No. 21-7109
CAPITAL CASE

In the
Supreme Court of the United States

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED
(Restated)

At Jamie Mills's capital murder trial, the regional lab director of the Alabama Department of Forensic Sciences testified that the DNA of Benjie Howe,[1] on whom Mills attempted to pin the crime, was already in the CODIS database because he was a convicted felon, and investigators did not find Howe's DNA on the murder weapons. A DNA analyst and crime scene investigator further testified that neither Mills's nor Howe's DNA matched unknown profiles on the murder weapons, but that not every touch transfers DNA. Mills contends that the Confrontation Clause was violated because he was denied the right to confront the analyst who, at some point prior to the murders, entered Howe's DNA into CODIS.

1. Did the court of appeals err in denying a certificate of appealability as to Mills's claim that his counsel rendered ineffective assistance by failing to argue his alleged Confrontation Clause violation?

1. Howe's name is spelled with and without an *e* in the record. His name appears as "Benjie" in the trial transcript. *See* Vol. 10, R. 870. (Volume citations are to the federal habeas record.)

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INTRODUCTION

On June 24, 2004, Jamie Mills, with the help of his common-law wife, JoAnn,[2] committed a "horrendous, gutless and cowardly act"[3]: he murdered eighty-seven-year-old Floyd Hill with a hammer, a tire tool, and a machete, and he severely injured Mr. Hill's wife, seventy-two-year-old Vera, who died of complications of blunt-force head trauma less than three months later. Mills, fresh off a night spent smoking methamphetamine, had wanted some quick cash, and the elderly couple made easy targets. His actions netted him about $140 and a padlocked tackle box containing Vera's medication, and Mills invited Benjie Howe over a few hours after murdering the Hills to sell Howe some of Vera's pain pills. The next day, as the Millses attempted to dispose of this evidence, police stopped their vehicle and discovered the bloody evidence of the crime in the trunk of their car: a duffel bag containing the murder weapons, the Hills' wallet and purse, bloodstained clothing from the day before, and a heavy cement block, plus the tackle box, which still contained pill bottles with Vera's prescriptions.[4]

Though Mills attempted to cast Benjie Howe as the culprit, there was little doubt that he killed the Hills, especially as JoAnn testified against him. Howe testified as well, and two other witnesses supported Howe's alibi for the day of the murders.[5]

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2. Her name also appears as Jo Ann Green Mills. *E.g.*, Vol. 1, C. 86.
3. *Mills v. State*, 62 So. 3d 553, 557 (Ala. Crim. App. 2008) (quoting sentencing order).
4. *Id.* at 557–61.
5. *Mills v. Dunn*, 6:17-cv-00789, 2020 WL 7038594, at *5 (N.D. Ala. Nov. 30, 2020) (App'x B).

At trial, the prosecution offered the regional lab director of the Alabama Department of Forensic Sciences, who testified that he obtained DNA samples from the Millses, that Howe's DNA was already in the CODIS[6] database because he was a convicted felon, and that investigators did not find Howe's DNA on the murder weapons. The prosecution then offered a DNA analyst and crime scene investigator, who testified that the victims' DNA was found on several of the items seized from the Millses' car, that Mills's DNA was not found on these items, that CODIS did not render a match for the unidentified DNA on the items, and that not every touch transfers DNA.[7] In other words, while this DNA testing did not irrefutably identify Mills or Howe as the murderer, the fact that the DNA did not produce a CODIS hit on Howe was unhelpful to Mills's defense.

During state postconviction, Mills argued that his counsel had been ineffective for failing to raise a Confrontation Clause violation based upon the prosecution's failure to produce the analyst who actually collected Howe's DNA and entered it into CODIS. The Alabama Court of Criminal Appeals ("ACCA") affirmed the summary dismissal of this claim on the merits.[8] In federal habeas, the district court held that

6. CODIS—Combined DNA Index System—is "the generic term used to describe the FBI's program of support for criminal justice DNA databases as well as the software used to run these databases." *Frequently Asked Questions on CODIS and NDIS*, FBI, https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet (last visited Feb. 9, 2022). As of October 2021, the national database contains over 14 million offender profiles, of which a quarter-million come from Alabama's database. *CODIS – NDIS Statistics*, FBI, https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics (last visited Feb. 9, 2022).
7. *Mills*, 6:17-cv-00789, 2020 WL 7038594, at *14.
8. *Mills v. State*, CR-13-0724, at 45–47 (Ala. Crim. App. Dec. 11, 2015).

the state court's decision was neither unreasonable nor contrary to this Court's clearly established precedent[9] and denied a COA.[10] The Eleventh Circuit Court of Appeals likewise denied a COA, holding that fairminded jurists could agree with the ACCA's findings and would not dispute that Mills cannot establish prejudice.[11]

Mills now seeks certiorari, claiming that the Eleventh Circuit applied too strict a standard in denying a COA and that reasonable jurists could debate the district court's holding.[12] This claim is not cert-worthy; Mills had no clearly established right to cross-examine the analyst who entered Howe's DNA into CODIS, and no reasonable jurist would conclude that Mills can establish prejudice as to counsel's alleged error. Thus, the Court should deny review.

9. *Mills*, 6:17-cv-00789, 2020 WL 7038594, at *15–17.
10. *Id.* at *79.
11. *Mills v. Comm'r, Ala. Dep't of Corr.*, No. 21-11534, 2021 WL 5107477, at *4–5 (11th Cir. Aug. 21, 2021) (App'x D).
12. Pet. 10.

STATEMENT OF THE CASE

A. The robbery-murder of Floyd and Vera Hill

Unless specifically noted, the facts of this case are taken from the trial court's sentencing order.[13]

In June 2004, Floyd and Vera Hill lived in Guin, a community in northwestern Alabama. Floyd, whom the trial court described as "a spry gentleman" of eighty-seven, cared for seventy-two-year-old Vera, who was diabetic and otherwise in poor health. As Vera needed several medications, Floyd set an alarm to administer them every four hours, and he kept her pills in a locked tackle box in the kitchen. Though the Hills lived alone, their adult grandchildren checked on them frequently. The Hills also held yard sales, and Floyd was known to carry large sums of money on his person. The employees of the local Amoco gas station certainly knew this, as Floyd always paid in cash.

Jamie Mills lived near the Hills[14] with his common-law wife, JoAnn. While he was unemployed in June 2004,[15] his last job had been at the Amoco that Floyd frequented. On June 23, Mills and JoAnn stayed up all night smoking methamphetamine. The next day, they remained at their house until 5 p.m., when

13. *Mills*, 62 So. 3d at 557–61.
14. At trial, Mills was vague about whether he lived in Guin or in nearby Twin, also known as Yampertown. Vol. 9, R. 786. His address on the case action summary was in Guin. Vol. 1, C. 1.
15. Mills stated that he had been more or less laid off until he could have his hand treated for tendonitis. Vol. 9, R. 786. The trial court noted that Mills's ailment was short-lived: "Incarcerated since June 25, 2004, the defendant has engaged in extensive weightlifting and now sports a lean muscular body." Vol. 1, C. 134 n.5.

they went to a local shop to buy cigarettes. Thereafter, Mills told JoAnn that he was "going to talk to a man about some money" and to "just follow his lead."

Mills, driving his white 1990 two-door Nissan Infiniti M30, reached the Hill house around 5:15 p.m. Floyd apparently knew Mills, as he greeted him by name and allowed the visitors into his home to make several phone calls. After the two couples talked for a time, Vera took JoAnn to their shed to show her some items stored for a yard sale. Floyd unlocked the building, which was constructed of plastic siding, and the four looked around. When the women proceeded back to the house, the men remained in the shed, talking.

JoAnn then heard a loud noise and turned to see a silhouette through the plastic that looked like Mills swinging something from over his head. She and Vera returned to the shed to find Floyd on the ground. Mills hit Vera in the back of the head with a hammer, and JoAnn claimed that she stood in the corner with her eyes closed while Mills repeatedly struck the elderly couple. When Mills finished, he gave JoAnn a hammer, a tire tool,[16] and a machete, and he placed a towel over Floyd's head to quiet the gurgling sounds the dying man was making. Mills locked the shed, and the two stole several items from the house: the tackle box with Vera's pills, Vera's purse, Floyd's wallet, a phone, and a police scanner.

Back at the Millses' home, JoAnn showered while Mills sorted through their haul. They netted about $140 from the Hills, plus Vera's medicine. Mills packed the

16. The sentencing order describes this as a "lug nut tire tool." *Mills*, 62 So. 3d at 559. Defense counsel called it a "lug wrench." Vol. 8, R. 643.

rest of the items and the murder weapons in a bag. After showering as well, he called Benjie Howe, a local drug user, who came over to purchase some of Vera's pain pills. The Millses then put the bag of stolen goods and bloody murder weapons in their shed and went to Mills's father's house in Hamilton to play dominos. They spent the night there.

Meanwhile, the murders had been discovered. When the Hills' granddaughter was unable to reach them by phone shortly after dark—around eight p.m.[17]—she drove by the house to check on them and ultimately called the police for a welfare check. Floyd's alarm for Vera's medicine was ringing in the house, and Vera's walker was still in the living room. A police officer found the shed locked and climbed onto a bench to look over the door, where he spotted Floyd and Vera lying in pools of blood within. He broke through the plastic to reach the victims. While Vera was still moving, Floyd was pronounced dead.

The scene was quickly secured, and blood samples were taken from both victims. Law enforcement learned of what had been stolen from the home. Around 11:15 p.m., investigators from the district attorney's office spoke with the Hills' next-door neighbor, who reported that she had noticed a white, late-model four-door sedan pass the house several times earlier that day, and she had seen it in the Hills' driveway. Shortly after midnight on June 25, the investigators spoke with Guin police

17. Latitudinally, Guin is located between Huntsville and Birmingham; longitudinally, it is closer to Tuscaloosa. On June 24, 2004, the sun set at 8:03 p.m. in Huntsville and Tuscaloosa and at 8:00 p.m. in Birmingham. *See* TIMEANDDATE, https://www.timeanddate.com/sun (last visited Feb. 9, 2022).

officers, who mentioned Jamie Mills, a local man who drove a car matching that description. A patrol car sent to the Mills residence found no one home, but the investigators asked the police to regularly send a car by to check for their return.

The next morning, Mills and JoAnn came home to find that a dog had torn open the bag containing the murder weapons and stolen items. The two packed everything into a large blue duffel bag, adding the bloody clothes Mills had worn the day before and a cement block for weight, then put this and the tackle box into the trunk of their car. But around 9:45 a.m., as they were about to drive off with the evidence, Guin police officers noticed them trying to leave and blocked the driveway. Mills was taken to city hall for questioning, but he denied any knowledge of the Hills. Meanwhile, investigators came to the Millses' home to question JoAnn, who was then on probation. She consented to a search of the home, the car, and its trunk. When the investigators opened the trunk, they found the tackle box with its cut padlock in plain view, plus the blood-splattered duffel bag. JoAnn was Mirandized but waived her rights and gave a statement. The tackle box still contained pill bottles with Vera's prescriptions, while the contents of the duffel bag included Floyd's wallet and driver's license, Vera's purse, and a pair of bloodstained work pants with Mills's name on the inside. The hammer had blood on it, while the machete bore traces of blood and hair.

DNA testing was performed on the murder weapons, a T-shirt, and Mills's pants. The blood on each of these items was determined to have come from one or both of the victims.

The medical examiner found that Floyd was 5'9" and 167.5 pounds, and died of blunt- and sharp-force wounds to his head and neck. Floyd's body showed multiple facial and scalp lacerations, including the "near total amputation" of his right ear. He had horizontal incised wounds and blunt-force wounds to the front of his neck and deep injuries to his airway. He also sustained injuries to his left arm and hand, and two fingers had been broken.[18]

Vera was taken to the hospital and treated for brain injuries, a depressed skull fracture, facial fractures, a broken neck, and crushed hands. She was sent home bedridden, incontinent, and with a feeding tube, and she could not answer questions.[19] Vera died of complications from her head trauma on September 12, 2004, less than twelve weeks after Mills attacked her.

B. The trial

Mills was indicted on three counts of capital murder in December 2004: one each for the robbery-murder of Floyd and Vera Hill, and the third for the murder of two or more persons pursuant to one scheme or course of conduct.[20] Voir dire began in Marion County on August 20, 2007,[21] and the trial commenced on August 21.[22]

During the prosecution's case in chief, they offered Rodger Morrison, the laboratory director of the Alabama Department of Forensic Sciences' Huntsville

18. Vol. 1, C. 93–94.
19. Vol. 8, R. 455, 460–61.
20. Vol. 1, C. 32–34.
21. Vol. 6, R. 148.
22. Vol. 7, R. 362.

regional laboratory.[23] Morrison had previously been in charge of the forensic biology section, which handled DNA analysis.[24] Of relevance to the present matter, Morrison testified to the following:

- On June 28, 2004, he took DNA samples from Mills and JoAnn.[25]
- The blood and other forensic evidence was turned over to Robert Bass, the DNA analyst who worked the case.[26]
- Morrison found Benjie Howe's DNA profile in the CODIS database. CODIS has national and state components. In Alabama, DNA samples from convicted felons have been collected and entered into CODIS since 1994, and the state database then had about 157,000 profiles on file.[27]
- Unknown DNA samples from the tire tool and machete were searched against CODIS and returned no matches. This would exclude Howe and the other 157,000 people in the database.[28]
- Morrison did not personally collect Howe's DNA sample or run the CODIS comparison for the DNA samples from the murder weapons.[29]

The prosecution then offered Robert Bass, a former DNA analyst and crime scene investigator for the Department of Forensic Sciences.[30] In the investigation of the Hill murders, Bass's work focused on DNA. Of relevance, he testified to the following:

- Bass was given forensic samples from Floyd and Vera Hill.[31]

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23. Vol. 8, R. 578.
24. *Id.* at R. 579.
25. *Id.* at R. 594.
26. *Id.* at R. 596.
27. *Id.* at R. 636–37.
28. *Id.* at R. 637, 641.
29. *Id.* at R. 645.
30. *Id.* at R. 601.
31. *Id.* at R. 604–05.

- Morrison collected DNA from Mills and JoAnn through buccal swabs at the Marion County Jail.[32]

- Vera's DNA was found on a black T-shirt, State's Exhibit 90.[33] (The shirt was recovered from Mills's car.[34])

- Floyd's DNA was found in presumptive blood stains on a pair of blue work pants, State's Exhibit 88.[35] (The pants were recovered from Mills's car.[36] An employee of Arrow Mark uniform supply company testified that the pants were marked with a company tag—6F5-93-01—and Mills's name.[37])

- Probable DNA from both victims (primarily Floyd's, possibly Vera's[38]) was found on the blade of the machete, State's Exhibit 87.[39]

- A DNA mixture on the machete handle did not match the reference samples.[40] The machete was supposedly a yard sale item, "laying out there for who knows who to pick up," which could explain why the profile on the handle was unknown.[41]

- Vera's DNA was found on the hammer, State's Exhibit 84.[42]

- A mixture containing Floyd's and Vera's DNA was found on the "hitting part" of the tire tool, State's Exhibit 83, while an unknown profile was found on the handle.[43]

- Touching an item does not always transfer DNA to it.[44]

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32. *Id.* at R. 606.
33. *Id.* at R. 607.
34. *See id.* at R. 554–55.
35. *Id.* at R. 610–12.
36. *Id.* at R. 554.
37. Vol. 9, R. 669.
38. The sample yielded a mixed profile with only some of the sixteen markers. The major portion, identified as Floyd's profile, would appear in one of 1.4 trillion Caucasians, and Bass was confident in the match. Vol. 8, R. 613–15.
39. *Id.* at R. 612–13.
40. *Id.* at R. 616.
41. *Id.* at R. 616.
42. *Id.* at R. 618.
43. *Id.* at R. 619–20.
44. *Id.* at R. 617.

- The unknown DNA samples were checked against CODIS, but the database returned no matches.[45]
- No DNA tested matched Mills.[46]

Last to testify in the prosecution's case in chief was JoAnn Mills, who stated that she did so without a deal having been made.[47] She told the jury about the Millses' use of methamphetamines on June 23 and the timeline of June 24 and 25, adding that she did not hit the Hills and that she feared Mills would hurt her if he did not comply with his instructions.[48] JoAnn stated that when Mills found her calling her aunt after the murders, he turned her cell phone off so that she would tell no one what he had done.[49] When the police stopped them from leaving their driveway on June 25, Mills told JoAnn to keep her mouth shut.[50] On cross-examination, JoAnn stated that she expected no help from the district attorney, that her lawyer had left it up to her whether to testify, that she had been an unwilling accomplice, that she "[p]ossibly" expected to be sentenced to life without parole or death, and that she hoped for "[s]ome forgiveness from God" for her testimony.[51] At the time of the murders, she was serving a fifteen-year term of probation for two counts of receiving stolen property.[52] JoAnn testified that Mills had not worn gloves while he attacked

45. *Id.* at R. 625–26.
46. *Id.* at R. 626.
47. Vol. 9, R. 686.
48. *Id.* at R. 701–02, 704.
49. *Id.* at R. 710.
50. *Id.* at R. 715.
51. *Id.* at R. 720–23.
52. *Id.* at R. 726–27.

the Hills, but she stated that she was "sure beyond a shadow of a doubt" that Mills struck and killed the victims.[53]

Mills then testified in his own defense, claiming innocence. He stated that he knew Benjie Howe because they had been incarcerated together.[54] According to Mills, he was not on drugs in June 2004, and Howe knew not to use around him because Mills was on probation.[55] Mills claimed that he did not know the Hills or where they lived.[56] He said that on the evening of June 24, after buying cigarettes, he and JoAnn returned to his house before 5 p.m., and Howe arrived between 7 and 8 p.m. to look at an air conditioner.[57] Howe left by 8:15 p.m., and Mills and JoAnn drove to his father's house in Hamilton for the night.[58] Mills said that he never wore uniform pants unless he was going to work and was not wearing them on June 24.[59] He also claimed that he had never seen the blue bag in his trunk before.[60] Mills said that Howe sometimes drove his white car.[61] The trial court found Mills's demeanor during his testimony to be "cold, calculated, rehearsed and unremorseful."[62]

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53. *Id.* at R. 759–60, 776. Following Mills's conviction, JoAnn was allowed to plead guilty to murder and was sentenced to life in prison. *See Mills*, 62 So. 3d at 570. She remains incarcerated, and her requests for a reduced sentence have been consistently denied.
54. Vol. 9, R. 788–89.
55. *Id.* at R. 791.
56. *Id.* at R. 792.
57. *Id.* at R. 799–800.
58. *Id.* at R. 801.
59. *Id.* at R. 810.
60. *Id.* at R. 811.
61. *Id.* at R. 818–19.
62. Vol. 1, C. 132.

Following the defense's case, the prosecution offered rebuttal witnesses. Thomas Green testified that Benjie Howe was with him for most of the day on June 24—Green was installing a radio in his truck—and that Howe left around dark.[63] Melissa Bishop, Green's cousin, stated that she gave Howe a ride to Mills's house during the afternoon of June 24 in her red Toyota Solara.[64] After that, she took Howe back to Green's house, where Howe's truck was parked.[65] Finally, Howe testified that Green was installing a radio in his truck on June 24 and that Howe was with Green for most of the day.[66] At one point during the day, he left with Bishop because Mills "was calling two or three times that he had something that [Howe] wanted."[67] Howe remembered that the calls were late in the afternoon, possibly around seven p.m., as it was still light outside.[68] The "something" were twenty-five Lortabs, which Mills sold to Howe for $100.[69] Howe then returned to Green's house. Later that evening, he went on a date with Brandy Barnes and spent the night with her.[70] Howe testified that he had used methamphetamines with Mills three or four times.[71]

On August 23, 2007, the jury found Mills guilty of all three counts of capital murder.[72] The next day, following the penalty-phase presentation, the jury

63. Vol. 10, R. 863–64.
64. *Id.* at R. 868.
65. *Id.* at R. 869.
66. *Id.* at R. 872.
67. *Id.* at R. 873.
68. *Id.* at R. 874, 877.
69. *Id.*
70. *Id.* at R. 875.
71. *Id.* at R. 885.
72. Vol. 1, C. 78–80.

recommended death eleven to one.[73] After a judicial sentencing hearing in September, the court accepted the jury's recommendation and sentenced Mills to death.[74] In particular, the court found Mills's crime to be especially heinous, atrocious, or cruel:

> One only has to view the gruesome autopsy photos of Mr. Hill's left hand (fingers and hand split by the machete's blows as he obviously tried to ward off the savage beating), his severed ear, his sliced and stabbed throat, to become repulsed and appalled. Mrs. Hill no doubt witnessed the brutal attack on her husband prior to having the back of her skull caved into her brain by the defendant's blow with a ball-peen hammer. Although she lived for two and a half months after the incident, it is unclear as to how conscious she was. During the last month of her life, she could not recognize her own daughter. We do know from the testimony that she could sometimes respond to simple commands. The only words she spoke while at UAB were to call out the name of her loving husband—"Floyd"![75]

C. Post-trial and direct appeal

Mills's motion for new trial was denied.[76] On direct appeal, the ACCA affirmed his convictions and sentence,[77] as did the Alabama Supreme Court.[78] This Court denied certiorari in 2012.[79]

D. State postconviction proceedings

Mills filed a petition for postconviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure in November 2011.[80] Of relevance to the

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73. *Id.* at C. 112.
74. *Id.* at C. 122–37.
75. *Id.* at C. 131.
76. *Id.* at C. 120–21.
77. *Mills*, 62 So. 3d at 574.
78. *Ex parte Mills*, 62 So. 3d 574 (Ala. 2010).
79. *Mills v. Alabama*, 567 U.S. 951 (2012) (mem.).
80. Vol. 15, Tab #R-53.

present matter, he claimed that trial counsel were ineffective for failing to object to the testimony of Rodger Morrison concerning Benjie Howe's DNA and to the testimony of Robert Bass concerning the DNA evidence more generally. Mills contended there had been a violation of the Confrontation Clause and *Crawford v. Washington*,[81] as the prosecution "offered no further evidence identifying the name of the database, the contents of the database, the structure of the database, the identity of the person(s) who actually searched the database, or the search methods and techniques used by that person(s)."[82] The circuit court summarily dismissed this claim in July 2013.[83]

Mills appealed, and the ACCA affirmed in a memorandum opinion in December 2015.[84] Of relevance here, the court wrote:

> Mills argues that his trial counsel were ineffective for not objecting to Morrison's testimony because, Mills says, (1) "Morrison's testimony, which was based solely on testing he did not conduct and as to which he had no personal knowledge, was admitted in violation of Mr. Mills's rights to confrontation, a fair trial, and due process as protected by state and federal law"; and (2) the evidence was unreliable "because the State produced no evidence even identifying or describing the method of analysis underlying the purported comparison of Howe's DNA profile to the material recovered from the murder-weapon handles, let alone attesting to
> testing, peer review, error rate, or general acceptance."
>
> As to Bass's testimony, Mills argues that his counsel should have objected "to the State's failure to make any showing that its DNA evidence was based on a reliable theory and techniques during the testimony of State witness Robert Bass. . . . Bass did not explain the

81. 541 U.S. 36 (2004).
82. Vol. 15, Tab #R-53, C. 64.
83. Vol. 16, Tab #55, C. 303.
84. Vol. 21, Tab #R-64.

scientific theory underlying his testing, nor the techniques involved; instead, he simply testified to the results of the supposed analysis."

Summary dismissal of these claims was appropriate. As to the claims related to Bass, the record indicates that Bass testified that he tested and obtained the DNA profiles from the submitted evidence and that he entered those DNA profiles into the database of convicted offenders, which database Bass identified as "CODIS." Further, Mills did not plead any facts that would have shown that Bass's testimony or the testing methods he used were actually unreliable. Indeed, in cross-examining Bass, Mills's counsel emphasized that Bass's testing revealed that Mills's DNA was not on any of the tested evidence; thus, attacking the reliability of Bass's methods would not have necessarily benefitted Mills.

As to the claim related to Morrison's testimony, the record indicates that both Morrison and Bass testified about the database at issue. Further, Morrison's testimony did not violate Mills's right to confrontation because Bass—who testified—conducted the testing of the DNA samples and entered the resulting profiles into the CODIS database. As to the suggestion that the comparison of the submitted evidence against the CODIS database and the profile of Howe was unreliable, Mills pleaded no facts that actually question the reliability of those matters.[85]

The Alabama Supreme Court denied certiorari without opinion in May 2016.[86]

E. Federal habeas proceedings

Mills filed a 28 U.S.C. § 2254 petition in the Northern District of Alabama in May 2017.[87] He raised the ineffective assistance claim he had exhausted below, plus an unexhausted substantive Confrontation Clause claim.

85. *Id.* at 45–47 (citations and footnote omitted).
86. Vol. 22, Tab #R-67.
87. Petition, *Mills v. Dunn*, 6:17-00789 (N.D. Ala. May 12, 2017), ECF No. 1.

On November 30, 2020, the district court denied the petition in a thorough opinion.[88] After holding that the substantive claim was procedurally defaulted,[89] the court considered the ineffective assistance claim and disagreed with some of the ACCA's reasoning, but still deemed it meritless:

> Because the state courts addressed Mills' claim on the merits, Mills must demonstrate not only that the claim is meritorious but also that the ACCA's rejection of the claim was either an unreasonable determination of the facts in light of the evidence presented to the ACCA or was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1)–(2); *Boyd* [*v. Allen*], 592 F.3d [1274,] 1292 [(11th Cir. 2010)].
>
> Mills argues that it was an unreasonable determination of the facts and contrary to law for the ACCA to conclude that his right to confront witnesses was not violated because Bass, who testified, conducted the DNA testing and entered the samples into the CODIS database. Indeed, prior to Morrison's testimony, Bass identified the name of the national database as "CODIS" and testified that he entered the DNA profiles found on the murder weapons into the database. Thus, there was a certain amount of identifying testimony presented about the databases at issue. However, Mills is correct 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. Although the ACCA dispensed with this argument by finding that Mills did not plead any facts that "actually question[ed] the reliability" of Howe's DNA profile in the database, Mills asserts that this finding was contrary to *Crawford*, which holds that a Confrontation Clause claim may still be maintained despite a finding of the "reliability" of the evidence:
>
> > Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." Certainly none of the authorities discussed above acknowledges any general

88. *Mills*, 6:17-cv-00789, 2020 WL 7038594, at *1.
89. *Id.* at *15.

> reliability exception to the common-law rule. Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Crawford, 541 U.S. at 61.

Nonetheless, Mills' Confrontation Clause claim (which is procedurally barred) must be viewed through the lens of his ineffective assistance of counsel claim and viewed "doubly deferentially" in the context of this federal habeas proceeding. *See Harrington* [*v. Richter*], 131 S. Ct. [770,] 788 [(2011)]. This standard of review leads the Court to conclude that the ACCA's decision was not contrary to, nor did it involve an unreasonable application of, clearly established Supreme Court precedent, i.e., *Strickland* [*v. Washington*, 466 U.S. 668 (1984)], because Mills cannot demonstrate that he was prejudiced by his counsel's failure to object to Morrison's testimony on Confrontation Clause grounds. In other words, the Court is convinced that Mills would still have been convicted of capital murder and sentenced to death had the jury not heard that Howe's DNA did not match any DNA samples taken from the murder weapons. This is because, even though Mills' DNA was also not a match for any of the items in his trunk, Bass explained that it is not uncommon for some people's DNA not to transfer. And even without any DNA evidence in this case incriminating Mills, the other evidence against Mills was overwhelming. JoAnn gave eyewitness testimony inculpating Mills, both four days after the murders to law enforcement, and again at trial, and her testimony both times was consistent. A second eyewitness recalled a car resembling Mills' at the scene of the crime. Clothing labeled with Mills' name and the murder weapons were found in the trunk of his car the day after the murders, all of which contained the victims' DNA. A concrete block was also found with these items, which the State argued Mills and JoAnn were going to use to sink the evidence. Mills also testified in his own defense, denying that he had committed the murders, and the jury was entitled to disbelieve him. Even if there was a question as to whether Howe's DNA would match that found on the murder weapons, Howe denied participation in the murders and had two alibis. Although Howe was found with one of Vera Hill's prescription pill bottles, he testified that Mills sold him some of her pills on the evening of the murders. Given the overwhelming

> evidence of guilt, the admission of the CODIS testimony did not affect the outcome of the trial, Mills is not entitled to relief.[90]

Mills filed a Rule 59(e) motion, which the district court denied on April 7, 2021.[91]

As the district court also denied a COA, Mills petitioned the Eleventh Circuit for a COA as to several issues, including the substantive and ineffective assistance Confrontation Clause claims.[92] The court denied the motion on August 12, 2021.[93] In a well-reasoned order, Chief Judge William H. Pryor Jr. agreed with the district court that the unexhausted substantive claim was procedurally defaulted and found that reasonable jurists would not debate this conclusion.[94] As for the ineffective assistance claim, Chief Judge Pryor explained that a COA was unwarranted for several reasons. First, fairminded jurists could agree with the ACCA. The state court never said that Bass himself collected Howe's DNA, as Mills had alleged, and it was not an unreasonable reading of the transcript to conclude that Bass entered the DNA profiles from the evidence found in Mills's car into the database.[95] Second, this Court has never held that the Confrontation Clause requires that the defendant be given the opportunity to cross-examine every analyst involved in generating a DNA

90. *Id.* at *16–17 (citations omitted).
91. Order Denying Rule 59(e) Motion, *Mills v. Dunn*, 6:17-00789 (N.D. Ala. Apr. 7, 2021), ECF No. 31 (App'x C).
92. Motion for Certificate of Appealability, No. 21-11534 (11th Cir. May 20, 2021).
93. *Mills*, No. 21-11534, 2021 WL 5107477, at *1.
94. *Id.* at *3.
95. *Id.* at *4.

profile.[96] As the opinion explained, "In the light of this uncertainty, not to mention the absence of information in the record about the nature of the DNA database, there can be no unreasonable application of clearly established law."[97] Third, "[r]easonable jurists also would not dispute that Mills cannot establish prejudice," given the overwhelming evidence against him and the fact that the testimony from Morrison and Bass did not eliminate Howe as a suspect. Indeed, Bass testified that not every touch transfers DNA.[98]

The court of appeals denied reconsideration on October 6, 2021,[99] and the present petition for writ of certiorari followed.

96. *Id.* (noting plurality opinion, concurrence, and dissent in *Williams v. Illinois*, 567 U.S. 50 (2012)).
97. *Id.*
98. *Id.* at *5.
99. Order, *Mills v. Comm'r, Ala. Dep't of Corr.*, No. 21-11534 (11th Cir. Oct. 6, 2021) (App'x E).

REASONS THE PETITION SHOULD BE DENIED

Mills's petition is not worthy of certiorari. His claim is factbound, does not implicate a circuit split, and is wholly meritless.

As this Court noted last July, in reviewing *Strickland* determinations in a § 2254 proceeding, "a federal court may grant relief only if *every* "'fairminded juris[t]'" would agree that *every* reasonable lawyer would have made a different decision."[100] Here, the district court correctly denied relief, and the Eleventh Circuit Court of Appeals correctly denied a COA because (1) this Court has never held that the Confrontation Clause is violated if a defendant is not permitted to cross-examine every DNA analyst tangentially attached to his case, and (2) reasonable jurists would not dispute that Mills cannot show prejudice. As Mills's petition notes, "A court should issue a COA where 'reasonable jurists would find the district court's assessment of the constitutional claims debatable.'"[101] Because Mills cannot make this showing, the court of appeals correctly denied a COA. For the reasons that follow, his petition is not cert-worthy.

I. Mills's petition is due to be denied because the ACCA's decision does not violate clearly established federal law.

The Court should deny certiorari because the Eleventh Circuit correctly recognized that the ACCA's decision to deny postconviction relief as to Mills's Confrontation Clause claim does not violate clearly established federal law.

100. *Dunn v. Reeves*, 141 S. Ct. 2405, 2411 (2021).
101. Pet. 9 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

In reviewing the ACCA's decision, the district court correctly noted that "Mills must demonstrate not only that the claim is meritorious but also that the ACCA's rejection of the claim was either an unreasonable determination of the facts in light of the evidence presented to the ACCA or was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent."[102] The district court disagreed with the ACCA's analysis, concluding that under *Crawford*, Mills was not required to plead facts questioning the reliability of Howe's DNA profile in CODIS.[103]

Still, the ACCA's holding was that "[s]ummary dismissal of [this claim] was appropriate."[104] Even if the ACCA was mistaken about the requirements of *Crawford*, summary dismissal was appropriate because there is no clearly established federal law entitling Mills to cross-examine the analyst who entered Howe's DNA information into CODIS at some point prior to the murders. As the Eleventh Circuit explained:

> The Court of Criminal Appeals also did not rule contrary to clearly established law because "the Supreme Court has never held that the Confrontation Clause requires an opportunity to cross examine each lab analyst involved in the process of generating a DNA profile and comparing it with another." *Washington v. Griffin*, 876 F.3d 395, 407 (2d Cir. 2017). And a decision is unreasonable "if, and only if, it is so obvious [how] a clearly established rule applies to a given set of facts that there could be no fairminded disagreement on the question." *Nance v. Warden, Ga. Diagnostic Prison*, 922 F.3d 1298, 1304 (11th Cir. 2019) (internal quotation marks omitted). The application of the Confrontation Clause to DNA evidence is contested. *Compare Williams v. Illinois*, 567 U.S. 50, 58 (2012) (plurality opinion) (concluding that the Confrontation Clause

102. *Mills*, 6:17-cv-00789, 2020 WL 7038594, at *16.
103. *Id.*
104. Vol. 21, Tab #R-55, at 46.

> does not require "calling the technicians who participated in the preparation of [a DNA] profile"), *with id.* at 110–11 (Thomas, J., concurring in the judgment) (concluding that the Confrontation Clause applies if the DNA evidence in question bears "indicia of solemnity" (internal quotation marks omitted)); *see also id.* at 141 (Kagan, J., dissenting) (noting that *Williams* creates "significant confusion" about the scope of the Confrontation Clause). In the light of this uncertainty, not to mention the absence of information in the record about the nature of the DNA database, there can be no unreasonable application of clearly established law.[105]

In *Williams*, the Court considered whether *Crawford* prohibited an expert from opining based on facts made known to the expert but about which he is not specifically competent to testify.[106] The prosecution called an expert who testified that the defendant's DNA profile, produced by the state lab, matched a DNA profile produced by an accredited private laboratory, Cellmark.[107] While the plurality opinion found that the expert's testimony was properly admitted, the plurality offered "a second, independent basis" for its decision: even if Cellmark's report had been admitted, there would have been no Confrontation Clause violation.[108] The plurality explained:

> The Cellmark report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose. And the profile that Cellmark provided was not inherently inculpatory. On the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today. The use of DNA evidence to exonerate persons who have been wrongfully accused or convicted is well known. If DNA profiles could not be introduced without calling the

105. *Mills*, No. 21-11534, 2021 WL 5107477, at *4.
106. 567 U.S. at 56.
107. *Id.*
108. *Id.* at 58.

> technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable. *See Perry v. New Hampshire*, 132 S. Ct. 716 (2012). The Confrontation Clause does not mandate such an undesirable development. This conclusion will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial.[109]

This is analogous to the situation in Mills's case. Prior to the murders, a DNA analyst entered Howe's genetic profile into CODIS. The analyst did not collect and submit Howe's genetic information for purposes of using it against Mills, but rather because all convicted felons in Alabama are added to the database. Mills could have subpoenaed this analyst, but he did not. During the course of the investigation, the prosecution asked the Department of Forensic Sciences to look for Howe's profile in CODIS, and they used the information in the system.

Bass, a DNA analyst, was certainly qualified to testify that Howe's CODIS profile did not match the unknown DNA profiles obtained from the evidence. Likewise, he was qualified to testify that *Mills's* DNA did not match the unknown profiles, and he admitted that not every touch transfers DNA. While Mills breathlessly claims that his counsel's failure to object to this alleged *Crawford* violation "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,"[110] it did no such

109. *Id.* at 58–59 (citation edited).
110. Pet. 13.

thing. Certainly, it would have been fortuitous for Mills's defense if Howe's DNA profile had matched the unknown profiles, but the forensic experts' testimony established that the fact that Howe's—*and Mills's*—DNA did not appear on the evidence did not mean that one of the men had not handled it. If anything, this testimony left Mills's position unchanged, at least as to his claim that Howe was the true killer. The fact that the victims' blood was found on pants with Mills's name on them, in the trunk of his car, was clearly detrimental to Mills, though nothing in that testimony implicated *Crawford*.

Here, then, Mills was not entitled to a COA for two reasons. First, as the Eleventh Circuit found, the ACCA's decision did not fall afoul of clearly established federal law because Mills had no clear right to cross-examine the analyst who handled Howe's DNA prior to the murders. Second, looking at this case through the *Strickland* lens, Mills cannot establish the deficient performance prong because he cannot show that no competent counsel would have failed to raise this Confrontation Clause claim of dubious merit. Thus, the Court should deny certiorari.

II. Mills's petition is due to be denied because reasonable jurists would not dispute that Mills cannot show prejudice.

The Court should also deny certiorari because the district court and the Eleventh Circuit correctly held that Mills cannot show *Strickland* prejudice as to this claim.

The claim before the Court is not a substantive Confrontation Clause claim, but rather an ineffective assistance claim, which must be decided based upon the

Strickland criteria: Mills must show that his counsel's performance in failing to raise this claim was deficient, and he must also show that he was thereby prejudiced.[111] This Court has made clear that "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' and that the burden to 'show that counsel's performance was deficient' rests squarely on the defendant."[112] "This analysis is 'doubly deferential' when, as here, a state court has decided that counsel performed adequately."[113] As the Court explained last year in *Dunn v. Reeves*:

> A federal court may grant habeas relief only if a state court violated "*clearly established* Federal law, as determined by *the Supreme Court* of the United States." § 2254(d)(1) (emphasis added). This "wide latitude" means that federal courts can correct only "extreme malfunctions in the state criminal justice syste[m]." *Richter*, 562 U.S. at 102, 106 (internal quotation marks omitted). And in reviewing the work of their peers, federal judges must begin with the "presumption that state courts know and follow the law." *Woodford* [*v. Visciotti*], 537 U.S. [19,] 24 [(2002)]. Or, in more concrete terms, a federal court may grant relief only if *every* "'fairminded juris[t]'" would agree that *every* reasonable lawyer would have made a different decision. *Richter*, 562 U.S. at 101.[114]

Here, both of the lower federal courts correctly held that Mills cannot show prejudice.

As set forth above and in the district court's opinion, the evidence against Mills was damning. JoAnn Mills testified against Mills without a plea bargain, and her trial testimony was consistent with the statement she made to law enforcement four

111. *See Strickland*, 466 U.S. at 687.
112. *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013) (quoting *Strickland*, 466 U.S. at 690, 687) (citations omitted).
113. *Dunn*, 141 S. Ct. at 2410.
114. *Id.* at 2410–11 (citations edited).

days after the murders.[115] Bloody clothing and the murder weapons were found in Mills's trunk on the morning after the murders—along with the victims' wallet and purse, Vera's prescription pills, and a heavy cement block to help hide the evidence. While Mills's DNA was not found on the clothes or the weapons, the bloody pants in the trunk were clearly his. Mills testified, but the trial court, at least, found his testimony "cold, calculated, rehearsed and unremorseful."[116] His story that Howe was the killer was flimsy and unsupported; JoAnn said that Howe came by on June 24 to buy pills, Howe admitted that he bought $100 of Lortab from Mills that night, and Howe's alibi witnesses, while not perfect, did not support Mills's version of events.

As the Eleventh Circuit concluded:

> Reasonable jurists also would not dispute that Mills cannot establish prejudice. There is not "a reasonable probability [that] there would have been a different verdict but for his counsel's unprofessional errors." *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1349 (11th Cir. 2009). As the district court explained, the evidence against Mills was "overwhelming." And the testimony about Howe's DNA did not "eliminate" Howe as a suspect. Mills's DNA did not match the DNA evidence either, and Bass testified that "it is not uncommon for some people's DNA not to transfer" when they touch objects. So even if the testimony were improper, fairminded jurists could conclude that it is not important enough "to undermine our confidence in the verdict." *Id.*[117]

Because Mills cannot establish the prejudice prong, as he must to raise a valid *Strickland* claim, the Eleventh Circuit correctly denied a COA. Likewise, this Court should deny certiorari.

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115. *Mills*, 6:17-cv-00789, 2020 WL 7038594, at *17.
116. Vol. 1, C. 132.
117. *Mills*, No. 21-11534, 2021 WL 5107477, at *5.

CONCLUSION

Mills offers this Court a factbound claim, essentially asking the Court to reweigh the trial evidence, determine that *Crawford* was violated because the analyst who entered Howe's DNA into CODIS prior to the murders was not called to testify, and conclude that reasonable jurists would find that had the allegedly improper forensic testimony been excluded, the result of this capital trial would have been different. The lower courts correctly found that the ACCA's decision was not contrary to clearly established federal law and that Mills cannot show *Strickland* prejudice. Therefore, the Court should deny certiorari.

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