meet this standard may result in summary dismissal:

> If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition.[105]

The CCA has consistently noted that Rule 32 pleading is more stringent than notice pleading.[106] To sufficiently plead a claim, a petitioner must provide adequate

104. *Borden v. Allen*, 646 F.3d 785, 810 (11th Cir. 2011), *cert. denied*, *Borden v. Thomas*, 566 U.S. 941 (2012) (mem.).

105. ALA. R. CRIM. P. 32.7(d).

106. *E.g.*, *Daniel v. State*, 86 So. 3d 405, 410–11 (Ala. Crim. App. 2011).

facts to show that the claim may be meritorious:

> The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b).[107]

For example, as Saunders notes,[108] it would be insufficient in a Rule 32 proceeding to plead only that counsel were ineffective for failing to retain an expert. Rather, a petitioner would need to plead the name of the expert who should have been retained, the expert's availability at the time of trial, and the substance of the expert's testimony—facts that show the expert could have been retained and would have made a difference to the outcome of the case.[109]

But Rule 32's heightened pleading requirement is not unduly burdensome. Rather, it is designed to make the petitioner—no longer a criminal defendant, but rather a litigant in a collateral civil proceeding[110]—plead facts showing that his rights have actually been violated.

B. Saunders's Rule 32 claim was insufficiently pleaded.

As set forth above, Saunders's Rule 32 claim contending that his trial counsel were per se ineffective was pleaded in two paragraphs in his first petition, filed in

107. *Hyde v. State*, 950 So. 2d 344, 356 (Ala. Crim. App. 2006).

108. Pet. 20.

109. *See, e.g.*, *Daniel*, 86 So. 3d at 425–26 (failure to comply with pleading requirement where no expert was identified by name).

110. *Miller v. State*, 99 So. 3d 349, 353 (Ala. Crim. App. 2011) (citing *Fay v. Noia*, 372 U.S. 391, 423–24 (1963)).

November 2009.[111] In late January 2010, the State moved for summary dismissal.[112] The circuit court granted the motion approximately two weeks later,[113] but counsel were not timely served, and they filed a reply to the State's motion on February 26.[114] This reply did not correct the pleading deficiencies in the petition, nor did either of Saunders's successive petitions seeking an out-of-time appeal.[115] Saunders's brief to the CCA likewise failed to address the pleading deficiency, instead merely pointing to a portion of the preliminary statement of his petition.[116]

In truth, Saunders could not have pleaded facts showing that was entitled to relief because his counsel's questioning did not constitute per se ineffective assistance. As the Court set forth in *Cronic*, prejudice may only be presumed where:

> (1) there is a "*complete* denial of counsel" at a "critical stage" of the trial, (2) "counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing," or (3) under the "circumstances the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair."[117]

Here, the first *Cronic* situation does not apply because Saunders had counsel with him throughout his entire trial. The second fails as well; counsel's theory of defense was that while Saunders had committed bad acts, he could not form the requisite specific intent for capital murder, and Saunders testified about his supposed crack use on the night of the crime. Finally, the third *Cronic* situation does not apply

111. Tab P-29 ¶¶ 97–98, ECF No. 41-34.
112. Tab P-30, ECF No. 41-35.
113. Tab P-32, ECF No. 41-37.
114. Tab P-31, ECF No. 41-36.
115. *See* Tab R-47 at 202–15, 327–33 ECF No. 47-6.
116. Tab P-33 at 27–34, ECF No. 41-38.
117. *Castillo*, 722 F.3d at 1286 (quoting *Cronic*, 466 U.S. at 659–61) (emphasis in *Castillo*).

because counsel used an accepted strategy to lessen their client's chances of being convicted of capital murder and sentenced to death.

Turning from per se ineffective assistance to *Strickland* ineffective assistance, Saunders would have been obligated to plead facts showing both that counsel rendered deficient performance in questioning him and that he was thereby prejudiced. Even if he had attempted to fully plead the facts of this claim, it is unclear what he could have offered. The negative facts that counsel brought out were found either in Saunders's confession or in Agnes's testimony, and so, regardless of what counsel had asked Saunders, the facts would have been put before the jury through the State's questioning. Counsel could not reasonably dispute Saunders's confession, and so they used his admissions to argue that he was being forthright, that he had a serious drug problem, and that he was sorry for what he had done while high. For Saunders to plead facts showing deficient performance in this case would be difficult; for him to plead facts showing prejudice would be nearly impossible.

C. The Eleventh Circuit considers Rule 32.6(b) dismissals to be merits determinations.

The exhausted portion of the claim that Saunders raised in habeas before the district court was based on the "per se" ineffective assistance claim in his Rule 32 petition.[118] The circuit court summarily dismissed that claim,[119] and the CCA affirmed for two reasons. First, Saunders failed to sufficiently plead his claim, so it

118. Amended Petition for Writ of Habeas Corpus ¶ 74, ECF No. 41-1.
119. Tab P-32, ECF No. 41-37.

was due to be dismissed pursuant to Rule 32.6(b). Second, his counsel were not per se ineffective, and "given the overwhelming evidence of Saunders's guilt, Saunders could have suffered no prejudice as a result of counsel's questioning," so the claim was due to be dismissed for failure to state a claim upon which relief could be granted pursuant to Rule 32.7(d).[120]

Since 2011, the Eleventh Circuit has held that a Rule 32.6(b) dismissal is a merits determination entitled to AEDPA deference. As the circuit court explained in *Borden v. Allen*, Alabama's postconviction scheme "closely resembles" the 28 U.S.C. § 2254 and § 2255 schemes.[121] The court discussed habeas Rule 2(c) and the warning in Rule 4 that a district court must dismiss a petition that is facially insufficient, noting, "[S]uch a summary dismissal by a federal court constitutes a ruling on the merits of a petitioner's or movant's claims."[122] On the state side, Rule 32.6(b) acts in much the same way as Rule 2(c) does, whereas Rule 32.7(d) functions like Rule 4. The sample forms attached to the § 2254 rules and to Rule 32 provide similar warnings about the necessity of pleading sufficient facts.[123] Thus, when a state court dismisses a claim on Rule 32.6(b) grounds, this is equivalent to a federal court dismissing on Rule 2(c) grounds—a merits determination.[124]

120. *Saunders*, 249 So. 3d at 1162–66.
121. 646 F.3d at 809.
122. *Id.* at 810.
123. *Id.* at 809–12.
124. *Id.* at 812–13.

D. The federal courts properly gave AEDPA deference to the state court's merits determination.

In Saunders's case, the federal courts correctly accorded deference to the state court's merits determination of his ineffective assistance claim.

Ordinarily, a federal court cannot grant habeas relief on a claim that has not been exhausted in state court.[125] If a claim is properly exhausted and was adjudicated on the merits below, then the reviewing court may only grant relief if the state decision was contrary to clearly established federal law or an unreasonable determination of the facts.[126] Here, Saunders exhausted his claim in state court, and it was summarily dismissed in accordance with Rule 32.6(b) and 32.7(d), a merits determination. That decision was not contrary to federal law, and it certainly was not unreasonable in light of the facts of this case.

Saunders may not appreciate the work that his Balch counsel did for him pro bono for a decade. He may disagree with the Rule 32 pleading burden. But the fact remains that he presented the state courts with a meritless, insufficiently pleaded claim, that claim was properly dismissed, and the federal courts correctly denied relief. As Saunders's claim is meritless, the Court should deny certiorari.

II. Saunders's *Martinez v. Ryan* claim is meritless.

Saunders's petition[127] touches on a claim raised in his first of two Rule 60(b) motions in the district court: because Balch counsel represented him in Rule 32 and

125. 28 U.S.C. § 2254(b)(1).
126. *Id.* § 2254(d).
127. Pet. 23–26.

federal habeas proceedings, he was unable to raise a *Martinez v. Ryan* claim concerning defaulted claims of ineffective assistance of trial counsel, as Balch counsel could not reasonably raise claims against themselves.[128] As for what these meritorious *Martinez* claims might be, Saunders remains vague, but the lone defaulted claim he presented in his Rule 60(b) motion was that trial counsel were ineffective in preparing him to testify.[129]

Martinez requires both a showing of cause for the procedural default and a showing that the underlying claim "has some merit."[130] For an ineffective assistance claim, the second *Martinez* prong requires a showing of a legitimate *Strickland* violation. In other words, to be entitled to relief, Saunders needed to show both that his trial counsel were unconstitutionally ineffective in preparing him to testify and that he was thereby prejudiced, such that there is a reasonable probability that the outcome of his trial would have been different if not for the alleged ineffectiveness.[131] Here, the district court correctly denied relief, concluding:

> Saunders has wholly failed to show that the underlying claim has even "some merit". As the State points out, Saunders has not indicated how his counsel failed to prepare him to testify or how this had any effect on the outcome of the trial. And it is not premature to expect Saunders to make some showing of merit to the claim he wishes to use to seek the extraordinary action of relief from the judgment.[132]

Saunders has appealed from the denial of the Rule 60(b) motion, and that matter

128. Petitioner's Motion to Grant Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(1) at 5, *Saunders v. Stewart*, 1:10-cv-00439 (S.D. Ala. Jan. 31, 2020), ECF No. 59.
129. *Id.* at 2–3.
130. 566 U.S. at 14.
131. *Strickland*, 466 U.S. at 688.
132. Order at 7, *Saunders v. Stewart*, 1:10-cv-00439 (S.D. Ala. Mar. 12, 2020), ECF No. 65.

remains before the Eleventh Circuit.[133] In any case, his supposed *Martinez* grievance does not give rise to a cert-worthy claim.

CONCLUSION

The Court should deny certiorari.

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133. *Saunders v. Warden, Holman Corr. Facility*, No. 20-12427-P (11th Cir.).