No. _____

IN THE
Supreme Court of the United States

DAVID FREEMAN,
Petitioner,
v.
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JON M. SANDS
Federal Public Defender
District of Arizona

CHRISTINE A. FREEMAN
Executive Director
Federal Defenders for the Middle District of Alabama

Robin C. Konrad
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 telephone
Robin_Konrad@fd.org

John A. Palombi*
Assistant Federal Defender
817 South Court Street
Montgomery, Alabama 36104
(334) 834-2099 telephone
John_Palombi@fd.org

**Counsel of Record*

February 21, 2023

Counsel for Petitioner

QUESTION PRESENTED
CAPITAL CASE

This Court has held that appellate courts should "exercise restraint" in reaching issues that had not been raised below, as the parties "would not have anticipated [these issues] in developing their arguments on appeal." *Wood v. Milyard*, 566 U.S. 463, 473 (2012). However, if a court does raise an issue *sua sponte*, it "must accord the parties fair notice and an opportunity to present their positions." *Day v. McDonough*, 547 U.S. 198, 210 (2006).

In this case, the Eleventh Circuit denied relief on Petitioner's ineffective assistance of counsel claim. It concluded that the claim had been fairly presented and adjudicated on the merits in state court under 28 U.S.C. § 2254(d), even though it was uncontested that Petitioner did not develop the factual support for his claim until he was provided resources in federal habeas proceedings.

In the district court, the parties did not brief § 2254(d), as it was uncontested that the factually developed claim had not been adjudicated on the merits in state court. After Petitioner requested a certificate of appealability to address issues related to the errors in the district court's procedural resolution of the claim, the Eleventh Circuit instead ordered Petitioner to address only the underlying Sixth Amendment claim. During oral argument, the Eleventh Circuit questioned Petitioner's counsel about § 2254(d), and counsel explained why it had not been addressed and asked for the opportunity to submit supplemental briefing if the court believed it to be applicable to the case. Nevertheless, the Eleventh Circuit found that Petitioner abandoned argument regarding § 2254 (d).

The questions presented in this case are:

(1) Under these circumstances, does a court of appeals violate the fundamental principles of party presentation and Petitioner's due process rights?

(2) Where an indigent state prisoner is denied resources in state court and is thus unable to develop the factual basis of the claim, can the state court adjudicate that claim "on the merits" under 28 U.S.C. § 2254(d)?

PARTIES TO THE PROCEEDING

Petitioner (and petitioner-appellant below) is David Freeman, an indigent prisoner condemned to death in Alabama. Respondent (and respondent-appellee below) is the Commissioner of the Alabama Department of Corrections, currently John Q. Hamm.

STATEMENT OF RELATED PROCEEDINGS

U.S. Supreme Court

Freeman v. Alabama, No. 00-5948 (U.S. Oct. 30, 2000) (denying petition for writ of certiorari from direct appeal)

Freeman v. Alabama, No. 05-10535 (U.S. June 26, 2006) (denying petition for writ of certiorari from post-conviction proceedings)

U.S. Court of Appeals for the Eleventh Circuit

Freeman v. Commissioner, Alabama Department of Corrections, No. 18-13995-P (11th Cir. Aug. 24, 2022) (affirming denial of petition for writ of habeas corpus)

U.S. District Court for the Middle District of Alabama

Freeman v. Dunn, No. 2:06-CV-122-WKW (M.D. Ala. July 2, 2018) (denying petition for writ of habeas corpus)

Freeman v. State of Ala., et al., No. 2:96-cv-323-ID-VPM (M.D. Ala. Feb. 26, 1996) (denying emergency petition for writ of habeas corpus regarding double jeopardy issue)

Alabama Supreme Court

Ex parte Freeman, No. 1041678 (Ala. Jan. 20, 2006) (denying petition for writ of certiorari on post-conviction)

Ex parte Freeman, No. 1981565 (Ala. Mar. 10, 2000) (affirming denial of relief on direct appeal)

Ex parte Freeman, No. 1950784 (Ala. Feb. 23, 1996) (denying petition for writ of mandamus regarding double jeopardy issue)

Alabama Court of Criminal Appeals

Freeman v. State, No. CR-02-1971 (Ala. Crim. App. June 17, 2005) (affirming denial of relief on post-conviction)

Freeman v. State, No. CR-95-2080 (Ala. Crim. App. Apr. 30, 1999) (affirming conviction and sentence)

Ex parte Freeman, No. 95-0934 (Ala. Crim. App. Feb. 22, 1996) (denying petition for writ of mandamus regarding double jeopardy issue)

Freeman v. State, No. CR-90-0279 (Ala. Crim. App. May 6, 1994) (reversing conviction)

Freeman v. State, No. CR-90-0279 (Ala. Crim. App. Sept. 18, 1992) (remanding for hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986))

Montgomery County Circuit Court

Freeman v. State, No. CC-88-1412.60-EWR (Montgomery Cnty. Cir. Ct. June 25, 2003) (denying post-conviction relief)

State v. Freeman, No. CC-88-1412-EWR (Montgomery Cnty. Cir. Ct. Aug. 15, 1996) (capital sentencing order)

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes

State Statutes

Rules

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Petitioner David Freeman, an indigent prisoner sentenced to death in Alabama, respectfully petitions this Court for a writ of certiorari to the U.S. Court of Appeals for the Eleventh Circuit.

I. DECISIONS BELOW

The U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's denial of relief in its reported decision, *Freeman v. Comm'r*, 46 F.4th 1193 (11th Cir. 2022). App. 1a-70a. The order of the Eleventh Circuit denying Petitioner's petition for panel rehearing and rehearing *en banc* is unreported. App. 71a-72a. The order of the Eleventh Circuit granting in part and denying in part a certificate of appealability is unreported. App. 73a-74a.

The decision of the U.S. District Court for the Middle District of Alabama denying relief is unreported but available at *Freeman v. Dunn*, No. 2:06-CV-122-WKW, 2018 WL 3235794 (M.D. Ala. July 2, 2018), App. 75a-345a, and the decision denying reconsideration is also unreported but available at *Freeman v. Dunn*, No. 2:06-CV-122-WKW, 2018 WL 8798300, (M.D. Ala. Aug. 15, 2018), App. 346a-367a.

The Montgomery County Circuit Court's sentencing order is unreported. App. 368a-377a. The Alabama Court of Appeals decision affirming Petitioner's conviction and death sentence is reported at *Freeman v. State*, 776 So. 2d 160 (Ala. Crim. App. 1999). App. 378a-425a. The Alabama Supreme Court affirmed the denial of relief in an unreported order that is available at *Ex parte Freeman*, 776 So. 2d 203 (Ala. 2000). App. 426a-430a.

The Montgomery County Circuit Court's order denying post-conviction relief is unreported. App. 431a-464a. The Alabama Court of Appeals decision affirming the denial of post-conviction relief is unreported. App. 465a-504a. The Alabama Supreme Court affirmed the denial of relief in an unreported order. App. 505a-506a.

II. STATEMENT OF JURISDICTION

On August 24, 2022, the Eleventh Circuit denied relief. App. 2a. Petitioner filed a timely petition for panel rehearing and rehearing *en banc*, which was denied on October 24, 2022. App. 72a. Petitioner filed an application for additional time to file the instant petition, and Justice Clarence Thomas extended the deadline until February 21, 2023. *Freeman v. Comm'r*, No. 22A637. This petition is now timely filed, and the Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

III. RELEVANT PROVISIONS OF LAW

U.S. Const. amend. XIV, § 1.

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

28 U.S.C. § 2254(b):

> (1) 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 unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)
>
> (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(d):

(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.

IV. STATEMENT OF THE CASE

A. Applicable Law

This case presents the Court with two questions involving the intersection of (1) the principle of party presentation and due process; and (2) proper application of the Anti-Terrorism and Effective Death Penalty Act (AEDPA).

1. Principle of Party Presentation and Due Process

This Court has long recognized that fundamental fairness grounded in the Fourteenth Amendment's due process clause "entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (citation and internal quotation marks omitted). Consistent with those principles, "appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance." *Wood v. Milyard*, 566 U.S. 463, 473 (2012); *Henderson ex rel. Henderson v.*

Shinseki, 562 U.S. 428, 434 (2011) ("Courts do not usually raise claims or arguments on their own."). In our adversary system, courts "follow the principle of party presentation." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). That principle is especially critical when an appellate court "spots an issue the parties did not air below, and therefore would not have anticipated in developing their arguments on appeal." *Wood*, 566 U.S. at 473. On occasion, there will be circumstances where an appellate court may address an issue "on its own initiative"; in such situations, the court "must accord the parties fair notice and an opportunity to present their positions." *Day v. McDonough*, 547 U.S. 198, 210 (2006).

2. Adjudication on the Merits under 28 U.S.C. § 2254(d)

By its plain language, 28 U.S.C. § 2254(d) applies only to claims adjudicated *on the merits* in state court, *i.e.*, where the state court "appl[ies] controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982). A decision is considered to have been adjudicated on the merits "only if it was delivered after the court heard and evaluated the evidence and the parties' substantive arguments." *Johnson v. Williams*, 568 U.S. 289, 302 (2013) (cleaned up). Indeed, it would be "strange" to think "that a state court can be deemed to have unreasonably applied federal law to evidence it did not even know existed." *Cullen v. Pinholster*, 563 U.S. 170, 183 (2011).

Consistent with allowing the state courts the opportunity to resolve a federal claim, a federal habeas petitioner must generally have first "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(a). In other words, to

satisfy exhaustion, "a habeas petitioner challenging a state conviction *must first attempt to present* his claim in state court." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (emphasis added). But AEDPA "does not equate prisoners who exercise diligence in pursuing their claims with those who do not." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). "A prisoner who developed his claim in state court" will be barred from habeas relief unless he can satisfy § 2254(d)(1)—applicable *only* to claims adjudicated on the merits by state courts. *Williams v. Taylor*, 529 U.S. 420, 434 (2000). In contrast, if a prisoner's claim was "pursued with diligence" but "remained undeveloped in state court" through no fault of his own, then a federal court is not constrained from reviewing the now-developed claim. *Williams v. Taylor*, 529 U.S. 420, 434 (2000). A prisoner, however, will be "'at fault' if he 'bears responsibility for the failure' to develop the record." *Shinn v. Ramirez*, __ U.S. __, 142 S. Ct. 1718, 1734 (2022).

B. Factual and Procedural Background

1. Trial Proceedings

Petitioner David Freeman lived nearly his entire life as a minor as a ward of the State. When he was only eighteen—still not having reached the age of majority in Alabama[1]—Freeman was arrested in Montgomery and charged with two counts of capital murder. App. 394a. Facing capital murder charges and unable to afford an

[1] Ala. Code § 26-1-1 (2019) ("Age of majority designated as 19 years.").

attorney, Freeman received the services of court-appointed counsel Allen Howell.[2] Freeman was tried, convicted, and sentenced to death. App. 394a. His first conviction was reversed on appeal because the prosecutor violated *Batson v. Kentucky*, 476 U.S. 79 (1986), by exercising peremptory challenges in a racially discriminatory manner. *Freeman v. State,* 651 So. 2d 576, 598 (Ala. Crim. App. 1994).

Freeman was retried in 1996, and the State again sought the death penalty. 394a. Howell remained lead counsel for the retrial. App. 434a. The defense entered a plea of not guilty by reason of mental disease or defect. App. 394a. Under Alabama law, the defense needed to prove that at the time of the crime, Freeman lacked "substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Dist. Ct. Doc. 20-44 at 56.

Trial counsel called three witnesses. Two of those witnesses were youth services caseworkers who had previously worked with Freeman. They provided no testimony bearing upon his mental state at the time of the crime. *See* Dist. Ct. Doc. 20-42 at 118, 131; Dist. Ct. Doc. 20-41 at 106-09. The prosecutor, however, was able to elicit details from the social worker regarding Freeman's behavior that—without challenge or context from the defense—would help support the State's theme that from the time Freeman was a young boy, he lied, stole, and acted out when he didn't get his way. *See generally* Dist. Ct. Doc. 20-42 at 150-57.

---

[2] During the time that Howell represented Freeman, Howell identified as Allen. However, not long after Freeman's second conviction and sentence, Howell transitioned and changed her to name to Ally Howell. App. 546a-547a.

Clinical psychologist Dr. Barry Burkhart was the only witness whose testimony focused on Petitioner's mental state during the crime, although like the other two witnesses, he also provided limited background on Freeman's life. Dist. Ct. Doc. 20-41 at 112—Dist. Ct. Doc. 20-42 at 115. Dr. Burkhart testified that Freeman suffered from major depressive disorder and schizotypal personality disorder. Dist. Ct. Doc. 20-41 at 133. When asked about his opinion regarding the day of the homicides, Dr. Burkhart said that "nobody can know for sure," but he believed Freeman was "very likely" experiencing a brief reactive psychosis triggered by Sylvia Gordon's rejection of him, rendering him unable to conform his conduct to the requirements of the law. Dist. Ct. Doc. 20-41 at 171.

On cross-examination, however, Dr. Burkhart conceded that no test results supported his conclusions and that the tests he administered to Freeman have been "criticized substantially and abundantly in [the] professional literature for trying to use them to establish insanity at a time prior to testing." Dist. Ct. Doc. 20-42 at 31. In fact, the prosecutor confirmed that Dr. Burkhart was alone in his opinion regarding Freeman's mental state at the time of the crime and that Dr. Burkhart could not even "say with certainty" that Freeman was psychotic at the time. Dist. Ct. Doc. 20-42 at 105.

During Dr. Burkhart's testimony, the defense introduced 1,941 pages of exhibits—rapidly, in large batches, and without explanation. *See* Dist. Ct. Doc. 20-41 at 124-28. Most of the documents were medical, psychological, and social records from Freeman's childhood, and they included hundreds of pages of raw data. *See, e.g.*, Dist.

Ct. Doc. 20-25 at 174 through 20-26 at 124. But without context, these documents did more harm than good. The prosecutor asked Dr. Burkhart to confirm that the records "are full of instances where he was violent, reactive, and refused to follow orders." Dist. Ct. Doc. 20-42 at 50. Dr. Burkhart responded, "I think that is true." Dist. Ct. Doc. 20-42 at 50.

After one hour of deliberating, the jury found Petitioner guilty on all six counts. Dist. Ct. Doc. 20-44 at 68-69. The jury rejected Petitioner's "not guilty by mental disease or defect" defense, which required proof that he lacked the "substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Dist. Ct. Doc. 20-44 at 56.

At the penalty phase, the State called no witnesses, choosing to rely upon the evidence presented at the guilt phase. App. 510a. The defense did not offer much more. Counsel moved to admit the more than 1,900 pages of social services records introduced in the guilt phase. App. 513a. Even though the records laid the foundation for a powerful mitigation story, they were offered without any explanation as to their mitigating effect; nor did counsel direct the jurors to the parts of the record that would help them better understand Freeman's life. App. 514a.

In the opening statement, trial counsel told the jurors that they should consider five mitigating circumstances. Two were apparent from the record: Freeman's age at the time of the crime (eighteen) and his lack of significant criminal history. App. 512a-513a. Trial counsel also presented three mitigating circumstances related to mental-health— that Freeman acted "under influence of extreme mental

or emotional disturbance"; acted "under duress"; and that "he was unable to conform his conduct to requirement of law because substantially impaired." App. 513a. These The jury was now tasked with understanding how Freeman's mental-health issues were crucially relevant to sentencing, even if they did not meet the previously determined "not guilty by reason of mental disease or defect" standard.

Moreover, one of the mitigating circumstances was nearly identical to the instruction regarding the "not guilty" defense, Dist. Ct. Doc. 20-44 at 56, but trial counsel did little to explain the difference between the guilt and penalty proceedings. And the prosecutor made sure to remind the jury that the mental health mitigating circumstances are "the same words…the same thing" that the jury had already rejected, saying Freeman "wants you to pretend like it is different. No, that is another lie." App. 539a. Notably absent from the list of mitigating circumstances was the fact that under the law the jury can consider any evidence regarding Freeman's character or background that it finds mitigating. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

For the entire the mitigation presentation, trial counsel called a single witness, who testified over the phone. That witness, Deacon Alexander Moore, had been a group-home parent at one of Freeman's many institutional placements while Freeman was between ages nine and thirteen. (Although it did not come out at trial, federal habeas counsel learned through investigation that Moore was one of several men who had sexually abused Freeman. *See* Dist. Ct. Doc. 64 at 132-33.)

In his three pages of testimony, Moore provided two descriptions of Freeman: (1) a "loner" who was "on the quiet side until confronted with anything that needed to be done or any corrections that needed to be made," App. 516a-517a; (2) "like any other normal child that lived the lifestyle that he had to live," App. 519a. Neither of those descriptions were explained by trial counsel. And trial counsel attempted, over repeated objections by the prosecution, to improperly elicit Moore's opinion on whether Freeman deserved a death sentence. The objections were sustained. App. 518a-519a.

In closing argument, trial counsel did not explain why the jurors—who had *just* rejected Freeman's defense of not guilty because of mental disease or defect—should now impose a life sentence. App. 530a-532a. Trial counsel provided no roadmap for the jurors to understand how to interpret the information that they heard in the guilt phase for purposes of the penalty phase nor did counsel point the jury to the critical pages in the 1,900-plus pages of exhibits. Instead, trial counsel told the jurors that even though they had rejected the insanity defense and found Freeman responsible for the crime, they could still find that the mental-health circumstances were mitigating. App. 531a-532a. And to help the jury understand how it could find that those circumstances existed, counsel simply stated "because, obviously, they do." App. 532a.

Because of defense counsel's failures, the jury was left with one-sided statements from the prosecutor supported not only by selected quotes from the records but also the witness testimony presented by the defense:

- "You have seen it in the records, his whole life. He didn't get his way, he loses his temper." App. 525a.
- "He was good. He was quiet until confronted when he had to do something." App. 525a.
- "[T]he truth is, he started lying and cheating and stealing and even assaulting, as soon as he had the ability to do it when he couldn't control." App. 536a.
- "The truth is, he is not just barely functioning. He did fairly well." App. 536a.

After three hours of deliberation, the jury recommended a death sentence by a vote of eleven to one. A judge then sentenced Freeman to death, and the state appellate courts affirmed. *Freeman v. State*, 776 So. 2d 160 (Ala. Crim. App. 1999); *Ex parte Freeman*, 776 So. 2d 203 (Ala. 2000).

2. State Post-Conviction Proceedings

When Freeman entered state post-conviction proceedings, Alabama law required that a prisoner first file a petition before a court could even *consider* whether it would appoint counsel—appointment of counsel was not guaranteed. Ala. Code § 15-12-23(a).[3] Two out-of-state attorneys agreed to represent Freeman *pro bono*, but they did not have private resources to pay for litigation expenses. As post-conviction counsel explained, even traveling to Alabama is "a large expense that comes *right out of our own pocket*." Dist. Ct. Doc. 20-51 at 126-27 (emphasis added).

Lacking the resources to fund the necessary expenses in the case, Freeman's counsel asked in the petition for funds to secure expert and investigative services; resources to develop colorable claims; and a full and fair hearing. Dist. Ct. Doc. 20-48

[3] In 2017, the Alabama legislature amended its statute to provide counsel in capital post-conviction proceedings. Ala. Code § 13A-5-53.1.

at 24. Freeman's counsel also filed separate motions seeking investigative and expert funds,[4] as well as travel funds to bring lead trial counsel from New York to Alabama to testify.[5] The State opposed all funding requests for investigation and experts, Dist. Ct. Doc. 20-51 at 23; Dist. Ct. Doc. 20-48 at 195; Dist. Ct. Doc. 20-51 at 41, and the court denied all funding requests, Dist. Ct. Doc. 20-49 at 50; Dist. Ct. Doc. 20-52 at 34.

Because Freeman could not afford to pay for experts and investigation and the State did not provide resources, he was deprived of the opportunity to develop the factual support for his claim alleging a violation of his Sixth Amendment right to counsel during the penalty phase of trial. Freeman's pro bono attorneys alleged a cursory claim that trial counsel failed to not only investigate, develop, and present mitigation, but also that counsel failed to present the available evidence regarding Freeman's background and mental health history in a manner that allowed the jury to give it mitigating effect. Dist. Ct. Doc. 20-49 at 129.

Despite the State's attorney arguing that the claim should be dismissed as insufficiently pleaded under Rules 32.6(b) and 32.3 of the Alabama Rules of Criminal

---

[4] *See* Dist. Ct. Doc. 20-48 at 181 (requesting funds for mitigation investigator with experience in locating and analyzing social history documents); Dist. Ct. Doc. 20-48 at 182 (requesting funds for social worker to explain how circumstances of his background contributed to, or impaired, his development and lessened his moral culpability of the crimes); Dist. Ct. Doc. 20-48 at 183 (requesting funds for neuropsychologist to test for brain damage and other neurological deficits); Dist. Ct. Doc. 20-49 at 52-54 (requesting funds for IQ testing).

[5] Dist. Ct. Doc. 20-49 at 51-52 (requesting $840 for trial counsel to travel to evidentiary hearing, which accounted for $630 for a plane ticket; two nights in a hotel at $60/night; and meals for three days at $30/day).

Procedure,[6] the state court allowed Freeman's cursory ineffective assistance of counsel (IAC) claim to survive summary dismissal and subsequently held an evidentiary hearing.[7] But since Freeman's *pro bono* attorneys were never provided funds for investigation or experts, or even witness travel expenses, they were severely hampered in what evidence they were able to develop and present at the hearing. In lieu of testimonial evidence, Freeman's attorneys attempted to introduce an affidavit from Howell, Dist. Ct. Doc. 20-50 at 17; App. 541a,[8] as well as a Proffer of Facts and Evidence, *see* Dist. Ct. Doc. 20-51 at 124; Dist. Ct. Doc. 20-50 at 4-10.

After the hearing, the court denied relief, adopting the State's proposed order and finding that Freeman offered no evidence to prove his claim. App. 452a-453a.

Pro bono counsel appealed the denial of relief, alleging that the failure to prove Freeman's claim was "not a reflection of any lack of evidentiary support" but rather a predictable result stemming from the denial of funding and of "a meaningful

---

[6] *See* Ala. R. Crim. P. 32.6(b) ("Each claim in the petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings."); Ala. R. Crim. P. 32.3 ("The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.").

[7] *See* Ala. R. Crim. P. 32.7(d) ("If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing.").

[8] Although the court did not consider the affidavit, it was made part of the record on appeal. App. 548a.

opportunity" to present the claim. Dist. Ct. Doc. at 188. Indeed, "[t]he absence of an evidentiary presentation…is attributable solely to the circuit court's summary rejection of petitioner's requests for necessary expert and investigative assistance." Dist. Ct. Doc. 20-53 at 52.

Freeman's counsel explained to the Court of Criminal Appeals (CCA) that "with the assistance of a mitigation investigator, a social worker and a neuropsychologist," he "could have identified and explained the adverse neurological and developmental effects wrought by the absence of nurturing petitioner experienced, and described ways in which these effects manifested themselves in petitioner's behavior." Dist. Ct. Doc. 20-53 at 55. Freeman further contended that counsel's omissions not only deprived him of a "more sympathetic portrait of his character and more favorable findings on the existence of mitigating factors," but "left the defense unable to counter the prosecution's use of his background against him." Dist. Ct. Doc. 20-53 at 56. As petitioner explained, "[w]ith the assistance of appropriate experts, trial counsel could have effectively rebutted the prosecution's assertions by presenting lay and/or expert testimony explaining how petitioner's early life experiences shaped him into the young man he was at the time of the offense." Dist. Ct. Doc. 20-53 at 56; *see also* Dist. Ct. Doc. 20-53 at 53 (noting counsel focused exclusively and in vain "on the ill-conceived effort to establish that petitioner was not guilty by reason of mental disease or defect").

The CCA rejected Freeman's IAC claim via its *sua sponte* determination that the lower court should not have granted a hearing because the allegations were not

"pleaded with sufficient specificity to satisfy the requirements in Rule 32.2 and Rule 32.6(b)." App. 480a. The CCA faulted petitioner for not alleging detailed information about his background and mental health, App. 489a-490a, and for failing to "allege what type of neurological impairments he suffered from; the severity of his alleged impairments; or how the alleged impairments would have been relevant to his trial." App. 488a; *see also* App. 490a ("Freeman alleged no facts tending to indicate that he was prejudiced by counsel's preparation for and conducting of the penalty phase of his trial"). Of course, as Freeman had made clear, the information that the CCA demanded was precisely the information that was not reasonably available to him without resources. The CCA neither acknowledged nor addressed this paradox.

3. Federal Habeas District Court Proceedings

In his federal habeas proceedings, Freeman was appointed counsel—both his state post-conviction attorney and the Federal Defender's Capital Habeas Unit. Dist. Ct. Docs. 4, 12. Freeman now had access to resources and was able to develop and present factual support for the Sixth Amendment violation that occurred during his penalty phase. Those resources, in turn, allowed his counsel to identify—for the first time—key factors and themes that formed the basis of the mitigation case that trial counsel should have presented, and to formulate an investigation plan designed to develop that evidence in detail.

The investigation that ensued from counsel's consultation with experts was made possible only through access to resources that were unavailable in the state courts. Whereas state post-conviction counsel operated on a shoestring budget from

an office hundreds of miles away, habeas counsel used the services of a trained and experienced mitigation investigator and social worker based in Alabama; habeas counsel were also equipped with investigative tools, local knowledge, and proximity to witnesses and other sources of information that out-of-state counsel did not possess. *See* Dist. Ct. Doc. 64 at 94-94; *id.* at 124, n.56. In contrast to the IAC claim presented in state court, the factually developed claim presented in federal court included "almost thirty pages of factual allegations of mitigation information, including explicit and lengthy allegations of physical abuse, sexual abuse, and PTSD." App. 56a; *see, e.g.*, Dist. Ct. Doc. 64 at 118-161.

The newly developed facts supporting Freeman's IAC claim demonstrate the clear prejudice that resulted from trial counsel's failure to use the records Howell *had* obtained to conduct a thorough investigation and present a comprehensive, accurate history to the jury. Dist. Ct. Doc. 64 at 124-152. If such a history had been presented, then the jury—instead of hearing only the prosecutor's argument that Freeman was an evil person—could have heard lay and expert witness testimony that detailed and humanized Freeman's childhood trauma. While it is impractical for Freeman to recite here verbatim the mitigation history presented in the district court, even a few examples demonstrate a completely different picture than that presented to the jury.

The social service records, through witness testimony, would been used to contradict the State's argument that Freeman was always a boy who stole, lied, and threw temper tantrums when he did not get his way. In fact, records showed that he did well at a foster home when he was four. Respondent-Appellee App. at 92, *Freeman*

v. Comm'r, No. 18-13995-P (11th Cir. Mar. 20, 2020). "All members of the family gave David a lot of attention and his year within that home could be described as the period of his greatest accomplishment. Within a few weeks his speech was showing a great deal of improvement. *He was happy and well adjusted*." *Id.* (emphasis added). It was not until Freeman was removed from that foster home and placed with his father's relatives in Missouri, that he began "exhibiting behavior problems." *Id.*

In reality, Freeman's behavioral problems stemmed not from a personality or conduct disorder, but from the repeated sexual, physical and emotional abuse he endured. Dist. Ct. Doc. 64 at 141. Had counsel followed up and investigated the allegations of abuse and talked with Freeman's younger brother, Howell would have learned that at the home in Missouri, he and Freeman were forced to perform oral sex on and submit to anal sex with their foster father. Dist. Ct. Doc. 64 at 131. They were subjected to beatings with belts, switches, or their foster father's fist. Dist. Ct. Doc. 64 at 126. The foster parents also punished Freeman by starving him, resulting in young Freeman acting out of survival—stealing food, eating a can of raw biscuits, and drinking out of the toilet. Dist. Ct. Doc. 64 at 129-30. When Freeman was caught stealing food from a neighbor, the foster father beat him and put him in his room until the next day. Dist. Ct. Doc. 64 at 129. Regarding Freeman's time in Missouri, the jury heard from the State only that allegations of abuse were unsubstantiated,

that Freeman had behavioral issues, that included lying and stealing, and that Freeman was returned to Alabama. [9]

After conducting an adequate investigation, habeas counsel was able to provide a trauma expert with an accurate and complete picture of Freeman's childhood. The expert was critical in helping to explain how this boy had been misdiagnosed by people who were not qualified to provide proper care and treatment, and consequently failed to identify (or perhaps to even look for) the cause of what was labeled early on as a "conduct" problem: sexual abuse and trauma. The behaviors that the untrained personnel who dealt with Freeman as a child attributed to conditions such as conduct or adjustment disorder—the same behaviors the prosecution would later rely upon without serious contradiction to portray him as a bad kid worthy of a death sentence—were actually clear, well-recognized symptoms of sexual, physical, and emotional abuse. Dist. Ct. Doc. 64 at 142. That trauma expert could have explained that Freeman's instances of acting out and stealing, as well as bladder control problems, were not because he was born bad, but rather because his foster father—

---

[9] At trial, using the social services records introduced by the defense, the prosecutor cross-examined social worker Yvonne Copeland regarding allegations of abuse reported at a one of Freeman's foster homes in Missouri, even though she had not yet been assigned as Freeman's case worker. Dist. Ct. Doc. 20-42 at 121. By quoting the records, Copeland agreed that a juvenile officer's investigation concluded that "no real abuse in likelihood occurred." Dist. Ct. Doc. 20-42 at 150. Copeland also confirmed that the records discussed that Freeman was placed in a special school in Missouri "for disruptive behavior," including "stealing and lying" as well as being "uncooperative" and throwing "temper tantrums." Dist. Ct. Doc. 20-42 at 152. Regarding Freeman's general behavior, Copeland confirmed that a record created when he was only eight or nine stated: "It seems as though he will do whatever necessary to get his way and has been pretty successful to date." Dist. Ct. Doc. 20-42 at 157; *id.* at 155.

the person who was supposed to love and care for him—was instead forcing him to fellate and submit to anal intercourse; beating by him; and subjecting him to food and water deprivation as punishment. *Id.* Testimony from a trauma expert would have corrected the entire narrative presented at Freeman's sentencing and helped the jury understand that his untreated abuse left him vulnerable to panic and dissociative episodes.

The factually developed IAC claim—which includes the above in addition to a much more detailed story—and how it should be considered by the federal court, is what is at issue in this case. From the start of the federal proceedings, the State has repeatedly asserted that the factually developed claim had not been properly presented to a state court, and that thus "any state remedy with respect to this claim is procedurally barred by the state procedural rules," making the claim "procedurally defaulted from [the federal] Court's review." Dist. Ct. Doc. 80 at 34; *see also* Dist. Ct. Doc. 27 at 34-35, 39-40, 41-44; Dist. Ct. Doc. 63 at 13-17; Dist. Ct. Doc. 80 at 49-53.

At no point during the district court proceedings did the parties brief whether Freeman could overcome the limitations of relief under 28 U.S.C. § 2254(d)—again, a provision applicable *only* to claims adjudicated on the merits. In fact, Freeman argued in his merits brief, that a procedural ruling, "by definition, precludes application of §2254(d)." Dist. Ct. Doc. 64 at 160 (citation omitted).[10] The State repeated its position

[10] When the parties briefed the issues in the district court proceedings, the CCA's denial of relief on the state court claim for failing to comply with the specificity rule was understood as a *procedural*—not a merits—ruling. *See Jenkins v. Bullard*, 210 Fed. Appx. 895, 899-901 (11th Cir. 2006).

regarding the IAC claim presented in federal court: "new legal theories and new factual claims put forth in the habeas petition should be deemed unexhausted, and this court should preclude review of the merits of those allegations." Dist. Ct. Doc. 80 at 32. By arguing that the factually developed IAC claim was "unexhausted," the State thereby did not challenge "the substance or legal consequences of a single word" of the evidence developed in federal court. Dist. Ct. Doc. 83 at 19; *see also* Dist. Ct. Doc. 80 at 51-53. Thus, at the close of briefing, both parties agreed that the state courts had not adjudicated the factually developed federal claim on the merits; and the allegations set forth by Freeman were not refuted by the State.

Even though the parties had briefed issues related to exhaustion and fair presentation, the district court denied relief by ignoring these open and highly consequential procedural questions. Instead, in a footnote, the court recognized that Freeman presented in federal habeas a "completely different, somewhat more factually detailed, version[ ]" of his IAC claim. App. 216a. Based on that conclusion, the district court did not analyze the factually developed IAC claim under § 2254(d), applicable only to claims adjudicated on the merits in state court. Instead, the court undertook what it characterized as—inaccurately—a "de novo review" of the "new" IAC claim, by finding that the claim was unexhausted and relying upon 28 U.S.C. § 2254(b)(2) as its purported pathway to deny relief. App. 216a-217a. Citing "concerns of judicial economy." the court found that it could reject Freeman's fifty-page claim as "meritless or even frivolous," instead of staying the proceedings to allow him to exhaust the claim in state court. App. 216a-217a.

Even though the State never contested—beyond a mere blanket denial—the newly developed allegations supporting Freeman's IAC claim, the district court consistently viewed the facts in the light least favorable to Freeman and drew inference after generous inference in favor of the State. For example, it found that "with two exceptions, all of the 'new' mitigating evidence Petitioner identifies…was either available to Petitioner's trial counsel or actually presented to Petitioner's capital sentencing jury in June 1996," without acknowledging that counsel "presented" 1,900 pages of records in bulk that the jury would neither have understood nor even had time to review. App. 263a-264a. It also credited trial counsel with having "presented an extensive case in mitigation," without acknowledging that the *actual* penalty phase "mitigation" case consisted of one witness who asked for mercy and did not present any argument explaining why Freeman deserved a life sentence. App. 264a.

Similarly, although the State failed to contest any of Freeman's specific factual allegations, the district court freely ignored them—and the record evidence supporting them—in service of its purportedly de novo § 2254(b)(2) analysis. For example, according to the court, two witnesses to Freeman's childhood sexual abuse deserved little credence because they "would have been subject to potentially devastating cross-examination based upon the failure of those same witnesses to report their suspicions of child abuse to responsible law enforcement authorities or child protective services officers in a timely manner." App. 280a. What the court left out in this summary devaluation of the witnesses was that one of them was Freeman's

younger brother, who was a mere six years old and thus not a mandatory reporter at the time he, too, was raped by their foster father, Dist. Ct. Doc. 64 at 131. Further, the other witness was a worker at St. Mary's group home who brought Freeman to a doctor because of his bleeding rectum and did, in fact, report the abuse to her superiors, who responded by doing nothing. *Id.* at 132-33.[11]

Ultimately, the district court denied relief by relying on these these and similarly inappropriate and tendentious findings. App. 345a. The reasoning behind the district court's decision—that the factually developed IAC claim was "frivolous" and thus appropriate for summary dismissal under § 2254(b)—is belied by the length that the court spends attempting to discredit Freeman's uncontested facts.

In its denial of relief, the district court also denied a Certificate of Appealability (COA), App. 345a, and later, a motion to alter or amend the judgment, App. 346a.

4. Eleventh Circuit Appeal

Freeman asked the Eleventh Circuit to grant a COA on three issues, including "the district court's procedural handling of Freeman's substantial claims of ineffective assistance of counsel." Mot. for Certificate of Appealability at 20-36, *Freeman v. Comm'r*, No. 18-13995-P (11th Cir. Oct. 5, 2018). Freeman pointed out that the parties had treated the factually developed IAC claim as defaulted and the district

---

[11] The district court also faulted Freeman for not informing his trial counsel that he was sexually abused as a child, App. 266a—a finding that ignores the state-court record that demonstrates that when the court or mental-health experts attempted to question Freeman about his childhood, he was unable to function. *See, e.g.*, Dist. Ct. Doc. 20-2 at 61 (psychologist testifying that Freeman would "cry or break down" when asked about past); Dist. Ct. Doc. 20-2 at 127-28 (noting recess due to Freeman's emotional outburst and crying when the court inquired about his family).

court's decision to "review these claims on the merits as unexhausted claims" was improper under § 2254(b) and this Court's precedent. *Id.* at 20-21. In the alternative, Freeman argued that "[e]ven if these claims could be construed as unexhausted rather than procedurally defaulted claims, reasonable jurists could disagree on the District Court's method of resolving these *substantial constitutional claims*." *Id.* at 21 (emphasis supplied).

The Eleventh Circuit granted a COA, but only with respect to the underlying merits of Petitioner's ineffectiveness claim, rejecting the procedural arguments laid out in the motion. App. 74a. In its partial grant, the court rephrased the claim Freeman had presented in the district court and in his COA motion. App. 74a (granting only as to whether trial counsel was ineffective for failing to "conduct a reasonable mitigation investigation" and "uncover and present mitigation evidence").

Consistent with counsel's understanding of the limited COA grant, Freeman briefed only the underlying merits of the factually developed IAC claim. Opening Br. at 12-27, *Freeman v. Comm'r,* , No. 18-13995-P (11th Cir. Feb. 12, 2020). In fact, in reply to the State's answering brief, which argued "that the District Court should not have considered the evidence before it, and just concluded that the state court ruling in this case was reasonable," Freeman affirmatively asserted that "[t]his issue is not properly before the Court," as the COA was limited to one question. Reply Br. at 2, *Freeman v. Comm'r*, No. 18-13995-P (11th Cir. Apr. 24, 2020). Freeman's counsel stressed that the Eleventh Circuit rejected "the other issues Mr. Freeman raised in his application, including whether the District Court used the appropriate procedure

to decide this claim." *Id.* For that reason, Freeman addressed only the underlying claim alleging a Sixth Amendment violation at his penalty phase.

During oral argument in the Eleventh Circuit, the State's attorney reiterated that Freeman never presented his factually developed IAC claim in state court, and that Freeman had thus rendered the claim procedurally defaulted. App. 557a-558a. Freeman did not contest Respondent's position *nor could he*: the facts alleged in federal court were never presented in state court. App. 559a. Rather, Freeman's counsel stressed that he attempted to develop the factual support for his claim in state court, but "[h]e did not have the resources and the funding as a poor prisoner sentenced to death in a state where counsel is not appointed in [post-conviction proceedings]." App. 559a. While Freeman agreed that "he did not present the facts to State Court," he explained that "*there are reasons why*, and that is the information that the District Court skipped over that needs to be resolved before reaching the merits." App. 560a[12]

When Freeman's counsel was asked at argument in the Eleventh Circuit whether deference is owed to the state court decision, she explained that the

---

[12] At various points during oral argument, Freeman's attorney repeatedly pointed out that the district court erred in its handling of the IAC claim. *See* App. 552a ("[T]he District Court erred in its procedural ruling and erred in [not] allowing us to have an evidentiary hearing to prove the facts that we allege in the District Court below."); App. 554a ("[O]ur expectation was that we would complete briefing on the procedural issues and then move to whether we would get an evidentiary hearing and allow for factual development."). *See also* Dist. Ct. Doc. 83 at 5-20 (Petitioner arguing why the federal court is not barred from reviewing the merits of, or granting an evidentiary hearing on, the claim).

application of § 2254(d)—which governs only claims that a state has "adjudicated on the merits"—was never briefed below since the parties both understood the claim to be procedurally defaulted. App. 555a. Counsel also explicitly requested supplemental briefing if the court were inclined to change course and find that § 2254(d) applied here. App. 555a-556a ("If . . . 2254(d) needs to be addressed and that Mr. Freeman needs to show how he can overcome the limitation on relief, I would respectfully ask that we be allowed to brief that issue."). That request was not granted.

However, without the benefit of briefing from the parties, the Eleventh Circuit denied relief finding that the IAC claim as alleged in federal habeas had been fairly presented and thus adjudicated on the merits in state court *and* that Petitioner had abandoned any argument that he could overcome the limitations of § 2254(d). The Court disagreed with Freeman's argument that issues of exhaustion and procedural default were "beyond the scope of the COA in this case and should not be considered by this Court." App. 48a.

In analyzing the factually developed claim, the court acknowledged that "Freeman's claim in state court did not contain *any* factual allegations in support of his claim," App. 53a, and that his federal claim included "almost thirty pages of factual allegations of mitigation information, including explicit and lengthy allegations of physical abuse, sexual abuse, and PTSD," App. 56a. It also cited this Court's precedents requiring federal habeas petitioners to first fairly present their claims in state court. App. 50a-51a (citing *Picard v. Connor*, 404 U.S. 270 (1971);

O'Sullivan v. Boerckel, 526 U.S. 838 (1999); and *Harrington v. Richter*, 562 U.S. 86 (2011)).

Nevertheless, the court held that petitioner's factually developed IAC claim—which was presented only *after* Freeman was given access to resources—had somehow been fairly presented to the state courts. App. 63a. And, because it found the "claim as to the new factual allegations was exhausted," the court concluded that the claim must be reviewed "under AEDPA" applying § 2254(d). App. 64a.

The court then found that because Freeman failed to raise an argument under § 2254(d), he abandoned the issue. App. 58a. It made this finding in the face of the parties' agreement—in district court and on appeal—that the factually developed claim was procedurally defaulted. It also made this finding in contradiction to the contours of the COA, which specifically rejected Freeman's procedural arguments and instead limited the question on appeal to whether there had been a Sixth Amendment violation in his case. The court also found that Freeman had abandoned any argument regarding § 2254(d) even though his counsel explicitly requested to brief the issue if the court deemed it applicable.

Despite finding that Freeman abandoned the issue, the court considered the factually developed claim and applied § 2254(d). App. 63a-64a. The Eleventh Circuit's review under § 2254(d) amounted to a conclusory statement: because Freeman "failed to plead any factual allegation with sufficient specificity in support of his claim" presented in state court (*not* the factually developed claim that it found to have been exhausted), he had not demonstrated that the state court decision was "'contrary to,

or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court' or 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented" in his state court proceedings." App. 66a.

V. REASONS FOR GRANTING CERTIORARI

A. The Eleventh Circuit decision stands in direct conflict with this Court's precedent, fundamental principles of our adversarial system, and habeas law.

The Eleventh Circuit abandoned the fundamental principles of our adversarial legal system when it reached an issue that had not been briefed in the district court nor addressed on appeal, and which the parties agreed was not relevant to the legal claim presented; that agreement was based on this Court's clear precedent. The circuit court decided the issue *sua sponte* without providing the either party fair notice that it intended to consider the issue and or the opportunity to be heard. In any case, but particularly in a capital case where there is a greater need for reliability, the court's decision amounts to an abuse of discretion and clear violation of Petitioner's due process rights.

Compounding its error, the Eleventh Circuit decided a complex habeas issue without the benefit of briefing by the parties. In doing so, the court has created binding precedent that disregards AEDPA, concluding that a claim never factually developed until federal habeas had, in fact, been fairly presented and adjudicated on the merits in state court. This holding turns this Court's long-established precedent regarding fair presentation and exhaustion on its head. Because the circuit decision

is irreconcilable with this Court's precedent, certiorari is necessary to correct the court's error.

1. This Court's intervention is necessary to ensure lower courts are not deciding significant issues never briefed by the parties.

The Eleventh Circuit decision stands in conflict with this Court's ruling that "a federal court does not have carte blanche to depart from the principle of party presentation basic to our adversary system," *Wood v. Milyard*, 566 U.S. 463, 472 (2012). However, in the rare case that a court finds it necessary to decide an issue never addressed by the parties, then it must give the parties "fair notice and an opportunity to present their positions." *Day*, 547 U.S. at 210. It is fundamentally unfair for an appellate court to decide the case on a ground not briefed below and without giving the parties an opportunity to address it.

Three aspects of this case demonstrate the court's clear abuse of discretion. *First*, the court decided an issue never briefed; in doing so, applied a novel interpretation of § 2254(d). This provision had been inapplicable throughout the litigation based on the parties' joint understanding that the factually developed claim had *not* been presented in state court. The understanding was founded upon an understanding of this Court's clear precedent. Where the State chose to invoke a procedural default, and Petitioner focused his efforts on demonstrating why a default would not prevent a federal court from reviewing his claim, then an appellate court should not reach a contrary conclusion—especially one contrary to this Court's

precedent—without providing an opportunity for parties to flesh out the issue in briefing.

Second, at argument, when Petitioner's counsel was asked about the application of AEDPA deference, she specifically informed the court that if it believed § 2254(d) applied in this case, then briefing was needed to address the issue. The court, however, did not allow supplemental briefing, thereby depriving Petitioner of "a meaningful opportunity to dispute the grounds on which the court" affirmed the denial of relief. *Thomas v. Payne*, 142 S. Ct. 1 (2021) (Sotomayor, J., statement respecting the denial of certiorari). Indeed, when appellants prepare and brief their arguments, they should not have to anticipate that a circuit court would resolve an issue in a manner fundamentally at odds with this Court's precedents.

Third, the unfairness of deciding a case based on an issue not raised on appeal is compounded in a habeas case. A habeas petitioner must receive permission to appeal through a COA, where the court—*not* the petitioner—defines the issues to be addressed. Here, the Eleventh Circuit rejected Petitioner's request for a COA as the request was set forth in his motion. Instead, he was ordered to brief only the constitutional question at issue as rewritten by the court. *Gonzalez v. Thaler*, 565 U.S. 134, 144 (2012) ("A petitioner…has no control over how the judge drafts the COA."). What is more, the court was aware that Petitioner believed that the COA was limited in scope, as he made that argument in his reply brief. It is fundamentally unfair for the court to then decide the case on a ground outside of the scope of a COA

that had been re-written by the court without any opportunity for supplemental briefing.

This Court should not allow a circuit court to invade principles of party presentation, ignore the parties mutual understanding of the law, and reach a decision of consequence not only to the parties here, but also to all courts within the circuit now bound by the decision. The Eleventh Circuit's decision to resolve a case based on an issue never briefed by the parties is clear error and should be corrected as it was an abuse of discretion. *Cf. U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (holding that a court of appeals does not abuse its discretion in deciding an issue not argued by the parties because it did so "after giving the parties ample opportunity to address the issue").

2. The Court's intervention is necessary as the lower court's misapplication of the exhaustion doctrine, principles of fair presentation, and the plain language of § 2254(d) creates circuit precedent that is directly contrary to this Court's clearly established law.

The decision in the case below is not merely an abuse of discretion. By deciding the case without the benefit of briefing on the issue, the Eleventh Circuit has created binding precedent that applies § 2254(d) in a manner contrary to the plain language of the statute and this Court's well-established precedent. This Court must intervene to correct this fundamental error.

By ignoring principles of comity and federalism, the Eleventh Circuit reached a decision contrary to this Court's unequivocal rule that a prisoner must give the state courts the first opportunity to adjudicate his federal claim. *O'Sullivan v.*

Boerckel, 526 U.S. 838, 844 (1999). That requires the presentation of not only the legal but also the factual basis of the claim. The circuit court's decision, however, flies in the face of that rule. Under the Eleventh Circuit's holding, a prisoner need not first present the factual basis of his claim in state court for a federal court to find that a claim was adjudicated on the merits. He can now present a factually developed claim *for the first time* in federal court and argue—successfully in the Eleventh Circuit—that he did, in fact, fairly present his claim. When a claim has been fairly presented, exhaustion has been satisfied under § 2254(b). And, says the Eleventh Circuit, that fairly presented claim has also been adjudicated on the merits under § 2254(d).

Thus, a state will no longer be able to assert—as the State repeatedly did in this case—that a claim has not been fairly presented to the state courts and that therefore the federal courts are precluded from merits review; a state will now be left to somehow defend a non-existent state decision that was "adjudicated on the merits" under § 2254(d). Similarly, a prisoner will be required to explain—somehow—that the state court's adjudication of claim that was never presented to it was unreasonable. Because the circuit decision is not only illogical but also contrary to well-established precedent, this Court should grant certiorari and correct the error.

VI. CONCLUSION

For the reasons explained above, this Court should grant certiorari.

Respectfully submitted: February 21, 2023

JON M. SANDS
Federal Public Defender
District of Arizona

Robin C. Konrad
Assistant Federal Public Defender
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 telephone
Robin_Konrad@fd.org

CHRISTINE A. FREEMAN
Executive Director
Federal Defenders for the Middle
District of Alabama

John A. Palombi*
Assistant Federal Defender
817 South Court Street
Montgomery, Alabama 36104
(334) 834-2099 telephone
John_Palombi@fd.org

*Counsel of record

s/John A. Palombi
JOHN A. PALOMBI
ASSISTANT FEDERAL PUBLIC DEFENDER

Counsel for Petitioner