No. 22-

IN THE

Supreme Court of the United States

KEITH EDMUND GAVIN,

Petitioner,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits" in state court unless, as relevant here, the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). This petition presents three questions relating to whether and when AEDPA deference applies to a state-court decision:

1. Whether federal habeas courts must defer to reasoning that appears nowhere in a state-court decision.

2. Whether federal habeas courts evaluating a claim for ineffective assistance of counsel must defer to a state-court decision that applies a demonstrably incorrect standard of proof for prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

3. Whether federal habeas courts must defer to a state-court's resolution of a claim that rested exclusively on the application of a state-law evidentiary rule and did not resolve a habeas petitioner's federal constitutional claim "on the merits."

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

I. Factual Background 6

II. Post-Trial Proceedings 8

A. State Post-Conviction Proceedings 8

B. Trial Counsel's Failure to Conduct a Reasonable Investigation 9

C. Juror Misconduct 10

D. The State Court's Decision 11

E. Federal Habeas Proceedings 12

REASONS FOR GRANTING THE WRIT 13

I. This Court Should Grant the Petition to Resolve a Circuit Split Over Whether AEDPA Deference Extends Beyond a State Court's Articulated Reasons for Rejecting a Claim. 13

A. Courts Are Split On Whether They May Defer to Reasons That the State Court Did Not Provide. 13

B. The Eleventh Circuit Deferred to a Reason the State Court Did Not Provide. 19

C. The Eleventh Circuit's Approach Is Inconsistent with This Court's Precedent and the Statute. 22

II. This Court Should Grant the Petition to Resolve a Circuit Split Regarding Whether a State-Court Decision That Applies a Demonstrably Wrong Prejudice Standard Is Entitled to AEDPA Deference. 24

A. The Eleventh Circuit's Prejudice Determination Created a Circuit Split, Or—At a Minimum—Reflects a Clear Departure from This Court's Precedent. 25

B. The Eleventh Circuit's Mistaken Application of Section 2254(d) Deference Is Outcome-Determinative Here and Likely to Affect Future Cases. 28

III. This Court Should Grant the Petition to Clarify That a State-Court Decision Denying a Federal Constitutional Claim Purely By Applying a State-Law Evidence Rule Is Not an "Adjudication on the Merits" For Purposes of Section 2254(d). 30

A. There Is Confusion Among the Lower Courts About Whether a State-Court Decision Rejecting a Federal Constitutional Claim Based on a State-Law Evidentiary Rule Is an "Adjudication on the Merits" for Purposes of Section 2254(d). 30

B. The Underlying Federal Constitutional Issue Is Exceptionally Important. 34

CONCLUSION 40

APPENDICES: VOLUME I

APPENDIX A: Opinion of the U.S. Court of Appeals for the Eleventh Circuit Affirming In Part and Reversing In Part the U.S. District for the Northern District of Alabama's Decision Granting In Part and Denying In Part Gavin's Petition for Federal Habeas Relief 1a

APPENDIX B: Amended Opinion of the U.S. District Court for the Northern District of Alabama's Decision Granting In Part and Denying In Part Gavin's Petition for Federal Habeas Relief 54a

APPENDIX C: Order of the U.S. Court of Appeals for the Eleventh Circuit Denying a Timely-Filed Petition for Rehearing En Banc 233a

APPENDIX D: Judgment of the U.S. Court of Appeals for the Eleventh Circuit 235a

APPENDIX E: Amended Judgment of the U.S. District Court for the Northern District of Alabama 238a

APPENDIX F: Original Judgment of the U.S. District Court for the Northern District of Alabama 240a

APPENDIX G: Order of the U.S. Court of Appeals for the Eleventh Circuit Denying Gavin's Motion for Certificate of Appealability 242a

APPENDICES: VOLUME II

APPENDIX H: Opinion of the Alabama Court of Criminal Appeals Affirming the Dismissal of Gavin's Petition for Post-Conviction Relief .. 244a

APPENDIX I: Order of the Alabama Court of Criminal Appeals Denying Gavin's Application for Rehearing 292a

APPENDIX J: Opinion of the Circuit Court of Cherokee County, Alabama Denying Gavin's Petition for Post-Conviction Relief 293a

APPENDIX K: Order of the Supreme Court of Alabama Denying Gavin's Petition for Writ of Certiorari 336a

APPENDIX L: Certificate of Judgment in the Alabama Court of Criminal Appeals 337a

APPENDIX M: Gavin's Second Amended Petition for Relief from Judgment 338a

APPENDIX N: Transcript of Penalty-Phase Trial 406a

TABLE OF AUTHORITIES

Page(s)

Cases

Abdul-Kabir v. Quarterman,
550 U.S. 233 (2007) 38

Andrus v. Texas,
140 S. Ct. 1875 (2020) 26

Bishop v. Warden, GDCP,
726 F.3d 1243 (11th Cir. 2013) 30

Brooks v. Comm'r, Ala. Dep't of Corr.,
719 F.3d 1292 (11th Cir. 2013) 30

Chambers v. Mississippi,
410 U.S. 284 (1973) 38

Clayton v. Crow,
No. 20-7015, 2022 WL 11485471 (10th Cir. Oct. 20, 2022) 15

Coleman v. Thompson,
501 U.S. 722 (1991) 31

Cone v. Bell,
556 U.S. 449 (2009) 31

Cooper v. Sec'y, Dep't of Corr.,
646 F.3d 1328 (11th Cir. 2011) 29

Couturier v. Vasbinder,
385 F. App'x 509 (6th Cir. 2010) 32, 33

Crane v. Kentucky,
476 U.S. 683 (1986) 38

Gibbs v. Adm'r N.J. State Prison,
814 F. App'x 686 (3d Cir. 2020) 15

Green v. Georgia,
442 U.S. 95 (1979) 38

Greene v. Fisher,
565 U.S. 34 (2011) 20, 21

Harrington v. Richter,
562 U.S. 86 (2011) 4, 23, 25

Harris v. Thompson,
698 F.3d 609 (7th Cir. 2012) 33, 34

Holland v. State,
587 So.2d 848 (Miss. 1991) 36

Holmes v. South Carolina,
547 U.S. 319 (2006) 38

Irvin v. Dowd,
366 U.S. 717 (1961) 40

Jennings v. Sec'y, Fla. Dep't of Corr.,
55 F.4th 1277 (11th Cir. 2022) 18

Johnson v. Williams,
568 U.S. 289 (2013) 31, 34

Kipp v. Davis,
971 F.3d 939 (9th Cir. 2020) 14

Lee v. Kemna,
534 U.S. 362 (2002) 31

Mays v. Stephens,
757 F.3d 211 (5th Cir. 2014) 31

Meders v. Warden, Ga. Diagnostic Prison,
911 F.3d 1335 (11th Cir. 2019) 17

Morgan v. Illinois,
504 U.S. 719 (1992) 35, 36, 38

Mosley v. Atchison,
689 F.3d 838 (7th Cir. 2012) 26, 27, 28

Neb. Press Ass'n v. Stuart,
427 U.S. 539 (1976) 35

Pena-Rodriguez v. Colorado,
580 U.S. 206 (2017) 39

People v. Nesler,
941 P.2d 87 (Cal. 1997) 36

People v. Weatherton,
328 P.3d 38 (Cal. 2014) 36

Pope v. Sec'y, Fla. Dep't of Corr.,
752 F.3d 1254 (11th Cir. 2014) 30

Porter v. Coyne-Fague,
35 F.4th 68 (1st Cir. 2022) 14

Porter v. McCollum,
558 U.S. 30 (2009) 22

Pye v. Warden, Ga. Diagnostic Prison,
50 F.4th 1025 (11th Cir. 2022) 17, 18, 19, 23, 24

Richardson v. Kornegay,
3 F.4th 687 (4th Cir. 2021) 14

Rock v. Arkansas,
483 U.S. 44 (1987) 38

Rompilla v. Beard,
545 U.S. 374 (2005) 22

Scrimo v. Lee,
935 F.3d 103 (2d Cir. 2019) 14

Skipper v. South Carolina,
476 U.S. 1 (1986) 29

Sheppard v. Davis,
967 F.3d 458 (5th Cir. 2020), *cert. denied sub nom. Sheppard v. Lumpkin*, 141 S. Ct. 2677 (2021) 15, 16

Smith v. Phillips,
455 U.S. 209 (1982) 35, 36

Strickland v. Washington,
466 U.S. 668 (1984) 5, 25, 27

Subdiaz-Osorio v. Humphreys,
947 F.3d 434 (7th Cir. 2020) 24

Thompson v. Skipper,
981 F.3d 476 (6th Cir. 2020) 14, 16

Turner v. Louisiana,
379 U.S. 466 (1965) 35

United States v. Burr,
25 F. Cas. 49 (C.C.D. Va. 1807) 37

Valdez v. State,
196 P.3d 465 (Nev. 2008) 36

Vasquez v. Bradshaw,
345 F. App'x 104 (6th Cir. 2009) 26

Washington v. Texas,
388 U.S. 14 (1967) 38

Whatley Warden, Ga. Diagnostic & Classification Ctr.,
927 F.3d 1150 (11th Cir. 2019) 15

Whatley v. Warden, Ga. Diagnostic & Classification Ctr.,
955 F.3d 924 (11th Cir. 2020) 15, 17

Wiggins v. Smith,
539 U.S. 510 (2003) 22

Williams v. Alabama,
791 F.3d 1267 (11th Cir. 2015) 31

Williams v. Taylor,
529 U.S. 362 (2000) 5, 25, 26, 27, 29

Wilson v. Sellers,
138 S. Ct. 1188 (2018) 16, 22, 23

Winfield v. Dorethy,
956 F.3d 442 14

Constitution and Statutes

U.S. Const. amend. VI 2

U.S. Const. amend. XIV 3

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 2253 2

28 U.S.C. § 2254 ..... 3, 4, 23, 30

Other Authorities

Ala. R. of Evid. 606(b) 12, 39

Benjamin T. Huebner, Note, *Beyond* Tanner: *An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469 (2006) 40

Justin Sevier, *The Unintended Consequences of Local Rules*, 21 Cornell J.L. & Pub. Pol'y 291 (2011) 37

PETITION FOR WRIT OF CERTIORARI

Petitioner Keith Gavin respectfully petitions this Court for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 40 F.4th 1247 and attached at Pet. App. 1a-53a. The amended opinion of the U.S. District Court for the Northern District of Alabama is reported at 449 F. Supp. 3d 1174 and attached at Pet. App. 54a-232a.[1]

The opinion of the Alabama Court of Criminal Appeals is unreported and attached at Pet. App. 244a-291a. That court's denial of rehearing is unreported and attached at Pet. App. 292a. The opinion of the Circuit Court of Cherokee County, Alabama, denying Gavin's Petition for Relief from Conviction or Sentence is unreported and attached at Pet. App. 293a-335a. The Supreme Court of Alabama's denial of Gavin's petition for writ of certiorari is also unreported and attached at Pet. App. 336a. The corresponding certificate of judgment in the Alabama Court of Criminal Appeals is attached at Pet. App. 337a.

JURISDICTION

The district court had jurisdiction over Gavin's federal habeas petition under 28 U.S.C. § 2254. The district court entered an amended final judgment granting in part and denying in part Gavin's habeas petition. Pet. App. 238a-239a. It granted

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[1] The district court's original opinion is unreported but available at 2020 WL 1285747. The amended opinion made minor, non-substantive changes, none of which are relevant to this petition. *See* Pet. App. 54a.

relief with respect to Gavin's penalty-phase ineffective assistance of counsel claim and denied relief with respect to his remaining claims. Pet. App. 238a-239a. The State appealed the grant of relief with respect to the penalty-phase ineffective assistance of counsel claim, and the Eleventh Circuit held that Gavin could also press his penalty-phase juror misconduct claim as an alternative ground to affirm the district court's judgment. *See* Pet. App. 242a (citing *Jennings v. Stephens*, 574 U.S. 271, 282-83 (2015)). The Eleventh Circuit had jurisdiction on appeal under 28 U.S.C. §§ 1291 and 2253.

The Eleventh Circuit issued an order denying Gavin's petition for rehearing en banc on September 26, 2022. Pet. App. 233a-234a. After Gavin's petition for rehearing en banc was denied, the Eleventh Circuit issued an order stating that the panel opinion would be entered as the judgment of that court. Pet. App. 235a-237a. On December 15, 2022, Justice Thomas granted an application to extend the time to file a petition for writ of certiorari from December 27, 2022, to January 24, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the U.S. Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall . . . 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.

U.S. Const. amend. XIV.

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides, in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> * * *
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254.

STATEMENT OF THE CASE

When a state court has adjudicated a habeas petitioner's federal claim on the merits, the Antiterrorism and Effective Death Penalty Act imposes a high hurdle: the petitioner is entitled to relief only if the ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

Supreme Court," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). To overcome section 2254(d), the petitioner "must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). This deferential standard is justified, this Court has explained, because it respects the state court's interests in preserving the finality of its convictions and in minimizing federal-court interference with state-court authority. This Court has frequently intervened when courts have rendered decisions that fail to respect this highly deferential standard.

But the plain language of the statute and Supreme Court precedent make equally clear that the deferential standard of section 2254(d) applies only to determinations a state court actually makes. The Eleventh Circuit in this capital case contravened this straightforward rule in three independent respects. And just as this Court has intervened when courts of appeals fail to respect AEDPA's highly deferential standard, it should also intervene when a court has taken that deference too far, in violation of AEDPA's plain language.

First, in reversing the district court's grant of penalty-phase habeas relief, the Eleventh Circuit deferred to a rationale that appears nowhere in the state-court opinion, thereby deepening a circuit split on whether a federal habeas court can consider and apply deference to reasons the state court did not provide. The majority of circuits have held that, when a state court renders a reasoned decision

on a claim, the federal habeas court applies deference only to the reasons the state court provided. Contrary to the decisions of these circuits, the rule in the Eleventh Circuit is that federal habeas courts are not limited to reviewing the specific reasons the state court provided and instead are free to consider and apply deference to any reason that could have supported the state court's decision. The Eleventh Circuit applied that rule here when reversing the district court's decision to grant habeas relief on Gavin's penalty-phase ineffective assistance of counsel claim. It conjured and then deferred to a theory that centers on the role of a private investigator who was not mentioned once in the relevant state-court opinion. This sort of deference to hypothetical reasons is impermissible.

Second, the Eleventh Circuit deferred to a state-court prejudice determination that was based on a demonstrably incorrect standard. It is undisputed that the state court did not, at any point, even mention that the relevant test under *Strickland v. Washington* is whether "there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 694 (1984) (emphasis added). Instead, the state court concluded that the omitted evidence "would not have changed the verdict." As this Court has explained, replacing a "reasonable probability" standard with one requiring certainty or even a preponderance of the evidence is "contrary to" clearly established federal law. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). The Eleventh Circuit's decision, which conflicts with decisions of two other circuits, is a clear departure from this Court's precedent.

Finally, as to Gavin's juror-misconduct claim, the Eleventh Circuit deferred to the state court on a claim that was not adjudicated on the merits at all. The state court rejected the claim exclusively on the basis of a state-law evidence rule. Where, as here, the state court did not reach the merits of a petitioner's claim, and did so based on a ground that is not adequate to bar federal review, the federal court must review the claim *de novo*. The Eleventh Circuit's decision not to do so here means that not a single court—state or federal—has *ever* addressed the merits of Gavin's claim that his right to an impartial jury was violated when his jurors voted prematurely to impose the death sentence before the sentencing phase trial had even begun. Before being put to death, Gavin deserves at least one unencumbered chance to have that claim decided on the merits.

I. Factual Background

Gavin was indicted on two counts of capital murder and one count of attempted murder. He has maintained his innocence at all times. In 1999, a jury convicted Gavin on all counts and recommended 10-2 that Gavin be sentenced to death, which was the minimum number of votes necessary to recommend a death sentence. Pet. App. 5a & n.3, 9a. In state post-conviction proceedings, Gavin asserted that he received ineffective assistance of counsel during the penalty phase of his trial and that his right to an impartial jury was violated due to juror misconduct.

At the penalty phase,[2] Gavin's trial counsel, Bayne Smith, introduced no substantive mitigation evidence, admitted to the jury that he was not prepared, gave an affirmatively harmful closing statement due to his lack of preparation, and told the jurors that he had personally searched his files while preparing for closing statements and could not find a shred of persuasive mitigation evidence. It is hard to imagine a more damaging presentation than a defendant's own advocate telling the jury that he searched for mitigation and came up empty, suggesting that the advocate's client is not worth sparing from the death penalty.

Gavin's trial counsel offered only two witnesses: Gavin's mother and a minister named Reverend Johnson. As to Gavin's mother, Smith admitted in open court that he did not have "an opportunity to prep[are] [Mrs. Gavin] for [her] testimony." Pet. App. 448a. He then asked her no questions about Gavin's upbringing or family life. *See* Pet. App. 448a-449a. In response to several open-ended questions, she simply asked the jury for mercy. Pet. App. 449a.

Smith's presentation of Reverend Johnson's testimony was no better. He met with Johnson only once, for approximately five minutes. R.35-42:57.[3] This lack of preparation was evidenced by him calling the minister by the wrong name in front of the jury and by Johnson's affirmatively harmful testimony. Johnson testified that Gavin blamed everyone else for the things that had happened to him and noted that

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[2] The transcript for the penalty-phase trial is attached at Pet. App. 406a-509a.

[3] District court docket entries are cited as R.[number]:[page number], where the page number is the ECF page number in the top right-hand corner of the page. *See Gavin v. Comm'r, Ala. Dep't of Corr.*, No. 4:16-cv-00273-KOB (N.D. Ala.).

the Bible called for the death penalty under some circumstances. Pet. App. 433a-440a. Johnson asked the jury to spare Gavin's life nonetheless. Pet. App. 442a.

Having presented no substantive mitigation evidence, Gavin's counsel was left with little to argue in closing. He did not make any affirmative argument regarding mitigation, for example. Indeed, he admitted to spending the night before "searching through all of [his] collected material" for "something, anything, one last shred of persuasive evidence or argument that [he] might place before [the jury]," but found "nothing that seemed really appropriate." Pet. App. 463a. He then commented on Gavin's race and prior conviction, and referred to a "Wizard of Id" comic in the Sunday newspaper, before asking the jury for mercy. Pet. App. 455a, 462a-465a.

II. Post-Trial Proceedings

A. State Post-Conviction Proceedings

During state post-conviction proceedings, post-conviction counsel called numerous witnesses who presented a compelling mitigation case and exposed trial counsel's failure to develop or prepare such a case. The evidence developed during post-conviction proceedings showed that Gavin had been a victim of domestic violence, impaired parenting, and gang violence. He was the third of twelve children, and each of his siblings had a history of incarceration and drug use. R.35-51:55-68. Gavin's father physically abused the family, but Gavin was beaten more than his siblings because he often stepped in to shield them. R.35-51:74-77. He took on adult responsibilities, caring for his younger siblings because his parents were

unable. This caused Gavin to engage in criminal activities to get the money he needed to support his family. R.35-51:81-82.

Gavin was profoundly impacted by growing up in a housing project. He witnessed riots and was repeatedly forced to confront violence. R.35-51:89-90. For example, when he was 17 years old, Gavin was attacked and beaten so badly that he was hospitalized, and his brother was shot in the back. R.35-51:63-66.

The mitigation evidence also showed that Gavin, who had been incarcerated for 17 years for a prior conviction, had trouble adjusting to life outside prison due to the effects of "institutionalization," but had adjusted well to prison and was not a safety risk inside. R.35-27:63, 70-71, 145-46. The State's sole witness at the post-conviction hearing agreed, testifying that Gavin was "almost" a "model prisoner" and would not pose a threat to others if re-incarcerated. R.35-53:66, 75.

B. Trial Counsel's Failure to Conduct a Reasonable Investigation

Although this evidence was readily available, trial counsel did not pursue it. Smith initially contacted Lucia Penland of the Alabama Prison Project to assist in preparing a mitigation case, but he did not follow through. Smith and Penland first discussed the matter about a year before the trial (October 1998), but the two did not discuss it again until about six months later (March 1999). R.35-50:57-58, 62-63. Smith did not arrange to have Penland interview Gavin until the following month. R.35-50:62-70.

Shortly after meeting with Gavin, Penland wrote to Smith, describing the work Smith needed to do to prepare a mitigation case. R.35-36:21. Smith did not

respond and did not contact Penland for another five months. R.35-50:74. No mitigation work was done during that time.

Less than six weeks before trial, Penland urged Smith to seek a continuance so that Smith could prepare an adequate mitigation defense. R.35-50:74-76. Smith refused. R.35-50:75-76.

Although Gavin and his mother initially were reluctant to cooperate with Penland, *see* R.35-50:94-97, Gavin gave Penland "the basic information" she "requested." R.35-36:11. Closer to trial, Gavin's family was—in Smith's own words—"coming around and beginning to cooperate to some extent." R.35-36:36.

Weeks before trial, Penland engaged a sentencing consultant, John Sturman. R.35-36:12. Within days, the sentencing consultant advised Penland that he had conducted interviews and requested educational records. R.35-36:27-31. Penland immediately sent the consultant's work to Smith and "urge[d] [Smith] again to request a continuance." R.35-36:25.

Not only did Smith not seek a continuance, he also did not accurately represent the status of the investigation to the court. On the day before trial, Smith wrote to the court, transmitting correspondence from Penland—but not the sentencing consultant's materials—and represented to the trial judge that it did not contain "any useable mitigation material." R.35-32:100.

C. Juror Misconduct

During the post-conviction proceedings, evidence surfaced that the jury voted on the sentence during the guilt-phase deliberations—before the penalty phase had begun. R.35-56:103; *see also* Pet. App. 14a (noting that state court summarily

dismissed the juror misconduct claim on the pleadings). After discussing the evidence of guilt, the jurors decided to vote by secret ballot. But before the ballots were distributed, a juror named Clifford Higgins spoke up to address what he regarded as underlying racial tension in the jury room. Pet. App. 393a.

Higgins announced that, if the other jurors thought he would vote differently than they would because Higgins, like Gavin, was Black, they were mistaken. *Id.* Higgins told his fellow jurors he was going to vote to find Gavin guilty and recommend a death sentence. *Id.* The jurors then cast their votes by secret ballot, with each juror voting on both guilt *and* sentence. *Id.* In other words, they agreed on the sentencing verdict before the sentencing trial began.

D. The State Court's Decision

The state post-conviction court rejected both of Gavin's claims, and the Alabama Court of Criminal Appeals affirmed in a reasoned opinion spanning over 47 single-spaced pages. *See* Pet. App. 244a-291a.

As to ineffective assistance of counsel, the court held that counsel's performance was not deficient, because he had "almost immediately" hired Penland to conduct a mitigation investigation, which was hampered by Gavin and his family being uncooperative. Pet. App. 285a-286a. The court also held that Gavin failed to establish prejudice because the omitted evidence "was to a great extent centered around Gavin's childhood in Chicago and imprisonment and . . . likely would have been given very little weight," and therefore "the admission of this evidence would not have changed the verdict." Pet. App. 286a.

As to juror misconduct, the court rejected the claim exclusively on the non-merits basis that the evidence supporting the claim would be inadmissible under Alabama's Rule of Evidence 606(b). Pet. App. 288a.

E. Federal Habeas Proceedings

In an exhaustive 178-page opinion, the district court granted relief with respect to Gavin's penalty-phase ineffective assistance of counsel claim, but denied relief with respect to the juror misconduct claim. Pet. App. 54a-232a. On appeal, the Eleventh Circuit reversed as to the ineffective assistance of counsel claim, and affirmed as to the juror misconduct claim.

As to the first claim, the court of appeals did not defer to the reasons given by the state court. Instead, it reasoned that "Penland admitted that Smith engaged in his own independent investigation," including by hiring "Dennis Scott, a private investigator," Pet. App. 35a, an individual the state-court decision does not mention or rely on, *see* Pet. App. 244a-291a. According to the Eleventh Circuit, the record "contains no information related to Scott's investigation or counsel Smith's independent investigative efforts." Pet. App. 35a. And in the absence of that evidence, "the state court's determination that . . . it could not conclude 'that the investigative steps taken by Gavin's trial counsel were unreasonable' was not … objectively unreasonable." Pet. App. 36a. The court of appeals also held that the state court's prejudice determination was not unreasonable, because the mitigation evidence was "of limited value and could have been a double-edged sword." Pet. App. 43a.

As to Gavin's juror misconduct claim, the Eleventh Circuit acknowledged "Gavin's argument that, in the context of premature penalty-phase jury deliberations, the no-impeachment rule 'must yield' to his Sixth and Fourteenth Amendment rights to a fair and impartial jury," but rejected it because Gavin "identified no clearly established federal law from the Supreme Court in support of that principle." Pet. App. 50a-51a. It did not explain why, given the state court's rejection of the claim on the basis of a state-law evidentiary rule, the state court's decision was an "adjudication on the merits" of Gavin's federal constitution claim entitled to AEDPA deference.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant the Petition to Resolve a Circuit Split Over Whether AEDPA Deference Extends Beyond a State Court's Articulated Reasons for Rejecting a Claim.

In addressing the performance prong of Gavin's penalty-phase ineffective assistance of counsel claim, the Eleventh Circuit deepened a circuit split by deferring to reasons for the state court's decision that the state court did not provide. This is an important and recurring issue in federal habeas cases that warrants this Court's review.

A. Courts Are Split On Whether They May Defer to Reasons That the State Court Did Not Provide.

Courts are split as to whether federal habeas courts are limited in applying AEDPA deference only to the reasons the state court provided. Most courts, including at least the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits, have held that, where at least one state court supplies reasoning for rejecting the

petitioner's claim, a federal habeas court can apply deference only to the specific reasons the state court actually provides. *See Porter v. Coyne-Fague*, 35 F.4th 68, 75 (1st Cir. 2022) ("The upshot of the AEDPA habeas regime is that 'when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion' . . . 'a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable.'" (quoting *Wilson v. Sellers*, 138 S. Ct. 1188, 1192(2018))); *Scrimo v. Lee*, 935 F.3d 103, 111-12 (2d Cir. 2019) (citing *Wilson* and explaining that federal habeas courts are to "determine whether [the state court's] rationale was contrary to, or represented an unreasonable application of, clearly established federal law," and then considering "the rulings and explanations of the trial judge" who provided the last reasoned decision); *Richardson v. Kornegay*, 3 F.4th 687, 697 (4th Cir. 2021) ("Sitting as a federal habeas court, we must identify 'the particular reasons . . . why state courts rejected a state prisoner's federal claims.'" (quoting *Wilson*, 138 S. Ct. at 1191-92)); *Thompson v. Skipper*, 981 F.3d 476, 480 (6th Cir. 2020) ("Hewing to *Wilson*, this court recently explained that AEDPA requires a habeas court 'to review the actual grounds on which the state court relied.'" (quoting *Coleman v. Bradshaw*, 974 F.3d 710, 719 (6th Cir. 2020)); *Winfield v. Dorethy*, 956 F.3d 442, 454 (7th Cir. 2020) ("Having found the state court's 'specific reasons' for denying relief, the next question is whether that explanation was reasonable thereby requiring our deference." (citing *Wilson*, 138 S. Ct. at 1192)); *Kipp v. Davis*, 971 F.3d 939, 952 n.10 (9th Cir. 2020) ("[W]e may look only to the reasoning of the [state court]." (citing

Wilson, 138 S. Ct. at 1193-94)).[4] In these circuits, if a petitioner establishes that the state court's actual reasons for denying the claim involved an unreasonable application of clearly established law, or were based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceedings, the petitioner has satisfied section 2254(d) and unlocked *de novo* review of his claim.

In contrast, the Eleventh Circuit has squarely rejected this view, and the Fifth Circuit appears likely to reject it as well. These circuits have held that a federal habeas court is not limited to the specific reasons given by the state court and can instead consider—and apply AEDPA deference to—hypothetical reasons that *could* have supported the state court's ultimate conclusion. *See Whatley Warden, Ga. Diagnostic & Classification Ctr.*, 927 F.3d 1150, 1182 (11th Cir. 2019) ("[W]e are not limited to the reasons the Court gave and instead focus on its 'ultimate conclusion' . . . . Under § 2254(d), we must 'determine what arguments or theories . . . *could* have supported . . . the state court's decision." (emphasis in original))[5]; *accord Sheppard v. Davis*, 967 F.3d 458, 467 n.5 (5th Cir. 2020) ("We

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[4] The Third and Tenth Circuits have also followed this rule, albeit in unpublished opinions. *See Gibbs v. Adm'r N.J. State Prison*, 814 F. App'x 686, 689 n.6 (3d Cir. 2020) ("Under AEDPA, we look to the highest state court to issue a reasoned opinion and examine its reasoning." (citing *Wilson*)); *Clayton v. Crow*, No. 20-7015, 2022 WL 11485471, at *8 (10th Cir. Oct. 20, 2022) ("[W]e take the [state court's] finding at face value." (citing *Wilson*)).

[5] Judge Beverly Martin dissented from denial of rehearing en banc, criticizing the panel decision for "suggesting that federal courts may look beyond the reasons a state court gives for denying habeas relief," in violation of *Wilson*. *Whatley v. Warden, Ga. Diagnostic & Classification Ctr.*, 955 F.3d 924, 925 (11th Cir. 2020) (Martin, J., dissenting from denial of rehearing en banc).

observe, without deciding, that it is far from certain that *Wilson* overruled *sub silentio* the position—held by most of the courts of appeals—that a habeas court must defer to a state court's ultimate *ruling* rather than to its specific *reasoning*." (emphasis in original)), *cert. denied sub nom. Sheppard v. Lumpkin*, 141 S. Ct. 2677 (2021).[6] In these circuits, the federal habeas court analyzes the reasonableness of the state court's ultimate conclusion, without regard to whether the actual rationale of a state-court decision involves an unreasonable application of clearly established federal law.

The division among the circuits traces in part to apparent confusion regarding the holding in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018). *See Thompson*, 981 F.3d at 480 n.1 ("In the wake of *Wilson*, courts have grappled with whether AEDPA deference extends only to the reasons given by a state court . . . ."). *Wilson* states unequivocally that federal habeas courts should "train [their] attention on the particular reasons . . . why state courts rejected a state prisoner's federal claims." 138 S. Ct. at 1191-92. But *Wilson* made this statement in a case where the last state-court decision did so without any reasoning. *See id.* ("the final and highest state court to decide the merits of Wilson's claim" was the Georgia Supreme Court, which did so without a reasoned opinion). The Eleventh Circuit has limited *Wilson* to its procedural posture—i.e., to cases where the last state-court decision to decide

[6] In dissent, Judge Carolyn King explicitly rejected this suggestion: The majority's suggested approach "is now foreclosed by *Wilson* [*v. Sellers*] . . . . The [Supreme] Court's repeated emphasis on state-court *reasons* would be hard to understand if those reasons were irrelevant to the federal habeas court's review." *Sheppard*, 967 F.3d at 473-74 (King, J., dissenting) (emphasis in original).

the merits of the petitioner's claim was unexplained. Specifically, the Eleventh Circuit reads *Wilson* narrowly, as deciding only whether the federal habeas court should "look through" an unexplained state-court decision to a reasoned decision of a lower court, and not whether a federal court is limited to deferring only to the reasons the state court provides.

For example, in *Meders v. Warden, Georgia Diagnostic Prison*, the Eleventh Circuit stated that *Wilson* was only "about *which* state court decision we are to look at if the lower state court gives reasons and the higher state court does not," not whether the federal habeas court should apply deference to reasons beyond those the state court articulated. 911 F.3d 1335, 1350 (11th Cir. 2019). Likewise, in *Whatley*, the Eleventh Circuit rejected a penalty-phase ineffective assistance claim, stating unequivocally that it was "not limited to the reasons the [state court] gave and instead focus[ed] on [the state court's] 'ultimate conclusion,'" quoting *Gill v. Mecusker*, 633 F.3d 1272, 1291 (11th Cir. 2011)—a pre-*Wilson* case. 927 F.3d at 1178.

This circuit split is well-entrenched. Indeed, the Eleventh Circuit doubled-down on its view in its recent en banc decision in *Pye v. Warden, Georgia Diagnostic Prison*, 50 F.4th 1025, 1036 (11th Cir. 2022) (en banc). According to the en banc court, "although the Supreme Court's decision in *Wilson* instructs us to 'review[ ] the specific reasons given by the state court and defer[ ] to those reasons if they are reasonable,' . . . we are not required, in assessing the reasonableness of a state court's decision, to strictly limit our review to the particular *justifications* that the

state court provided." *Id.* at 1035-36 (quoting *Wilson*, 138 S. Ct. at 1192); *see also Jennings v. Sec'y, Fla. Dep't of Corr.*, 55 F.4th 1277, 1292 (11th Cir. 2022) ("[W]e are not limited by the particular justifications the state court provided for its reasons, and we may consider additional rationales that support the state court's determination." (citing *Pye*)). This rule is supported, in the Eleventh Circuit's view, by "AEDPA's plain language and the logic of the Supreme Court's decision" in *Harrington v. Richter*: "[W]here . . . a state court rejects a petitioner's claim in a written opinion accompanied by an explanation, the federal habeas court reviews only the state court's 'decision' and is not limited to the particular justifications that the state court supplied." *Pye*, 50 F.4th at 1037-38 (citing both pre- and post-*Wilson* cases for support). This approach is consistent with *Wilson*, the en banc court further reasoned, because *Wilson* "confronted only a very narrow question: The issue before [the Supreme Court] . . . was solely whether to look through a silent state higher court opinion to the reasoned opinion of a lower court in applying AEDPA deference." *Id.* at 1039 (brackets and internal quotation marks omitted); *see also id.* at 1039 n.6 (noting that the Eleventh Circuit had "subsequent[ly] reaffirm[ed] that *Wilson* dealt *only* with the question of 'which state court decision we are to look at if the lower state court gives reasons and the higher court does not" (quoting *Meders*, 911 F.3d at 1350) (emphasis in original)).

Judge Jill Pryor, joined by two other judges in relevant part, dissented in *Pye*, underscoring the fact that the Eleventh Circuit's approach conflicted with those of six other circuits. *See id.* at 1071-72 & nn.22-28 (Pryor, J., dissenting) (noting that

the en banc's interpretation of *Wilson* has been rejected in published opinions by the First, Second, Fourth, Sixth, Seventh, and Ninth Circuits, and in unpublished opinions by the Third and Tenth Circuits). Concluding that *Wilson* controlled the case, Judge Pryor argued that the majority had "sidestep[ped] *Wilson*'s dictate" by inventing a distinction between so-called "reasons" and "justifications" for a state court's decision—a distinction that was "nonexistent in the caselaw" and not supported by sound logic. *Id.* at 1065-66. She also criticized the majority for relying on cases that predated, and in her view had been abrogated by, *Wilson*. *See id.* at 1070-71.

B. The Eleventh Circuit Deferred to a Reason the State Court Did Not Provide.

Consistent with its approach in *Whatley*, *Pye*, and *Jennings*, the Eleventh Circuit in Gavin's case rejected his penalty-phase ineffective assistance of counsel claim by applying section 2254(d) deference to a reason on which the state court did not rely. The court paid lip service to *Wilson*, citing it once in the standard-of-review section for the proposition that "[w]hen the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion . . . a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." Pet. App. 29a (citing *Wilson*, 138 S. Ct. at 1192). But in the discussion section of the court's opinion, the court ignored *Wilson* and deferred to a rationale nowhere found in the relevant state-court opinion. *See*

Pet. App. 32a-37a.[7]

The court of appeals began by correctly identifying the state court's actual reasoning, which focused on (1) trial court's initial decision to hire Penland as a mitigation specialist and (2) Gavin and his family's initial lack of cooperation:

> [T]he CCA determined that Smith hired Penland to assist with mitigation almost immediately after taking the case, and that the correspondence between Smith and Penland established that she could not complete her investigation because Gavin and his family were uncooperative. Based on these circumstances, the CCA held that "we are unable to say that the investigative steps taken by Gavin's trial counsel were unreasonable, and the circuit court did not err in denying this claim."

Pet. App. 32a-33a; *see also* Pet. App. 285a-286a.

Rather than evaluate this reasoning, however, the Eleventh Circuit determined that Gavin's claim failed because of a purported gap in the evidentiary record—a gap the state court never found. The court of appeals asserted that "Smith conducted his own independent investigation" by "hir[ing] Dennis Scott, a private investigator." Pet. App. 35a. The court noted that Smith "requested and obtained additional funding for Scott's services; and had Scott sit at counsel's table throughout the voir dire and trial proceedings." *Id.* This was said to be "a clear indicator that Scott played a pivotal role in the defense's preparation." *Id.* The court determined, however, that "the record contains no information related to Scott's investigation or [ ] Smith's independent investigative efforts." *Id.* Accordingly, it

[7] The relevant state-court decision is the opinion of the Alabama Court of Criminal Appeals, because that is the last state court to decide Gavin's claim on the merits. *See Greene v. Fisher*, 565 U.S. 34, 39-40 (2011).

concluded that "the record is incomplete concerning Gavin's counsel's investigation," and "[a]n incomplete or ambiguous record concerning counsel's performance . . . is insufficient to overcome the presumption of reasonable performance." *Id.*

As the opinion below acknowledges, the state court nowhere relied on any "independent investigation" by Smith or Scott to find that Gavin's counsel performed acceptably. In fact, the state court's decision does not mention Scott's name once. The only "investigative steps taken by Gavin's trial counsel" that the state court considered were Smith's interactions with Penland and Reverend Johnson. *See* Pet. App. 276a-277a, 285a-286a. And whereas the court of appeals asserted that "Penland *admitted* that Smith engaged in his own independent investigation" Pet. App. 35a (emphasis added), the state court found no such thing, noting only that Penland testified she "*did not know* how much investigative work regarding mitigation . . . Smith had conducted on his own," Pet. App. 285a (emphasis added).

The Eleventh Circuit's deference to this hypothetical reason is especially unfair to Gavin here because it is belied by the record. Scott was a forensic investigator who worked on the guilt-phase portion of the case. R.35-1:75 (Scott was hired to develop "exculpatory evidence"); R.35-26:61 (Scott was a "forensic investigator" who investigated "irregularities" in law enforcement's investigation). There is no suggestion in the record that Scott ever did any mitigation work. Consistent with this reality, Gavin's trial counsel's affidavit—which the Eleventh Circuit's opinion quotes extensively (*see* Pet. App. 14a-15a)—mentions only Penland

as being involved in the mitigation investigation, not Scott. *See* R.35-42:47; Pet. App. 14a-15a.

The decision below thus applied AEDPA deference to a new—and factually incorrect—theory to deny Gavin's claim. *See* Pet. App. 36a-37a ("Accordingly, the state court's determination that, given the circumstances here, it could not conclude 'that the investigative steps taken by Gavin's trial counsel were unreasonable' was not an objectively unreasonable application of *Strickland*, and the district court erred in holding otherwise.").

C. The Eleventh Circuit's Approach Is Inconsistent with This Court's Precedent and the Statute.

The Eleventh Circuit's approach is inconsistent with this Court's decision in *Wilson* and AEDPA itself. When this Court in *Wilson* directed federal habeas courts to "train [their] attention on the *particular reasons* . . . why state courts rejected a state prisoner's federal claims," 138 S. Ct. at 1191-92 (emphasis added), there was no indication that such a rule was limited to the procedural posture in *Wilson*. On the contrary, this Court emphasized that this rule was "straightforward" where, as here, the last state-court decision to decide the merits of the petitioner's claim did so in a reasoned opinion. *Id.* at 1192. In that situation, "a federal habeas court simply reviews the *specific reasons* given by the state court and defers to *those reasons* if they are reasonable." *Id.* (emphases added); *accord Porter v. McCollum*, 558 U.S. 30, 39-44 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 388-92 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523-38 (2003).

This Court explained in *Wilson* that, by contrast, it is *only* where there is *no* reasoned state-court opinion at any level for a federal habeas court to review that the habeas court asks whether "there was no reasonable basis for the state court to deny relief." *Wilson*, 138 S. Ct. at 1195 (quoting *Richter*, 562 U.S. at 98). In that situation, because there is no state-court reasoning to consider *at all*, the federal habeas court's only option is to consider the reasonableness of hypothetical justifications for the state court's decision. *See id.*; *accord Richter*, 562 U.S. at 106-13 (considering and ultimately applying deference to hypothetical reasons that could have explained the California Supreme Court's decision to deny the petitioner's claim). This is the only situation identified by *Wilson* where the federal habeas court may apply section 2254 deference to hypothetical reasons.

This approach is compelled by the statute. Section 2254(d) directs federal habeas courts to analyze whether a state-court decision "involved an unreasonable application of, clearly established law," or was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). "In tasking federal courts with determining whether a decision involved, or was based on, certain egregious errors, the statute directs [federal courts] to examine *how*, or *why*—that is to say, the reasons, if any, for the decision." *Pye*, 50 F.4th at 1067 (Pryor, J., dissenting) (emphasis in original). Under the statute, those reasons prevent a federal court from interfering with a state-court conviction so long as they are reasonable. But if they are unreasonable, the statute is satisfied and "no further deference is authorized or warranted." *Id.*

In addition to being compelled by statute, the *Wilson* rule reflects principles of federalism insofar as it affords due respect to what state courts actually decide—and do not decide. As this Court explained, the rule in *Wilson* "is more likely to respect what the state court actually did" than a rule that empowers a "federal court to substitute . . . the federal court's thought as to more supportive reasoning." *Id.* at 1197; *see also Subdiaz-Osorio v. Humphreys*, 947 F.3d 434, 450 (7th Cir. 2020) (Hamilton, J., dissenting) ("We must 'respect what the state court actually did' rather than substitute 'the federal court's thought as to more supportive reasoning.'" (quoting *Wilson*, 138 S. Ct. at 1197)).

In light of the important federalism principles at stake, this Court should grant certiorari to resolve this entrenched circuit split.

II. This Court Should Grant the Petition to Resolve a Circuit Split Regarding Whether a State-Court Decision That Applies a Demonstrably Wrong Prejudice Standard Is Entitled to AEDPA Deference.

The Eleventh Circuit also created a circuit split in addressing the prejudice prong of Gavin's penalty-phase ineffective assistance of counsel claim. Contrary to decisions of the Sixth and Seventh Circuits, the Eleventh Circuit held that the state court's prejudice determination, which applied a demonstrably wrong burden of proof for assessing prejudice, was not "contrary to" clearly established federal law and thus the state court's prejudice determination was subject to AEDPA deference, rather than *de novo* review. This error is outcome-determinative here and likely to affect future cases.

A. The Eleventh Circuit's Prejudice Determination Created a Circuit Split, Or—At a Minimum—Reflects a Clear Departure from This Court's Precedent.

A habeas petitioner asserting a claim for ineffective assistance of counsel must show "prejudice" to obtain relief. Under this Court's long-established precedent, the "prejudice" inquiry requires the petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. As applied to the capital context, "the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. This threshold requires the petitioner to show that the "likelihood of a different result" is "substantial, not just conceivable." *Richter*, 562 U.S. at 112. But this threshold is lower than the preponderance of the evidence: a petitioner "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693; *accord Richter*, 562 U.S. at 111-12 ("This does not require a showing that counsel's actions 'more likely than not altered the outcome' . . . .").

Applying the wrong standard of proof when analyzing a claim for ineffective assistance of counsel is not merely "unreasonable," but in fact results in a decision that is "contrary" to clearly established federal law. As this Court explained in *Williams v. Taylor*, "[i]f a state court were to reject a prisoner's claim of ineffective

assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be 'diametrically different,' 'opposite in character or nature,' and 'mutually opposed' to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a 'reasonable probability that . . . the result of the proceeding would have been different.'" 529 U.S. 362, 405-06 (2000) (quoting *Strickland*, 466 U.S. at 694).

In the wake of *Williams*, two other courts of appeals have recognized that a state-court decision requiring a defendant to prove that the result "would have been different" if not for counsel's errors is "contrary to" *Strickland* and therefore is not entitled to AEDPA deference under section 2254(d). *See Vasquez v. Bradshaw*, 345 F. App'x 104, 111-12 (6th Cir. 2009) ("A 'reasonable probability' of difference does not mean 'would have been different.' The latter formulation puts a greater burden on the petitioner."); *Mosley v. Atchison*, 689 F.3d 838, 850 (7th Cir. 2012) ("[T]he state appellate court's decision was, in the terms of § 2254(d)(1), 'contrary to' *Strickland* because it required Mosley to show that the result *would have* been different.") (emphasis in original); *see also Andrus v. Texas*, 140 S. Ct. 1875, 1886 n.5 (2020) (per curiam) (omitting the "reasonable probability" language imposes "a stricter standard . . . than that set forth in *Strickland*").

The Eleventh Circuit, however, has rejected this position. In the decision below, the court held that the state court's prejudice determination was entitled to AEDPA deference under section 2254(d) even though it is undisputed that the state-

court decision rejected Gavin's claim on the ground that "the admission of [the omitted] evidence *would not have changed* the verdict." Pet. App. 286a (emphasis added). According to the Eleventh Circuit, notwithstanding this misstatement of the standard, the state court "applied the proper prejudice analysis" because it asked "whether the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Pet. App. 39a n.24 (quoting without citing p. 39 of the state court's opinion, which is at Pet. App. 282a)). Tellingly, the Eleventh Circuit's quotation omits the crucial part of *Strickland*. As noted above, *Strickland* held: "[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." 466 U.S. at 695 (emphasis added). The italicized portion establishes the burden of proof, and that is the very part omitted by the state court in the quotation on which the Eleventh Circuit relied. The state court's error is precisely the type of error identified by this Court in *Williams*. *See* 529 U.S. at 405-06.

As the Seventh Circuit has explained, this "is not a mere detail or a quibble over word-smithing. The Supreme Court has used this precise discrepancy to illustrate how a state court's decision may be 'contrary to' clearly established federal law under § 2254(d)(1)." *Mosley*, 689 F.3d at 850 (citing *Williams*, 529 U.S. at 405-06). Indeed, in *Mosley*, the Seventh Circuit held that the state court's articulation of the standard—there, the state court stated that the petitioner was required to "show that . . . *the result of the proceedings would have differed* but for defense

counsel's deficient performance" and that the petitioner failed to establish prejudice because "*the result of the trial would not have differed*"—was contrary to clearly established federal law. *Id.* at 850 (emphases in original). The state court's articulation in *Mosley* is materially identical to the state court's "would not have changed the verdict" formulation here. Pet. App. 286a.

B. The Eleventh Circuit's Mistaken Application of Section 2254(d) Deference Is Outcome-Determinative Here and Likely to Affect Future Cases.

Because the state court's decision is contrary to clearly established federal law, the Eleventh Circuit should have assessed prejudice *de novo*. And on *de novo* review, there can be no question Gavin has satisfied *Strickland*'s standard. Gavin's jury did not hear *any* individualized evidence that would explain why Gavin was particularly susceptible to criminal activity, that humanized him, or that showed he would not be a threat to others if re-incarcerated. As the district court found, the omitted information "presents exactly the type of evidence that could have humanized Mr. Gavin in the eyes of the jury" and persuaded at least one other juror to vote for life. Pet. App. 184a.

Laboring under the wrong standard, the Eleventh Circuit reasoned that the state court's determination was not unreasonable because it could have concluded that this mitigation evidence was of "limited value and could have been a double-edged sword." Pet. App. 43a. But the "limited value" criticism ignores what actually happened at trial. Trial counsel did not put on *any* substantive mitigation evidence, and his closing argument was *affirmatively harmful*. Trial counsel told the jurors he searched his files and found "*nothing*" to mitigate Gavin's crime, suggesting to the

jury that Gavin's *own advocate* had conducted an investigation and concluded there was nothing mitigating in Gavin's background—a fact the Eleventh Circuit's opinion conspicuously ignores. And even still, Gavin came up only one vote short. Indeed, that two jurors voted against the death penalty, notwithstanding the lack of a competent presentation from trial counsel, further underscores the prejudice here. *See, e.g.*, *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1356 (11th Cir. 2011) ("Given that some jurors nonetheless were inclined to mercy even with having been presented with so little mitigating evidence . . . it is possible that, if additional mitigating evidence had been presented, more jurors would have voted for life." (alterations and internal quotation marks omitted)).

The "double-edged sword" criticism fares no better. As the Eleventh Circuit acknowledged (*see* Pet. App. 8a), the jury was told—in detail—about the circumstances of Gavin's prior conviction. *See, e.g.*, Pet. App. 452a-453a. Gavin's violent past was therefore already known, and neither the State nor the Eleventh Circuit identified any new aggravating evidence that would have come out. That the jury already knew about these facts made it even more essential that counsel introduce countervailing evidence to humanize Gavin and establish that Gavin would not pose a risk if re-incarcerated. *Cf. Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (vacating death sentence due to exclusion of evidence that defendant was a "well-adjusted" prisoner). Moreover, that mitigation evidence is not wholly favorable does not foreclose a prejudice finding. *See, e.g.*, *Williams*, 529 U.S. at 396 (granting relief even where "not all of the additional evidence was favorable").

If not corrected, this error is likely to affect many future cases. As this Court well knows, habeas cases raising *Strickland* claims are common, and many are resolved on prejudice grounds, oftentimes as the sole basis for rejecting the claim. *See, e.g.*, *Pope v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 1254, 1264-65 (11th Cir. 2014) (state court's determination that petitioner was not prejudiced by counsel's alleged failures not unreasonable); *Bishop v. Warden*, *GDCP*, 726 F.3d 1243, 1256 (11th Cir. 2013) (same); *Brooks v. Comm'r, Ala. Dep't of Corr.*, 719 F.3d 1292, 1294 (11th Cir. 2013) (same). Federal habeas petitioners in one part of the country should not face a higher burden than petitioners elsewhere do. This Court should grant certiorari to resolve the split.

III. This Court Should Grant the Petition to Clarify That a State-Court Decision Denying a Federal Constitutional Claim Purely By Applying a State-Law Evidence Rule Is Not an "Adjudication on the Merits" for Purposes of Section 2254(d).

The Eleventh Circuit's treatment of Gavin's juror misconduct claim illustrates continued confusion among the lower courts about whether section 2254(d)'s deferential standard applies to state-court decisions that resolve a federal constitutional claim based purely on application of a state-law evidence rule. This confusion has dramatic consequences here: it means, in effect, that not a single court—state or federal—has decided Gavin's juror misconduct claim on the merits.

A. There Is Confusion Among the Lower Courts About Whether a State-Court Decision Rejecting a Federal Constitutional Claim Based on a State-Law Evidentiary Rule Is an "Adjudication on the Merits" for Purposes of Section 2254(d).

Under section 2254(d), AEDPA's deferential standard of review is limited to claims that have been "adjudicated on the merits" in state court. 28 U.S.C.

§ 2254(d). If a state court refuses to decide a claim "on the merits" because the claim is barred by a state-law rule that is independent of the federal question and adequate to support the judgment (e.g., a statute-of-limitations requirement), a federal habeas court has no authority to decide the claim at all. *Cone v. Bell*, 556 U.S. 449, 465 (2009); *see also Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Lee v. Kemna*, 534 U.S. 362, 375 (2002). If, however, the state court did not reach the merits of the petitioner's claim based on some ground that is not adequate to bar federal review, the federal court must review the claim *de novo*. *Cone*, 556 U.S. at 472; *see also, e.g.*, *Mays v. Stephens*, 757 F.3d 211, 217 n.11 (5th Cir. 2014) ("Because the state court did not address these issues on the merits, we review [the petitioner's] constitutional claims *de novo* and not through the prism of AEDPA deference."); *Williams v. Alabama*, 791 F.3d 1267, 1273 (11th Cir. 2015) ("AEDPA's deferential standard of review is limited to claims that have been 'adjudicated on the merits' in state court."); *Johnson v. Williams*, 568 U.S. 289, 302-03 (2013) (Because 2254(d) "applies only when a federal claim was 'adjudicated *on the merits* in State court,' . . . [if] a federal claim was inadvertently overlooked in state court, § 2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge.") (emphasis in original).

The Eleventh Circuit did not even acknowledge this framework here, illustrating lower court confusion about how to treat federal claims that state courts decide based on state-law evidentiary rules. As Gavin argued (Brief of Appellee at ECF pp. 75-76, 82-84 (11th Cir. Mar. 12, 2021) No. 20-11271), under this

framework, the district court was required to review Gavin's juror-misconduct claim *de novo*. As the State conceded (11th Cir. Reply Brief of Appellant at ECF pp. 21-22 (11th Cir. Apr. 22, 2021) No. 20-11271), the state court denied Gavin's juror misconduct claim on the ground that the evidence supporting the claim would be barred by Alabama's no-impeachment rule. Pet. App. 288a. This was not a merits determination, and the state court never addressed whether barring this evidence would be permissible under the federal Constitution. Accordingly, section 2254(d) does not apply, and the Eleventh Circuit should have reviewed the claim *de novo*.

Although it was briefed, the Eleventh Circuit did not address this issue. It simply assumed that section 2254(d) applied and concluded that the state court's decision "was not contrary to, or an unreasonable application of, federal law." Pet. App. 47a. The Eleventh Circuit discussed some of the cases cited in Gavin's brief, but it ultimately applied AEDPA deference and denied the claim merely because Gavin failed to identify a Supreme Court holding directly on point. Pet. App. 50a-51a. That was not Gavin's burden. Because the state court's decision was not a merits determination, section 2254(d)'s deferential standard does not apply.

The Sixth Circuit correctly reached the opposite conclusion in *Couturier v. Vasbinder*, holding that application of a state-law evidence rule was not a merits determination under section 2254(d) and therefore *de novo* review was appropriate. 385 F. App'x 509, 516 (6th Cir. 2010). There, the petitioner claimed that the exclusion of certain evidence violated his constitutional right to present a defense. *Id.* The state court "did not address the claim as a violation of the right to present a

complete defense but rather characterized [the petitioner's] argument as an appeal of the application of state evidence rules." *Id.* The state court, "citing Michigan Rules of Evidence 401 and 402, found that it was not an abuse of discretion to exclude the evidence because it was not relevant." *Id.* But, as the Sixth Circuit explained, "the state court did not review the merits of this constitutional claim," and therefore "AEDPA deference [did] not apply, and [the court] conduct[ed] *de novo* review of questions of law." *Id.*

Consistent with the Sixth Circuit's decision in *Couturier*, and inconsistent with the Eleventh Circuit's approach here, the Seventh Circuit has correctly recognized that a state-court decision that rejects a federal constitutional claim on the basis of a state-law evidence rule is not a merits determination entitled to deference under section 2254(d). In *Harris v. Thompson*, the petitioner "clearly presented a federal constitutional claim to the state courts" in arguing that the state court's disqualification of a proffered witness on competency grounds violated her Sixth Amendment right to compulsory process. 698 F.3d 609, 623 (7th Cir. 2012). But the state court did not reach the merits of the federal constitutional claim because it had rested its decision on "state evidence law" regarding the competency of witnesses. *Id.* at 624. Because "the state courts simply ha[d] not addressed the federal constitutional issue," the Seventh Circuit addressed the claim *de novo* as "there [was] no state court judgment [on the federal issue] to which [it] could defer." *Id.* at 625.

As the Seventh Circuit recognized, "AEDPA requires federal courts to accord substantial deference to state court adjudications of federal constitutional claims. Such deference is 'part of the basic structure of federal habeas jurisdiction,' which is 'designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions' and to honor 'the State's significant interest in repose for concluded litigation.'" *Id.* (quoting *Richter*, 562 U.S. at 103). But where "the state courts have overlooked a constitutional claim, . . . these comity and finality concerns have less force." *Id.* And in "the absence of a state decision on the merits," a federal court's review "is 'not circumscribed by a state court conclusion' on the issue." *Id.* (quoting *Wiggins*, 539 U.S. at 534).

The Court should take this opportunity to address this confusion and clarify that a state court's decision barring the only evidence of a federal constitutional violation is not an "adjudication on the merits" and therefore is not entitled to deference under section 2254(d).

B. The Underlying Federal Constitutional Issue Is Exceptionally Important.

Clarifying this point about AEDPA deference is especially important in this case. "Because the requirements of § 2254(d) are difficult to meet," this Court has emphasized that "it is important whether a federal claim was 'adjudicated on the merits in State court.'" *Johnson v. Williams*, 568 U.S. 289, 292 (2013). Due to the Eleventh Circuit's error, no court has ever addressed the merits of Gavin's Sixth Amendment claim. In fact, although he has litigated this issue through the state courts and both the federal district court and Eleventh Circuit, not a single court—

state or federal—has addressed the merits of his claim.

And this claim is important. The Sixth and Fourteenth Amendments guarantee every criminal defendant the right to a fair trial by an impartial jury. *See Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976); *Turner v. Louisiana*, 379 U.S. 466, 471-72 (1965). This guarantee of impartiality requires that the jury's verdict "be based upon the evidence developed at the trial," not on prior judgments or conclusions. *Turner*, 379 U.S. at 472 *see also Smith v. Phillips*, 455 U.S. 209, 217 (1982). Moreover, in the specific context of capital sentencing, the Supreme Court has held that the Constitution is violated if even a single member of the jury would vote automatically for the death penalty upon a guilty verdict. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). A juror who has prejudged the sentence is not impartial, because that juror "will fail in good faith to consider the evidence of aggravating and mitigating circumstances." *Id.*

Gavin's right to a fair trial by an impartial jury was violated by the jury's premature vote on his sentence. The vote occurred during guilt-phase deliberations, before the penalty-phase trial had even begun and before the jurors had heard any mitigating evidence. Pet. App. 393a. After discussing the evidence of guilt, the jurors decided to vote by secret ballot. *Id.* Before the ballots were distributed, a juror announced that he intended to find Gavin guilty, and he had already decided to vote for a death sentence upon a guilty verdict. *Id.* The jurors then cast their votes by secret ballot, with each juror voting on both Gavin's guilt and sentence. *Id.* The jury unanimously voted to convict Gavin and—without having heard any

aggravating or mitigating evidence—voted 10 to 2 to recommend a death sentence. *Id.* After the jury returned its guilty verdict, the penalty-phase trial began. But by then, the die was cast.

Under *Morgan*, the Constitution is violated if even one member of the jury would vote automatically for the death penalty upon a guilty verdict. 504 U.S. at 729. In Gavin's case, ten jurors voted this way. There is no question those jurors failed in good faith to consider the evidence of mitigating circumstances—they cast their votes before any such evidence had been introduced. *See, e.g.*, *Holland v. State*, 587 So.2d 848, 872-74 (Miss. 1991) (reversing because "jury's premature deliberations prejudiced [defendant's] right to a fair hearing during the sentencing phase"); *Valdez v. State*, 196 P.3d 465, 473-75 (Nev. 2008) (reversing because "jurors committed misconduct when they deliberated the sentence during the guilt phase of the trial"); *People v. Weatherton*, 328 P.3d 38, 44-46 (Cal. 2014) (granting new trial due to juror misconduct, including juror's comment before the sentencing phase that "defendant deserved the death penalty").[8]

The Eleventh Circuit noted that the evidence Gavin seeks to admit "is not evidence of an external influence on or extraneous prejudicial information that was brought to bear on the jury's decision," and therefore questioned whether the

[8] The holding in *Weatherton* was based on the Sixth and Fourteenth Amendment right to an impartial jury. While it did not expressly invoke a specific constitutional provision as the source of this right, *Weatherton*, 328 P.3d at 52, the *Weatherton* court cited *People v. Nesler*, 941 P.2d 87, 98 (Cal. 1997), which in turn grounded the right to an impartial jury in this Court's Sixth and Fourteenth Amendment jurisprudence. *Id.* at 98-99 (citing *Turner*, 379 U.S. at 472–73; *Smith*, 455 U.S. at 217 ("Due process means a jury capable and willing to decide the case solely on the evidence before it.")).

evidence would fit into the traditional exceptions to Rule 606(b). Pet. App. 50a. But Gavin's argument is not that the jurors relied on extraneous evidence when voting to sentence him to death; it is that they prejudged the sentence and failed to consider mitigating evidence before casting their sentencing votes.

Where a jury has made a collective decision to recommend a death sentence before the penalty-phase trial has even begun, that jury will likely fail to consider the court's instructions and the mitigating evidence during the penalty-phase trial, thus violating a defendant's right to an impartial jury. Indeed, the common-sense notion that a juror who has already announced a decision in a case will be reluctant to change that position finds support in both historical authority and contemporary psychology.[9]

This problem is especially significant in capital cases because of the unique importance of a jury's impartial consideration of mitigating evidence before sentencing a person to die. Indeed, *Morgan* establishes that the jury's impartial consideration of mitigating evidence is constitutionally *required* before a death

[9] Chief Justice Marshall cautioned that a juror who "has prejudged the case" and "formed and delivered an opinion upon it" in a previous trial will "listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case." *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807). The Chief Justice's intuition has since been confirmed by psychological research. *See, e.g.*, Justin Sevier, *The Unintended Consequences of Local Rules*, 21 Cornell J.L. & Pub. Pol'y 291, 341 (2011) ("To the extent premature discussions allow jurors to decide the outcome of the trial, a juror could fall prey to the confirmation bias, where the juror filters the remaining evidence presented to her in search of evidence that matches her view of the case. If the practice spreads to enough jurors early in the trial, it could lead to groupthink, a phenomenon in which people conform more quickly to a majority view without weighing all the facts, especially those contradicting the majority opinion.") (footnoted omitted).

sentence may be imposed. 504 U.S. at 729; *see also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) ("[O]ur cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual."). Gavin's jury failed to give mitigating evidence any consideration at all.

No court has addressed the merits of Gavin's argument that non-constitutional rules of evidence, like Alabama Rule of Evidence 606(b), must yield to federal constitutional interests where, as here, they "'infring[e] upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)). *See, e.g.*, *Washington v. Texas*, 388 U.S. 14 (1967) (state evidence rule prohibiting persons charged in same crime from testifying for one another unconstitutional); *Chambers v. Mississippi*, 410 U.S. 284, 297-98 (1973) (application of state's hearsay rule and voucher rule unconstitutional); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam) (state evidence rule barring testimony from co-defendant tried in separate trial unconstitutional); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (state evidence rule barring evidence about the voluntariness of confession unconstitutional); *Rock v. Arkansas*, 483 U.S. 44 (1987) (state evidence rule excluding hypnotically refreshed testimony unconstitutional).

And based on the circumstances here, Gavin's interest in an impartial jury at the sentencing phase of his trial must trump the arbitrary way that the Alabama

courts applied Alabama's no-impeachment rule. Alabama's no-impeachment rule provides that, when a party challenges "the validity of a verdict or indictment, a juror may not testify in impeachment of the verdict . . . as to any matter or statement occurring during the course of the jury's deliberations." Ala. R. Evid. 606(b). The traditional justifications for the no-impeachment rule are to promote full and frank discussions among jurors during deliberations, preserve the finality of verdicts, and minimize the incentive of losing parties to harass jurors.

Here, the state court's application of Alabama's no-impeachment rule did not materially further any of these interests, while depriving Gavin of his ability to demonstrate that his constitutional rights were violated. If permitted to testify, the jurors would have spoken only to objective conduct—that is, that a premature vote took place. No evidence regarding what jurors said or believed during deliberations would be necessary.

Furthermore, Gavin did not seek to introduce testimony regarding deliberations that led to a verdict in order to challenge *that* verdict. He sought to introduce evidence from the deliberations in one trial (on guilt) to show why the jury in the second, separate trial (on penalty) was not impartial.[10]

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[10] As the Eleventh Circuit acknowledged, *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 225 (2017), held that the federal no-impeachment rule must yield to juror testimony about racial animus in jury deliberations. Pet. App. 49a. To be clear, the exception to Alabama's no-impeachment rule that Gavin urges here is significantly narrower than the exception recognized in *Pena-Rodriguez*. As discussed above, the jurors' testimony would have addressed only objective conduct, not what was said or believed during the jury's deliberations. And the evidence would *not* have been introduced to invalidate the jury's guilt verdict, which is when the premature vote took place. In any event, the Eleventh Circuit's conclusion that Gavin's claim failed

Finally, applying the no-impeachment rule here does not materially impact a losing party's incentive to contact jurors after a verdict has been rendered. Jurors in capital cases are routinely contacted by defense investigators about whether extraneous information infected juror deliberations. *See, e.g.*, Benjamin T. Huebner, Note, *Beyond* Tanner*: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. Rev. 1469, 1486 (2006). Permitting juror testimony on the narrow issue of whether premature voting took place would not appreciably increase a defendant's incentive to contact jurors.

"The theory of the law is that a juror who has formed an opinion cannot be impartial." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (internal quotation marks omitted). Because Gavin's jury voted on his sentence before hearing *any* evidence during his sentencing trial, this is a case of juror bias so extreme that, almost by definition, Gavin's Sixth Amendment right to an impartial jury has been abridged. Indeed, in an important sense, a jury that has already reached its decision before the start of the trial is not a jury at all. At least one court should review this important claim on the merits before Gavin suffers the ultimate punishment.

CONCLUSION

This Court should grant certiorari to review the important and unresolved questions of law presented by this capital case.

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because "he has identified no clearly established federal law from the Supreme Court in support of that principle" shows that the court was asking the wrong question. The Court should have addressed Gavin's claim *de novo*.

Respectfully submitted,

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