

No. 21-6238

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

REPLY TO BRIEF IN OPPOSITION

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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?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION.....	1
REASONS FOR GRANTING THE PETITION	2
I. The issue presented in this petition has not been decided by this Court and is important to the system of habeas corpus review of state court judgments.....	2
A. “Claims” are only subject to AEDPA when they attack the underlying conviction or the process used to obtain that conviction, but not the state’s post-conviction process.	2
B. The state court did not decide this claim on the merits.....	3
C. This Court has not decided whether AEDPA applies to this type of claim.....	5
II. The <i>de novo</i> review took too narrow a view of the controlling law on the admissibility of hearsay in post-conviction hearings and did not fully account for the fact that the evidence would now be admissible under state law.	5
CONCLUSION	6

TABLE OF AUTHORITIES

Cases

<i>Brecht v. Abrahamson</i> , 507 U. S. 619 (1993).....	3
<i>Calderon v. Thompson</i> , 523 U.S. 538 (1998)	3
<i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011).....	4
<i>Hamm v. Reeves</i> , 142 S. Ct. 743 (2022)	1, 6
<i>Herrera v. Collins</i> , 506 U.S. 390 (1993)	2
<i>Lockyer v. Andrade</i> , 538 U.S. 63 (2003).....	4
<i>Martinez v. Ryan</i> , 566 U.S. 1 (2012)	3
<i>Metrish v. Lancaster</i> , 569 U.S. 351 (2013).....	5
<i>Sears v. Upton</i> , 561 U.S. 945 (2010)	5, 6
<i>Solem v. Stumes</i> , 465 U.S. 638 (1984)	2

Statutes

28 U.S.C. § 2254(b)(1)(B)(ii)	3
28 U.S.C. § 2254(d)(1).....	2, 4

INTRODUCTION

Respondent’s Brief in Opposition recites, with little elaboration, the magic words it believes necessary to cause this Court to deny certiorari: “no genuine split,” “fact bound,” “thorough consideration of facts and circumstances.” BIO at 6. Perhaps this *pro forma* treatment arises from Alabama’s success in vacating stays entered and affirmed by lower courts in capital cases regardless of the arguments advanced by Alabama in this Court. *See, e.g., Hamm v. Reeves*, 142 S. Ct. 743 (2022) (mem.).

However, closer examination reveals that the Court has not determined whether issues of due process of law arising from defects in post-conviction proceedings are subject to deference under AEDPA. Further, the state court’s purportedly “thorough” decision contains no reference to the constitutional claim at issue, instead only considering that court’s previous decisions about a state hearsay rule. Finally, the *de novo* analysis conducted by the Eleventh Circuit on the reliability of the hearsay at issue here is in direct contrast with present state law in Alabama, which recognizes that the hearsay in question here would be admissible.

Mr. Broadnax’s petition easily meets the standards for this Court to grant *certiorari*. The issue before this Court is crucial where, as in Alabama, postconviction proceedings are the only opportunity for a defendant to vindicate his right to effective assistance of counsel. As set out here and in

his petition for *certiorari*, Mr. Broadnax presents an unresolved issue of national importance that this Court should resolve one way or the other.

REASONS FOR GRANTING THE PETITION

I. The issue presented in this petition has not been decided by this Court and is important to the system of habeas corpus review of state court judgments.

The State's primary argument for denial of *certiorari* is that the statute is clear, and the Court has already resolved the question that Mr. Broadnax presented in his petition. BIO at 6-7. The State further argues that the state court resolved Mr. Broadnax's due process claim on the merits. Neither is accurate.

A. "Claims" are only subject to AEDPA when they attack the underlying conviction or the process used to obtain that conviction, but not the state's post-conviction process.

This Court has held that the system of habeas corpus allows the federal courts "to vacate a final conviction [or sentence] on any properly preserved ground of federal constitutional error." *See, e.g., Solem v. Stumes*, 465 U.S. 638, 653 (1984) (Powell, J, concurring); *see also Herrera v. Collins*, 506 U.S. 390, 400, 403 (1993) (federal habeas corpus lies to ensure that individuals are not imprisoned in violation of the Constitution). Section 2254(d)(1) of title 28 of the United States Code provides a restriction on the grant of habeas corpus relief if the state court's ruling on the constitutional claim is not contrary to or an unreasonable application of this Court's precedent. The purpose of that provision is to show respect for "the State's

interest in the finality of convictions that have survived direct review within the state court system.” *Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (quoting *Brecht v. Abrahamson*, 507 U. S. 619, 635 (1993)).

Mr. Broadnax’s claim, which all lower courts agreed was cognizable, is not an attack on his conviction. Rather, it was an attack on the process used in state post-conviction to reject a substantive claim. Such claims, if vindicated, do not attack the state conviction, but rather, allow the federal court to review the substantive claim in question without deference. *See, e.g., Martinez v. Ryan*, 566 U.S. 1 (2012) (inadequate postconviction counsel can establish cause for procedural default in habeas corpus proceedings); 28 U.S.C. § 2254(b)(1)(B)(ii) (exhaustion unnecessary if state corrective process is ineffective to vindicate rights).

B. The state court did not decide this claim on the merits.

The State is incorrect when it states in its BIO that the lower state courts decided this claim on the merits. They did not. The Alabama Court of Criminal Appeals (“CCA”) resolved the claim solely by reference to Alabama state law. The entirety of the CCA’s discussion of this claim, in the last reasoned state court opinion, included a recitation of the issue, block quotes from previous cases where the issue was raised, and this conclusion: “[t]herefore, the circuit court properly refused to allow Broadnax to present hearsay evidence at the Rule 32 hearing.” Pet. App. 77a. At no point did the CCA discuss or resolve the federal constitutional issue. Given that a claim

that is adjudicated on the merits is judged by whether it is contrary to or an unreasonable application of this Court’s precedent, 28 U.S.C. § 2254(d)(1), a claim that is not resolved on the federal grounds is not “decided on the merits” for purposes of AEDPA. *See Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003) (state court decisions are measured against this Court’s precedents at the time they are rendered). “[A] habeas court must determine what arguments or theories ... could have supporte[d] the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.” *Cullen v. Pinholster*, 563 U.S. 170, 188 (2011). Here, because the CCA did not decide the claim based on federal law but on its interpretation of state evidentiary and procedural law, it was not adjudicated on the merits for purposes of AEDPA.

The due process claim—which the State does not address—stems from the fact that Alabama state law prohibits hearsay from being introduced in post-conviction proceedings, even though the same hearsay would be admissible during the sentencing hearing.¹ Further, state rules concerning the conduct of post-conviction hearings in Alabama are consistent only in their inconsistency. At the time of Mr. Broadnax’s post-conviction hearing,

¹ It should also be noted that, at the time of Mr. Broadnax’s post-conviction hearing, Alabama did not make exceptions to the post-conviction hearsay prohibition for information relied upon by experts. That rule has now changed, and the excluded evidence would today be admissible in a post-conviction hearing in Alabama. Pet. App. 35a.

hearsay was not admissible. Yet, at the same hearing, the rules permitted affidavits to be introduced. Ala. R. Crim. P. 32.9(a). Alabama's strict rule against hearsay violated Mr. Broadnax's right to due process at the hearing on his ineffective assistance of counsel claim.

C. This Court has not decided whether AEDPA applies to this type of claim.

The State's BIO claims this Court has already decided that AEDPA applies to this type of claim. It has not. In support, the State cites *Metrish v. Lancaster*, 569 U.S. 351 (2013). However, the State fails to note that *Metrish* involved a claim of a due process violation *during trial*. As Mr. Broadnax noted in his petition, there can be no argument that, if a state violates due process to obtain a conviction, such a claim in a habeas corpus petition is a "claim" subject to the restrictions of AEDPA. Pet. at 7-8. This case, however, involves a due process claim during state post-conviction proceedings, an important issue that this Court has never addressed.

II. The *de novo* review took too narrow a view of the controlling law on the admissibility of hearsay in post-conviction hearings and did not fully account for the fact that the evidence would now be admissible under state law.

This Court has 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 v. Upton*, 561 U.S. 945, 949

n.6 (2010). Yet rote application of state evidentiary rules is exactly what occurred in this case.

The Eleventh Circuit panel concluded that the evidence in question in this case did not meet the *Sears* reliability test. Ironically, the two-judge concurrence sets out the fact that, by operation of state law, that evidence is now admissible in Alabama: “if Mr. Broadnax brought his Rule 32 petition today, Dr. Benedict would be permitted to testify about the background evidence the Rule 32 court excluded in 2011.” Pet. App. 35a. Therefore, by operation of state law, as recognized by the Eleventh Circuit, the evidence in question is now admissible. Given that the state court did not evaluate the issue based on whether the evidence was reliable, the panel’s *de novo* review was too narrow and did not consider the change in state law. Further, this Court’s review is unconstrained, and it may vacate decisions from lower courts regardless of their findings. *See, e.g., Hamm v. Reeves.*

CONCLUSION

For the reasons set forth herein and in his initial petition, this Court should grant *certiorari*, vacate the Eleventh Circuit’s opinion, and remand for further proceedings.

Respectfully submitted,

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