No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

JAMIE MILLS,
Petitioner,

v.

JOHN Q. HAMM,
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

ANGELA L. SETZER
COUNSEL OF RECORD
JAMES M. HUBBARD
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803
asetzer@eji.org
mhubbard@eji.org

Counsel for Petitioner

February 3, 2022

CAPITAL CASE

QUESTION PRESENTED

At Jamie Mills' capital trial, the State introduced forensic DNA evidence, from an expert who did not testify, purporting to exclude the lead alternate suspect in the case. Despite *Crawford v. Washington*, 541 U.S. 36 (2004), trial counsel did not object or argue that such evidence violated Mr. Mills' confrontation rights. In habeas corpus proceedings below, the district court acknowledged both that trial counsel failed to object to this evidence and also that, because the expert in question did not testify, Mr. Mills was unable to "question that particular analyst to make sure that he had the training or skills necessary and did not make a mistake," *Mills v. Dunn*, No. 6:17-cv-00789-LSC, 2020 WL 7038594, at *16 (N.D. Ala. Nov. 30, 2020).

In addition to denying relief, the district court also denied a certificate of appealability ("COA") on his claim of ineffectiveness of counsel for failing to object to this evidence. The Eleventh Circuit also denied a COA. The question presented is:

> Whether, given that the district court's agreement that Mr. Mills was denied the opportunity to confront the forensic analyst in this case, did Mr. Mills meet the certificate of appealability standard articulated by this Court in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), and its progeny, "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."

RELATED PROCEEDINGS

State v. Mills, Marion County Circuit Court, No. CC-2004-402. Convicted on August 23, 2007; sentenced on September 14, 2007.

Mills v. State, Alabama Court of Criminal Appeals, No. CR-06-2246. Opinion remanding the case issued June 27, 2008; opinion on return to remand issued September 26, 2008; rehearing denied December 12, 2008.

Ex parte Mills, Alabama Supreme Court, No. 1080350. Opinion issued September 3, 2009; rehearing denied November 24, 2010.

Mills v. Alabama, United States Supreme Court, No. 10-10180. Petition for a writ of certiorari denied June 29, 2012.

Mills v. State, Marion County Circuit Court, No. CC-2004-402.60. Order dismissing majority of claims issued July 19, 2013; order dismissing remainder of claims issued January 14, 2014.

Mills v. State, Alabama Court of Criminal Appeals, No. CR-13-0724. Opinion issued December 11, 2015; rehearing denied February 26, 2016.

Ex parte Mills, Alabama Supreme Court, No. 1150588. Petition for a writ of certiorari denied May 20, 2016.

Mills v. Dunn, United States District Court for the Northern District of Alabama, No. 6:17-cv-00789-LSC. Opinion and order dismissing habeas petition issued November 30, 2020.

Mills v. Commissioner, Alabama Department of Corrections, United States Court of Appeals for the Eleventh Circuit, No. 21-11534. Order denying certificate of appealability issued August 12, 2021; order denying motion for reconsideration issued October 6, 2021.

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The order of the United States District Court for the Northern District of Alabama dismissing Mr. Mills' habeas petition is unreported and is attached as Appendix A. The district court's contemporaneously issued memorandum of opinion, *Mills v. Dunn*, No. 6:17-cv-00789-LSC, 2020 WL 7038594 (N.D. Ala. Nov. 30, 2020), is attached as Appendix B. The district court's order denying Mr. Mills' motion to alter or amend judgment is unreported and is attached as Appendix C. The order of the United States Court of Appeals for the Eleventh Circuit denying Mr. Mills a certificate of appealability, *Mills v. Commissioner, Alabama Department of Corrections*, No. 21-11534, 2021 WL 5107477 (11th Cir. Aug. 12, 2021), is attached as Appendix D. The order of the United States Court of Appeals for the Eleventh Circuit denying Mr. Mills' motion for reconsideration is unreported and is attached as Appendix E.

STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Alabama dismissed Mr. Mills' habeas petition on November 30, 2020, *Mills v. Dunn*, No. 6:17-cv-00789-LSC, 2020 WL 7038594 (N.D. Ala. Nov. 30, 2020), and denied his motion to alter or amend the district court's judgment on April 7, 2021, Order

Denying Rule 59(e) Motion, *Mills v. Dunn*, No. 6:17-cv-00789-LSC (N.D. Ala. Apr. 7, 2021). The United States Court of Appeals for the Eleventh Circuit denied Mr. Mills a certificate of appealability on August 12, 2021, *Mills v. Commissioner, Alabama Department of Corrections*, No. 21-11534, 2021 WL 5107477 (11th Cir. Aug. 12, 2021), and subsequently denied Mr. Mills' motion for reconsideration on October 6, 2021, Order, *Mills v. Commissioner*, No. 21-11534 (11th Cir. Oct. 6, 2021). This Court granted Mr. Mills' application to extend the time to file a petition for writ of certiorari on December 14, 2021, extending the time to file to February 3, 2022. *Mills v. Dunn,* No. 21A221 (Dec. 14, 2021).[1] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitution provides:

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[1]Pursuant to Supreme Court Rule 35.3, John Q. Hamm is automatically substituted in his official capacity as the Commissioner of the Alabama Department of Corrections as the Respondent in this action, replacing the former Commissioner Jefferson S. Dunn.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2253(c)(2) provides in relevant part:

> A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

I. Statement of the Facts Relevant to the Issue Presented.

Mr. Mills was convicted of three counts of capital murder in 2007 for causing the deaths of Vera and Floyd Hill, an elderly couple, in Marion County, Alabama, three years earlier. The State's theory of the case was that Mr. Mills and his wife, JoAnn Mills, were high on methamphetamine and looking for a way to get money to purchase more drugs when they decided to rob Floyd and Vera Hill, who were known to have large amounts of cash at their home. (Vol. 9, Tab #R-18, R. 658, 690, 693; Vol. 9, Tab #R-19, R. 795; Vol. 10, Tab #R-23, R.

913-14.)[2] Ms. Hill, who suffered from chronic obstructive pulmonary disease ("COPD") and was on hospice prior to the assault (Vol. 7, Tab #R-17, R. 387; Vol. 8, Tab #R-17, R. 452), survived the assault and went home after being released from the hospital; she died two and a half months later from bronchopneumonia. (Vol. 7, Tab #R-17, R. 402; Vol. 8, Tab #R-18, R. 511.)

The State's evidence consisted primarily of the testimony of Mrs. Mills that she and Mr. Mills were highly intoxicated at the time of the offense and that it was Mr. Mills who attacked the victims (Vol. 10, Tab #R-23, R. 913-14, 917); evidence that the victims' belongings and murder weapons were found in the trunk of the Mills' car (Vol. 8, Tab #R-18, R. 548-49, 553-55); testimony that DNA retrieved from the victims' belongings matched the victims, although DNA retrieved from the murder weapons could not be matched to Mr. Mills (Vol. 8, Tab #R-18, R. 606-12, 616, 620); and the testimony of Kenneth Snell, the state's medical examiner, that Vera Smith's death due to bronchopneumonia was caused by the assault (Vol. 8, Tab #R-18, R. 511).

Mr. Mills pleaded not guilty and testified at trial that he was at home with his wife at the time of the offense (Vol. 9, Tab #R-19, R. 785-812); that there was

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[2]Citations to the record before the District Court reference the volume and tab number assigned by the State in the Respondent's Habeas Corpus Checklist, *Mills v. Dunn*, No. 6:17-cv-00789-LSC, 2020 WL 7038594 (N.D. Ala. Nov. 30, 2020), ECF No. 9, along with the page number as assigned by the internal document.

no lock on the trunk to their car so anyone could have planted the evidence there (Vol. 9, Tab #R-19, R. 792); that Benjie Howe, the other suspect in the murders, had access to the Mills' home and car; and that Howe had stopped by their house on the evening of the offense. (Vol. 9, Tab #R-19, R. 791-92, 798-801.)

The State sought to discredit Mr. Mills' testimony with testimony from Benjie Howe and his alibi witnesses, Thomas Green and Melissa Bishop. The first, Thomas Green, testified that while Howe was at his house on the day of the crime, Howe left in the early evening—right around the time of the crime—and was out of his presence for three or four hours. (Vol. 10, Tab #R-20, R. 865-66.) The second alibi witness, Melissa Bishop, testified to having been in Howe's presence "between lunchtime and three" p.m. (Vol. 10, Tab #R-20, R. 868), hours before the relevant time, and cast doubt on the reliability of Green's testimony (*see* Vol. 10, Tab #R-20, R. 870 (agreeing that, according to her recollection, Green must have been "lying")).

To counter Mr. Mills' testimony that Benjie Howe was the perpetrator, the State presented testimony from Alabama Department of Forensic Sciences lab director Rodger Morrison asserting that Howe had been excluded as a source for unidentified DNA found on the evidence collected at the scene because that DNA had been compared without match to a database that purportedly contained Howe's DNA (Vol. 8, Tab #R-18, R. 636-37)—even though neither Morrison nor

any other State witness had actually collected Howe's DNA, added it to the database at issue, or compared it directly to the evidence in the case (*see* Vol. 8, Tab #R-18, R. 617, 645).

On the stand, Morrison asserted that the State maintained a database—the Combined DNA Index System ("CODIS")—containing DNA profiles of all offenders convicted of a felony in Alabama since 1994. (Vol. 8, Tab #R-18, R. 636.) He then testified as follows:

> Prosecutor: And did you find Benjie Howe in that data base?
>
> Morrison: **He is in the data base, yes sir.**
>
> Prosecutor: And did you compare his DNA to the evidence that was collected in this case?
>
> Morrison: There was two samples from -- in our analysis of stains from this crime scene. These were the handles of two of the weapons which were involved. **We sent those profiles in to be searched against the data base, and there were no matches in our data base.**
>
> Prosecutor: **So that would have excluded Benjie Howe and any other of the 157,000 people in that data base?**
>
> Morrison: **That is correct.**

(Vol. 8, Tab #R-18, R. 637 (emphasis added).)

Both Morrison and his colleague Robert Bass—the only official who conducted DNA analysis in this case (*see* Vol. 8, Tab #R-18, R. 596)—made clear that neither of them were involved in collecting Howe's DNA, sequencing it, or

adding it to the State database (Vol. 8, Tab #R-18, R. 596, 617, 645).[3] Yet, the State impermissibly introduced, through Morrison's testimony, the statement of the out-of-court analyst who did undertake these tasks, asserting that (1) a sample of Howe's DNA was at some point taken; (2) Howe's DNA profile was at some point entered into the CODIS database; (3) Howe's DNA profile was in the database and accurate at the time the search was conducted; and (4) the lack of a match in the database excluded Howe as a donor of the unidentified DNA. Although *Crawford v. Washington*, 541 U.S. 36 (2004), had been decided three years prior to trial, defense counsel failed to raise a Confrontation Clause challenge to Morrison's testimony.

Closing arguments centered on the credibility contest between Mr. and Mrs. Mills, the forensic evidence, the alleged role of methamphetamine in the

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[3]This fact had been made clear prior to Morrison's testimony, during the trial court's interruption of the State's direct examination of Bass, as follows:

> Court: Did you check the handle for -- say you had some samples from various individuals. I think we've mentioned the Hills, the defendant in this case and his wife. **Did you have any DNA samples of Benjie Howe?**
>
> Bass: **I did not, sir.**
>
> Court: Okay. Go ahead.

(Vol. 8, Tab #R-18, R. 617.)

crime, the possible role of Benjie Howe in the crime, and the possibility that the evidence in Mr. Mills' car trunk was staged or planted. (*See* Vol. 10, Tab #R-21 R. 887-88; Vol. 10, Tab #R-22, 889-907; Vol. 10, Tab #R-23, 908-20.) Mr. Mills was subsequently convicted of capital murder on all three counts.

II. How the Federal Question Was Raised and Addressed in the Courts Below.

On collateral review in state court, Mr. Mills asserted that trial counsel were constitutionally ineffective for failing to object to the Confrontation Clause violation. *See Mills v. State*, No. CR-13-0724, at 92 (Ala. Crim. App. Dec. 11, 2015), (Vol. 21, Tab #R-64). The state courts denied relief. *See id.*, *cert. denied sub nom.* No. 1150588 (Ala. May 20, 2016), (Vol. 22, Tab #R-67).

Mr. Mills raised this ineffectiveness issue in his habeas petition to the district court below. The district court acknowledged both that trial counsel failed to object to this evidence and also that, because the expert in question did not testify, Mr. Mills was unable to "question that particular analyst to make sure that he had the training or skills necessary and did not make a mistake," but nonetheless denied Mr. Mills' ineffectiveness claim. *Mills v. Dunn*, No. 6:17-cv-00789-LSC, 2020 WL 7038594, at *16 (N.D. Ala. 2020). The district court further denied Mr. Mills a certificate of appealability ("COA") on any issue. *Id.* at *79.

Mr. Mills subsequently sought a COA at the Eleventh Circuit, which denied his application. *Mills v. Commissioner, Alabama Department of Corrections*, No. 21-11534, 2021 WL 5107477 (11th Cir. Aug. 12, 2021). The Eleventh Circuit found that Mr. Mills had not demonstrated deficient performance, a finding the district court did not make, and that "fairminded jurists could conclude" Mr. Mills had not demonstrated prejudice and so reasonable jurists would not dispute the district court's finding. *Id.* at *5. The Eleventh Circuit subsequently denied Mr. Mills' motion to reconsider its order denying him a COA. Order Denying Motion to Reconsider, *Mills v. Commissioner, Alabama Department of Corrections*, No. 21-11534 (11th Cir. Oct. 6, 2021).

This petition follows.

REASONS FOR GRANTING THE WRIT

The standard for issuance of a certificate of appealability ("COA") is extremely low. A court should issue a COA where "reasonable jurists would find the district court's assessment of the constitutional claims debatable." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This Court has held that a petitioner is not required "to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). "[A] claim can be debatable even though every jurist of reason might agree, after

the COA has been granted and the case has received full consideration, that the petitioner will not prevail." *Id.*

Despite this low bar, the Eleventh Circuit denied Mr. Mills a COA on his habeas claim that counsel were ineffective for failing to object pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004). This Court should grant certiorari because the Eleventh Circuit's analysis applied "too demanding a standard," *Miller-El*, 537 U.S. at 341, and reasonable jurists could certainly debate the district court's resolution of this claim. Sup. Ct. R. 10(c).

I. Mr. Mills Is Entitled to a Certificate of Appealability Because the State Violated *Crawford v. Washington* When It Introduced Evidence Purporting to Exclude the Lead Alternate Suspect and Jurists of Reason Could Disagree With the District Court's Denial of Habeas Relief Based on a Finding that Trial Counsel's Failure to Object Did Not Prejudice Mr. Mills.

At Mr. Mills' capital trial, the State violated *Crawford v. Washington*, 541 U.S. 36 (2004), by introducing testimonial forensic results generated by a nontestifying forensic expert that purported to exclude the lead alternate suspect. Because the State made no showing of that analyst's unavailability and Mr. Mills had no opportunity to cross-examine the expert, introduction of the out-of-court analyst's conclusions violated the Confrontation Clause. *Crawford*, 541 U.S. at 68 ("Where testimonial evidence is at issue, . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination."). Trial counsel's failure to object to this testimony as violating the

Confrontation Clause was constitutionally deficient performance that prejudiced Mr. Mills. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The district court effectively found that the admission of the forensic evidence violated Mr. Mills' rights under the Confrontation Clause, *see Mills v. Dunn*, No. 6:17-cv-00789-LSC, 2020 WL 7038594, at *16 (N.D. Ala. 2020) ("Mills is correct . . . ."), but it denied habeas relief based on a finding that counsel's failure to object did not prejudice Mr. Mills, *id.* at *17. Rather than evaluate whether reasonable jurists could debate the district court's determination, the Eleventh Circuit denied Mr. Mills a COA after evaluating the full *merits* of the *Strickland* claim, including reevaluating the deficient performance prong, even though the district's court's finding clearly demonstrates that prong's debatability. *Mills v. Commissioner, Alabama Department of Corrections*, No. 21-11534, 2021 WL 5107477, at *3-5 (11th Cir. Aug. 12, 2021). This Court should grant certiorari pursuant to Sup. Ct. R. 10(c) to consider whether the Eleventh Circuit's opinion "essentially decid[ed] the case on the merits" instead of undertaking the less onerous COA inquiry demanded by this Court's precedent in *Slack* and its progeny. *Buck v. Davis*, 137 S. Ct. 759, 774 (2017) ("[W]hen a reviewing court . . . 'first decid[es] the merits of an appeal, ... then justif[ies] its denial of a COA based on its adjudication of the actual merits,' it has placed too heavy a burden on the prisoner *at the COA stage*." (quoting *Miller-El v. Cockrell*,

537 U.S. 322, 336-37 (2003))); *Slack*, 529 U.S. at 485 (recognizing COA inquiry as mere "threshold inquiry").

First, on the facts and the law, the district court effectively found that *Crawford* was violated, because testimonial evidence was admitted that Mr. Mills had no ability to confront, and that counsel failed to object. "Mills is correct," the district court noted,

> that the analyst who obtained a sample of Howe's DNA, prepared his DNA profile, and entered it into the database (sometime in the past), was not available to testify, such that Mills could not question that particular analyst to make sure that he had the training or skills necessary and did not make a mistake in entering Howe's DNA.

Mills v. Dunn, 2020 WL 7038594, at *16. On this finding alone, whether counsel's performance was deficient is clearly debatable, even if the Eleventh Circuit would not find the state court's factual determinations unreasonable, *Mills v. Comm'r*, 2021 WL 5107477, at *4, the application of *Crawford* to DNA-related evidence not clearly established, *id.*, or Mr. Mill's claim ultimately non-meritorious as to the first *Strickland* prong, *id*. *See Buck*, 137 S. Ct. at 774 ("The COA inquiry, we have emphasized, is not coextensive with a merits analysis.").

On the question of prejudice, the Eleventh Circuit found that "fairminded jurists could conclude that [the testimony] is not important enough 'to undermine our confidence in the verdict.'" *Mills v. Comm'r*, 2021 WL 5107477,

at *5 (quoting *Smith v. Secretary, Department of Corrections*, 572 F.3d 1327, 1349 (11th Cir. 2009)). That the Eleventh Circuit would find that fairminded jurists could conclude there was no prejudice—the standard for obtaining habeas relief, *see Harrington v. Richter*, 562 U.S. 86, 101-02 (2011)—does not preclude a finding that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong"—the standard for issuance of a COA, *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)—because satisfying the standard for denial of habeas relief does not render a claim undebatable. *Miller-El*, 537 U.S. at 338 ("We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus."); *see also Buck*, at 137 S. Ct. at 774 ("That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable.").

In fact, the lower court's finding on prejudice is debatable because the *Crawford* violation and counsel's failure to object to it resulted in the collapse of the central pillar supporting the defense theory—that Howe had the motive and opportunity to commit this crime as well as the proximity to and familiarity with Mr. Mills to incriminate him. Mr. Mills' jury saw evidence that Howe possessed Vera Hills's pills when he was arrested; admitted to using and being addicted to methamphetamine around the time of the crime; and used to carry Floyd Hills's

groceries at his father's store, which likely tipped him off to the fact that Mr. Hill frequently carried large amounts of cash. (Vol. 10, Tab #R-20, R. 875-76, 879-80, 882.) Moreover, Howe's own testimony established that he was familiar with the Mills' home; had used their car, allowing for the inference that he knew that its trunk—where the murder weapons were found—could be opened without a key; and had stopped by the Mills' house on the evening of the offense. (Vol. 9, Tab #R-19, R. 799-801; Vol. 10, Tab #R-20, R. 872, 881-82, 884-85.)

Despite motive and opportunity, the district court credited Howe's denial of guilt and alibis that were unquestionably dubious. *Mills v. Dunn*, 2020 WL 7038594, at *17. Setting aside the fact that Howe's denial was self-serving, those "two alibis" actually provided inconsistent and potentially incriminating testimony. The first, Thomas Green, testified that while Howe was at his house on the day of the crime, Howe left in the early evening—right around the time of the crime—and was out of his presence for *three or four hours*. (Vol. 10, Tab #R-20, R. 865-66.) The second alibi witness, Melissa Bishop, was no more helpful; she testified to having been in Howe's presence "between lunchtime and three" p.m. (Vol. 10, Tab #R-20, R. 868), hours before the time of the crime, and cast doubt on the reliability of Green's testimony (*see* Vol. 10, Tab #R-20, R. 870 (agreeing that, according to her recollection, Green must have been "lying")). Accordingly, because Howe lacked an alibi and had knowledge of and proximity

to Mr. Mills, his home, and his car, evidence that an "eyewitness recalled a car resembling Mills' at the scene of the crime," and that the murder weapons were found in the trunk of that same car did not in fact incriminate Mr. Mills to the exclusion of Howe, as the district court appears to have concluded. *See Mills v. Dunn*, 2020 WL 7038594, at *17. Indeed, these facts establish that, contrary to the Eleventh Circuit's finding, the evidence against Mr. Mills was far from "overwhelming." *Mills v. Comm'r*, 2021 WL 5107477, at *5.

Trial counsel's failure to object to this testimony as violating the Confrontation Clause was constitutionally deficient performance that prejudiced Mr. Mills. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The Eleventh Circuit denied a COA after reviewing the claim essentially de novo. This Court should grant certiorari to consider whether a court applies "too demanding a standard," *Miller-El*, 537 U.S. at 341, when it conflates the standard for granting a COA with the standard for granting habeas relief in denying a COA. Sup. Ct. R. 10(c).

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

/s/ Angela L. Setzer
ANGELA L. SETZER
COUNSEL OF RECORD
JAMES. M. HUBBARD
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803
asetzer@eji.org
mhubbard@eji.org

February 3, 2022

Counsel for Petitioner