No. 20–7589
CAPITAL CASE

**In the SUPREME COURT of the UNITED STATES**

DONALD DALLAS,

Petitioner,

v.

TERRY RAYBON, Warden,

Respondent.

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

# BRIEF IN OPPOSITION

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**CAPITAL CASE**
**QUESTIONS PRESENTED**
**(Rephrased)**

1. The Eleventh Circuit applied de novo review in adjudicating Donald Dallas's penalty-phase ineffectiveness claim. The court of appeals reweighed the totality of his mitigation evidence, including the new evidence that is essentially cumulative of the evidence presented at his trial, against the aggravating circumstances and determined that he failed to establish that he was prejudiced by his counsel's performance. Should this Court deny certiorari where the Eleventh Circuit properly followed *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny and correctly denied Dallas's claim?

2. The Alabama Court of Criminal Appeals denied Dallas's claim that his right to conflict-free counsel was violated where his lead counsel simultaneously represented the Alabama Department of Mental Health and Mental Retardation at the time of his trial. Applying AEDPA's deferential standard of review, the Eleventh Circuit determined that the state court's denial of his claim was neither contrary to nor an unreasonable application of then-existing clearly established federal law or based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d). Should this Court deny certiorari where this case is a poor vehicle for deciding whether federal habeas courts can consider precedent from this Court post-dating a state-court decision in determining whether that decision was reasonable because the Eleventh Circuit properly applied this Court's precedents as of the time of the state court's decision in correctly denying his claim?

## RELATED CASES

Underlying Trial and Direct Appeal:

*State of Alabama v. Donald Dallas*, CC–94–2142, Circuit Court of Montgomery County, Alabama.
Judgment Entered: November 16, 1995.

*State v. Dallas*, CR–95–354, 711 So. 2d 1101 (Ala. Crim. App. 1997), Alabama Court of Criminal Appeals.
Judgment Entered: March 21, 1997.
Rehearing Denied: May 23, 1997.

*Ex parte Dallas*, No. 1961457, 711 So. 2d 1114 (Ala. 1998), Alabama Supreme Court.
Judgment Entered: March 13, 1998.

*Dallas v. Alabama*, No. 97–9579, 525 U.S. 860 (1998) (mem.). United States Supreme Court.
Judgment Entered: October 5, 1998.

State Postconviction Proceeding (Rule 32) and Appeal:

*Dallas v. State*, CC–94–2142.60, Circuit Court of Montgomery County, Alabama.
Judgment Entered: September 25, 2001.

*Dallas v. State*, CC–94–2142.60, Circuit Court of Montgomery County, Alabama.
Motion to Alter, Vacate, or Amend Denied: October 29, 2001.

*Dallas v. State*, CR–01–0488, Alabama Court of Criminal Appeals.
Appeal Dismissed: December 7, 2001.

*Dallas v. State*, CC–94–2142.60, Circuit Court of Montgomery County, Alabama.
Granting Motion to Toll Time for Appeal: February 12, 2002.

*Dallas v. State*, CR–01–1088, Alabama Court of Criminal Appeals.
Appeal Stricken: March 1, 2002.

*Ex parte Dallas*, No. 1011134, (Ala. 2002), Alabama Supreme Court.
Judgment Entered: June 28, 2002.

Federal Habeas (2254) and Appeal:

*Dallas v. Dunn*, No. 2:02–cv–00777, United States District Court for the Middle District of Alabama, Northern Division.

Judgment Entered: July 14, 2017.

*Dallas v. Warden*, No. 17–14570, 964 F.3d 1285 (11th Cir. 2020), Eleventh Circuit Court of Appeals.

Judgment Entered: July 13, 2020.

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## STATEMENT OF THE CASE

### A. Statement of the Facts

On the afternoon of July 12, 1994, Dallas observed 73-year-old Hazel Liveoak loading groceries into her car at the Food World in Prattville, Alabama. Doc. 13–2 at C. 357–58.[1] Dallas shoved his way into her car, forcing her face down on the floorboard. *Id.* at 358. He demanded money from her, but when she told him that she had only $10, he and Carolyn "Polly" Yaw, his codefendant, abducted her. *Id.* With Mrs. Liveoak sitting in the front passenger seat and Yaw sitting in the back seat, Dallas drove to Greenville, Alabama. *Id.* Mrs. Liveoak prayed for him during this trip. Doc. 13–6 at R. 795. Once there, he stopped the car at the end of a dirt road, ordered Mrs. Liveoak to give him her credit cards, and put her in the trunk of her vehicle. Doc. 13–2 at C. 358.

Dallas and Yaw then drove Mrs. Liveoak's car to the Am-South Bank located near the K-Mart on East South Boulevard in Montgomery, Alabama. *Id.* Dallas parked the car in a remote area of the K-Mart parking lot, and Yaw used Mrs. Liveoak's credit card eleven times at the ATM that was located at the bank. *Id.* While Yaw was using Mrs. Liveoak's credit card, Dallas exited the vehicle, sat on the trunk of the car, and spoke with her. *Id.* She told Dallas that she had a heart condition and prayed for him again. *Id.* at 358, 458. She also told him that he could call her son and gave him the number, but he did not write it down. Doc. 13–6 at R. 798. He promised her that he would call the police to make sure that she was released from her car. *Id.* at 798–99.

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[1] Document numbers refer to the district court proceedings below.

Dallas then called a cab, and he and Yaw went to a crack house. Doc. 13–7 at R. 822. Dallas testified at his trial, and when asked how many pay phones he passed on his way from the bank to the crack house, he replied, "Five hundred." *Id.* Although he passed a number of pay phones, he never called the police to obtain help for Mrs. Liveoak despite promising her that he would send help. Doc. 13–2 at C. 359; Doc. 13–7 at R. 822–23. Dallas "had hundreds of opportunities to get help for Mrs. Liveoak if his intention was to release her; instead, he chose to leave Mrs. Liveoak in the trunk of the car." Doc. 13–2 at C. 359.

After purchasing crack with the money that they stole from Mrs. Liveoak, Dallas and Yaw went to a motel where they smoked crack all night. *Id.* at 359. On the following day, Dallas bragged to a friend that he had abducted an elderly lady, placed her in the trunk of a car, and left her. *Id.* Dallas was very sarcastic during this conversation and stated that he "hoped the old lady would die." *Id.* Mrs. Liveoak was never released from the trunk of her vehicle, and she died as a result of homicide by heart attack. *Id.* When asked on cross why he left Mrs. Liveoak in the trunk of her car knowing that she had a heart condition, Dallas stated that he did not want to get caught. Doc. 13–7 at R. 824.

On the evening of July 13, Montgomery Police Department Corporal Steve Saint and Montgomery Police Department Detective David Hill received a call to respond to the K-Mart on the East South Boulevard. Doc. 13–6 at R. 625. They arrived at approximately 8:10 p.m. *Id.* at 669–70. Millbrook Police Chief Danny Pollard arrived thereafter, and he provided the keys to Mrs. Liveoak's car to

Corporal Saint. *Id.* at 628–29. Corporal Saint opened the trunk, and they found her body. *Id.* Evidence presented at trial showed that she lived for hours and had numerous bruises and cuts on her hands that were consistent with attempting to free herself and banging on the lid of the trunk to draw attention to her precarious situation. Doc. 13–2 at C. 359.

Three days before he abducted Mrs. Liveoak, Dallas abducted Wesley Portwood, an elderly man, from the K-Mart parking lot in Prattville. *Id.* at 360. Dallas forced Mr. Portwood face down on the floorboard of his vehicle, drove him to a remote area, and ordered him out of his car. *Id.* Dallas told Mr. Portwood to lie down in some weeds, and when he objected, Dallas offered to put him inside the trunk of his car. *Id.* Mr. Portwood declined, stating that he would "smother inside there." *Id.* Dallas allowed Mr. Portwood to lie down in the weeds while he robbed him, and Mr. Portwood survived the abduction. *Id.*

**B. The Proceedings Below**

Algert Agricola, Dallas's lead counsel, was appointed to represent him on February 1, 1995. Doc. 13–1 at C. 134. On that same day, Agricola was appointed by the Alabama Attorney General as a Special Deputy Attorney General for the limited purpose of representing the Alabama Department of Mental Health and Mental Retardation ("DMHMR") in an entirely unrelated civil matter. *Id.* at 140.

Agricola moved the trial court for leave to withdraw as Dallas's counsel and filed a supporting affidavit in which he asserted that there is a potential conflict of interest because the "Attorney General . . . will represent the State of Alabama on

appeal from a conviction in this matter." Pet. App. D; Doc. 13–1 at C. 135–39. He did not cite any caselaw in support of his motion to withdraw. Doc. 13–1 at C. 135–37. In addition, he informed the court that he "had conferred with the Disciplinary Commission of the Alabama State Bar Association concerning the possibility of a conflict of interest posed in these circumstances" and that "counsel for the Disciplinary Commission does not believe there exists a conflict under the Rules of Professional Conduct in these circumstances." *Id.* at 135–36.

The trial court held a hearing on his motion to withdraw. Doc. 126–1. At the hearing, Agricola assured the trial court that he would represent Dallas to the best of his ability if he remained on the case. Pet. App. A6. After listening to the arguments of counsel and considering the opinion of the Alabama State Bar Association, the court determined that there was no actual conflict of interest that would prevent Agricola from zealously representing Dallas and denied his motion. *Id.* at A37. In its Order denying his motion, the court expressly stated that it had held a hearing at which it heard argument from counsel and considered the applicable law. Doc. 13–1 at C. 141 ("hearing having been held and argument and applicable law considered").

A Montgomery County, Alabama jury found Dallas guilty of the capital offenses of murdering Hazel Liveoak during the course of a kidnapping and during the course of a robbery, in violation of sections 13A–5–40(a)(1) and (a)(2) of the Code of Alabama. Doc. 13–1 at C. 7–8, 24. The jury recommended by a vote of eleven to

one that Dallas should be sentenced to death. *Id.* at 5. The trial court followed the jury's recommendation and sentenced him to death. Doc. 13–2 at C. 369.

Dallas's convictions and death sentence were affirmed on direct appeal. *Dallas v. State*, 711 So. 2d 1101 (Ala. Crim. App. 1997), *aff'd*, 711 So. 2d 1114 (Ala. 1998), *cert denied*, 525 U.S. 860 (1998) (mem.).

Dallas next filed his Rule 32 petition for postconviction relief in the state circuit court. Doc. 13–12 at Tab 13A. The circuit court held an evidentiary hearing at which Jeffery Duffey, one of his trial counsel, and Susan James, his mitigation investigator, testified. *Id.* at Tab 13. The parties deposed Algert Agricola, his lead counsel.[2] Doc. 13–13 at Tab 14. After the circuit court denied his petition, Dallas moved the court to alter, amend, or vacate its judgment. *Id.* at Tab 14A, Tab 15. The court denied his motion. Doc. 13–16 at Tab 66.

Because Dallas did not file a timely notice of appeal, the State moved the Court of Criminal Appeals ("CCA") to dismiss his appeal. Doc. 13–14 at Tab 18. The CCA granted the State's motion, dismissed Dallas's appeal, and entered the Certificate of Judgment. Doc. 13–16 at Tab 68.

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[2] Dallas asserts that his "defense team candidly confessed their abject failure to prepare for either phase of trial, in primary part, because of lead counsel's conflict." Pet. 10. It is unsurprising that he fails to cite any record support for that allegation because it is patently false. As the district court correctly found, his counsel testified that they consulted with and obtained valuable information from Dallas, investigated his crime, learned about his horrific home life and upbringing, developed and pursued the strategy of presenting evidence at the guilt phase of the trial showing that he lacked the intent to kill Hazel Liveoak, and presented mitigation evidence at both phases of the trial regarding his dysfunctional family, traumatic childhood, long-term substance abuse, intoxication at the time of the crime, domination by his codefendant, and remorse for Mrs. Liveoak's death. Pet. App. B183 n.156. The district court also correctly found that James testified at length about her investigation into and development of mitigation evidence. *Id.* So, again, Dallas's counsel and mitigation investigator never testified that they failed to prepare for his trial.

Dallas returned to the circuit court and moved that court to enter an order holding that his post-judgment motion tolled the time for filing his notice of appeal. *Id.* at Tab 70. The court granted his motion, and he filed a second notice of appeal. *Id.* at Tabs 71, 73. But the CCA struck his appeal, holding that the court "has already dismissed the appellant's attempted appeal of the judgment herein for lack of a timely notice of appeal." *Id.* at Tab 75. The Alabama Supreme Court denied certiorari. Doc. 13–14 at Tab 27.

Dallas next filed a petition for writ of habeas corpus in the Middle District of Alabama. Doc. 1. Respondents answered Dallas's petition. Doc. 49. In 2007, Dallas submitted affidavits that were executed by his mother, siblings, and others to the district court in an effort to support his claim that his counsel were ineffective at the penalty phase of his trial. Doc. 87, Ex. 4–16. The district court denied and dismissed his habeas petition. Pet. App. B1–B263. The court did not grant him a certificate of appealability. *Id.* at B263.

Dallas moved the Eleventh Circuit to grant him a certificate of appealability. The court granted his motion as to two of his claims and instructed the parties to address whether the second claim—his penalty-phase ineffectiveness claim—is procedurally defaulted. After briefing and oral argument, the court of appeals affirmed the district court's judgment. Pet. App. A1–A56 (*Dallas v. Warden*, 964 F.3d 1285 (11th Cir. 2020)).

## REASONS FOR DENYING THE PETITION

This Court should not grant certiorari on either of the questions presented by Dallas. The Eleventh Circuit's denial of his penalty-phase ineffectiveness claim does not conflict with *Strickland* and its progeny or create a circuit split. Contrary to Dallas's assertions in his petition, the Eleventh Circuit did not exclude any of his mitigation evidence when it reweighed that evidence against the aggravating circumstances. Instead, the court of appeals, applying de novo review, reweighed the totality of his mitigation evidence, including the new evidence that it found to be essentially cumulative of evidence presented at his trial, against the aggravating circumstances and determined that he is not entitled to relief because he failed to establish that he was prejudiced by his counsel's performance. That decision is correct and should not be disturbed.

Dallas's second claim likewise is unworthy of certiorari review. The Eleventh Circuit applied AEDPA deference in determining that the CCA's denial of his claim that his right to conflict-free counsel was violated where his lead attorney, Algert Agricola, simultaneously represented the DMHMR at the time of his trial was reasonable. In holding that the CCA's decision was neither contrary to nor an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts, the Eleventh Circuit applied precedent from this Court that existed at the time of the CCA's decision. Because the court of appeals properly applied then-existing precedent to the facts of his case in correctly resolving his claim, this case is a poor vehicle for deciding whether federal habeas

courts can consider precedent from this Court that post-dates a state-court decision in determining whether that decision was reasonable. This Court accordingly should deny Dallas's petition.

## I. The Eleventh Circuit correctly followed *Strickland* and this Court's other precedents and did not create a circuit split in holding that Dallas failed to establish that he was prejudiced by his counsel's performance at the penalty phase of his trial.

Dallas seeks certiorari review of the Eleventh Circuit's denial of his claim that his counsel were ineffective at the penalty phase of his trial for failing to adequately investigate and present mitigation evidence. Pet. 16–31. But he misreads the decision below. Although the Eleventh Circuit found that much of his new mitigation evidence is essentially cumulative to the evidence that his counsel presented at his trial, the court did not "ignore" or "disregard" that evidence in adjudicating his claim. Pet. 23–31. And the court certainly did not "exclude" any of his new mitigation evidence when it reweighed the totality of the mitigation evidence against the aggravating circumstances. *Id.* at 28.

Instead, the Eleventh Circuit, applying de novo review, properly reweighed the totality of the mitigation evidence, the old and the new, against the aggravating circumstances and correctly held that, even if the new mitigation evidence had been presented at his trial, there is no reasonable probability that the outcome of his sentencing would have been different. Based on that determination, the court correctly concluded that Dallas is not entitled to relief because he failed to establish that he was prejudiced by his counsel's performance.

Dallas's argument that the Eleventh Circuit's decision conflicts with this Court's precedents and creates or contributes to a circuit split is based on a misunderstanding of the decision below. For that reason and because his claim is without merit, this Court should deny certiorari.

### A. The Eleventh Circuit's decision does not conflict with *Strickland* or this Court's other precedents.

Dallas argues that the Eleventh Circuit's decision conflicts with *Strickland v. Washington*, 466 U.S. 668 (1984), and this Court's other precedents because the court failed to consider all of his new mitigation evidence in determining whether he established prejudice. Dallas is mistaken. The Eleventh Circuit faithfully applied *Strickland* and its progeny in resolving his claim.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance was deficient because it fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced the defendant by depriving him of "a trial whose result is reliable." *Strickland*, 466 U.S. at 687–88. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686; *see also Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.").

Under *Strickland's* prejudice prong, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." 466 U.S. at 693. Instead, "[t]he question is whether there is a 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "That requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)).

To determine whether a defendant has established prejudice, courts must "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000). In reweighing the mitigating and aggravating factors, courts must consider all of the evidence, including harmful evidence that the State could have elicited to rebut the new mitigation evidence. *Wong v. Belmontes*, 558 U.S. 15, 26 (2009). So, to establish prejudice, a defendant "must show a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence . . . against the entire body of aggravating evidence." *Id.* at 20.

This Court repeatedly has held that new mitigation evidence that is essentially cumulative of evidence that was presented at trial is not sufficient to meet *Strickland's* high bar for establishing prejudice. In *Pinholster*, the Court

found that the petitioner's counsel presented evidence at trial about his "troubled childhood and adolescence," including evidence that he was run over by a car, was sent to a school for emotionally-handicapped children, spent time in juvenile halls and boys' homes, suffered from epilepsy, and that his eldest brother died. 563 U.S. at 199–200. Nevertheless, he argued that his counsel were ineffective for failing to present evidence showing that his brother committed suicide, that he was neglected by and did not receive much love from his mother and step-father because they worked so much and focused on themselves, and that neither parent was concerned about his education. *Id.* at 201–02. In holding that he failed to establish prejudice, the Court reasoned that the new mitigation evidence "largely duplicated" and "basically substantiate[d]" the trial evidence and that it was "not so significant . . . to show a 'substantial' likelihood of a different sentence." *Id.* at 200–02.

In *Wong*, the Court found that the petitioner's trial counsel presented "substantial" mitigation evidence. 558 U.S. at 20. His counsel presented evidence regarding his tragic childhood, his successful tenure as a firefighter during which he rose from the lowest person in his unit to second-in-command, his religious conversion and good works in prison, and the petitioner's own testimony taking responsibility for his crimes. *Id.* at 21. In holding that he failed to establish prejudice, this Court reasoned that "[s]ome of the [new mitigation] evidence was merely cumulative of the humanizing evidence" presented at trial, that the jury was "well aware" of his "background and humanizing features," and that "[a]dditional

evidence on these points would have offered an insignificant benefit, if any at all." *Id.* at 22–23.

Here, Dallas argues that the Eleventh Circuit "dismissed" the new mitigation evidence that it found to be cumulative of the evidence that was presented at his trial and reweighed "only" the new allegation that he was sexually abused and his new ADHD diagnosis against the aggravating evidence. Pet. 28. That is not so.

The Eleventh Circuit properly reweighed the totality of the mitigation evidence, the old and the new, against the aggravating circumstances and correctly held that there is no reasonable probability that the outcome of his sentencing would have been different if the jury and trial court had heard the new evidence. Pet. App. A51–A52 ("In short, we readily conclude that there is no reasonable probability that Benedict's testimony, even when added together with the additional (and largely cumulative) postconviction testimony of Dallas's family members, would have changed Dallas's sentence."); *id.* at A56 ("[T]here is no reasonable probability that, had the jury known the limited additional details presented in postconviction, they would have spared his life."). Thus, the court correctly applied *Strickland* and its progeny in adjudicating his claim.

Moreover, the Eleventh Circuit correctly found that Dallas's counsel presented a wealth of mitigation evidence at the guilt phase of his trial from Dr. Guy Renfro, Susan James, and Dallas himself and from Cindy Knight ("Cindy"), Paul Dallas ("Paul"), Pam Cripple, and Rhonda Chavers at the penalty phase of his trial. Pet. App. A7–A18. To begin, the jury and trial court were aware that Dallas

was the youngest of four siblings who were raised in an impoverished, chaotic, and violent household with an alcoholic, abusive, and absentee father and an alcoholic, mentally unstable, and abusive mother.[3] *Id.* They were aware that his parents divorced when he was young and that he, his mother, and two of his siblings, Cindy and Paul, then resided with an alcoholic man in an unstable environment. *Id.*

The jury and trial court knew that Dallas and his siblings had little to no adult supervision which caused them to go hungry and regularly miss school. *Id.* Cindy testified that their mother and step-father paid very little attention to the children, explaining, "They did what they wanted. Nobody cared." Doc. 13–7 at R. 959. She further testified that she and her siblings were left to raise themselves from a young age and that she was molested as a result of their neglect and indifference. *Id.* The jury and court also learned from Cindy that police officers came to their house on several occasions to take their mother "to an insane asylum." *Id.* at 960. Dallas similarly testified that nobody in his family attended church, that no one taught him right from wrong, and that he "pretty much did what [he] wanted to do" because he did not have any positive role models. Doc. 13–6 at R. 780, 783.

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[3] Although there is no dispute that his mother was physically abusive to her children at times, Dallas alleges that she beat him and his siblings "with her hands, bats, and belt buckles," "kicked the children as they lay prone on the floor," "pick[ed] [him] up by one arm and lash[ed] him repeatedly with a belt," and used "a cattle prod-type device" to "shock [him] and his siblings." Pet. 12, 27. He does not cite any record support for those factual allegations. That is because there is no evidence in the record to support them. For example, the affidavits that he submitted to the district court do not contain any evidence supporting those allegations. Doc. 87, Ex. 4–16. At most, his mother's affidavit reveals that she "began to spank her children with a paddle" at some point after her drinking escalated. Doc. 87, Ex. 14 at ¶ 22. That, of course, is a far cry from beating, kicking, and shocking her children with a cattle prod. Because those factual allegations are not supported by any evidence in the record, this Court should not consider them. *Lawn v. United States*, 355 U.S. 339, 354 (1958) ("We must look only to the certified record in deciding questions presented."); *Holmes v. Trout*, 32 U.S. 171, 210 (1833) ("No evidence can be looked into in this court, which exercises an appellate jurisdiction, that was not before the circuit court; and the evidence certified with the record must be considered here, as the only evidence before the court below.").

Cindy also testified that the family never had meals together and added, "We was lucky we got food sometimes. Sometimes it would be a week before we would get to eat." Doc. 13–7 at R. 960. The children attended school only if their mother woke them up in time to ride the bus and, even then, only if they had clean clothes. *Id.* at 961. Dallas dropped out of school in the sixth grade, Paul dropped out in the seventh grade, and Cindy is illiterate. *Id.* at 956, 971.

Just like Dallas, Paul faced troubles with the law as an adult. At the time of his testimony, Paul was on probation for possession of marijuana, and he admitted that he has several DUIs. *Id.* at 968–69. By contrast, Jimmy Dallas, the eldest of the Dallas siblings, has seen success in his life. *Id.* at 968. According to Paul, he attended college and is a juvenile counselor. *Id.* Unlike his younger siblings, he was allowed to choose where he lived after their parents divorced, and he decided to live with his paternal grandparents. *Id.* at 956–57, 967.

The jury and trial court also knew that Dallas started drinking alcohol at the tender age of seven or eight, began using marijuana at the age of twelve or thirteen, and began using cocaine and crystal methamphetamine intravenously when he was thirteen or fourteen. Pet. App. A8. In fact, when asked to identify all of the drugs that he used as a child and adolescent, Dallas replied, "Well, it would be probably easier to answer which ones I didn't use." Doc. 13–6 at R. 785.

In addition, the jury and trial court were aware that Dallas married Pam Cripple and had two daughters with her. Doc. 13–7 at R. 961–62. During that period of his life, Dallas worked as an electrician, maintained steady employment,

and treated Cripple and their daughters well. *Id.* at 969, 972, 974. Cindy testified that he never got in trouble while he was married to Cripple, that she was a good influence on him, and that "he was a kind, considerate person" while they were together. *Id.* at 962. Echoing her testimony, Paul explained that Dallas, when he was married to Cripple, "would do anything for people. I have seen him go help people, work on their houses when they couldn't get nobody to do it and didn't have the money. He has fixed people's cars. He has went to trailer parks and cut grass for the old people." *Id.* at 970.

But Dallas's behavior drastically changed after he met and began using crack cocaine with Carolyn "Polly" Yaw, a "vicious psychopath." Pet. App. B253. As Cindy explained, "It was like before he met her, he was a kind, considerate person. He would do anything for anybody. But when he got with her, he got with the drugs, and it was like a different person. You didn't know him." Doc. 13–7 at R. 962. Paul testified that Yaw was a bad influence on Dallas and that his behavior changed for the worse after he met her. *Id.* at 969–70.

The jury and trial court learned from Dr. Guy Renfro, Susan James, and Dallas about the devastating effects of crack addiction. They were aware that Yaw introduced Dallas to crack and that he quickly became addicted to that drug. Doc. 13–6 at R. 786. During the two weeks before they abducted, robbed, and killed Hazel Liveoak, he and Yaw were binging on crack. *Id.* at 757–58. With regard to Dallas's state of mind at the time of the offense, Dr. Renfro testified, "My opinion is that he was binging on [crack], that he did want more and more of the drug, and

that he was in a process of disregarding a lot of other circumstances to do whatever he could to obtain money for the drug." *Id.* at 757. He further testified that Dallas has below average intelligence and expressed remorse for Mrs. Liveoak's death. *Id.* at 759. So, the jury and court knew about his crack addiction and cognitive deficits and how those factors, among many others, contributed to his offense.

In short, the Eleventh Circuit correctly found that the jury and trial court were well aware that Dallas was raised in a dysfunctional environment that was marked by violence, physical abuse, extreme neglect, substance abuse, poverty, hunger, their mother's mental illness, and a lack of positive role models. Pet. App. A7–A18, A45–A49. Indeed, Cindy powerfully and succinctly described their upbringing and home life in three words—"it was hell." Doc. 13–7 at R. 958.

The Eleventh Circuit correctly found that most of the mitigation evidence that is contained in the affidavits that he submitted to the district court is cumulative to the evidence that the jury and trial court heard and, thus, serves only to amplify, expand on, and provide more details about the mitigation issues that were presented by his trial counsel. Pet. App. A44–A49. And the court properly followed this Court's precedent in holding that he was not prejudiced by his counsel's failure to present that cumulative evidence because it just "substantiates, supports, or explains more general testimony provided at trial." *Id.* at A45 (quoting *Pinholster*, 563 U.S. at 200–01) (cleaned up); *id.* at A49.

The Eleventh Circuit also examined the two new pieces of mitigation evidence that are found in those affidavits—Dr. Ken Benedict's diagnosis that

Dallas has ADHD and learning disorders and Paul's allegation that he and Dallas were sexually abused. Pet. App. A49–A52. The court correctly found that Dr. Benedict's testimony that children who have ADHD and learning disabilities are more likely to develop problems with substance abuse, exhibit "passive-dependent" behavior, and drop out of school, while "marginally helpful," would have added little to Dallas's mitigation case because the jury and trial court were well aware that he abused substances from a young age, had difficulties in school and dropped out in the sixth grade, was known to be passive and unassertive, and was dominated by Yaw. *Id.* at A50–A51.

The court further correctly found that Dr. Benedict's testimony "would have come at the cost of undermining part of Dr. Renfro's helpful trial testimony." *Id.* at A51. Dr. Renfro testified that Dallas has below average intelligence, but Dr. Benedict stated in his affidavit that he "demonstrates average intellectual ability." *Id.* If Dallas's counsel had called Dr. Benedict, the State no doubt would have elicited his opinion that Dallas has average intelligence and, thereby, undermined Dr. Renfro's beneficial testimony about his low intelligence. *Id.*

Turning to Paul's allegation that he and Dallas were sexually abused, the Eleventh Circuit correctly noted that Paul was in the courtroom during Cindy's testimony and heard her state that she was molested but made no mention of sexual abuse when he testified. *Id.* at A52. The court also found that there is no evidence in the record showing that Dallas told his counsel that he was sexually abused and correctly held that his counsel cannot be found ineffective for failing to

"discover and develop evidence of childhood abuse" that he did not mention to them. *Id.* (quoting *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999)).

Additionally, in reweighing the totality of the mitigation evidence against the aggravating circumstances, the Eleventh Circuit correctly held that there is no reasonable probability that the outcome of Dallas's sentencing would have been different even if the jury and court had heard about the sexual-abuse allegations. *Id.* at A53. As the court explained, his case is highly aggravated. *Id.*

The trial court found the existence of the following four, not three, aggravating circumstances: (1) the capital offense was committed while the defendant was engaged in the course of a robbery, pursuant to section 13A–5–49(4) of the Code of Alabama, (2) the capital offense was committed while the defendant was engaged in the course of a kidnapping, pursuant to section 13A–5–49(4) of the Code of Alabama, (3) Dallas was previously convicted of a felony involving the use or threat of violence to the person, pursuant to section 13A–5–49(2) of the Code of Alabama, and (4) the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses, pursuant to 13A–5–49(8) of the Code of Alabama. Doc. 13–2 at C. 361–64. With regard to the fourth aggravating circumstance, the trial court made the following findings of fact:

> This Court cannot imagine a more depraved and cruel murder of a person than what Mrs. Liveoak suffered at the hands of Dallas. He left her in the trunk of her automobile on a summer afternoon so that she would die simply because he did not want to get caught. He literally entombed her in the trunk of her car. The suffering of Mrs. Liveoak is unimaginable. She lay helpless in the hot, stuffy trunk and fought to escape, until the conditions that she was left in caused her death. Yet, even as torturous as her death, the cruelest act committed by Dallas

> was that he gave Mrs. Liveoak false hope; he told her, as she was praying for him, that he would send help. The help never arrived because the evidence clearly showed that he had no intention of sending her help. Mrs. Liveoak was tortured at the hands of Dallas.

*Id.* at 363–64.

The Eleventh Circuit, in reweighing the totality of the mitigation evidence against the aggravating circumstances, similarly emphasized the heinous nature of Dallas's crime and the brutality of Mrs. Liveoak's death:

> [T]he jury also necessarily found when it convicted him of capital murder that Donald Dallas placed an elderly woman in the trunk of a car and *intended* for her to die there. That is, that he intended for her to suffer a slow and agonizing death in the sweltering trunk of a car. That he intended for her to bear the mental anguish of being essentially buried alive. Of waiting in vain for hope that would never arrive despite his promises to her. That he intended for her to endure, in the words of Edgar Allen Poe, "a degree of appalling and intolerable horror from which the most daring imagination must recoil": the "unendurable oppression of the lungs . . . —the clinging to the death garments—the rigid embrace of the narrow house—the blackness of the absolute Night—the silence like a sea that overwhelms . . . —these things, with the thoughts of the air and grass above, with memory of dear friends who would fly to save us if but informed of our fate."

Pet. App. A53 (quoting Edgar Allen Poe, *The Premature Burial* (1850)).

Applying de novo review, the Eleventh Circuit properly reweighed the totality of the mitigation evidence against the aggravating circumstances and correctly held that there is no reasonable probability that the outcome of Dallas's sentencing would have been different if the jury and trial court had heard his new mitigation evidence. *Id.* at A56. That determination is all the more correct in light of the highly aggravated nature of Dallas's crime and the relative weakness of his new evidence. *Id.* As the Eleventh Circuit aptly stated, it is "wholly unlikely that the

additional evidence would have changed the jury's" death recommendation or the trial court's decision to sentence him to death. *Id.*

Moreover, the Eleventh Circuit's opinion is a straightforward application of *Strickland* and this Court's other precedents to the facts of Dallas's case. Because the court properly applied *Strickland* and its progeny in adjudicating his claim and correctly held that he failed to establish that he was prejudiced by his counsel's performance at the penalty phase of his trial, this Court should deny certiorari.

### B. The Eleventh Circuit's decision neither contributed to nor created a circuit split.

Dallas argues that the Eleventh Circuit's decision contributed to and created a circuit split regarding how federal habeas courts decide whether a petitioner was prejudiced by trial counsel's failure to present mitigation evidence that is raised for the first time in a postconviction proceeding. Pet. 17–23. In his telling, the Fifth, Sixth, Eighth, and Eleventh Circuits have held that a petitioner cannot establish prejudice where the new mitigation evidence relates to evidence that was presented at trial, even where the new evidence is more detailed or persuasive, while the Third, Seventh, and Ninth Circuits have held that a petitioner can establish prejudice where the new evidence relates to the trial evidence. *Id.* at 17–18.

But there is no meaningful divergence in how those courts approach that question. Each of those courts has required a fact-specific inquiry into a petitioner's claim that he was prejudiced by his counsel's failure to present adequate mitigation evidence. That inquiry involves reweighing the totality of the mitigation evidence against the aggravating factors. And each of those courts has recognized that a

petitioner cannot establish prejudice where the new mitigation evidence both is cumulative to that presented at trial and insufficient when combined with the old to create a reasonable probability of a different sentencing outcome. Because the split that Dallas identifies is illusory, this Court should deny certiorari.

1. *Fifth Circuit*. The Fifth Circuit has held that a petitioner cannot establish prejudice where the new mitigation evidence, although more detailed, is cumulative to the evidence presented at trial and, when combined with the old, does not create a reasonable probability of a different outcome. *Busby v. Davis*, 925 F.3d 699, 726 (5th Cir. 2019); *see also Trevino v. Davis*, 861 F.3d 545, 550–51 (5th Cir. 2017); *Parr v. Quarterman*, 472 F.3d 245, 257–58 (5th Cir. 2006). But the Fifth Circuit granted a certificate of appealability based on its finding that reasonable jurists could debate whether the state court unreasonably applied federal law in denying the petitioner's ineffectiveness claim where the new evidence depicting his disadvantaged childhood was of greater quality and quantity than the evidence presented at trial. *Escamilla v. Stephens*, 749 F.3d 380, 393 (5th Cir. 2014).

2. *Sixth Circuit*. The Sixth Circuit has held that, to prove prejudice, a petitioner must show that the new mitigation evidence "differ[s] in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing." *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005); *see also Pike v. Gross*, 936 F.3d 372, 382 (6th Cir. 2019); *Broom v. Mitchell*, 441 F.3d 392, 410–11 (6th Cir. 2006); *Clark v. Mitchell*, 425 F.3d 270, 287 (6th Cir. 2005). The Sixth Circuit also has held that a petitioner established that he was prejudiced by his

counsel's failure to adequately investigate mitigation evidence where "the volume and compelling nature" of the new evidence regarding his dysfunctional family and troubled life was much greater than the evidence that was presented regarding that subject at trial. *Morales v. Mitchell*, 507 F.3d 916, 933, 935–36 (6th Cir. 2007).

3. *Eighth Circuit*. The Eight Circuit has held that a petitioner cannot establish prejudice where the new mitigation evidence, albeit more extensive than that presented at trial, was similar to the trial evidence, where some of that evidence would have harmed the petitioner, and where the new evidence, when combined with the old, would not have "detract[ed] from the government's strong case in aggravation." *Paul v. United States*, 534 F.3d 832, 843 (8th Cir. 2008); *see also Anderson v. Kelley*, 938 F.3d 949, 958 (8th Cir. 2019). The Eighth Circuit also has held that a petitioner established that he was prejudiced by his counsel's deficient performance where the new mitigation evidence painted a much more "vivid" picture of his abusive, traumatic, and poverty-stricken childhood. *Simmons v. Luebbers*, 299 F.3d 929, 939 (8th Cir. 2002).

4. *Eleventh Circuit*. The Eleventh Circuit has held that a petitioner cannot establish prejudice where the new mitigation evidence merely presents "a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury." *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1260–61 (11th Cir. 2012). The Eleventh Circuit also has held that a petitioner established prejudice where his new mitigation evidence "far exceeded" what was presented at trial regarding the horrific abuse

and neglect that he suffered as a child. *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907, 936–37 (11th Cir. 2011); *see id.* at 936 ("The picture [counsel] painted for the jury was of Johnson having cold and uncaring parents, something in the nature of the 'American Gothic' couple. With a reasonable investigation, though, he could have painted for the jury the picture of a young man who resembled the tormented soul in 'The Scream.'").[4]

5. *Third Circuit.* The Third Circuit has held that a petitioner failed to establish prejudice even where his new mitigation evidence was greater in both detail and credibility than the evidence presented at trial because there was no reasonable probability that the new evidence, when combined with the old, would have resulted in a different outcome in light of the State's highly aggravated case. *Shelton v. Carroll*, 464 F.3d 423, 440 (3d Cir. 2006); *see also Williams v. Beard*, 637 F.3d 195, 234–36 (3d Cir. 2011).

The decisions cited in Dallas's petition are not to the contrary. In *Abdul-Salaam v. Sec'y, Penn. Dep't of Corr.*, the Third Circuit held that the petitioner

[4] According to Dallas, the Eleventh Circuit applies a "test for assessing prejudice" providing that "if new mitigation evidence . . . concerns the same theme as old evidence . . . the new evidence is necessary cumulative and cannot establish prejudice" and that this "test" applies "regardless of whether the omitted evidence is more detailed, more extensive, or more persuasive than the penalty phase evidence that the jury actually heard." Pet. 17–18. Dallas's failure to cite any authority for that proposition is telling; the Eleventh Circuit applies no such test in determining whether a petitioner has established that his new mitigation evidence, when combined with the old and weighed against the aggravating circumstances, creates a reasonable probability of a different sentencing outcome. To the contrary, the Eleventh Circuit repeatedly has held that a petitioner established prejudice where the new mitigation evidence included more details about the same themes that were the focus of trial counsel's mitigation presentation. *See*, *e.g.*, *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1337, 1354 (11th Cir. 2011) (holding that petitioner established prejudice where counsel presented evidence at trial showing that his father physically abused him and his siblings by beating them with a belt because the new mitigation evidence regarding the abuse far exceeded that presented to the jury); *Williams v. Allen*, 542 F.3d 1326, 1329, 1342 (11th Cir. 2008).

established prejudice where new mitigation evidence revealing that his childhood was "dominated by severe and pervasive violence at the hands of his father and poverty that often rose to the level of severe deprivation" was "of a totally different quality" than the evidence presented at his trial depicting his abuse "as an uncommon, instead of dominant, feature of [his] childhood." 895 F.3d 254, 270–72 (3d Cir. 2018). So, the court found that the petitioner was entitled to habeas relief because his counsel presented a woefully incomplete and materially misleading account of his tragic childhood to the jury. *Id.* Similarly, in *Bond v. Beard*, the court granted habeas relief where the petitioner's counsel presented a materially misleading account of his life that gave the jury the false "impression that [he] came from a supportive (if poor) family but went on a crime spree after the type of disappointments many people face in life." 539 F.3d 256, 291 (3d Cir. 2008).

6. *Seventh Circuit*. The Seventh Circuit has held that a petitioner failed to establish prejudice where his new mitigation evidence revealed additional details about his upbringing but was essentially cumulative to the trial evidence. *Woods v. McBride*, 430 F.3d 813, 825–26 (7th Cir. 2005). Similarly, the court, in *Eddmonds v. Peters*, held that the petitioner could not establish prejudice where his new mitigation evidence included more details about his horrible past because his crime was "abominable—almost unspeakable." 93 F.3d 1307, 1321–22 (7th Cir. 1996).

The decisions cited by Dallas are not to the contrary. In *Pruitt v. Neal*, the Seventh Circuit held that the petitioner established prejudice where his new mitigation evidence would have supported two statutory mitigating circumstances.

788 F.3d 248, 274 (7th Cir. 2015); *see also Stevens v. McBride*, 489 F.3d 883, 888, 897–98 (7th Cir. 2007). Similarly, in *Griffin v. Pierce*, the court held that the petitioner established prejudice where the new mitigation evidence depicting his tragic childhood, mental illness, suicide attempts, and good deeds was inherently mitigating and where the evidence presented at trial was misleading and incomplete. 622 F.3d 831, 845 (7th Cir. 2010).

7. *Ninth Circuit.* The Ninth Circuit has held that a petitioner could not establish that he was prejudiced by his counsel's failure to present additional evidence regarding his brain abnormality in light of the "exceptional depravity" of his crime which involved "the surgical mutilation of the victim's body." *Leavitt v. Arave*, 646 F.3d 605, 615–16 (9th Cir. 2011). The court also has held that a petitioner did not establish that he was prejudiced by his counsel's failure to present more evidence about his drug addiction, which the court noted "could be characterized as merely another element of social history," because the case "involved significant aggravating factors." *Miles v. Ryan*, 713 F.3d 477, 489 (9th Cir. 2013); *see also Moormann v. Ryan*, 628 F.3d 1102, 1114 (9th Cir. 2010).

The decisions cited by Dallas are not to the contrary. In *Stankewitz v. Woodford*, the Ninth Circuit remanded the petitioner's case to the district court with instructions to hold a hearing on his claim that he was prejudiced by his counsel's failure to present additional mitigation evidence. 365 F.3d 706, 725 (9th Cir. 2004). When that case returned to the Ninth Circuit, the court held that the petitioner established prejudice because the new mitigation evidence was so

substantial that, when combined with the old, it created a reasonable probability of a different outcome. *Stankewitz v. Wong*, 698 F.3d 1163, 1167, 1174 (9th Cir. 2012).

Thus, rather than establishing a circuit split, Dallas has done the opposite. In light of the foregoing decisions, the consensus among the circuit courts is that a petitioner who claims that he was prejudiced by his counsel's failure to present adequate mitigation evidence must present new mitigation evidence that is of much greater quality and quantity than the evidence that was presented at trial or new evidence revealing that counsel presented a materially misleading and inaccurate life story to the jury and trial court. In addition, the petitioner must show that the new evidence is so substantial that, when combined with the old, it creates a reasonable probability of a different sentencing outcome. And contrary to Dallas's assertions in his petition, the circuit courts are unanimous in holding that a petitioner can establish prejudice where his new mitigation evidence relates to mitigation themes that were presented by trial counsel. Because Dallas has failed to establish a split with regard to this issue, the writ should be denied.

## II. This case is a poor vehicle for deciding whether federal habeas courts can consider precedent from this Court post-dating a state-court decision in determining whether the decision was reasonable because the Eleventh Circuit based its correct determination that the CCA's denial of Dallas's conflict-of-interest claim was reasonable on this Court's precedent as of the time of the CCA's decision.

Dallas's second question presented is based on a clear misrepresentation of the Eleventh Circuit's decision. Pet. i, 31–39. The Eleventh Circuit did not base its determination that the CCA reasonably denied his claim that his right to conflict-free counsel was violated where his lead attorney, Algert Agricola, simultaneously

represented the DMHMR at the time of his trial on precedent from this Court that post-dates the CCA's decision. Instead, the Eleventh Circuit correctly held, under 28 U.S.C. § 2254(d), that the CCA's decision was neither contrary to nor an unreasonable application of then-existing clearly established federal law and was not based on an unreasonable determination of the facts. *Harrington v. Richter*, 562 U.S. 86, 100 (2011). In any event, if the CCA's opinion does not conflict with the Sixth Amendment as more recently interpreted by this Court, then there were no "extreme malfunctions in the state criminal justice systems," *id.* at 102 (quotations omitted), and thus habeas relief was not warranted. For those reasons, certiorari should be denied.

### A. This case is a poor vehicle for deciding the question presented because the Eleventh Circuit applied this Court's precedents as of the time of the CCA's decision in holding that the CCA's denial of Dallas's claim was reasonable.

According to Dallas, the Eleventh Circuit "relied solely" on *Mickens v. Taylor*, 535 U.S. 162 (2002), in determining that the CCA's denial of his conflict-of-interest claim was reasonable. Pet. 36. That is decidedly untrue. The Eleventh Circuit based that determination on its interpretation of *Holloway v. Arkansas*, 435 U.S. 475 (1978), and *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and its application of *Sullivan* to the facts of Dallas's case. Pet. App. A33–A40.

In determining that the CCA's denial of Dallas's claim was neither contrary to nor an unreasonable application of then-existing clearly established federal law, the Eleventh Circuit correctly reasoned:

> Dallas says that because Agricola represented Alabama's Department of Mental Health and Mental Retardation (the "DMHMR") in an unrelated civil matter, while at the same time defending him against Alabama's prosecution, he was deprived of his Sixth Amendment right to the effective assistance of counsel. He argues that the Alabama Court of Criminal Appeals erroneously applied [*Cuyler v.*] *Sullivan*[, 446 U.S. 335 (1980),] instead of *Holloway v. Arkansas*, 435 U.S. 475 (1978), in adjudicating the alleged conflict. In *Holloway*, the Supreme Court held that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." 435 U.S. at 488. The problem with this argument, however, is that *Holloway's* automatic reversal rule is limited only to those circumstances where a trial court improperly requires the joint representation of codefendants over[] timely objection. In the absence of the joint representation of codefendants, the appropriate legal standard is found in *Sullivan*, which requires a showing that an actual conflict of interest adversely affected defense counsel's performance. 446 U.S. at 349–50. The Court of Criminal Appeals' reliance on *Sullivan* was neither contrary to nor an unreasonable application of clearly established Supreme Court law. Moreover, nothing in the state court's findings amounted to an unreasonable determination of the facts.

Pet. App. A33–A34.

In adjudicating Dallas's conflict-of-interest claim, the Eleventh Circuit closely examined *Holloway* and *Sullivan* and determined that, even though his counsel objected to the alleged conflict before trial, the *Sullivan* standard, rather than *Holloway's* automatic reversal rule, applied to his claim because his case did not involve the joint representation of codefendants. *Id.* at A5–A6, A33–A34. The Eleventh Circuit concluded that *Holloway* applies only to cases involving the joint representation of codefendants based on its independent analysis of *Holloway* and *Sullivan* and its interpretation of the language that this Court used in deciding *Holloway*. *Id.* at A33–A34. And having found that the *Sullivan* standard applies to Dallas's claim, the Eleventh Circuit correctly held that the CCA's application of

*Sullivan* in resolving his claim was neither contrary to nor an unreasonable application of then-existing clearly established federal law. *Id.*

True, the Eleventh Circuit briefly mentioned *Mickens v. Taylor*, 535 U.S. 162 (2002), in addressing Dallas's claim but only to the extent that *Mickens* summarized the Court's earlier holdings in *Holloway* and *Sullivan*. *Id.* at A35–A36. After all, the narrow question presented in *Mickens* was about "the effect of a trial court's failure to inquire into a potential conflict upon the *Sullivan* rule that deficient performance of counsel must be shown." 535 U.S. at 174. Having correctly found that the trial court "adequately discharged its duty" by investigating the alleged conflict after Dallas's counsel brought it to the court's attention, Pet. App. A36–A37, the Eleventh Circuit had no reason to consider, much less apply, *Mickens* in resolving Dallas's claim and did not do so. Instead, the court relied solely on its own interpretation of *Holloway* and *Sullivan* in determining that the CCA's denial of his claim was reasonable. Pet. App. A33–A34.

Dallas has failed to show that the Eleventh Circuit erred in holding that the CCA's denial of his claim was not contrary to or an unreasonable application of then-existing clearly established federal law. And he entirely has failed to show that the Eleventh Circuit relied on any precedent from this Court that post-dates the CCA's decision in reaching that result.

Additionally, Dallas does not point to a single case in which a federal court has granted habeas relief where a state court applied a rule of constitutional law that was later embraced by this Court. Granting the extraordinary writ in such a

case would be unwarranted for "habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Richter*, 562 U.S. at 102–03 (quotation omitted). There is no "extreme malfunction" present in such circumstances.

For those reason, his case is a poor vehicle for deciding whether federal habeas courts can consider precedent post-dating a state-court decision in determining whether that decision was reasonable. The writ should be denied.

### B. The Eleventh Circuit correctly held that the CCA's denial of Dallas's conflict-of-interest claim was reasonable.

The Eleventh Circuit properly applied AEDPA deference in correctly holding that the CCA's denial of Dallas's conflict-of-interest claim was neither contrary to nor an unreasonable application of then-existing clearly established federal law and was not based on an unreasonable determination of the facts. Pet. App. A33–A40. For that additional reason, certiorari should be denied.

As a critical threshold matter, a state-court decision cannot be contrary to clearly established federal law, under 28 U.S.C. § 2254(d)(1), where this Court has not confronted the specific question presented. *Woods v. Donald*, 575 U.S. 312, 317 (2015); *see also Kernan v. Cuero*, 138 S. Ct. 4, 9 (2017). Likewise, where this Court's "cases give no clear answer to the question presented, . . . it cannot be said that the state court unreasonably applied clearly established Federal law." *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (cleaned up). Precedent from the courts of appeals cannot "be used to refine or sharpen a general principle of Supreme Court

jurisprudence into a specific legal rule that this Court has not announced." *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013).

Long before *Holloway* and *Sullivan* were decided, this Court established the principle that the joint representation of codefendants who have conflicting interests by one attorney violates the Sixth Amendment right to the effective assistance of counsel. *Glasser v. United States*, 315 U.S. 60 (1942). There, the district court appointed the defendant's attorney to represent one of his codefendants over the defendant's objection that he and his codefendant had divergent interests. *Id.* at 68–69, 72. This Court held that the district court violated the defendant's right to the effective assistance of counsel by requiring his attorney to represent his codefendant and reversed his conviction. *Id.* at 76.

In reaching that result, the Court reasoned that "the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." *Id.* at 70. The Court emphasized that trial courts are duty-bound to ensure that "an accused has the assistance of counsel" and "to refrain from . . . insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court." *Id.* at 76. And notably, the Court presumed that the defendant was prejudiced by the conflict of interest, reasoning that "[t]he right to have the assistance of counsel

is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Id.* at 75–76.

In *Holloway*, a single public defender was appointed to represent three codefendants who were charged with robbing and terrorizing employees at a restaurant. 435 U.S. at 477. Recognizing that his clients had divergent interests, the attorney timely and repeatedly objected that he could not adequately represent them and moved the trial court to appoint separate counsel for each defendant to alleviate the conflict of interest. *Id.* at 477–78. The court denied his motions and objections and refused to permit him to cross-examine any of the defendants on behalf of the others. *Id.* at 477–80.

This Court reversed the defendants' convictions, holding that the trial court's failure "to appoint separate counsel or to take adequate steps to ascertain whether the risk [of conflicting interests] was too remote to warrant separate counsel" violated their right to the assistance of counsel. *Id.* at 484. In so ruling, the Court interpreted its decision in *Glasser*, 315 U.S. at 75–76, "as holding that whenever a trial court improperly requires joint representation over timely objection reversal is automatic." *Id.* at 488. But in announcing that automatic reversal rule, the Court was careful to confine its reach only to cases involving the joint representation of codefendants who have conflicting interests. *Id.* at 488–89.

Two years later, this Court was confronted with the scenario in which a defendant and his codefendants were represented by the same attorneys, but the defendant, who was tried separately, did not object to the joint representation.

*Sullivan*, 446 U.S. at 337–38. The Court held that a trial court "need not initiate an inquiry" into the propriety of joint representation absent an objection or unless the court "knows or reasonably should know that a particular conflict exists." *Id.* at 346–47. Applying that holding to the facts of the case, the Court concluded that the trial court did not have an affirmative duty to inquire whether there was a conflict of interest. *Id.*

Significantly, the Court declined to extend *Holloway's* automatic reversal rule to cases where a defendant did not object to joint representation at trial. *Id.* at 348. Instead, the Court held that a defendant who failed to object "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance" to establish a Sixth Amendment violation. *Id.* If a defendant makes that showing, then prejudice is presumed. *Id.* at 349–50; *see also Strickland*, 466 U.S. at 692.

Here, the Eleventh Circuit correctly determined that the CCA's application of *Sullivan* in resolving Dallas's conflict-of-interest claim was neither contrary to nor an unreasonable application of then-existing clearly established federal law and that its decision was not based on an unreasonable determination of the facts. Pet. App. A33–A40. That is so for at least three reasons.

First, the Eleventh Circuit correctly held that it was reasonable for the CCA, in light of then-existing precedent, to conclude that *Holloway's* rule applied only in the context of the joint representation of codefendants and to apply *Sullivan's* standard instead in adjudicating Dallas's claim. Pet. App. A33–A34, A40. The CCA denied his claim in its 1997 decision affirming his convictions and sentence. *Dallas*,

711 So. 2d at 1111. At that time, this Court had decided that a defendant's conviction must be reversed "whenever a trial court improperly requires joint representation over timely objection." *Holloway*, 435 U.S. at 488. But the Court had not applied *Holloway's* rule in any other scenario and had declined to extend it to cases where a defendant fails to object to joint representation at trial.[5] *Sullivan*, 446 U.S. at 348.

Indeed, the CCA's application of the *Sullivan* standard to Dallas's claim cannot have been contrary to or an unreasonable application of then-existing clearly established federal law because this Court, at the time the CCA rendered its decision, had not confronted the specific question of whether *Holloway's* automatic reversal rule applies to conflicts of interest arising outside the context of the joint representation of codefendants. *See*, *e.g.*, *Woods*, 575 U.S. at 317; *Kernan*, 138 S. Ct. at 9. In fact, this Court has yet to confront that question.

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[5] Dallas asserts that "pre-*Mickens* circuit court cases applying *Holloway* outside the codefendant context demonstrate . . . that clearly established law at the time of [his] direct appeal extended *Holloway's* automatic reversal rule to cases outside the codefendant context." Pet. 37–38 & n.80. That is both beside the point and wrong. This Court's decisions, not the decisions of the courts of appeals, constitute clearly established federal law under 28 U.S.C. § 2254(d)(1). *Parker v. Matthews*, 567 U.S. 37, 48–49 (2012). And federal courts, pre-*Mickens*, routinely declined to apply *Holloway's* rule outside the context of the joint representation of codefendants. *See*, *e.g.*, *Mickens v. Taylor*, 240 F.3d 348, 358 (4th Cir. 2001) ("The *Sullivan* Court did not extend the *Holloway* reversal rule, however, beyond the facts of *Holloway* to all circumstances in which the defense did not object to a conflict of interest at trial."); *Beets v. Scott*, 65 F.3d 1258, 1260 (5th Cir. 1995) (en banc) ("*Strickland* more appropriately gauges an attorney's conflict of interest that springs not from multiple client representation but from a conflict between the attorney's personal interest and that of his client."); *id.* at 1265 ("The position adopted by this court en banc may be easily summarized. *Strickland* offers a superior framework for addressing attorney conflicts outside the multiple or serial client context."); *Garcia v. Bunnell*, 33 F.3d 1193, 1198 n.4 (9th Cir. 1994) ("The vast bulk of the caselaw in the attorney conflict area involves alleged conflicts arising out of representation of multiple defendants by a single attorney who may not be able simultaneously to serve optimally the interests of each. It is not logically necessary that the approach of these cases also apply to conflicts between a defendant's and the attorney's own personal interests."); *Riley v. South Carolina*, 82 F.Supp.2d 474, 480 (D. S.C. 2000) (holding that *Holloway's* automatic reversal rule "is relevant only in the context of an attorney representing multiple defendants").

Second, the Eleventh Circuit correctly held that it was reasonable for the CCA to apply *Sullivan's* standard in resolving Dallas's claim because the very language that this Court employed in announcing the automatic reversal rule in *Holloway* limited the application of that rule to cases where a trial court improperly requires the joint represent of codefendants over timely objection. Pet. App. A34. Even Dallas must have interpreted *Holloway* as applying only to cases involving the joint representation of codefendants because he argued in his direct appeal brief that the CCA should apply *Sullivan*, not *Holloway*, in resolving his conflict-of-interest claim. Doc. 13–10 at Tab 2, p. 51.

Third, the Eleventh Circuit correctly held that the CCA's conclusion that Dallas failed to establish that an actual conflict of interest adversely affected his counsel's performance was based on a reasonable determination of the facts. Pet. App. A37–A40. After he was appointed to represent Dallas, Agricola was appointed as a Special Deputy Attorney General to represent the DMHMR "in a wholly unrelated civil case" involving a "class action relating to conditions in Alabama's mental-health institutions." *Id.* at A37. Agricola moved to withdraw as Dallas's counsel, citing a possible conflict of interest. Pet. App. D; Doc. 13–1 at C. 135–39. The trial court held a hearing on his motion during which Agricola assured the court that he would represent Dallas to the best of his ability if he remained on the case. Doc. 126–1; Pet. App. A6. After listening to the arguments of counsel and considering the Alabama State Bar Association's opinion that his representation of Dallas and the DMHMR did not present a conflict of interest, the court found that

there was no actual conflict of interest that would prevent Agricola from zealously representing Dallas and denied his motion.[6] Pet. App. A37.

As the Eleventh Circuit found, the CCA's denial of Dallas's claim not only was reasonable but correct as well, and he fails to show otherwise. Pet. App. A38 ("Most critically, Dallas has failed to show that this supposed conflict had any bearing on his counsel's performance, much less that it amounted to an unreasonable application of *Sullivan* or an unreasonable determination of the facts for the [CCA] to conclude as much."). In resolving his claim, the CCA correctly found that Dallas failed to show that his interests were adverse to those of the DMHMR and, thus, did not establish the existence of an actual conflict of interest. *Dallas*, 711 So. 2d at 1111. The CCA further correctly found that Dallas did not "establish[] by any evidence that his attorney's performance was adversely affected" by the alleged conflict of interest. *Id.* The CCA correctly applied those factual findings to the law as set forth in *Sullivan* in denying his claim. *Id.*

Nevertheless, Dallas seeks to manufacture a conflict of interest by arguing that Dr. Guy Renfro, the psychologist who conducted his court-ordered evaluation, was contracted by the DMHMR and that Agricola, due to his representation of that state agency, felt constrained to use Dr. Renfro as Dallas's expert witness instead of

[6] Dallas asserts that the Eleventh Circuit should not have considered the transcript of that hearing because the CCA "found that no such hearing took place." Pet. 38–39. That is misleading. The CCA simply noted in passing that the trial court did not hold a hearing on Agricola's motion to withdraw. *Dallas*, 711 So. 2d at 1111. But in its Order denying his motion, which was before the CCA on direct appeal, the trial court expressly stated that it had held a hearing at which it heard argument from counsel and considered the applicable law. Doc. 13–1 at C. 141 ("hearing having been held and argument and applicable law considered"). So, the CCA's incorrect statement that the trial court did not hold a hearing is, at most, a scrivener's error or a simple oversight. And in any event, the Eleventh Circuit's determination that the CCA's denial of his claim was reasonable clearly was not premised on the contents of that transcript.

hiring an independent mental-health expert. Pet. App. A37–A40. The Eleventh Circuit made short shrift of that argument. *Id.* The court correctly found that Dr. Renfro's testimony "was altogether beneficial to Dallas" and that the state-court record is devoid of any evidence suggesting that his counsel chose Dr. Renfro as their expert witness because of Agricola's alleged conflict.[7] *Id.* at A39–A40.

Simply put, Dallas has failed to show that the Eleventh Circuit erroneously determined that the CCA's decision was neither contrary to nor an unreasonable application of then-existing clearly established federal law and was not based on an unreasonable determination of the facts. He likewise has failed to show that the Eleventh Circuit's decision conflicts with any decision of this Court or creates a circuit split. His claim, therefore, is meritless and unworthy of certiorari review.

## III. This Court should deny certiorari because Dallas did not file a timely certiorari petition.

Dallas's petition for writ of certiorari was due on or before February 26, 2021. His certiorari petition was not timely filed because the Clerk did not receive his petition in paper form until the following day. Because this Court lacks jurisdiction to consider his untimely petition, certiorari should be denied.

Title 28 U.S.C. § 2101(c) requires a party in a civil case to file a petition for writ of certiorari within ninety days of the entry of the judgment below, but a justice

[7] Dallas asserts that the Eleventh Circuit should not have considered Jeffery Duffey's testimony at the state postconviction hearing that he and Agricola "weren't concerned about a conflict" when they selected Dr. Renfro to be their defense expert because the transcript of that hearing was not before the CCA on direct appeal. Pet. 36. Because the Eleventh Circuit mentioned Duffey's testimony in just one sentence in its decision, there can be no doubt that the court would have reached the same correct conclusion absent his testimony. Pet. App. A39–A40 ("Quite simply, there is no basis in this record to suggest, let alone find, that the defense team chose to use Dr. Renfro and not another expert because of any claimed conflict of interest.").

of the Court, upon a showing of good cause, may extend the time for filing the petition up to but no more than sixty days. The time period for filing a certiorari petition in a civil case is "mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). And Supreme Court Rule 13.2 provides that "[t]he Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time."

In 2017, this Court began requiring parties who are represented by counsel to submit their filings both in paper form and through this Court's electronic-filing system. Critically, Supreme Court Rule 29.2, as of July 1, 2019, provides that "[a] document is timely filed if it is received by the Clerk in paper form within the time specified for filing." So, under that rule, a petition for writ of certiorari is timely only if the Clerk receives the petition in paper form within the specified time for filing, regardless of whether or when the petition is filed electronically.

Dallas is not challenging a state-court judgment affirming his convictions and sentence under 28 U.S.C. § 2101(d). Instead, he is seeking certiorari review of the Eleventh Circuit's decision affirming the district court's denial of his petition for writ of habeas corpus. It is well-settled that "habeas corpus proceedings are civil in nature." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). For that reason, he is a civil litigant, and the jurisdictional time period for filing a certiorari petition set forth in 28 U.S.C. § 2101(c) applies to his case.

The Eleventh Circuit denied Dallas's petition for panel rehearing and rehearing en banc on September 29, 2020. Pet. App. C. Pursuant to this Court's Order of March 19, 2020, Dallas had 150 days, or until February 26, 2021, to file a

timely petition for writ of certiorari. Because the Clerk received his petition in paper form on February 27, 2021, his petition was not timely. Dallas then moved this Court for leave to file an out-of-time petition. The Clerk docketed his motion as case number 20M66, and on March 29, the following docket entry was added: "Motion considered closed." On that same day, his certiorari petition was docketed in case number 20–7589.

Although Dallas's untimely petition was docketed, certiorari should be denied because this Court lacks jurisdiction to consider it. But even assuming, *arguendo*, that this Court has jurisdiction to consider his petition, Dallas's case now presents a complex threshold jurisdictional question that this Court would have to resolve before reaching his questions presented which, as explained above, are meritless and unworthy of review in any event. So even if this Court has jurisdiction here, his petition should be denied.

## CONCLUSION

This Court should deny Dallas's petition for writ of certiorari.

Respectfully submitted,

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