No. 21–6822
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

JAMES E. BARBER,

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED
(Rephrased)

The Eleventh Circuit granted a certificate of appealability on James Barber's penalty-phase ineffectiveness claim. Assuming for purposes of its opinion that Barber's counsel performed deficiently and assessing prejudice de novo, the court of appeals properly reweighed the totality of his mitigation evidence—the evidence presented at his trial and the evidence presented at his state postconviction hearing—against the aggravating circumstances and found that he failed to show that there is a reasonable probability that he would have received a sentence other than death had the jury and trial court heard his additional mitigation evidence. Should this Court deny certiorari where the Eleventh Circuit properly applied *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny in resolving his factbound and meritless ineffectiveness claim?

RELATED CASES

Federal Habeas (2254) and Appeal

Barber v. Comm'r, Ala. Dep't of Corr., No. 19–12133, 861 F. App'x 328 (11th Cir. 2021), Eleventh Circuit Court of Appeals.
Judgment Entered: June 25, 2021.

Barber v. Dunn, No. 5:16–cv–00473, United States District Court for the Northern District of Alabama, Northeastern Division.
Judgment Entered: March 8, 2019.

State Postconviction Proceeding (Rule 32) and Appeal

Ex parte Barber, No. 1141028, Alabama Supreme Court.
Judgment Entered: September 25, 2015.

Barber v. State, CR–13–1167, Alabama Court of Criminal Appeals.
Judgment Entered: April 10, 2015.

Barber v. State, CC–02–1794.60, Circuit Court of Madison County, Alabama.
Judgment Entered: April 21, 2014.

Underlying Trial and Direct Appeal

Barber v. Alabama, No. 06–8514, 549 U.S. 1306 (2007) (mem.), United States Supreme Court.
Judgment Entered: March 26, 2007.

Ex parte Barber, No. 1041603, Alabama Supreme Court.
Judgment Entered: September 22, 2006.

Barber v. State, CR–03–0737, 952 So. 2d 393 (Ala. Crim. App. 2005), Alabama Court of Criminal Appeals.
Judgment Entered: May 27, 2005.
Rehearing Denied: July 8, 2005.

State of Alabama v. James Edward Barber, CC–02–1794, Circuit Court of Madison County, Alabama.
Judgment Entered: January 9, 2004.

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INTRODUCTION

James Barber robbed and murdered his former girlfriend's elderly mother, brutally beating her to death with his fists and a claw hammer. He was convicted of capital murder and sentenced to death for that offense.

Barber seeks certiorari review of the Eleventh Circuit's denial of his penalty-phase ineffectiveness claim, but even a cursory reading of his petition reveals that he has completely misapprehended the decision below. He asserts that the court of appeals recognized that he presented new evidence at his state postconviction hearing that would have had mitigating value at trial but nevertheless "held that prejudice could not possibly exist given the aggravated nature of the crime." Pet. 11. Although it is not entirely clear, his argument seems to be that the court improperly skipped the process of reweighing the totality of his mitigation evidence against the aggravating circumstances and just decided that he cannot establish prejudice because his crime was highly aggravated. That is manifestly wrong.

Instead, assuming that Barber's counsel's performance was deficient and assessing prejudice de novo, the court properly reweighed the totality of his mitigation evidence against the aggravating circumstances and correctly found that he had not carried his burden of showing that there is a reasonable probability that the outcome of his sentencing would have been different had the jury and trial court heard his additional evidence. Pet. App. 15a–18a. So, in reality, Barber is simply seeking review of his factbound and meritless *Strickland* claim. Because he fails to raise any cert-worthy issues, his petition should be denied.

STATEMENT OF THE CASE

A. Statement of the Facts

One weekend in May 2001, James Barber stopped by Dorothy Epps's house in Harvest, Alabama. *Barber v. State*, 952 So. 2d 393, 401 (Ala. Crim. App. 2005). Her husband was out of town on a business trip, so she was by herself. *Id.* at 402. Mrs. Epps and Barber had a friendly relationship. *Id.* at 401, 457. He and her daughter had dated in the past, and Mrs. Epps had hired him to do repair work on her home. *Id.* at 401, 404–05. The evidence presented at trial established that she most likely invited him inside. *Id.* at 401, 457.

After entering her house, Barber struck Mrs. Epps, who was seventy-five years old and weighed one hundred pounds, in the face and then beat her to death with his fists and a claw hammer. *Id.* at 401. The medical examiner testified that Mrs. Epps had seven skull or head fractures, nineteen head lacerations, bleeding over her brain, and multiple rib fractures. *Id.* Barber's bloody footprints were found on her back and buttocks area. *Id.* at 403; Doc. 16–10 at R. 899–900.[1]

Mrs. Epps also had multiple defensive wounds on her hands and arms, establishing that she was facing Barber at times, was conscious and aware of what was happening, and tried to fend off his blows with her bare hands. *Barber*, 952 So. 2d at 401–02. The evidence further established that she tried to get away from him. *Id.* Crime scene investigators discovered her blood all over the area of the house where she was found, including the floor, furniture, walls, and ceiling. *Id.* at 402.

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

During the beating, Barber placed his hand in a puddle of her blood that had spilled on a counter. *Id.* at 402. A latent print examiner compared the bloody print from the counter to Barber's known palm print and testified that the prints were identical. *Id.* After his arrest, Barber voluntarily "confessed to the commission of this crime, admitting that he struck Mrs. Epps with a claw hammer, grabbed her purse, and ran out of the house." *Id.*

B. The Proceedings Below

After a jury trial, Barber was found guilty of the capital offense of murder committed during a robbery in the first degree, in violation of section 13A-5-40(a)(2) of the Code of Alabama. Pet. App. 221a. The jury recommended by a vote of eleven to one that Barber should be sentenced to death. *Id.* The trial court followed the jury's recommendation and sentenced him to death. Pet. App. 227a.

Barber's conviction and death sentence were affirmed on direct appeal. *Barber v. State*, 952 So. 2d 393 (Ala. Crim. App. 2005), *cert. denied*, No. 1041603 (Ala. 2006), *cert. denied*, 549 U.S. 1306 (2007) (mem.).

Barber filed a Rule 32 petition for postconviction relief and an amended petition in the Madison County Circuit Court. Doc. 16–17 at C. 14–81; Doc. 16–19 at C. 539–600; Doc. 16–20 at C. 601–05. Following an evidentiary hearing, the circuit court denied his amended petition. Pet. App. 153a–220a. The Court of Criminal Appeals ("CCA") affirmed, Pet. App. 127a–52a, and the Alabama Supreme Court denied certiorari, Doc. 16–29 at Tab 68.

Barber next filed a petition for writ of habeas corpus in the Northern District of Alabama. Doc. 1. Respondent filed his answer to Barber's petition, a supporting brief, the state-court record, and the habeas checklist. Docs. 15–16, 19–20. The district court denied and dismissed the habeas petition, and further denied a certificate of appealability ("COA"). Pet. App. 19a–126a; Doc. 25.

Barber moved the Eleventh Circuit for a COA. The court granted the motion as to only one claim. After briefing and argument, the court of appeals affirmed the district court's judgment in a per curiam, unpublished opinion. Pet. App. 1a–18a (*Barber v. Comm'r, Ala. Dep't of Corr.*, 861 F. App'x 328 (11th Cir. 2021)). The court denied his petition for panel rehearing and rehearing en banc. Pet. App. 228a.

REASONS FOR DENYING THE PETITION

Barber presents no "compelling reasons" for granting certiorari. SUP. CT. R. 10. He has not established that the Eleventh Circuit's decision conflicts with the decisions of other courts of appeals or presents an important question of federal law. *Id.* For the reasons set forth below, his petition should be denied.

I. This Court should deny certiorari because Barber's petition is based on a profound misunderstanding of the decision below.

It is critical at the outset to disaggregate Barber's account of the Eleventh Circuit's decision from the decision itself. The difference is night and day.

In the preface to his question presented, Barber contends that "the court of appeals held '[t]he aggravating circumstances in this case are simply too great to permit us to find a probability of a different outcome.'" Pet. i (quoting Pet. App.

17a). A few pages later, Barber includes the same quotation in representing that the court resolved his claim this way:

> Ignoring that juror's life vote and suggesting that the unaltered aggravation evidence necessarily precluded any possible prejudice, the Eleventh Circuit briefly concluded that "[t]he aggravating circumstances in this case are simply too great to permit us to find a probability of a different outcome."

Pet. 4 (quoting Pet. App. 17a).

That was not the court's holding. And that is not even an accurate quotation of the court's opinion. In truth, the sentence reads, "The aggravating circumstances in this case are simply too great to permit us to find a probability of a different outcome *had the jury heard what Barber presented at his Rule 32 hearing*." Pet. App. 17a (emphasis added). Read in its entirety, it quickly becomes clear that the court did not hold that Barber *cannot* prove that he was prejudiced by his counsel's alleged deficient performance at the penalty phase of his trial because his crime was highly aggravated. Instead, the court reweighed the totality of his mitigation evidence against the aggravating circumstances and found that he *had not* shown that there is any probability, much less a reasonable probability, that the outcome of his trial would have been different had the jury and court heard his additional mitigation evidence. Pet. App. 16a–18a.

Disregarding the Eleventh Circuit's plain language, Barber premises his petition on the fiction that the court held that he cannot establish prejudice because of the aggravated nature of his crime. Pet. 8–20. In arguing that certiorari is warranted, he represents again that "the court of appeals held that prejudice could

not possibly exist given the aggravated nature of the crime despite [his] 'new evidence that the jury never heard.'" Pet. 11 (quoting Pet. App. 17a). He even goes so far as to allege that the court created a new rule that some capital offenses are so aggravated that penalty-phase prejudice can never be shown, arguing:

> By acknowledging that Barber presented "new evidence that the jury never heard" that "undoubtedly have [sic] mitigation value" but nevertheless holding that aggravating evidence rendered prejudice impossible, the decision below effectively elevated the prejudice standard into a requirement that Barber show a "substantial likelihood" of a different sentence, as other courts of appeals have.

Pet. 14.

This argument is facially nonsensical, as the court of appeals held no such thing. It simply reweighed the totality of Barber's mitigation evidence against the aggravating circumstances and held that he had not satisfied his burden of proving that there is a reasonable probability he would have received a sentence other than death if the jury and court had heard his new evidence. Pet. App. 16a–18a; Pet. App. 16a ("After review of the evidence Barber presented at his Rule 32 hearing as well as the mitigating evidence the jury heard and a reweighing of the totality of that evidence against the aggravating evidence, we conclude that Barber has not shown prejudice.").

In short, Barber's misapprehension of the Eleventh Circuit's decision is so great and so pervasive that it infects his whole petition. For that reason alone, certiorari should be denied.

II. This Court should deny certiorari because the Eleventh Circuit's decision does not conflict with *Strickland* and its progeny.

Barber contends 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 of appeals determined that the aggravated nature of his crime "necessarily precluded" him from proving prejudice. Pet. i, 4, 8–20. That is patently untrue. The court faithfully applied the familiar *Strickland* standard in resolving his claim.

To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must establish that his counsel's performance was deficient because it fell below an objective standard of reasonableness and that his counsel's deficient performance prejudiced him 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).

Under *Strickland's* prejudice prong, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. When claims arise concerning a death sentence, "[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.

In determining whether a petitioner has established prejudice, a reviewing court 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 conducting that inquiry, courts "presume a reasonable decisionmaker." *Dallas v. Warden*, 964 F.3d 1285, 1306 (11th Cir. 2020), *cert. denied*, 142 S. Ct. 124 (2021) (mem.); *see also Strickland*, 466 U.S. at 695 ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker.").

As this Court has repeatedly held, new mitigation evidence that is essentially cumulative of evidence that was presented at trial is not sufficient to satisfy *Strickland*'s high bar for establishing prejudice. In *Cullen v. Pinholster*, the petitioner's counsel presented evidence at trial about his "troubled childhood and adolescence," including evidence that he was run over by a car, sent to a school for emotionally-handicapped children, spent time in juvenile halls and boys' homes, and suffered from epilepsy. 563 U.S. 170, 199–200 (2011). On collateral review, he argued that his counsel were ineffective for failing to present evidence showing that he was neglected by and did not receive much love from his mother and stepfather because they prioritized work and focused on themselves and that neither parent was concerned about his education. *Id.* at 201–02. But this Court held that the petitioner failed to establish prejudice, reasoning that his new mitigation evidence

"largely duplicated" and "basically substantiate[d]" the evidence that was presented at his trial and was "not so significant . . . to show a 'substantial' likelihood of a different sentence." *Id.* at 200–02.

Similarly, in *Wong v. Belmontes*, counsel presented "substantial" mitigation evidence at the petitioner's trial. 558 U.S. 15, 20 (2009). The jury learned about his tragic childhood, his successful tenure as a firefighter, during which time he rose from the lowest person in his unit to second in command, his religious conversion, and his good works in prison and heard him testify that he takes 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, Barber argues that the Eleventh Circuit recognized that he presented new evidence at his Rule 32 hearing that would have had mitigating value at trial but "held that prejudice could not possibly exist given the aggravated nature of the crime." Pet. 11. As explained above, that is not so.

Instead, the court of appeals, assuming deficient performance and applying de novo review, properly reweighed all of Barber's mitigation evidence, old and new, against the aggravating circumstances and correctly determined that even if the new mitigation evidence had been presented at trial, there is no reasonable probability that the outcome of his sentencing would have been different. Pet. App.

16a ("After review of the evidence Barber presented at his Rule 32 hearing as well as the mitigating evidence the jury heard and a reweighing of the totality of that evidence against the aggravating evidence, we conclude that Barber has not shown prejudice."); Pet. App. 18a ("In the face of the horrific nature of Barber's crime and the brutality of Epps' death, and because the jury already knew much about Barber's life, there is no reasonable probability that, had the jury known the limited additional details presented in postconviction, they would have spared his life.") (cleaned up). Thus, the court correctly applied *Strickland* in resolving his claim.

Moreover, the court correctly found that Barber's counsel presented a wealth of mitigation evidence at the penalty phase of his trial through his brother (Mark Barber), his mother (Elizabeth Barber), his jailhouse minister (Alex Dryer), and the defense psychologist (Dr. Marianne Rosenzweig). Pet. App. 6a–9a, 16a–18a. To begin, counsel humanized Barber by presenting testimony from Mark and Elizabeth about their love and affection for him. Mark testified that Barber "always had a big heart," did "whatever he could for anybody he could," and was "very supportive" of their mother while their father battled cancer and after their father died. Doc. 16-12 at R. 1217, 1221. Mark further testified that Barber excelled at his work as a painter and got referrals easily because he "was personable and people took a tendency to like him." *Id.* at R. 1219.

Elizabeth testified that one of her sons was killed and implored the jury to recommend life without parole for Barber because she cannot bear losing another child. *Id.* at R. 1274–75. She stated that Barber was a good son, that he had been of

great help to her before and after her husband died, and that she and Barber write and call each other often. *Id.* Her testimony not only humanized him but, critically, informed the jury that she and their entire family would be devastated if Barber were executed.

Further humanizing him, Dryer recounted how Barber became a Christian and testified that Barber shares his faith and exhibits "very positive attributes" that other inmates try to emulate. *Id.* at R. 1223–25. Dryer, too, asked the jurors to recommend a sentence of life without parole for Barber, explaining that Barber is "one of my best friends. Always will be. He's like a brother to me." *Id.* at R. 1224–25.

Building on Dryer's testimony, Dr. Rosenzweig explained that Barber is a "model prisoner" who had not been disciplined even once during the two and a half years that he has been in jail awaiting trial. *Id.* at 1258. She testified that he would continue to be a model prisoner and would "pose no risk to other inmates or the correctional staff" if he were sentenced to life without parole. *Id.* at R. 1260.

Dr. Rosenzweig opined that Barber did not understand right from wrong at the time of the offense and did not have the specific intent to kill Mrs. Epps. *Id.* at R. 1265–66. She stated that he expressed remorse for the crime, and she believed his remorse was genuine. *Id.* at R. 1272. She testified that Barber loved Mrs. Epps and added that she "liked him a great deal." *Id.*

Dr. Rosenzweig also testified about positive traits in Barber's character. She explained that he was a pleasant and kind person who was considerate of others when he was not abusing substances. *Id.* at R. 1236. He was "very considerate" of

his parents, frequently cooked for them and did their laundry when he lived in their home, and helped his mother in any way that he could after his father became sick. *Id.* at R. 1237. In addition, Barber was a hard worker. *Id.* at R. 1236. By way of example, he worked as a salesman for a company, was promoted to the position of branch manager for one of its stores, and worked there for four years, earning a "very good salary." *Id.*

In terms of substance abuse, Mark testified that Barber began using alcohol and marijuana when he was just twelve or thirteen and had struggled with addiction ever since. *Id.* at R. 1217. Dr. Rosenzweig explained why Barber was predisposed to substance abuse and chronicled his substance abuse during his life, from his use of marijuana and alcohol as a child to his introduction to cocaine as a young adult, to his addiction to crack, pain pills, and alcohol during his adulthood and at the time of the offense. *Id.* at R. 1234, 1238–58. She testified that Barber's substance abuse strained his relationships with his family and friends and ruined his seven-year relationship with a girlfriend. *Id.* at R. 1237, 1239–41. She further testified at length about the effects of crack and withdrawal from crack on Barber's brain and behavior and, using a chart, depicted the progression of crack addiction in general and in Barber's case. *Id.* at R. 1248–56.

Thus, Barber's assertion that "the jury heard only limited and misleading evidence that painted [him] as a hopeless drug addict who was not worthy of mercy," Pet. 5, could not be further from the truth. His counsel presented a host of mitigating circumstances for the jury's consideration, including his lack of a

significant history of prior criminal activity, the love and affection that he shares with his family and the devastating effect that his execution will have on them, his devout Christian faith, his model behavior in jail, his lack of intent to kill the victim, his genuine remorse for her death, positive traits including his work ethic, and his longstanding addiction to drugs, including crack, which, counsel argued, led him to commit the crime.

As such, the Eleventh Circuit was correct in finding that the evidence Barber presented at his Rule 32 hearing was, for the most part, cumulative of the evidence that the jury and trial court heard and serves only to amplify, expand on, and provide more details about the mitigation issues that were presented by his trial counsel. Pet. App. 16a–18a. The court properly followed this Court's precedent in holding that Barber was not prejudiced by his counsel's failure to present that additional evidence because it just "filled in some of the details of his drug use" and life. *Id.* at 16a (cleaned up).

The trial court found the existence of two aggravating circumstances: (1) the capital offense was committed while the defendant was engaged in the commission of a robbery, pursuant to section 13A-5-49(4) of the Code of Alabama, and (2) the capital offense was especially heinous, atrocious, or cruel as compared to other capital offenses, pursuant to section 13A-5-49(8) of the Code of Alabama. Pet. App. 224a. The trial court made the following findings of fact with regard to the second aggravating circumstance:

> (b) The Defendant caused the death of Mrs. Epps while inflicting great fear and extreme pain and mental anguish prior to the infliction of the

> injury, which ultimately caused her death. There is no logical explanation for the Defendant's behavior except his indifference to this human life, and even his enjoyment of the suffering of this victim.
>
> (c) As stated previously in this order, the multiple blows by the Defendant with a claw hammer on the body of the victim shows clearly that the death of Mrs. Epps did not occur quickly and mercifully; rather, the events that lead [sic] to her ultimate death lead[] this Court to conclude, without reservation, that the crime of this defendant was extremely wicked, shockingly evil, outrageously wicked, and vile and cruel, with the actions of the Defendant designed to inflict a high degree of pain and fear in the victim, with utter indifference to or even enjoyment of, the suffering of Mrs. Epps. Any murder of a defenseless victim is to some extent heinous, atrocious and cruel, but the degree of heinousness, atrociousness, and cruelty, with which this offense was committed, exceeds that common to other capital offenses.

Id. at 224a–25a. The trial court determined that the aggravating circumstances "clearly outweigh any mitigating circumstances." *Id.* at 227a. The Court of Criminal Appeals likewise held that "the evidence *overwhelmingly* supports a finding that the offense was especially heinous, atrocious, or cruel when compared to other capital offenses." *Barber*, 952 So. 2d at 458 (emphasis added).

The Eleventh Circuit properly considered the heinous nature of Barber's crime and the brutality of Mrs. Epps's death in reweighing the totality of his mitigation evidence against the aggravating circumstances:

> The aggravating circumstances in this case are simply too great to permit us to find a probability of a different outcome had the jury heard what Barber presented at his Rule 32 hearing. The jury heard that Barber took advantage of his friendly relationship with a frail, elderly woman to gain access to her home and then brutally beat her to death, first with his fists and then with a hammer. The jury heard that Epps moved about the house during the attack and tried to defend herself from Barber's onslaught with nothing but her bare hands. Jurors heard that Epps had wounds all over her body and Barber's footprints on her back, and they saw gruesome photographs of her

> injuries. They heard that Barber stole Epps' purse in the hopes it would contain money he could use to buy drugs.

Pet. App. 17a–18a.

The court of appeals properly reweighed the totality of the mitigation evidence against the aggravating circumstances and correctly determined that there is no reasonable probability that Barber would have received a sentence other than death had the jury and trial court heard his additional mitigation evidence. *Id.* As the court aptly stated, "[I]n the face of the horrific nature of Barber's crime and the brutality of Epps' death, and because the jury already knew much about Barber's life, there is no reasonable probability that, had the jury known the limited additional details presented in postconviction, they would have spared his life." *Id.* at 18a (cleaned up).

Moreover, the court's opinion is a straightforward application of *Strickland* and this Court's other precedents to the facts of Barber's case. Because the court properly applied *Strickland* in resolving his claim and correctly held that Barber failed to satisfy his burden of proving that he was prejudiced by his counsel's performance at the penalty phase of his trial, this Court should deny certiorari.

III. This Court should deny certiorari because the Eleventh Circuit's decision does not contribute to or implicate a circuit split.

Barber contends that the Eleventh Circuit's decision "deepens" three conflicts among the courts of appeals regarding the proper standard for assessing penalty-phase prejudice in capital cases. Pet. 3–4, 8–20. Those splits do not exist, and even

assuming arguendo that they did, his case would be a terrible vehicle in which to resolve them.

1. First, Barber asserts that the circuit courts apply divergent standards in assessing whether a capital petitioner has established that there is a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. Pet. 3, 8–10, 15–16. In his telling, the Third, Sixth, Seventh, Eighth, and Tenth Circuits examine the relevant state's capital-sentencing statute to find out what would have led to a different result. *Id.* at 8–10. If, for example, a state's statute provides that a death sentence will be imposed upon a unanimous jury vote, then those circuits ask whether the petitioner has shown that there is a reasonable probability that at least one juror would not have voted for death. *Id.* According to Barber, the decision below sits alone on the other side of this alleged split. *Id.* at 10. He does not argue that the Eleventh Circuit or any other circuit court applies a different standard—rather, he alleges only that the court did so in his case. *Id.*

In reality, Barber is just seeking error correction here. He insists that he was required to show only that two more jurors would have voted for life without parole to prove prejudice and complains that the court did not explicitly say as much in resolving his claim. Pet. 10, 16. Putting aside Barber's questionable interpretation of Alabama's death-penalty statute,[2] he fails to cite any precedent from this Court

[2] At the time of Barber's trial in 2003, the trial court was the sentencer under Alabama law, and the jury's advisory vote at the penalty phase of a capital trial was "not binding upon the court." ALA. CODE § 13A-5-47(e); *see also Scott v. State*, 163 So. 3d 389, 463 (Ala. Crim. App. 2012) ("Section 13A-5-47(e), Ala. Code 1975, grants the sentencing judge exclusive authority to fix the sentence for a capital-murder conviction."). Moreover, both then and now, Alabama juries cannot return a penalty-phase verdict until at least ten jurors vote for death or seven vote for life without parole. ALA. CODE § 13A-5-46(f). The jury must continue deliberating until it reaches the required number of votes; if it

imposing mandatory opinion-writing standards on state and federal courts that are presented with penalty-phase ineffectiveness claims. *Id.* at 8–10, 15–16.

Moreover, this Court's decision in *Rompilla v. Beard*, 545 U.S. 374 (2005), demonstrates that Barber is wrong in arguing that the court of appeals was required to conduct such an analysis. In *Rompilla*, the Court made no mention of Pennsylvania law in holding under de novo review that the petitioner was prejudiced by his counsel's deficient performance at the penalty phase of his trial. *Id.* at 390–93. And even if there were a split on this issue, Barber's case would not be an appropriate vehicle for resolving it because it would make no difference in the result in light of the court's correct application of *Strickland* to the facts of his case.

2. Second, Barber alleges that the circuit courts are divided on the proper standard to apply in reweighing the totality of the mitigation evidence against the aggravating circumstances. Pet. 3, 10–13, 16–17. Specifically, he asserts that the Eleventh and Fifth Circuits conduct that analysis by comparing a petitioner's case with the facts of this Court's precedent, while the Sixth and Ninth Circuits conduct an independent review in each case without reference to this Court's precedent. *Id.* at 11–12. He is mistaken.

There is no such circuit split. The cases that Barber cites in his petition turn on differences of fact, not law. In each case, the courts properly weighed the totality of the petitioner's mitigation evidence against the aggravating circumstances and

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cannot meet this requirement, a mistrial is declared, and a new penalty-phase jury is empaneled. *Id.* § 13A-5-46(g). Barber received one vote for life without parole, and thus, he needed to sway at least *six* more jurors to get a recommendation of life without parole. Anything less would constitute a penalty-phase mistrial.

arrived at a result. That the courts reached different conclusions as to whether the petitioner had established prejudice reveals only that the additional mitigation evidence differed in amount and substance from that presented at trial. It does not indicate that the courts are divided on how to assess prejudice.

Even if there were a split, it would have no bearing on Barber's case. The Eleventh Circuit did not compare his case with the facts that were at issue in any of this Court's decisions, or indeed, with the facts of any other case. Pet. App. 15a–18a. The court independently reviewed the mitigation evidence that was presented at trial and the additional evidence that Barber presented at his Rule 32 hearing and then reweighed the totality of his mitigation evidence against the aggravating circumstances. *Id.* Because the resolution of any split would not affect the result here, this is not an appropriate vehicle for resolving it.

3. Third, Barber suggests that the circuit courts are divided on whether the proper standard for assessing prejudice is a reasonable probability of a different outcome or a substantial likelihood of one. Pet. 3, 12–14, 18–20. There is no such split, but even if it did exist, his case would be a remarkably poor vehicle for resolving it because the term "substantial likelihood" does not appear even once in the court's opinion. Pet App. 1a–18a. Nor does the court cite, much less discuss, *Harrington v. Richter*, 562 U.S. 86 (2011). *Id.* In fact, the court assumed without deciding that the state court's prejudice determination was objectively unreasonable because that court applied "a higher standard" than a reasonable probability of a different result and accordingly applied de novo review in assessing prejudice. *Id.* at

15a & n.3. Because the court properly applied *Strickland*'s standard in resolving his claim, the resolution of any split on this issue would not affect the result in his case.

Barber altogether has failed to establish that his case implicates any split among the courts of appeals. His petition should be denied.

CONCLUSION

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

Respectfully submitted,

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