No. _____

In the Supreme Court of the United States

DONALD BROADNAX,
Petitioner,

v.

COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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November 8, 2021

CAPITAL CASE

QUESTIONS PRESENTED

Alabama prohibits a state postconviction petitioner from introducing hearsay to prove a penalty phase ineffective assistance of counsel claim. By contrast, the same hearsay is admissible in the penalty phase of a capital trial.

The questions presented are:

1. Does AEDPA deference apply where a federal court considers whether state postconviction evidentiary rules violate due process?

2. Can a state bar hearsay offered to prove an ineffective assistance of counsel claim where that same hearsay was admissible at trial?

LIST OF PARTIES

Petitioner is Donald Broadnax. Respondent is Jefferson Dunn, Commissioner of the Alabama Department of Corrections. Petitioner is not a corporation, and a corporate disclosure statement is not required. S. Ct. R. 29.6.

LIST OF PROCEEDINGS

Broadnax v. Comm'r, Ala. Dep't of Corrs., No. 20-12600 (11th Cir. 2021)

Broadnax v. Comm'r, Ala. Dep't of Corrs., No. 02:13-cv-01142-AKK (N.D. Ala. 2020)

Broadnax v. State, No. CR-10-1481 (Ala. Crim. App. 2013)

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PETITION FOR A WRIT OF CERTIORARI

Donald Broadnax respectfully requests that this Court grant a writ of *certiorari* to review the decision of the Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion affirming denial of habeas corpus relief (Pet. App. 1a) is published. The order denying rehearing is attached. Pet. App. 44a. The District Court's memorandum opinion and order denying Mr. Broadnax's Rule 59 motion (Pet. App. 45a) is unpublished. The Alabama Court of Criminal Appeals' opinion (Pet. App. 60a) is published.

JURISDICTION

The court of appeals denied rehearing on June 9, 2021. Pet. App. 44a. This Court's standing order, then in effect, extended the deadline by 150 days, making this petition due on or before Saturday, November 6, 2021. By rule, the petition is due November 8, 2021. Sup. Ct. R. 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

At the evidentiary hearing on Mr. Broadnax's state postconviction petition, he called an expert witness to support a penalty phase ineffective assistance claim. Applying a state court rule prohibiting hearsay in postconviction proceedings, the court barred the expert from testifying about his interviews with members of Mr. Broadnax's family. There is no dispute

that the excluded evidence would have been admissible in Alabama at the penalty phase of Mr. Broadnax's trial.

When Mr. Broadnax challenged application of the rule, the state appellate courts resolved the issue without reference to federal law. In his federal habeas corpus petition, Mr. Broadnax argued that applying the rule violated due process, an argument the District Court rejected. Affirming, the Eleventh Circuit held Mr. Broadnax could not point to clearly established federal law that would support a due process violation.

STATEMENT OF THE CASE

After Donald Broadnax's 1997 convictions and death sentences were affirmed on direct appeal, Pet. App. 6a-7a, he pursued relief through state postconviction proceedings. His first petition was improperly denied after he was erroneously prevented from amending his petition. Pet. App. 8a. On remand, the state postconviction court held an evidentiary hearing on ineffective assistance of counsel claims.

Mr. Broadnax presented a great deal of evidence at the evidentiary hearing supporting an alibi that was entirely uninvestigated by defense counsel. Specifically, he argued that trial counsel performed deficiently because, while Mr. Broadnax was housed at a work-release center at the time of the events of this case, counsel interviewed no one at the work release center, and had he done so, it would have led to a strong alibi. Pet. App. 8a.

During that evidentiary hearing, Mr. Broadnax also called neuropsychologist Ken Benedict, Ph.D. Dr. Benedict was to testify about tests he administered to Mr. Broadnax and information learned in interviews with Mr. Broadnax and his family that he conducted to create Mr. Broadnax's psychological profile. Pet. App. 23a.

The State objected to testimony about the interviews, arguing that even though Dr. Benedict could testify about his own testing, it would violate state evidentiary rules to have him testify about the family interviews because those would be hearsay. *Id.* Mr. Broadnax argued that because the evidence would have been admissible at trial, and Dr. Benedict's testimony was necessary to prove the claim, it should be admitted. *Id.* Ultimately, the trial court granted the motion *in limine*, and prohibited Dr. Benedict's testimony about the interviews. *Id.*

Dr. Benedict's testimony established that Mr. Broadnax had an unspecified cognitive disorder. Pet. App. 37a. If allowed, Dr. Benedict would have established that in his opinion, Mr. Broadax suffered from a panic disorder, agoraphobia, and post-traumatic stress disorder. *Id.* The evidence that supported this came from sources that a mental health expert would normally rely upon: Mr. Broadnax's family.

Dr. Benedict interviewed Mr. Broadnax's family and learned that his mother was 14 when she got married to her first husband, and Mr. Broadnax's father was abusive, both physically and emotionally. Pet. App.

26a. During early adolescence, Mr. Broadnax was raped at age 12 and hit by a car and pinned against a wall when he was 13. *Id.*

The trauma continued for Mr. Broadnax when he witnessed the killing of a friend. *Id.* As he endured beatings from his mother, who had such severe social anxiety that she would rarely leave the home, he began drinking, and then attempted to kill himself using his sister's pain medication. *Id.*

Mr. Broadnax's father had a stroke, and Mr. Broadnax became his primary caretaker until he died when Mr. Broadnax was 16. *Id.* A year after his father died, Mr. Broadnax was convicted of murder, in an event possibly driven by knife attacks he suffered from gang members. *Id.* After his incarceration, he was sexually assaulted. *Id.*

These facts were central to Dr. Benedict's opinion and the type regularly relied on by experts in his field. Without them, Mr. Broadnax's story was woefully incomplete, both at trial and in the postconviction challenge.

When Mr. Broadnax raised and argued this issue in the Alabama Court of Criminal Appeals ("ACCA"), claiming that this rote application of Alabama law violated his due process rights, the court rejected the issue without mentioning the due process claim (or federal law), instead simply citing state precedent. Pet. App. 75a-77a.

In federal habeas proceedings, Mr. Broadnax argued that the rote application of Alabama's hearsay rule denied him due process and prevented

him from proving his claim. (Doc. 1 at 68). The State responded by block quoting the ACCA's opinion, claiming it was correct, and alternatively, arguing it was a matter of state, not federal, law. (Doc. 15 at 37).

The District Court rejected the State's alternative argument, finding the claim cognizable as to whether the evidentiary ruling violated a due process right. (Doc. 20 at 44). It then denied relief omitting discussion of any case Mr. Broadnax cited.

In response to Mr. Broadnax's Rule 59 motion, the District Court addressed one of the cases he cited: *Sears v. Upton*, 561 U.S. 945 (2010). In doing so, it concluded, "Critically, however, neither *Sears* nor the cases cited therein establish a right to the presentation of inadmissible hearsay evidence during the state-court post judgment hearing." Pet. App. 58a.

Following the District Court's denial of a certificate of appealability on this claim, the Eleventh Circuit granted one. Pet. App. 10a. The Eleventh Circuit rejected the issue, holding that there was no clearly established federal law to support Mr. Broadnax's argument, and that he could not overcome AEDPA deference. Pet. App. 27a. While all three judges agreed with that conclusion, two wrote separately to state that the same evidence rejected in Mr. Broadnax's hearing would now be admissible under Alabama rules, and had the evidence been admitted, it could have proven his claim of ineffective assistance of counsel and required a grant of habeas corpus. Pet. App. 36a-37a.

REASONS FOR GRANTING THE PETITION

This Court should grant *certiorari* to answer two important and undecided questions concerning federal review of state postconviction proceedings and proof of ineffective assistance of counsel claims.

The District Court found that due process violations arising from state postconviction proceedings are reviewable in habeas corpus. (Doc. 1 at 44). On appeal, however, the Eleventh Circuit found relief was properly denied because there was no clearly established federal law prohibiting Alabama from applying its rule. Pet. App. 27a. Further, the court of appeals concluded that, even if the cases cited were the clearly established federal law, Mr. Broadnax did not satisfy their requirements. Pet. App. 25a-26a. This Court should grant *certiorari* to resolve these two important questions concerning the interaction between evidentiary rules governing state postconviction proceedings and federal habeas proceedings.

A. *Certiorari* is needed to answer an important and unresolved question of federal habeas corpus procedure.

While both federal courts held the state court decision in this case was not unreasonable, this Court has never decided whether a due process challenge to a state court's postconviction procedure is subject to the strictures of the AEDPA. *Certiorari* is necessary to resolve this open question.

Justice Stevens observed that the obligation of states to provide post-conviction review at all is "shrouded in uncertainty." *Kyles v. Whitley*, 498 U.S. 931, 932 (1990) (Stevens J., concurring in denial of application for stay).

The same can be said for the requirements of due process in state postconviction procedures. *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (*per curiam*) ("We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient"); *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67 (2009) ("Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.").

In *Swarthout*, this Court declared the relevant inquiry is what process the petitioners received. 562 U.S. at 220. That is precisely the inquiry Mr. Broadnax requested. What *Swarthout* did not do, even though the case was brought under 28 U.S.C. § 2254—not 42 U.S.C. § 1983—was to evaluate the claim using § 2254(d)'s clearly established federal law standard.

The District Court cited no cases to support a conclusion that this type of claim, cognizable in habeas, was covered under AEDPA and the Eleventh Circuit cited just one: *Randolph v. McNeil*, 590 F.3d 1273 (11th Cir. 2009). However, *Randolph* is inapposite.

Randolph involved a due process claim of error at *trial*, which, if relief was granted, would have required a new trial. The entirety of the discussion in *Randolph* was as follows:

> To prevail, Randolph must show that the comment "infected the trial with such unfairness that the conviction constitutes a denial of due process." *Whisenhant v. Allen,* 556 F.3d 1198, 1207 (11th Cir. 2009). In context of the prosecutor's whole argument,

> state courts concluded that the remark did not diminish the jury's sense of responsibility. In this case, the prosecutor's statement did not implicate Randolph's constitutional rights. Randolph fails to present argument or evidence that would justify our overturning the state court conclusion that the statement did not infect the trial with unfairness.

Randolph, 590 F.3d at 1277–1278.

It is relatively uncontroversial for a court to conclude that trial error raised in habeas corpus is subject to AEDPA, because if the petitioner is successful, his conviction is overturned. Here, a grant of relief would require either *de novo* review, or remand to the state court for a hearing where the evidence is admitted. One of AEDPA's purposes in amending § 2254(d) was to reduce delays in executing state sentences and promote finality in state court judgments. *Rhines v. Weber*, 544 U.S. 269, 276 (2005); *Woodford v. Garceau*, 528 U.S. 202, 206 (2003). The "judgments" focused on in AEDPA were not those of state postconviction courts but of state courts imposing death sentences. *Banister v. Davis*, 140 S. Ct. 1698, 1707 (2020) ("AEDPA aimed to prevent serial challenges to a judgment of conviction, in the interest of reducing delay, conserving judicial resources, and promoting finality").

The closest analogue to this case is *Panetti v. Quarterman*, 551 U.S. 930 (2007). There, Texas' failure to provide appropriate procedures for enforcement of a constitutional right led to habeas corpus "relief" in the sense that the state court decision on his incompetency claim was due no deference. *Panetti*, 551 U.S. at 948.

As in *Panetti*, here the state court decision was due no deference because: (1) it did not resolve the constitutional issue presented on federal grounds, Pet. App. 73a-77a; and (2) this type of claim was not intended to receive AEDPA deference. *Certiorari* is necessary to resolve this question.

B. *Certiorari* is necessary to address whether the Eleventh Circuit's interpretation of this Court's precedent was too narrow and in conflict with the Fifth Circuit.

As was undisputed at the state postconviction evidentiary hearing, Pet. App. 23a, the excluded evidence would have been admissible during the penalty phase of Mr. Broadnax's trial. Pet. App. 23a; *see also Whatley v. State*, 146 So. 3d 437, 486 (Ala. Crim. App. 2010); Ala. R. Evid. 1101(b)(3). Paradoxically and inexplicably, Alabama bars the same evidence from being used to prove a postconviction petitioner's penalty phase ineffective assistance claim that would be admissible at the penalty phase of the trial. Ala. R. Evid. 1101(b)(3).

The Eleventh Circuit concluded that there was no clearly established law requiring Alabama to allow the introduction of hearsay to support a claim of ineffective assistance of counsel where that hearsay would have been admissible at trial. Pet. App. 33a.

Assuming AEDPA applies and, thus, clearly established federal law is necessary, the Eleventh Circuit's conclusion is unsupportable by, and irreconcilable with, this Court's precedent, especially *Green v. Georgia*, 442 U.S. 95 (1979), which provided the legal underpinning for *Sears*. *Certiorari* is

necessary to address the meaning, and continued viability, of *Green* and *Sears* and a conflict between the Eleventh and the Fifth Circuit.

This Court has recognized the importance of mitigation since the reinstatement of the death penalty after *Furman v. Georgia*, 408 U.S. 238 (1972). In *Lockett v. Ohio*, 438 U.S. 586 (1978), a plurality stated:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, 438 U.S. at 604 (emphasis added).

Four years later, the Court addressed mitigation again in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), concluding:

> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.

Eddings, 455 U.S. at 113-14 (emphasis in original).

Alabama evidentiary rules implement these concepts by not limiting the type of evidence admissible in a sentencing hearing. Ala. R. Evid. 1101(b)(3) (rules of evidence do not apply at sentencing hearings).

In *Green v. Georgia*, 442 U.S. 95 (1979), decided between *Lockett* and *Eddings*, this Court addressed the intersection of hearsay rules and sentencing. *Green* considered whether exculpatory hearsay for which "substantial reasons existed to assume its reliability" and that was "highly

relevant to a critical issue in the punishment phase of the trial" could be excluded under Georgia's hearsay rules. *Green*, 442 U.S. at 97. Answering in the negative, this Court held, "Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment." *Id.*

This Court returned to Georgia and the questions of hearsay in sentencing in *Sears*. There, relying on *Green*, this Court held that, in evaluating an ineffective assistance of counsel claim brought in postconviction, "reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule[.]" *Sears*, 561 U.S. at 949 n.6. *Sears* considered, among other things, the admissibility of postconviction hearsay evidence consistent with "a mitigation theory portraying Sears as an individual with diminished judgment and reasoning skills, who may have desired to follow in the footsteps of an older brother who had shut him out of his life." *Id.* at 950.

As Dr. Benedict did here, the mental health experts in *Sears* relied on interviews with family members and others in forming their opinions that Sears had significant brain damage. *Id.* at 949-50 ("Whatever concern the dissent has about some of the sources relied upon by Sears' experts . . . it does not undermine the well-credentialed expert's assessment, based on between 12 and 16 hours of interviews, testing, and observations . . . that Sears

suffers from substantial cognitive impairment.") (footnote omitted). But, as this Court stated, "the fact that some of such evidence may have been 'hearsay' does not necessarily undermine its value—or its admissibility—for penalty phase purposes." *Id.*

Together, these decisions stand for a straightforward proposition: just as mitigating hearsay evidence is admissible at a capital sentencing proceeding, so too it is admissible in a postconviction hearing to establish prejudice from trial counsel's deficient failure to offer it. *Chandler v. Moore,* 240 F.3d 907, 918 (11th Cir. 2001) ("hearsay evidence is admissible at a capital sentencing"). *Green* and *Sears* forbid what the Alabama courts did here—applying hearsay rules "mechanistically to defeat the ends of justice" during postconviction hearings considering the appropriateness of a capital sentence. *Green*, 442 U.S. at 97 (internal quotation marks and citation omitted).

Here, the Eleventh Circuit concluded that the state court decision was reasonable because the hearsay in question in this case was not reliable, unlike in *Green*. Pet. App. 26a. That was the first time that any court in this case made a reliability determination. The state court did not cite to *Green* or *Sears*, and the District Court did not even cite to them until the memorandum opinion denying the Rule 59 motion but made no findings on reliability. Pet. App. 57a-58a.

Dr. Benedict's testimony was "highly relevant to a critical issue in the punishment phase." *Green*, 442 U.S. at 97. The hearsay was material because it was unquestionably mitigating, and as two members of the Eleventh Circuit panel believed, Pet. App. 36a, would have helped prove, to the sentencer, that Mr. Broadnax did not deserve a death sentence. Also, "substantial reasons existed to assume its reliability," namely, the fact that these witness interviews were corroborated by testing, such that the testimony's exclusion violates due process. *Green*, 442 U.S. at 97.

Dr. Benedict's interviews corroborated the results of Mr. Broadnax's psychological tests, which were administered over the course of four years, and which led him to conclude that Mr. Broadnax had cognitive deficits. These interviews confirmed that Mr. Broadnax been cognitively impaired since childhood. Like *Green*, the existence of corroborating evidence is a strong indicium of reliability. *Green*, 442 U.S. at 97 ("The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence.").

Ignoring Mr. Broadnax's due process arguments, the Alabama courts applied the rule against hearsay in postconviction proceedings in the rote manner prohibited under *Green* and *Sears*. The District Court considered none of this in rejecting Mr. Broadnax's challenge to the state court's ruling. Instead, it incorrectly concluded that *Sears* did not apply, when, as explained above, it clearly does.

The Eleventh Circuit—for the first time during postconviction proceedings in this matter—conducted an analysis that the state courts did not undertake to justify the state court's decision. The Eleventh Circuit's conclusion—that there was no corroborating evidence—did not consider that the evidence would have been admissible without regard to credibility in the penalty phase of Mr. Broadnax's trial.

This view is contrary to the analysis used by the Fifth Circuit when faced with a similar situation in *Escamilla v. Stephens*, 602 F. App'x 939 (5th Cir. 2015). There, the state argued that the evidence presented to the state postconviction court was inadmissible hearsay and not available to prove prejudice in his IAC claim. The Fifth Circuit disagreed, concluding that it would analyze the case considering "all of the evidence presented to the state habeas court, regardless of whether such evidence would be admissible at a trial in Texas state court." *Escamilla*, 602 F. App'x at 942 n.1. This is consistent with Fifth Circuit practice, where the totality of the evidence adduced at trial and in postconviction proceedings is analyzed. *See Ruiz v. Stephens*, 728 F.3d 416, 424-25 (5th Cir. 2013) ("We agree with Ruiz that in assessing prejudice, "we need not ... make the state-law evidentiary findings that would have been at issue at sentencing.") *Ruiz* and *Escamilla* both use *Sears* as the basis for that analysis.

The questions presented to this Court are straightforward and important: (1) are claims of due process violations in postconviction

proceedings subject to the restrictions of AEDPA and (2) can a state bar a postconviction petitioner from introducing evidence to prove ineffective assistance of counsel where that evidence would have been admissible at trial? This case is an appropriate one to consider both issues.

CONCLUSION

For the above reasons, this Court should grant *certiorari*.

Respectfully submitted,

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