No. 22-6629
CAPITAL CASE

IN THE
SUPREME COURT OF THE UNITED STATES

KEITH GAVIN,
Petitioner,
v.
COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Eleventh Circuit properly apply *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), in conjunction with this Court's other precedent and the Antiterrorism and Effective Death Penalty Act of 1996, when it denied Gavin's penalty-phase ineffective assistance of counsel claim?

2. Did the Alabama Court of Criminal Appeals apply the correct prejudice analysis to Gavin's *Strickland v. Washington*, 466 U.S. 668 (1984), claim?

3. Did the Eleventh Circuit correctly deny Gavin's federal habeas claim, which was based on inadmissible juror testimony about the jury's internal deliberations?

PARTIES

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STATEMENT OF THE CASE

A. Gavin Murders William Clayton and is Convicted of the Crime

There is no doubt about Gavin's guilt or the seriousness of his crime.

Gavin was convicted of murder in Illinois on June 9, 1982. Doc. 35-7 at R. 647. In February 1998, just months after Gavin was released from prison, he and his cousin Dewayne Meeks traveled to Fort Payne, Alabama, for the purpose of picking up girls and for Gavin to get away "because he had been gone a long time." *Id.* at R. 650–51. Meeks lived in Chicago but had been raised in the Fort Payne area and had a daughter living there. *Id.* at R. 648, 651–52, 700. Gavin and Meeks stayed the weekend in Fort Payne and then returned to Chicago.

In March, Gavin wanted to return to Fort Payne to see a girl he met during the February trip. Gavin and Meeks traveled from Chicago to Chattanooga, Tennessee, along with Meeks's wife and son, on March 6, 1998. They checked into a motel in Chattanooga. *Id.* at R. 649–55. Gavin had no luck finding the girl he wanted to visit, and he and Mr. Meeks ended up in Centre, Alabama, looking for her. *Id.* at R. 660–65. While in downtown Centre, Gavin walked up to a Corporate Express van outside Regions Bank and shot and killed the driver, William Clinton Clayton, Jr. There were four eyewitnesses to the crime, two of whom positively identified Gavin as the shooter. After shooting Clayton, Gavin pushed him to the passenger's side of the van and drove away. *Gavin v. State*, 891 So. 2d 907, 927 (Ala. Crim. App. 2003).

Meeks testified against Gavin at his capital murder trial. He stated that while he and Gavin were at a traffic light outside of Regions Bank, Gavin told him that he

was going to ask someone for directions. Gavin got out of the truck and walked over to a van. Meeks then realized Gavin had a pistol, and he saw Gavin fire two shots into the van. Doc. 35-8 at R. 668–71. Meeks shouted at Gavin, asked what he was doing, then drove away. *Id*. at R. 671–76. Gavin followed him in the van. He honked the horn and flashed the lights in an attempt to get Meeks to stop, but Meeks refused because he was scared. *Gavin,* 891 So. 2d at 928.

Larry Twilley was also an eyewitness to the murder. When Twilley first saw Gavin, Gavin was wearing something red and black, possibly a toboggan, around his head. Twilley subsequently got a direct view of the side of Gavin's face when Gavin was not wearing anything around his head. At trial, Twilley positively identified Gavin as the shooter. Doc. 35-7 at R. 519–23, 528–29, 533–36, 542–45.

Danny Smith, an investigator with the District Attorney's Office for the Ninth Judicial Circuit, was driving from Fort Payne to Centre when he heard over the radio that there had been a shooting and that both the shooter and the victim were traveling in a white van with lettering on the outside. He saw a van matching that description and began following it. The van pulled over once, then sped away again. It stopped a second time in the middle of the road, near the intersection of Highways 68 and 48. The driver of the van got out of the vehicle and fired a shot at Investigator Smith, then ran into the nearby woods. Investigator Smith checked the van and discovered Clayton, who was barely alive, and called for an ambulance. At trial, Investigator Smith identified Gavin as the person who got out of the van and shot at him. *Id.* at R. 552–56, 558–60.

Other law enforcement officers arrived at the scene, cordoned off the area, and began searching for Gavin but could not locate him. A search dog was brought to the area and tracked Gavin's scent into the woods, where he was found standing in a creek. *Id.* at R. 560–63; Doc. 35-8 at R. 569. Gavin attempted to flee but was apprehended. Doc. 35-8 at R. 729–34. Although no law enforcement officers asked questions of or solicited information from Gavin, he made a statement as he was being brought out of the wooded area that he did not have a gun and had not shot or killed anyone. *Id*. at R. 762–63.

A week later, law enforcement located the murder weapon near the woods where Gavin had been hiding. Shell casings were found where Clayton was shot and where Gavin shot at Investigator Smith, and ballistics showed that they were fired from this gun. Doc. 35-9 at R. 882, 958–59, 962–63. A toboggan was also found in this wooded area that matched the description given by eyewitnesses. Doc. 35-8 at R. 816–17, 821–22.

Clayton was pronounced dead after he arrived at the hospital. *Id*. at R. 789–93. His cause of death was multiple gunshot wounds, apparently from only two gunshots. *Id*. at R. 830, 833–35, 838, 843.

Barbara Genovese, a supervisor at the Cherokee County Jail, was also called to testify during Gavin's trial. She testified that Gavin and Meeks were inmates at the jail in April 1998. At one point, Gavin asked to go outside with Meeks to exercise. When Genovese told Gavin that he could not go outside with Meeks, he asked why, and she informed him that he had acted unruly when Meeks was initially brought to

the jail. Doc. 35-9 at R. 1001. Gavin then told Genovese, "Dewayne didn't do anything . . . I did it," and "Dewayne should not be in here." *Id.* at R. 1002. Genovese also testified that she did not know what Gavin was referring to when he said, "I did it." *Id.*[1]

Gavin was convicted in the Circuit Court of Cherokee County, Alabama, for the murder of William Clinton Clayton, Jr. He was found guilty of the capital offenses of murder during a robbery, in violation of section 13A-5-40(a)(2) of the Code of Alabama, and of murder within twenty years of a prior murder conviction, in violation of section 13A-5-40(a)(13). He was also convicted of one count of attempted murder for shooting at a law enforcement officer. Doc. 35-10, Tab #R-24.

B. Gavin Is Sentenced to Death

Gavin's counsel called two witnesses to testify during the penalty phase of his trial: Annette Gavin, his mother, and S.J. Johnson, a minister from the local Kingdom Hall of Jehovah's Witnesses. Johnson met Gavin shortly after he was arrested for the murder of Clayton after getting word that Gavin wanted someone from the church to visit him. Doc. 35-10, Tab #R-29, at R. 1244. He met with Gavin weekly until his trial, spending about an hour with him on each occasion. *Id.* at R. 1244–45. According to Johnson, Gavin eventually stopped blaming others for his situation and took some responsibility for his actions. *Id.* at R. 1247. Johnson testified, "I feel that if Keith is given an opportunity to continue to live, he has the potential to cultivate a deeper

1. A more detailed statement of the facts can be found in the direct appeal opinion of the Court of Criminal Appeals. *Gavin*, 891 So. 2d at 926–30.

relationship with God and I feel that there is hope for Keith if he's given time and opportunity." *Id.* at R. 1249. He also testified that "there are occasions even today where mercy might override just cold justice." *Id.* at R. 1251. He added that on occasion, Gavin had mentioned his concern for the Clayton family and had acknowledged their grief. *Id.* at R. 1252–53. Finally, Johnson extended his "sincere sympathy" to the victim's family. *Id.* at R. 1253.

Annette Gavin testified that she felt Gavin "has the ability to live as he should live because he had to, he had to see it, he sees it now" and that he "could really be a great source of help to others and to our Creator." *Id.* at R. 1259. She testified that the Jehovah's Witness faith had been a part of her son's foundation, *id.* at R. 1258–59, and that "he's always felt a concern for other people," *id.* at R. 1259. Finally, she asked the jury to spare her son's life. *Id.*

Following a sentencing hearing, the jury recommended that Gavin be sentenced to death by a ten-to-two vote. Doc. 35-11, Tab #R-34. The trial court found the existence of three aggravating circumstances: (1) the capital offense was committed by a person under sentence of imprisonment, ALA. CODE § 13A-5-49(1), (2) Gavin had previously been convicted of a felony involving the use or threat of violence to the person, *id.* § 13A-5-49(2), and (3) the capital offense was committed while Gavin was engaged in the commission of, or an attempt to commit, or flight after committing, or attempting to commit a robbery, *id.* § 13A-5-49(4). The court found that no statutory mitigating circumstances existed in this case. The court noted that it examined the report from mitigation consultant John David Sturman for non-

statutory mitigating circumstances. After weighing the aggravating and mitigating circumstances, the court sentenced Gavin to death. *Gavin v. Comm'r, Ala. Dep't of Corrs.*, 40 F.4th 1247, 1255 (11th Cir. 2022).

C. State Courts Reject Gavin's Direct Appeal and Collateral Challenges

On direct appeal, the Alabama Court of Criminal Appeals (CCA) affirmed Gavin's convictions and death sentence. *Gavin*, 891 So. 2d 907. The Alabama Supreme Court denied Gavin's petition for writ of certiorari, *Ex parte Gavin*, 891 So. 2d 998 (Ala. 2004), and this Court did likewise, *Gavin v. Alabama*, 543 U.S. 707 (2005).

After his direct appeal concluded, Gavin filed a petition for postconviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. Doc. 35-19, Tab #R-58. The circuit court returned the petition to Gavin's attorneys because it was not filed in the proper form. *Id.* at CR. 44. Gavin then refiled his petition, *id.* at CR. 46, and the State filed an answer and a motion to dismiss. *Id.* at Tab #R-59. The court dismissed many of the claims in the petition but granted leave for Gavin to file a more specific petition concerning his ineffective assistance of counsel claims. Doc. 35-20, Tab #R-61, CR. 272. Subsequently, Gavin filed an amended Rule 32 petition, *id.* at Tab #R-62, and the State again moved to dismiss, Doc. 35-33, Tab #R-63.

Among his many claims, Gavin asserted that his trial counsel were ineffective at the penalty phase for failing to more fully investigate his background, and the circuit court held an evidentiary hearing. Doc. 35-48, Tab #R-78.

Gavin was the first witness to testify during this hearing. *Id*. at TR. 107. He denied any involvement in the death of the victim, claiming that Meeks shot Clayton and that he had no idea that Meeks was going to kill someone. *Id*. at TR. 113–15. Gavin denied taking Meeks's weapon and testified that he never had Meeks's gun in his possession. *Id*. at TR. 123–24. He also testified that Meeks was involved in a drug ring and that he came to Alabama with Meeks to make a drug transaction. *Id*. at TR. 134–35.

On cross-examination, Gavin claimed that he got out of Meeks's Blazer to confront him, even though he knew Meeks had just shot someone and had a gun. Doc. 35-49 at TR. 207–08. He denied taking the gun with him when he ran into the woods and claimed he did not see the gun being thrown in there. *Id*. at TR. 211. He also testified that instead of staying on the road and telling Investigator Smith what had happened, he ran into the woods. *Id*. at TR. 209–10. Finally, Gavin acknowledged that he stayed in the woods for several hours but did not come out and tell the police that Meeks had shot Clayton. *Id*. at TR. 212.

Gavin testified that he had taken college courses in prison and had earned a GED. *Id*. at TR. 172. He was a self-described "Grand Master" in chess who, while in prison, had learned about plumbing and word processing, and served as a clerk in the law library. *Id*. at TR. 172–74. Gavin stated that his neighborhood was safe until he was nine or ten years old, that his mother always left the doors unlocked, and that he was not exposed to drugs until he was thirteen or fourteen years old. *Id*. at TR. 174–76. He denied having a drug problem. *Id*. at TR. 175–76. Gavin's father had lived

in the home with Gavin and his eleven siblings. *Id*. at TR. 176–77. The Department of Children's Services was never called to his home because of beatings or abusive behavior, and none of the children were removed, *id*. at TR. 177–78, though Gavin's father gave him "whoopings" when he did something wrong, *id*. at TR. 178.

Lucia Penland, a mitigation specialist, testified next. Penland was contacted in October 1998 by Gavin's trial counsel, Bayne Smith, about conducting a mitigation investigation in Gavin's case. Doc. 35-50 at TR. 309–10. She told Mr. Smith she would help as long as she had sufficient time to conduct her investigation. *Id*. at TR. 310. The defense team formally retained her in early 1999. *Id*. at TR. 310–11.

Penland acknowledged on cross-examination that Gavin was reluctant to put together a mitigation case because he insisted that he had not committed the murder. *Id*. at TR. 342. She had a difficult time with him during her initial interview. *Id*. at TR. 346. In May 1999, Penland contacted Craig Haney about testifying on Gavin's behalf on the effects of institutionalization, and Dr. Haney told her that he would be available if the trial were continued from its June 1999 trial date. *Id*. at TR. 343–44. Based on this information, defense counsel obtained a continuance over the summer months. *Id*. at TR. 344–45. Penland traveled to Chicago in May 1999, but Gavin's mother would not speak to her because Gavin told her not to. *Id*. at TR. 348. On October 19, 1999, Penland sent trial counsel a letter stating that her investigation was not complete because she was working on other cases, coupled with the lack of cooperation from Gavin and his family. *Id*. at TR. 347–48. She sent counsel a second

letter on October 20 stating that Gavin was still completely unwilling to discuss his background with her for mitigation purposes. Doc. 35-51 at TR. 357.

Neither of Gavin's trial counsel testified at the Rule 32 hearing.[2] Penland stated that she did not know the extent of the mitigation investigation Mr. Smith conducted on his own, nor did she know whether Mr. Smith was ready to try a mitigation case. Doc. 35-50 at TR. 345–46; Doc. 35-51 at TR. 361. She was unaware that the trial court considered information from another mitigation specialist she employed prior to sentencing Gavin to death. Doc. 35-51 at TR. 358. Finally, Penland testified that she is against the death penalty. *Id*. at TR. 362.

Dr. Betty Knight Paramore, a licensed clinical and school psychologist who works in a school setting and does not have her own practice, also testified on Gavin's behalf. Dr. Paramore was hired by state collateral counsel to investigate Gavin's childhood history. Doc. 35-52 at TR. 490. She testified that Gavin grew up in a large family in public housing in Chicago, an area she claimed was high in crime and gang activity. She testified that the Gavin home was crowded and that the family had a low socioeconomic status. *Id*. at TR. 437–47. She also testified that Gavin's father was abusive to his wife in Gavin's presence and whipped his children, including Gavin. However, the whippings stopped when Gavin stood up to his father. *Id*. at TR. 427–31. Dr. Paramore testified that Gavin became involved in criminal activity to help support his family. *Id*. at TR. 435. In fact, she testified that when Gavin was thirteen,

2. As the Eleventh Circuit noted, Mr. Smith died before the hearing. *Gavin*, 40 F.4th at 1256.

he was involved in a robbery and was sent to vocational school. *Id.* at TR. 464. She further stated that Gavin was arrested when he was in the eleventh grade and was not allowed to return to school. *Id.*

Dr. Paramore did not include any information in her report concerning the seventeen years Gavin spent in prison for murder. *Id.* at TR. 486–90. She acknowledged that she would not have been able to gather information about Gavin if his family members had not been cooperative. *Id.* at TR. 505–06. She also acknowledged that there are people with the same risk factors as Gavin who have not murdered two people. *Id.* at TR. 510.

Gavin also submitted the deposition testimony of Dr. Craig Haney in support of his Rule 32 petition. Dr. Haney is a social psychologist and a professor of psychology at UC Santa Cruz. Doc. 35-27, Tab #R-79, at 8. He testified about the effects of institutionalization on Gavin. *Id.* at 24, 40–41. It was Dr. Haney's opinion that the seventeen years Gavin spent in prison undermined his ability to positively adjust to free society. *Id.* at 46–50. He further opined that Gavin's years in prison did nothing to prepare him to return to life outside. *Id.* at 57–99, 112–24. Dr. Haney testified in depth about Gavin's prison experience. *Id.* He admitted, however, that he is opposed to the death penalty, *id.* at 152–55, and he acknowledged that institutionalization is not a recognized diagnosis but rather a social phenomenon. *Id.* at 27, 203–04.

Dr. Haney was contacted by Lucia Penland about testifying in Gavin's case, but he never talked to Gavin's trial attorneys. *Id.* at 140–43, 149. On cross-examination, he acknowledged that Gavin's attorneys could have decided that they

did not want to present an institutionalization defense. *Id*. at 169–71. Dr. Haney admitted that he had never been to Centre or to Cherokee County, Alabama, and that he did not know anything about the people in the community. *Id*. at 171–72. He did not know whether Gavin cooperated with his attorneys during the penalty phase of the trial or how much time defense counsel spent with Gavin trying to persuade him to cooperate. *Id*. at 180–81.

It was Dr. Haney's opinion that Gavin's attorneys should have presented all of the information about Gavin's prior imprisonment during the penalty phase, including the facts that he had been convicted of murder and served seventeen years, had gotten into fights while in prison, and had over sixty disciplinaries. *Id*. at 173–76. Dr. Haney acknowledged that institutionalization does not make someone walk up to another person and shoot them and did not directly cause Gavin to shoot the victim in this case. *Id*. at 199, 238–39. He testified that a person could serve seventeen years in prison and not become institutionalized. *Id*. at 209–11. Finally, he stated that he was not privy to Gavin's attorneys' thought processes and acknowledged that trial counsel could have believed that testimony about Gavin's years in prison for an earlier murder would have been more harmful than helpful during the penalty phase of his trial for a second murder. *Id*. at 255–56.

The State then called Dr. Glen King, a board-certified clinical psychologist and certified forensic examiner, to testify. Doc. 35-52 at TR. 532–33. Dr. King stated that the term "institutionalization" is not a scientific or clinical term, and it is not a recognized diagnosis in clinical psychology. *Id*. at TR. 543–44. According to Dr. King,

institutionalization is more of an opinion or an idea because it does not predict anything. *Id*. at TR. 544–45. He also testified that there is no evidence suggesting that a person's imprisonment leads them to commit crimes. *Id*. at TR. 545.

Dr. King met with Gavin at Holman Correctional Facility. *Id*. at TR. 539, 547. Gavin was pleasant and cooperative during the interview. *Id*. at TR. 548. He did not indicate that he had current or past problems with drugs or alcohol, stating that the only drug he used on occasion was marijuana. *Id*. at TR. 549–50. Gavin described his parents as loving, devoted, good parents. They were still living together when his father died of a heart attack. *Id*. at TR. 550–51. Gavin told Dr. King that he was not sexually or physically abused as a child, but when pressed, he said that his father had been "borderline" abusive to him. *Id*. At TR. 551–52. Gavin described his family as quite close and told Dr. King that they got along extremely well. He explained that he was the caretaker of his siblings. *Id*. at TR. 553. He also told Dr. King that he grew up in a four-bedroom row house. Doc. 35-53 at TR. 555. Gavin attended the same schools for most of his educational experience, never repeated a grade, got good grades (mostly Cs), and attended school on a regular basis. *Id*. at TR. 563. He attended two years of high school before he dropped out in the eleventh grade. *Id*. at TR. 554.

There was some violence in the neighborhood where Gavin lived, but Gavin told Dr. King that his neighborhood was relatively safe, especially during his first twelve years, when the family did not lock the door. *Id*. at TR. 555. Violence started in the neighborhood when Gavin was sixteen or seventeen. Gavin stated that his

family home had never been broken into, and he was never particularly afraid for himself or his siblings. *Id*. Gavin also told Dr. King that there was not much violence in his neighborhood. *Id*. at TR. 556.

Gavin told Dr. King that he was incarcerated for sixteen years and nine months in Illinois. *Id*. at TR. 558–59. He was moved ten or eleven times during his incarceration at his request because moving broke time up for him. *Id*. at TR. 559. Gavin informed Dr. King that he had a number of different jobs while in prison and also received vocational training. *Id*. at TR. 559–60. During his time in prison, he attended college classes and was a few hours short of an AA degree. *Id*. at TR. 562. Gavin stated that his time in prison made him wiser and gave him time to reflect. *Id.*

The impression Dr. King received about Gavin's adolescence and family life was very different from the impressions of Drs. Haney and Paramore. *Id*. at TR. 563. Gavin told Dr. King that he was not rich or poor, but rather moderate. *Id.* He described a cohesive family that was very close. *Id*. He also told Dr. King that his childhood home was crowded, but that his family always had food on the table and clothes to wear. *Id*. Gavin recalled only one time when the family's utilities were turned off because his mother forgot to pay the bill. *Id*. at TR. 563–64. When that occurred, his mother immediately paid, and the power was restored. *Id*. at TR. 564.

In Dr. King's opinion, reliance on risk factors is problematic because one does not know the base rates for the particular behavior one is trying to predict. *Id*. at TR. 565. Dr. King also testified that risk factors are not a reliable indicator of criminal behavior or the likelihood of committing criminal behavior. *Id*. at TR. 568–69. Finally,

he testified that there is no evidence that indicates that Gavin suffers from any type of psychological maladjustment or mental illness. *Id*. at TR. 569–70.

Upon questioning by the circuit court, Dr. King testified that he disagrees with Dr. Paramore's conclusion that a person with Gavin's risk factors is more likely to commit a crime than someone without those factors. *Id*. at TR. 634. After researching this issue, it was Dr. King's opinion that only two risk factors have any probability for predicting future violence, mental illness and substance abuse. *Id*. at TR. 634–35. It was Dr. King's opinion that the risk factors in Dr. Paramore's report have no quantitative basis. *Id*. at TR. 635–36. Gavin does not suffer from either mental illness or substance abuse. *Id*. at TR. 642.

The circuit court denied Gavin's amended Rule 32 petition. Doc. 35-47 at CR. 3484. The court first determined that counsel's performance during the penalty phase was not deficient. Counsel had called two witnesses to testify, a minister who had established a relationship with Gavin during his incarceration and Gavin's mother. The court could not "conclude that the trial attorneys erred in choosing to emphasize the Defendant's relationship with Rev. Johnson and the minister's opinion about the Defendant's redemptive qualities." Doc. 35-57 at CR. 3513–15.

The court also found that any failure to introduce the evidence adduced at the Rule 32 hearing was not prejudicial. The court reasoned that "[i]f the purpose of such testimony" was to " 'humanize'" Gavin, then portraying him "as the product of a violent family from a violent, gang ridden, and drug-infested Chicago ghetto where

the Defendant had previously committed a murder would not be likely to achieve that result in the eyes of a Cherokee County, Alabama, jury." *Id.* at 3517.

The CCA affirmed, noting the following facts:

- Gavin's lead attorney immediately contacted Lucia Penland from the Alabama Prison Project to conduct a mitigation investigation, but Gavin "adamantly refused to discuss mitigation matters" with her.
- Gavin's family members in Chicago also refused to cooperate with Penland.
- Penland contacted trial counsel on October 13, 1999—less than three weeks before trial—urging him to obtain a continuance because she had not completed her mitigation investigation. Counsel, however, believed that requesting a continuance because Gavin and his family had been uncooperative "would not be persuasive toward a continuance, but would in fact be counterproductive in that regard as well as towards [Gavin] as a whole," and counsel had already secured one continuance to allow for additional mitigation investigation.

Doc. 35-56, Tab #R-85, at 42–43. Based on this evidence, the CCA found that it "was 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." *Id.* at 43.

The CCA also reviewed the new evidence do novo, reweighing it against the evidence presented at Gavin's trial and sentencing hearing. *Id.* The court noted the three significant aggravating factors present in this cold-blooded murder: (1) Gavin had previously been convicted of murder; (2) Gavin was still under a sentence of

imprisonment for that crime when he killed again; and (3) the second murder was committed in the course of a first-degree robbery. Balanced against this was evidence that focused on "Gavin's childhood in Chicago and imprisonment," which "would have been given very little weight by the jury." *Id.* In support of this conclusion, the CCA cited its earlier decision in *Washington v. State*, 95 So. 3d 26, 45 (Ala. Crim. App. 2012), which relied on multiple decisions of the Eleventh Circuit that had come to the same conclusion on similar facts. *See Washington*, 95 So. 3d at 45 ("*Mills v. Singletary*, 63 F.3d 999, 1025 (11th Cir. 1995) ('[E]vidence of Mills' childhood environment likely would have carried little weight in light of the fact that Mills was twenty-six when he committed the crime.'); *Bolender v. Singletary*, 16 F.3d 1547, 1561 (11th Cir. 1994) ('Bolender was twenty-seven years old at the time of the murders, "evidence of a deprived and abusive childhood is entitled to little, if any mitigating weight" when compared to the aggravating factors.'").) Thus, relying on this Court's guidance, the CCA "agree[d] with the circuit court that the admission of this [additional] evidence would not have changed the verdict in the penalty phase." Doc. 35-56, Tab #R-85, at 43.

The Alabama Supreme Court denied Gavin's petition for writ of certiorari, *Ex parte Gavin*, No. 1140665 (Ala. Oct. 23, 2015),[3] as did this Court, *Gavin v. Alabama*, 135 S. Ct. 1325 (2016) (mem.)

3. This document is located in Volume 47, Tab #R-88, of the habeas record, which does not appear in PACER.

D. The Federal District Court Grants Gavin's Habeas Petition

Gavin timely filed a petition for writ of habeas corpus in federal district court, Doc. 1, and the district court held that the CCA had unreasonably applied both the deficient performance and prejudice prongs of *Strickland*. Doc. 65. On performance, the district court briefly noted that Gavin had stymied his counsel's attempt to gather mitigation evidence, but it discounted the relevance of this information (and the CCA's reliance on it) by noting that shortly before trial, "Gavin's family was finally 'coming around and beginning to cooperate to some extent.'" *Id.* at 124. The court faulted trial counsel for failing to "arrange for any family members other than Mr. Gavin's mother Annette to testify on Mr. Gavin's behalf," *id.*, at 124, though the court did not question counsel's judgment that the trial court was unlikely to grant a motion to continue based on the earlier refusals of Gavin and his family to provide evidence. And though the district court noted that it had "no insight into counsel's decision not to elicit testimony concerning Mr. Gavin's background from Annette," the court determined that this decision was not a strategic call to emphasize Gavin's redemptive qualities over a troubled past of gang involvement and murder. *Id*. at 127. Rather, the court decided that it must have been the product of an unreasonable investigation, and any conclusion to the contrary was objectively unreasonable.

On prejudice, the district court appeared to consider Gavin's claim de novo:

> After reweighing the considerable evidence offered in aggravation . . . against the considerable evidence that could have been, but was not offered in mitigation[,] the court concludes that if counsel had not performed deficiently, but had offered the evidence offered at the Rule 32 evidentiary hearing, a reasonable probability exists that he would have been sentenced to life imprisonment rather than death.

Id. at 133. The court then concluded that because some Supreme Court decisions had found omission of evidence of an abusive childhood to be prejudicial, the CCA unreasonably applied *Strickland*. *Id.* at 134.

The district court denied relief on Gavin's juror misconduct claim. *Id*. at 33–39. The court found that this claim was not contrary to, or an unreasonable application of, clearly established federal law and "was nothing more than prohibited testimony about the debate and deliberations of the jury." *Id*. at 39.

The State filed a notice of appeal and motion to stay the district court's judgment granting penalty-phase relief, which was granted. Docs. 66, 67, 72. Gavin then filed a motion to alter or amend the judgment and a notice of appeal. Doc. 73. The district court denied Gavin's motion and his request to issue a certificate of appealability (COA) on the remaining claims in his habeas petition. Doc. 81. The district court also entered a revised final judgment.

E. The Eleventh Circuit Reverses the District Court's Grant of Relief on Gavin's Penalty-Phase Ineffective Assistance of Counsel Claim and Denies Relief on the Juror Misconduct Claim

The State appealed the district court's judgment granting penalty-phase relief. Gavin cross-appealed, challenging the district court's denial of his juror misconduct claim.

The Eleventh Circuit agreed with the State that the district court erred in granting relief on Gavin's penalty-phase ineffective assistance of counsel claim. *Gavin*, 40 F.4th at 1264–67. First, the court found that counsel's performance was not deficient; counsel prepared for the penalty phase by hiring a mitigation specialist

and by conducting his own independent investigation, a fact the mitigation specialist admitted during her testimony. *Id.* at 1265. Moreover, "Gavin and his family were consistently uncooperative leading up to the penalty phase." *Id.* The court also found that the district court failed to follow AEDPA when assessing counsel's deficient performance because the court substituted its judgment that counsel's performance was deficient rather than asking whether the CCA's determination was contrary to, or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), as required by 28 U.S.C. § 2254(d)(1). *Id.* at 1266.

Next, the Eleventh Circuit examined the district court's prejudice analysis and found it lacking as well, holding that "the district court unreasonably rejected the CCA's finding that the mitigation evidence would have been given little weight by the jury, based solely on the fact that the Supreme Court had placed value on similar types of mitigation evidence in other cases." *Id.* at 1267. After examining the facts presented at the Rule 32 evidentiary hearing, the court found that it was not unreasonable for the CCA to "conclude that there was not a substantial likelihood that the jury would have concluded that the non-statutory mitigation evidence—which was of limited value and could have been a double-edged sword—would have outweighed the three significant statutory aggravating factors present in this case." *Id.* at 1269. The court also compared the mitigation in Gavin's case with the mitigation in the cases Gavin cited and found that "the balance of aggravating and mitigating factors is significantly different in Gavin's case than in the precedents he cites." *Id.* at 1269–70. Finally, citing *Shinn v. Kayer*, 141 S. Ct. 517, 526 (2020), the

Eleventh Circuit concluded "that the CCA's determination that Gavin failed to establish prejudice 'was not so obviously wrong as to be beyond any possibility of fairminded disagreement' and the district court 'exceeded its authority' in rejecting the state court's determination." *Id*. at 1270.

The Eleventh Circuit also rejected Gavin's argument that it should affirm the district court's grant of penalty-phase relief because the jury conducted premature penalty-phase deliberations. *Id*. at 1270–72. After distinguishing this Court's holding in *Morgan v. Illinois*, 504 U.S. 719 (1992), from the facts in this case, the circuit court found that this case did not fall into either of the exceptions to Rule 606(b) of the Alabama Rules of Evidence or under the narrow exception from this Court in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017). *Id*. at 1270–72. The court also found that Gavin failed to identify any clearly established Supreme Court precedent to support his argument that in this case, the no-impeachment rule must yield to his Sixth and Fourteenth Amendment rights to a fair and impartial jury. *Id*. at 1272. The circuit court concluded that "the CCA's rejection of this claim was not contrary to, or an unreasonable application of, any federal law." *Id*.

REASONS FOR DENYING THE PETITION

None of the claims presented by Gavin warrant this Court's review. First, Gavin's claim that the Eleventh Circuit's method of adjudicating his penalty-phase *Strickland* claim conflicts with *Wilson* and creates a circuit split is meritless. In resolving his claim, the circuit court followed *Wilson* and this Court's other precedent by identifying the CCA's reasons for denying Gavin's claim, properly reviewing the

state-court record in its entirety to determine whether those decisions were reasonable, and correctly holding that they were. In fact, Gavin's reading of *Wilson* would be inconsistent with longstanding precedent of this Court and AEDPA. Nor is there any real split of authority over whether AEDPA deference extends beyond a state court's articulated reasons for rejecting a claim. The Eleventh Circuit's decision neither conflicts with this Court's precedent nor creates a circuit split. At bottom, Gavin simply disagrees with the circuit court's resolution of this claim, and as such, his petition should be denied.

This Court should also decline to grant certiorari on Gavin's second question. The CCA applied the correct standard of review for assessing prejudice under *Strickland*. That court considered the totality of the available mitigating evidence from the trial and the state postconviction proceedings and reweighed it against the evidence in aggravation. In this case, there were three aggravating circumstances, and the evidence in mitigation—evidence concerning a thirty-eight-year-old murderer's childhood poverty and background—was not nearly as substantial as the mitigating evidence presented in this Court's precedents. Moreover, Gavin's testimony contradicted much of the evidence offered in the state court proceedings.

Certiorari should also be denied on Gavin's third question. Gavin's argument that the federal courts should have reviewed his juror misconduct claim de novo is wrong. The cases Gavin relies on do not have any application to his claim. The Eleventh Circuit affirmed the CCA because Gavin failed to identify any precedent

from this Court that supported his argument, and the state court's decision is consistent with this Court's precedent.

I. The Eleventh Circuit's decision does not conflict with *Wilson*.

Gavin seeks certiorari review of the Eleventh Circuit's denial of his penalty-phase ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984). He contends that the circuit court's method of adjudicating his *Strickland* claim is inconsistent with *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), and that a circuit split exists on the extent of this Court's holding in *Wilson*. Because his arguments are without merit, this Court should deny certiorari.

A. The Eleventh Circuit's methodology in resolving Gavin's ineffective assistance of counsel claim is in keeping with *Wilson*.

According to Gavin, federal courts, in light of *Wilson*, must confine their review of a state court's denial of a claim to the exact reasoning set forth in the state court's decision. He contends that the Eleventh Circuit violated *Wilson* and AEDPA by looking beyond the reasons set forth by the CCA when it denied relief. Gavin's argument is based on a misreading of the Court's holding in *Wilson*, and he fails to show any inconsistency between *Wilson* and the Eleventh Circuit's methodology in adjudicating his claim.

In fact, the Eleventh Circuit's decision faithfully applied *Wilson* in conjunction with this Court's other longstanding precedent and AEDPA. The court identified the CCA's reasons for denying Gavin's *Strickland* claim, properly reviewed the state-court record in its entirety to determine whether those reasons were reasonable, and correctly held that they were. *Gavin*, 40 F.4th at 1264–70. In conducting that

analysis, the circuit court properly afforded the deference that is due to the CCA's decision under AEDPA, which "instructs that, when a federal habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, the federal court may overturn the state court's decision only if it was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.'" *Burt v. Titlow*, 571 U.S. 12, 18, (2013) (quoting 28 U.S.C. § 2254(d)(2)); *see also Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceedings, § 2254(d).").

A state court's factual determinations are not objectively unreasonable "merely because the federal habeas court would not have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). Nor will habeas relief be granted where "reasonable minds reviewing the record might disagree" about the state court's factual determinations. *Rice v. Collins*, 546 U.S. 333, 341–42 (2006). Habeas relief likewise will not be granted "unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA." *Wetzel v. Lambert*, 565 U.S. 520, 525 (2012) (emphasis in original). Thus, if a "fairminded jurist could agree" that even one of the factual determinations supporting the state court's decision is reasonable, then the state court's remaining factual determinations are "beside the point." *Shinn*, 141 S. Ct. at 524; *see also Parker v. Matthews*, 567 U.S. 37,

42 (2012) ("That ground was sufficient to reject Matthews' claim, so it is irrelevant that the [state] court also involved a ground of questionable validity.").

So to determine whether a state court's decision is "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)(2), a federal court must, of course, thoroughly review the evidence in the state-court record. *See, e.g.*, *Brumfield v, Cain*, 576 U.S. 305, 314 (2013) ("[O]ur examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable."); *McDaniels v. Kirkland*, 813 F.3d 770, 780 (9th Cir. 2015) (en banc) ("Federal courts sitting in habeas may consider the entire state-court record, not merely those materials that were presented to the state appellate courts."). That is precisely the method of review that the Eleventh Circuit applied in adjudicating Gavin's *Strickland* claim. *Gavin*, 40 F.4th at 1264–70.

Wilson did not create a different methodology that federal courts must employ in reviewing state court factual determinations under § 2254(d)(2). There, the Court was presented with the narrow question of how a federal court should address a case where a lower state court gave reasons for its decision but a higher state court did not. 138 S. Ct. at 1192. Under those circumstances, the Court held that "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Id.*

Gavin reads *Wilson* to stand for far more. He argues that the Eleventh Circuit's approach is inconsistent with *Wilson* because a district court "simply reviews the *specific reasons* given by the state court and defers to *those reasons* if they are reasonable." Pet. 22. But *Wilson* did not hold that federal courts, in determining whether a state-court decision was based on an unreasonable determination of the facts in light of the evidence presented in state court, may consider only a state court's factual determinations as they are worded in its decision and not the evidence in the state-court record supporting the state court's reasoning. *See Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1037 (11th Cir. 2022) (en banc) (explaining that the court's approach in *Pye* is consistent with AEDPA because "[a] federal habeas court is tasked with reviewing *only* the state court's 'result[ing] decision'—*not* the constituent justifications for that decision"). Nor did *Wilson* address "the specificity or thoroughness with which state court must spell out their reasoning to be entitled to AEDPA deference of the level of scrutiny that [federal courts] are to apply to the reasons that they give." *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1350 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 394 (2019) (mem).

Indeed, under Gavin's proposed reading, *Wilson* would be inconsistent with longstanding precedent of this Court in at least three respects. First, federal courts reviewing a state-court decision under § 2254(d) must not be "read[y] to attribute error" to a state court. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Instead, federal courts are to "presume[e] that state courts know and follow the law." *Id*. Also, such skeptical review is "incompatible with § 2254(d)'s highly deferential standard for

evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Id.* (cleaned up).

Second, this Court repeatedly has held that federal courts "have no power to tell state courts how they must write their opinions" or "impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim." *Coleman v. Thompson*, 501 U.S. 722, 739 (1991); *see also Johnson v. Williams*, 568 U.S. 289, 300 (2013) ("[F]ederal courts have no authority to impose mandatory opinion-writing standards on state courts."). The courts of appeals follow this Court's teaching. *See, e.g.*, *Sheppard v. Davis*, 967 F.3d 458, 469 (5th Cir. 2020) ("[W]e do not sit to grade the thoroughness of a state court's opinion."); *Meders*, 911 F.3d at 1350 ("This Court has stressed that in applying AEDPA deference federal courts are not to take a magnifying glass to the state court opinion or grade the quality of it."); *Grant v. Royal*, 886 F.3d 874, 905–06 (10th Cir. 2018) ("On habeas review, we properly eschew the role of strict English teacher, finely dissecting every sentence of a state court's ruling to ensure all is in good order."); *Zuluaga v. Spencer*, 585 F.3d 27, 31 (1st Cir. 2009) ("[I]t would elevate form over substance to impose some sort of requirement that busy state judges provide case citations to federal law (or corresponding state law) before federal courts will give deference to state court reasoning. Such formalism would be contrary to the congressional intent expressed in AEDPA."); *Cruz v. Miller*, 255 F.3d 77, 86 (2nd Cir. 2001) (rejecting "grading papers" approach in habeas review).

Third, AEDPA deference must be accorded to state-court decisions that contain no rationale or reasoning whatsoever. *Harrington v. Richter*, 562 U.S. 86, 100 (2011). For that reason, "[i]t would be irrational to afford deference to a decision with no stated explanation but not afford deference to one that states reasons, albeit not as thoroughly as it could have." *Meders*, 911 F.3d at 1351; *see also Santellan v. Cockrell*, 271 F.3d 190, 194 (5th Cir. 2001) ("It would be odd to require a less deferential approach to reasonableness in cases where the state courts attempted to articulate reasons for their decisions than in those where they did not.").

Simply put, Gavin's reading of *Wilson* does not square with this Court's precedents. *See, e.g.*, *Sheppard*, 967 F.3d at 467 n.5 ("[I]t is far from certain *Wilson* overruled *sub silentio* the position—held by most of the court of appeals—that a habeas court must defer to a state court's ultimate *ruling* than to its specific *reasoning*.") (emphasis in original); *Meders*, 911 F.3d at 1351 ("Only the clearest indication that *Wilson* overruled the Supreme Court's previous decisions, such as *Johnson*, would warrant ignoring those decisions, and there is no indication at all that *Wilson* did so."). Moreover, the Eleventh Circuit properly followed this Court's precedents in adjudicating Gavin's *Strickland* claim. His claim that the court's decision is contrary to *Wilson* is therefore meritless and unworthy of certiorari review.

Gavin contends that the Eleventh Circuit gave AEDPA deference to a reason the state court did not provide. Pet. 19–22. Specifically, he alleges that rather than analyzing the CCA's actual reasoning for its determination that counsel was not

ineffective during the penalty phase, the circuit court relied on a gap in the evidentiary record—a gap the state court never found. *Id.*

First, as set forth above, there was nothing wrong with the Eleventh Circuit's analysis under *Wilson*, especially where this Court's narrow question in *Wilson* is not applicable here.

Next, Gavin misconstrues the Eleventh Circuit's opinion, which is focused on the district court's faulty analysis of the penalty-phase IAC claim. The circuit court found that the district court turned the *Strickland* analysis on its head and "determined that because in its view 'Gavin clearly established that counsel were deficient under *Strickland*,' it followed necessarily that the CCA's 'finding to the contrary [was] objectively unreasonable.'" *Gavin*, 40 F.4th at 1266. The Eleventh Circuit explained why the district court's analysis was faulty: because "there is an absence of evidence regarding the full picture of counsel's investigation in preparation for the penalty phase." *Id.* at 1265. The court then explored the evidence that was before the state courts: counsel hired a mitigation specialist, Gavin's family were consistently uncooperative, counsel engaged in his own independent investigation, the mitigation specialist admitted that she did not know what counsel's independent investigation entailed (including that counsel hired a private investigator). *Id.* The Eleventh Circuit noted, like the CCA had before, that "the record shows that Gavin's counsel did, in fact, prepare for the penalty phase. Smith hired mitigation specialist Penland shortly after his appointment to Gavin's case to help prepare for mitigation. Gavin and his family were consistently uncooperative leading up to the penalty

phase." *Id.* at 1265. The Eleventh Circuit thus concluded that "Gavin does not show that the state court's determination that his counsel's performance was not unreasonable 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Harrington*, 562 U.S. at 103). That approach is the same one taken by every Circuit, it is correct, and there is no reason for this Court to grant certiorari to review it.

B. There is no real split of authority over whether AEDPA deference extends beyond a state court's articulated reasons for rejecting a claim.

This Court should deny certiorari here because there is no real split of authority on the question presented. In fact, the holding in *Wilson*—the narrow question of how a federal court should address a case where a lower state court gave reasons for its decision, but a higher state court did not—is not at issue in this case.

Gavin cites six decisions that, he says, stand for the proposition that "where at least one state court supplies reasoning for rejecting the petitioner's claim, a federal court can apply only deference to the specific reasons the state court actually provides." Pet. 13–14. However, as the Eleventh Circuit recently found, "No circuit" has held "that *Wilson* somehow changed the way AEDPA applies to reasoned state-court decisions." *Pye*, 50 F.4th at 1040 n.9. The cases Gavin cited are the same cases the circuit court found the dissenting judges in *Pye* overread "in the same way" that it "overread *Wilson* itself." *Id*. In fact, the circuit court noted that "[b]ehind the cited

cases' rote quotes of *Wilson's* language, one finds important nuance that the dissent overlooks." *Id*.

As the Eleventh Circuit noted, in *Thompson v. Skipper*, 981 F.3d 476 (6th Cir. 2020), *Porter v. Coyne-Fague*, 35 F.4th 68 (1st Cir. 2022), and *Scrimo v. Lee*, 935 F.3d 103 (2nd Cir. 2019), "the courts expressly did *not* confine themselves to the particular justifications proffered by the state courts whose decisions they were reviewing, but rather considered others—the very thing the dissent [and Gavin] insists *Wilson* forbids." *Pye*, 50 F.4th at 1040 n.9. The circuit court also distinguished two other cases Gavin relies on—*Richardson v. Kornegay,* 3 F.4th 687 (4th Cir. 2021) (finding that the Fourth Circuit followed the Eleventh Circuit's approach by distinguishing the state court's reason from its underlying rationale), and *Winfield v. Dorethy*, 956 F.3d 442 (7th Cir. 2020) (finding that the Seventh Circuit denied relief under § 2254(a) and declined to decide how § 2254(d) applied.). The court noted that the Ninth Circuit is the only circuit that has employed the sweeping rule that Gavin believes *Wilson* stands for but found the Ninth Circuit had limited its review to state courts' specific justifications long before *Wilson* was decided and on a different legal rationale. *Pye*, 50 F.4th at 1040 n.9.

Thus, Gavin has failed to identify a compelling split, and even if it existed, this case does not present it, as the Eleventh Circuit expressly relied on many of the precisely identical reasons that the CCA relied on when concluding that AEDPA barred relief. *Compare* Gavin, 40 F.4th at 1265 (noting that "Smith hired mitigation specialist Penland shorly after his appointment" and that "Gavin and his family were

consistently uncooperative") *with* App.285a (nothing that Smith "initiated contact almost immediately with Lucia Penland" and that Gavin and his family refused to cooperate with her). This Court should, therefore, deny Gavin's petition.

II. The state court applied the correct standard in its determination that Gavin was not prejudiced by counsel's penalty-phase performance.

Gavin contends that the Eleventh Circuit created a circuit split when it refused to apply de novo review to the state court's prejudice determination, which was allegedly based on the wrong burden of proof. He then asserts that under de novo review, he satisfied *Strickland*'s prejudice standard. Gavin is not entitled to relief on either argument.

First, as the Eleventh Circuit found, the CCA applied the correct standard for assessing prejudice under *Strickland*. *Gavin*, 40 F.4th at 1267 n.24. The CCA conducted de novo review of the trial court's prejudice holding, and after reweighing the omitted mitigating evidence against the evidence that was presented during the trial, it found that Gavin "failed to establish that he was prejudiced by the alleged omission of the above mitigating evidence." App.286a. This is the correct analysis under Supreme Court precedent. *See Sears v. Upton*, 561 U.S. 945, 955–56 (2010) ("To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation."). As the Eleventh Circuit found, the CCA applied this analysis:

> The CCA explained and applied the proper prejudice analysis, consistent with the standard in *Strickland*. For instance, the CCA explained that "[w]hen claims of ineffective assistance of counsel involve

> the penalty phase of a capital murder trial the focus is on whether the sentencer would have concluded that the balance of aggravating and mitigating circumstance did not warrant death," which is the test set forth by the Supreme Court. *Strickland*, 466 U.S. at 695, 104 S. Ct. 2052. It then applied that test, reweighing the totality of the mitigating evidence against the aggravating circumstances in Gavin's case. Further confirmation that the CCA applied the *Strickland* prejudice standard is that the CCA cited *Wiggins v. Smith*, 539 U.S. 510 (2003), and its own decision in *Washington v. State*, 95 So. 3d 26 (Ala. Ct. Crim. App. 2012), both of which applied *Strickland*'s standards for assessing prejudice.

Gavin, 40 F.4th at 1267 n.24. Because the Eleventh Circuit correctly found that the CCA applied the proper prejudice standard, there is no conflict with the circuit cases Gavin cited. This Court should refuse to grant cert to consider this argument.

The Eleventh Circuit also properly applied the deferential standard of review under AEDPA to Gavin's prejudice argument. Under that standard (and even under de novo review), Gavin has not established that he was prejudiced by counsel's penalty-phase defense. The State established the following aggravating circumstances during the penalty phase: (1) Gavin committed the capital offense while he was under a sentence of imprisonment; (2) prior to murdering Clayton, Gavin had been convicted of murder, another felony involving the use of violence; and (3) Gavin murdered Clayton during a robbery. *Gavin*, 40 F.4th at 1255. With this overwhelming aggravation, there is no possibility, much less a reasonable probability, that had trial counsel presented mitigation such as that presented in the Rule 32 proceedings, the outcome of the penalty phase would have been different. Evidence concerning a thirty-eight-year-old murderer's childhood poverty and childhood background would have been entitled to little, if any, mitigating weight.

In fact, as the Eleventh Circuit found, the mitigating evidence presented during the state postconviction proceedings was not nearly as substantial as the mitigating evidence offered in *Wiggins*, *Rompilla*, and *Porter*. *Gavin*, 40 F.4th at 1267 1269–70 n.25. Moreover, as set forth above, Gavin's testimony contradicts much of the evidence offered at the evidentiary hearing concerning his childhood. Contrary to his experts' dire portrayals, Gavin painted a picture of a stable family in which he received "whoopings" for bad behavior but was never abused. The violence in his neighborhood did not begin until he was an older teenager, and Gavin never had any particular fear for himself or his siblings. While his family was not wealthy, the children always had food and shelter.

The Eleventh Circuit properly reversed, concluding that "the CCA's determination that Gavin failed to establish prejudice 'was not so obviously wrong as to be beyond any possibility of fairminded disagreement' and the district court 'exceeded its authority' in rejecting the state court's determination." *Id.* at 1270 (quoting *Shinn*, 141 S. Ct. at 526). And even under de novo review, his claim would fail. He had murdered once, and then just months after his release from prison, he robbed and murdered his second victim. Gavin is therefore not entitled to certiorari review.

III. The CCA properly refused to grant relief on Gavin's juror misconduct claim.

Gavin argues that this Court should grant certiorari to review his claim that the jurors engaged in premature penalty-phase deliberations. His argument is twofold. First, he argues that the district court erred when it refused to review his

claim de novo. Second, he argues that no court has addressed the merits of his claim. Neither argument entitles Gavin to certiorari review.

A. De novo review is inappropriate.

Gavin contends that the state courts ignored the merits of his federal constitutional claim, and therefore, the district court and the Eleventh Circuit should have reviewed his claim de novo. He argues that the state court did not decide his claim on the merits because it relied exclusively on Alabama's no-impeachment rule to deny relief.

However, Gavin cites no authority from this Court to support his argument that de novo review is appropriate. Instead, he relies on Supreme Court and circuit cases that have no application here because those cases involve claims that are procedurally defaulted, because a procedural default is not adequate to bar review of the claim, or because a federal claim was inadvertently overlooked in state court. Pet. at 31.[4]

In *Richter*, 562 U.S. at 98, this Court noted that by "its terms § 2254 bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)." Those exceptions are that the state court's decision is contrary to Supreme Court precedent or is "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) and (2). Following *Richter*, the Eleventh Circuit

4. Gavin relies on Sixth and Seventh Circuit cases to argue that de novo review is appropriate. Pet. 32–34. However, he does not argue that those cases create a circuit split, as required by Rule 10 of the Rules of the Supreme Court.

wrote, "In deciding whether a state court actually reached the merits of a claim, the Supreme Court has also instructed us that we should presume 'the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.'" *Ferrell v. Hall*, 640 F.3d 1199, 1224 (11th Cir. 2011) (quoting *Richter*, 562 U.S. at 99).

As neither of the § 2254 exceptions apply in this case, de novo review is inappropriate. Moreover, there is no indication that the state court's judgment was based on procedural principles to the contrary. In fact, the CCA decision references Rule 606(b) of the Federal Rules of Evidence. Thus, contrary to Gavin's argument, the CCA addressed the merits of Gavin's claim, and de novo review is inappropriate.

B. The CCA properly denied relief on this claim.

Gavin raised his juror misconduct claim for the first time in his second amended Rule 32 petition, which was filed after the circuit court held an evidentiary hearing. Doc. 35-26, Tab #R-70, at C. 2687–89. He did not attach an affidavit or deposition supporting this claim, even though he introduced numerous affidavits and depositions supporting other ineffective assistance of counsel claims. *Id*. While the circuit court did not address this specific claim in its final order, it did state the following:

> To the extent that the Defendant's amended Rule 32 petition seeks to restate claims which were dismissed by this Court's order of June 20, 2006, said restated claims are DISMISSED, and the order of June 20, 2006, is deemed a final order as to those claims dismissed by said order.[5]

5. The circuit court denied the following claim in its June 20, 2006, order: "Jurors, in order to remain impartial, must be guarded in their deliberation from outside influences that may unlawfully affect the verdict. The introduction of extraneous

Doc. 35-33 at C. 586. Gavin never objected to the circuit court's order, never requested that the court hold an evidentiary hearing on this claim, and never proffered any facts to support this claim while his case was pending in the circuit court.

The CCA denied relief, holding that Rule 606(b) of the Alabama Rules of Evidence "specifically excludes the admission of juror testimony to attack 'internal influences.' '[P]otentially premature deliberations that occurred during the course of the trial' . . . have been held to 'constitute[] a potential internal influence on the jury.'" Doc. 35-56, Tab #R-85, at 44 (citations omitted). The CCA then held: "Because [juror] T.M.'s testimony would have been inadmissible at a hearing held on Gavin's petition, the circuit court did not err in dismissing Gavin's claim." *Id.* at 45. The district court agreed with the CCA, finding that "the appellate court correctly concluded that the evidence offered on this issue was nothing more than prohibited juror testimony about the debate and deliberations of the jury." Doc. 65 at 39 (citation omitted). The Eleventh Circuit affirmed, holding that Gavin failed to identify any federal law from this Court to support his position that the no-impeachment rule "must yield" to his Sixth and Fourteenth Amendment rights to a fair and impartial jury trial. *Gavin*, 40 F.4th at 1272.

Although Gavin contends that this claim is important because no court has ever addressed the merits of the claim, the CCA decision is consistent with this Court's precedent and is not contrary to and does not involve an unreasonable

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information into the deliberations in Mr. Gavin's case violated his rights to due process and a fair trial." *See* Doc. 35-19 at C. 66 (Rule 32 petition); Doc. 35-20, Tab #R-61, at C. 288–89 (dismissing claim).

application of Supreme Court precedent. 28 U.S.C. § 2254(d)(1). In *Tanner v. United States*, 483 U.S. 107 (1987), the Court upheld a challenge to Rule 606(b) of the Federal Rules of Evidence, which is grounded in the common law rule against admission of jury testimony to impeach a verdict. In that case, the defendant filed a motion seeking to continue his sentencing date and requesting permission to interview jurors, an evidentiary hearing, and a new trial after receiving information that several jurors consumed alcohol during lunch breaks and slept at various times during the trial. *Id.* at 113. The district court declined Tanner's request, and the Eleventh Circuit affirmed the district court's holding. *Id.* at 114–16. In declining to grant relief, this Court stated:

> There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or months after the verdict, seriously disrupt the finality of the process. *See, e.g.*, *Government of Virgin Islands v. Nicholas*, *supra*, at 1081 (one year and eight months after verdict rendered, juror alleged that hearing difficulties affected his understanding of the evidence). Moreover, full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct. *See* Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 888–892 (1983).

Id. at 120–21.

Likewise, in *Warger v. Shauers*, 135 S. Ct. 521, 524 (2014), this Court held that Rule 606(b) precluded a party seeking a new trial from using one juror's affidavit of what another juror said in deliberations to demonstrate the other juror's dishonesty

during voir dire. The Court recognized that "Rule [606(b)] applies '[d]uring an inquiry into the validity of a verdict,'" *id*. at 525 and stated that this type of evidence did not fall within Rule 606(b)'s exception concerning extraneous information, *id*. at 529. In addition, this Court noted that it had recognized in *Tanner* that "evidence of jurors' insanity, inability to understand English, and hearing impairments are all 'internal' matters subject to exclusion under Rule 606(b)." *Id.* at 530.

As the Eleventh Circuit found, the "evidence that Gavin seeks to submit in support of his claim does not fall within the ambit of any exceptions to Rule 606(b)—it is not evidence of an external influence on or extraneous prejudicial information that was brought to bear on the jury's decision, or evidence of racial animus." *Gavin,* 40 F.4th at 1272. Moreover, the same policy considerations that existed in *Tanner* and *Warger* apply to this case. This is especially true where Gavin did not raise this claim until after the circuit court had conducted an evidentiary hearing. In addition, granting relief on Gavin's claim would involve an inquiry into the validity of the jury's penalty-phase verdict and, contrary to Gavin's argument, would necessarily require testimony from the jurors about whether the sentencing recommendation was influenced by the alleged initial vote on Gavin's sentence.

Finally, the cases on which Gavin relies do not entitle him to relief because they do not involve juror testimony about the debate and deliberations of the jury. As the Eleventh Circuit found, this Court's holding in *Morgan v. Illinois*, 504 U.S. 719, 729 (1992), does not help Gavin. *Id*. at 1271. In *Morgan*, the Court held that any juror who will automatically vote for the death penalty may be challenged for cause by the

defendant because that juror would fail to consider the evidence of aggravating and mitigating circumstances, as he is required to do. *See also Abdul-Kabir v. Quarterman,* 550 U.S. 233, 246 (2007) (sentencing juries must be able to give meaningful consideration and effect to all mitigation evidence); *Holmes v. South Carolina*, 547 U.S. 319 (2006) (defendant's constitutional rights were violated when he was not allowed to introduce evidence of a third party's guilt). There is no evidence in the instant case that any juror would automatically vote for the death penalty, that the jurors failed to consider the evidence of aggravating and mitigating circumstances, or that Gavin was precluded from presenting evidence of a third party's guilt.

The Eleventh Circuit properly denied relief on this claim, and Gavin is not entitled to certiorari review.

CONCLUSION

For the foregoing reasons, this Court should deny Gavin's petition for a writ of certiorari.

Respectfully submitted,

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s/***Beth Jackson Hughes***
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