No. 22-6851

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED
(Restated)

In this federal habeas proceeding, the district court reviewed under 28 U.S.C. § 2254(d) an ineffective assistance of counsel claim that had been exhausted in state postconviction proceedings, but it reviewed additional information related to that claim that had *not* been fairly presented to the state courts de novo. The Eleventh Circuit Court of Appeals granted a certificate of appealability as to this claim. The State argued that the district court's de novo review was improper, as the new "claim" was procedurally defaulted. The panel disagreed on this point, instead holding that the new information was part of the exhausted ineffective assistance claim, but it agreed that de novo review was unwarranted because the proper lens for analysis was § 2254(d). The court affirmed the denial of habeas relief.

1. Did the circuit court err by affirming the district court and holding that Freeman's claim was correctly analyzed under § 2254(d)?

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INTRODUCTION

This case concerns an attempted end-run around AEDPA's deferential review of claims exhausted in state court.

Alabama law requires a postconviction (Rule 32) petitioner to fully plead facts entitling him to relief.[1] A failure to plead with sufficient specificity constitutes grounds for summary dismissal.[2] David Freeman's Rule 32 petition was woefully deficient. His claims of penalty-phase ineffective assistance of counsel for (1) failure

1. ALA. R. CRIM. P. 32.6(b)
2. ALA. R. CRIM. P. 32.7(d).

to investigate and present mitigation evidence and (2) failure to present evidence of his background and mental health issues constituted four sentences in toto, two of them formulaic conclusory statements, with nary a fact in sight.[3] Despite Freeman's poor pleading, the circuit court granted him an evidentiary hearing, then denied relief after he failed to present evidence in support of his naked allegations.[4] The Alabama Court of Criminal Appeals (CCA) affirmed, noting that Freeman's claims were "vague and conclusory and wholly insufficient to satisfy his burden of pleading."[5] Indeed, CCA stated that Freeman had never been entitled to an evidentiary hearing because of the deficiency of his petition.[6]

But in federal habeas, Freeman's claims ballooned. While Freeman insisted that his legal claims had not fundamentally changed,[7] he offered the district court ***nearly thirty pages*** of new information produced by unnamed expert witnesses and investigators.[8] The district court bifurcated its analysis. First, the court conducted AEDPA review of the state courts' decisions pursuant to 28 U.S.C. § 2254(d) and held that the state courts were not unreasonable in denying relief.[9] Second, however, the court conducted de novo review of the "new claims"—i.e., the alleged facts not properly presented below—under § 2254(b)(2) and found that Freeman satisfied

3. *See* App'x A at 61a–62a.
4. App'x I at 452a–53a.
5. App'x J at 489a–90a.
6. *Id.* at 480a.
7. Petitioner's Brief on the Merits at 121, *Freeman v. Dunn*, 2:06-cv-00122 (M.D. Ala. Apr. 16, 2007), ECF No. 64.
8. *Id.* at 124–52 & n.56.
9. App'x D at 260a–61a.

neither prong of the *Strickland v. Washington*[10] standard.[11]

The Eleventh Circuit Court of Appeals granted a certificate of appealability as to only one issue: whether trial counsel were ineffective for failing to conduct a reasonable mitigation investigation and to uncover and present mitigation evidence.[12] Freeman's argument focused on the district court's findings from its de novo review, never mentioning § 2254(d). The State, on the other hand, argued that the district court's § 2254(d) decision was correct, that de novo review of the "new claims" was unnecessary because the new information was not exhausted in the state court, and that in the alternative, the district court's de novo analysis was sound. In reply, Freeman argued that the question whether de novo review was proper was not before the Eleventh Circuit.

The panel disagreed, explaining that "whether Freeman's claims are barred from federal review, and if not, what legal standard applies, are threshold procedural issues that must be resolved before we can reach the merits of his Sixth Amendment claims."[13] The court held that de novo review was unnecessary because the "new claims" were not new, but rather were part of Freeman's exhausted claims.[14] Because Freeman failed to address the district court's § 2254(d) analysis, he had abandoned it, and even if he had addressed it, the district court's decision was correct.[15] As for the "new claims" reviewed de novo, the circuit court reviewed them under § 2254(d)

10. 466 U.S. 668, 687 (1984).
11. App'x D at 261a–85a.
12. *Id.* at 124–52 & n.56.
13. App'x A at 48a (*Freeman v. Comm'r, Ala. Dep't of Corr.*, 46 F.4th 1193, 1215 (11th Cir. 2022)).
14. *Id.* at 56a–57a.
15. *Id.* at 58a–63a.

as well and found that the state court decisions were not unreasonable, based upon Freeman's deficient Rule 32 pleadings.[16]

Freeman claims that the Eleventh Circuit abused its discretion by deciding the threshold procedural issue before turning to the merits of the issue specified in the COA. But because the district court relied upon § 2254(d) to dispose of Freeman's claims, at least in part, it should have come as no surprise to him that this statute would factor into the circuit court's analysis. He also argues that the circuit court "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."[17] Here, however, Freeman did raise and exhaust the claims at issue in state court—he simply failed to offer to the state court the additional information he presented in his federal habeas petition.

Thus, certiorari is unwarranted.

16. *Id.* at 63a–66a.
17. Pet. 27.

STATEMENT OF THE CASE AND FACTS

A. Freeman's capital convictions and direct appeal

Sylvia Gordon tried to let David Freeman down gently. He had given the seventeen-year-old girl a note stating that he loved her, wanted to see her more frequently, and did not want to lose her. But Sylvia wasn't interested, and on the afternoon of March 11, 1988, when Freeman came to her house, she planned to give him a note saying she just wanted to be friends. In response, Freeman stabbed Sylvia twenty-two times, stabbed her mother, Mary Gordon, fourteen times and raped her, cut the telephone lines, stole the Gordons' car, and fled the scene. Sylvia's sister, Deborah Gordon Hosford, discovered the bodies when she came home around one the next morning.[18]

The evidence against Freeman was compelling. One of Freeman's coworkers claimed that about a week before the murders, he "told her he would rather see Sylvia dead than [for] someone else [to] have her." Deborah had left Freeman sitting with Sylvia on the couch when she went to work on March 11. Freeman's semen was found inside Mary's body, while shoeprints on her shirt and near her corpse were consistent with Freeman's shoes. The Gordons' stolen car was discovered parked near Freeman's apartment, his fingerprint was on it, and Mary's and Sylvia's blood was found inside, along with a butcher knife. While the knife had been cleaned, it was consistent with the weapon used to injury Mary and to cut clothing off both women. Police found Freeman at home with a bandaged right hand and bite marks from Sylvia on his arm.

18. App'x G at 394a–95a (*Freeman v. State*, 776 So. 2d 160, 169 (Ala. Crim. App. 1999)).

A search revealed clothing with Sylvia's blood on it, and his underwear contained a mixture of blood and semen. While Freeman initially tried to establish an alibi by going to work after the murders, he eventually admitted to stabbing both women, though he claimed to have blacked out during the murders.[19]

The medical evidence showed that the Gordons died horribly. Mary, raped and then stabbed fourteen times, had only two fatal wounds and lived for approximately five minutes after the first was inflicted. But none of Sylvia's twenty-two stab wounds were fatal on their own, and the girl remained conscious for up to ten minutes while bleeding to death.[20]

Freeman was evaluated in 1988 and 1989 and found to be competent to stand trial.[21] His case went to trial three times. He was initially convicted and sentenced to death in October 1989, but CCA reversed in 1994 for a *Batson v. Kentucky*[22] violation and on other grounds.[23] The second trial began in January 1996, but the trial court declared a mistrial six days later due to defense counsel's ill health. Freeman moved to dismiss the indictment on double jeopardy grounds, and the motion was denied, as were his state mandamus[24] and federal habeas[25] petitions.

The third trial began in June 1996. After the prosecution's fifteen witnesses, Freeman's defense team did their best to present a mitigation case. During the guilt

19. *Id.* at 395a–96a.
20. *Id.* at 395a.
21. *Id.* at 396a.
22. 476 U.S. 79 (1986).
23. *Freeman v. State*, 651 So. 2d 576 (Ala. Crim. App. 1994).
24. *Ex parte Freeman*, CR-95-0934 (Ala. Crim. App. Feb. 22, 1996); *Ex parte Freeman*, No. 1950784 (Ala. Feb. 23, 1996).
25. Order, *Freeman v. State*, 96-D-323-N (M.D. Ala. Feb. 26, 1996).

phase, they offered the testimony of clinical psychologist Dr. Barry Burkhart, who stated that at the time of the offense:

> (a) [Freeman] was suffering from major depressive disorder, Schizotypal Personality Disorder, and Borderline Personality Disorder, (b) [Freeman]'s condition was characterized by a markedly unstable self-image and violent reaction to perceived abandonment, and (c) when [Freeman] perceived that Sylvia was rejecting his romantic overture, [Freeman] suffered intense dissociative symptoms, including inappropriate intense anger, which culminated in a brief reactive psychosis in which [Freeman] lost touch with reality and was unable to conform his behavior to the requirements of the law.[26]

Dr. Burkhart further testified that:

> (1) he was certified in clinical psychology and had served as supervisor of the Lee County Development Center's psychological assessment center, (2) he evaluated [Freeman] four times for a total of approximately twelve hours in 1989 and administered many tests, (3) he also reviewed a wealth of records relating to [Freeman]'s medical and mental health history, [Freeman]'s written and typed statements to police, (4) [Freeman]'s mental health records showed that he was diagnosed as depressed and angry from an early age and included recommendations for placement in a long-term treatment facility and psychotherapy, (5) [Freeman] reported abuse in the home in Missouri in which [Freeman] was placed along with his sister, (6) he diagnosed [Freeman] with Schizotypal Personality Disorder, a condition characterized by a pervasive pattern of social discomfort and disability, an inability to get along with others, an inability to make any attachment to people, and brief paranoid psychotic episodes, (7) [Freeman] had been diagnosed by Dr. Guy Renfro and other mental health professionals as displaying Borderline Personality disorder, a condition very similar to Dr. Burkhart's diagnosed Schizotypal Personality disorder, (8) Borderline Personality Disorder ("BPD") is characterized by instability in interpersonal relationships, self-image, affect, feelings, and marked impulsivity in early childhood or early adulthood, (9) persons with BPD often engage in frantic efforts to avoid real or imagined abandonment, (10) persons with BPD often go through a cycle in their interpersonal relationships in which they initially idealize the object of their affection then, when the relationship fails or deteriorates, they demonize the person they once idealized, (11) persons displaying BPD also have markedly unstable self-images, *i.e.*, their self-

26. App'x D at 91a–92a.

> image alternates between grandiose and extremely negative, (12) persons displaying BPD also show impulsivity, potentially self-damaging behaviors, including recurrent suicidal behavior and gestures, and an inability to self-regulate their emotions, (13) BPD can be co-morbid with depressive problems, (14) persons displaying BPD also show affective instability due to marked reactivity of mood and intense episodic dysphoria, (15) persons displaying BPD often have feelings of boredom and emptiness and display inappropriate intense anger, (16) persons with BPD can display transient stress-related paranoid ideation or severe dissociative symptoms, which can lead to delusional thinking and a loss of cognitive control, *i.e.*, "blanking out," (17) [Freeman] meets seven of the nine criteria for BPD and only five are required for a diagnosis, (18) children require consistent attachment to a parent, (19) children exposed to chronic neglect or abuse are impaired socially, cognitively, and psychologically, (20) children denied normal personal relationships have a high probability of having psychological disorders and emotional dis-control, (21) the extreme stress [Freeman] experienced when Sylvia Gordon rejected his romantic overture could have caused [Freeman] to experience a psychotic disorder or reactive psychosis in which [Freeman] lost touch with reality, and (22) he believed it was "very likely" that, at the time of his capital offenses, [Freeman] suffered a brief reactive psychosis while under the stress of being abandoned or rejected.[27]

However, Dr. Burkhart admitted to the following on cross:

> (1) [Freeman]'s was the first case in which Dr. Burkhart testified in an adult criminal case about a defendant's competency, (2) [Freeman]'s answers to two different MMPI tests Dr. Burkhart administered showed possibly invalid results, (3) there is disagreement within the mental health profession regarding the efficacy of the Rorschach test he administered to [Freeman], (4) during his clinical interview, [Freeman] refused to discuss his condition at the time of his offenses, (5) none of the tests he administered showed that [Freeman] was psychotic on March 11, 1988, (6) he disagrees with both (a) Dr. Mohabbat's diagnosis of adjustment disorder with mixed emotions and (b) Dr. Grayson's finding of an absence of major depressive disorder in [Freeman] and diagnosis of adjustment disorder with disturbance of emotions and conduct, (7) he disagrees with a December, 1984 diagnosis of Antisocial Personality Disorder, in part because such a diagnosis is inappropriate for a patient under the age of eighteen, (8) [Freeman]'s records are full of incidents in which [Freeman] was violent, reactive, and refused to follow orders, (9) [Freeman] has a pattern of being aggressive toward

27. *Id.* at 92a–94a.

female staffers at his youth facilities, (10) [Freeman]'s records from a Missouri youth facility show he was violent at age seven, (11) a psychological evaluation performed in March 1977 showed [Freeman]'s intelligence as average, (12) [Freeman]'s records show he was hard to manage at both school and home, (13) by age eight, a Dr. R.J. Kline reported [Freeman] had constantly caused problems for boarding home parents and [Freeman] was referred to the Department of Pensions and Securities because of his behavioral problems, (14) a September 1978 report by Dr. Kline stated that [Freeman] will possibly become antisocial in later life and diagnosed [Freeman] with adjustment disorder, (15) a January 1979 report by Dr. Dennis Breiter states [Freeman] has a low tolerance for frustration, (16) a psychological evaluation report done when [Freeman] was thirteen years and two months old states, in part, that [Freeman] (a) refused to talk about his past, (b) had been removed from a foster home because he had been aggressive toward a young child, (c) was angry with persons in authority, (d) had low impulse control, and (e) denied having experienced any sexual contact, (17) a December 1983 psychological evaluation by Dr. Garry Grayson found no symptoms of major depressive episodes, (18) a May 1984 psychological evaluation by Dr. Dale Wisely found no major depression and diagnosed [Freeman] with adjustment disorder with mixed disturbance, (19) a September 1984 psychological evaluation performed when [Freeman] was fifteen diagnosed [Freeman] with conduct disorder, ([20]) a psychological evaluation in December 1984 by Dr. F. Lopez reported [Freeman] displayed antisocial attitudes, (21) a November 1985 psychological evaluation by Dr. Thomas Boyle performed when [Freeman] was sixteen years and four months diagnosed [Freeman] with conduct disorder, (22) a January 1989 Lunacy Commission Report prepared by Dr. Joe Dixon summarized the findings of the three physicians who evaluated [Freeman], i.e., Dr. Mohabbat (Adjustment Reaction with anger and depression), Dr. Bryant (Adjustment Disorder with depressed mood), and Dr. Nagi (Antisocial Personality Disorder), (23) Dr. Guy Renfro diagnosed [Freeman] with Borderline Personality Disorder, (24) none of the other mental health experts who evaluated [Freeman] following [Freeman]'s arrest diagnosed [Freeman] with a psychotic disorder, (25) no one believes [Freeman] lacked the substantial capacity to appreciate the criminality of his conduct, (26) only Dr. Burkhart believes [Freeman] lacked substantial capacity to conform his conduct to the law, (27) Dr. Burkhart believes Schizotypal Personality Disorder is the correct diagnosis for [Freeman], (28) he believed [Freeman] suffered from a mental disease or defect at the time of his offense which prevented [Freeman] from conforming his conduct to the requirements

> of the law, i.e., a brief reactive psychosis, but (29) he was unable to determine precisely when that brief psychotic episode began or ended.[28]

The defense also presented testimony from two social workers during the guilt phase. Marvin W. Hartley, who worked at the Bell Road Group Home in 1986–87, testified that Freeman "(1) was a loner and appeared isolated and withdrawn, (2) had occasional outbursts, (3) once punched a hole in the wall, (4) was involved in one or two fights, and (5) had a child-like craving for love and attention."[29] Yvonne Price Copeland, who had been Freeman's caseworker for several years, testified far more extensively about his placements and problems:

> (1) she handled [Freeman]'s case while he was in foster care, (2) [Freeman] never had a relationship with his biological mother, (3) she believed [Freeman]'s mother was mentally retarded based upon his mother's behavior and appearance, (4) [Freeman]'s father was a disabled veteran who suffered from a painful facial tic, nerves, and depression, (5) [Freeman]'s childhood was characterized by a number of frequent, erratic moves, (6) [Freeman] was placed with a relative of his step-mother in Missouri from 1974–77 with an eye toward adoption, (7) [Freeman] was returned to Alabama in 1977, where he was placed in a foster home and then in Symmetry House in Opelika after [Freeman] was aggressive toward another child, (8) [Freeman] was placed in St. Mary's Home in Mobile from 1978–83 but was removed from that facility after he assaulted a house parent, (9) [Freeman] was placed in Coosa Valley, a crisis facility for delinquent children, for four months in 1983 and then sent to Gateway in Birmingham, (10) [Freeman] twice ran away from the Gateway facility, (11) on one occasion while at Gateway, [Freeman] climbed on the roof and refused to come down, (12) on another occasion, [Freeman] grabbed a butcher knife and cut himself, (13) a social summary (State Exhibit 6A) prepared by Doris Reeder, who took over for her as [Freeman]'s caseworker, accurately reflects [Freeman]'s delayed social development and multiple unsuccessful placements, (14) [Freeman] did not communicate verbally and was the most difficult child she ever dealt with, and (15) [Freeman]'s numerous placements were unsuccessful due to [Freeman]'s aggressive behavior.[30]

28. *Id.* at 94a–97a.
29. *Id.* at 97a.
30. *Id.* at 97a–98a.

Copeland offered further details on cross-examination:

> (1) [Freeman]'s brother Michael did well in school, (2) at age ten months, [Freeman] was placed in foster care, (3) [Freeman] went to a second foster home and then to live with relatives in Missouri from 1974–77, (4) the family in Missouri returned [Freeman] and his other siblings to Alabama after allegations of abuse were made in Missouri, (5) an investigation by military authorities in 1976 concluded "no real abuse had in likelihood occurred," (6) prior to his return, [Freeman] was evaluated at age seven in Missouri and found to be normal with low frustration tolerance, (7) [Freeman] was removed from a foster family in Alabama after six months and sent to Symmetry House, (8) at age nine, [Freeman] was removed from Symmetry House due to behavioral problems, (9) [Freeman] then went to St. Mary's Home in Mobile, another residential treatment facility, from 1978–82, (10) [Freeman] was removed from St. Mary's and sent to Gateway after [Freeman] struck a childcare worker, (11) Dr. Burkhart evaluated [Freeman] at age thirteen and recommended further long term residential placement, (12) [Freeman] then went to Coosa Valley Attention Facility in Anniston (not a long term facility) and then to Gateway in Birmingham (which was a long term facility), (13) while at Gateway, [Freeman] displayed tantrum-like behavior, picked on younger children, often presented himself as the victim when he was the instigator, engaged in self-hurt behaviors, was manipulative and attention-seeking, but not depressed, (14) [Freeman] was then sent to the Eufaula Adolescent Adjustment Center, a more structured facility, in August, 1984 around age fifteen, where [Freeman] received both group and individual therapy, (15) in August, 1985, [Freeman] escaped or "eloped" from the Eufaula facility with a girl and committed a burglary for which [Freeman] was placed in a diversion program in Dothan, (16) a report in April 1986 states [Freeman] had displayed excellent conduct and educational progress, (17) individual counseling was included in [Freeman]'s treatment plan, (18) in September 1986 a report indicates [Freeman] was uncooperative during his weekly therapy sessions, (19) [Freeman] began acting out at age four and the reason he was moved around so frequently was his own behavior, and (20) all efforts to modify [Freeman]'s behavior failed.[31]

The State offered two more psychological experts in rebuttal. They presented nothing new during the penalty phase, while the defense offered a deacon who had

31. *Id.* at 99a–100a.

worked at a children's home where Freeman had lived, who asked for leniency.[32] The defense also submitted to the jury "[v]oluminous records from [Freeman's] largely institutionalized childhood . . . showing a wide range of information concerning [his] chaotic and unstable family life, unstable social history, academic troubles, difficulty complying with the rules in various institutional settings, difficulty getting along with others, tendency toward violence, and various personality disorders."[33] But in light of the forensic evidence, Freeman's confession, and the heinousness of his crimes, the jury again convicted him of six counts of capital murder and recommended death 11–1.[34]

CCA affirmed in 1999,[35] and the Alabama Supreme Court[36] and this Court[37] denied certiorari in 2000.

B. State Postconviction (Rule 32)

Freeman filed a Rule 32 petition in October 2001, which he amended four times. The relevant claims in his fourth amended petition stated:

> J. Trial counsel failed to investigate, develop and present available evidence in mitigation of petitioner's punishment. But for counsel's deficient performance, there exists a reasonable probability that the result of petitioner's trial would have been different.

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32. *Id.* at 109a.
33. *Id.* at 279a.
34. *Id.* at 168. Freeman was convicted of all six capital counts for which he was indicted: murder of two or more people (ALA. CODE § 13A-5-40(a)(10)), burglary-murder of both Sylvia and Mary (*id.* § 13A-5-40(a)(4)), robbery-murder of both Sylvia and Mary (*id* § 13A-5-40(a)(2)), and sexual abuse murder of Mary (*id.* § 13A-5-40(a)(8)). While Sylvia's body showed evidence of vaginal tears, App'x G at 395a, Freeman was not tried for a sexual crime concerning her.
35. App'x G.
36. App'x H.
37. *Freeman v. Alabama*, 531 U.S. 966 (2000) (mem.).

> K. Trial counsel failed to present available evidence regarding petitioner's background and his mental health history to the jury in a manner which would have allowed the jury to give this evidence mitigating effect during the sentencing phase. But for counsel's deficient performance, there exists a reasonable probability that the result of petitioner's trial would have been different.[38]

Although this pleading was conclusory and wholly devoid of the facts necessary for well-pleaded Rule 32 claims,[39] the circuit court granted Freeman an evidentiary hearing in June 2003. There, he presented two of his trial counsel, William Abell and John David Norris, and his direct appeal counsel, Thomas M. Goggans.[40] Freeman also attempted to introduce affidavit testimony by his lead trial counsel, Ally W. Howell, but this was disallowed; the affidavit was dated only a week prior to the hearing, and the State had been given no valid contact information for the affiant.[41]

The circuit court denied relief, holding in relevant part that Freeman did not prove that counsel's alleged failure to investigate and present mitigating evidence entitled him to relief under *Strickland* and that Freeman failed to offer evidence showing that if counsel had presented evidence about his background and mental health differently, his case would have had a different outcome.[42]

Two years later, CCA affirmed, holding as to these claims:

> Freeman did not allege in his petition what "available evidence" there

38. *See* App'x D at 258a–59a n.181.
39. *See* ALA. R. CRIM. P. 32.6(b).
40. Habeas Record Vol. 51 at 84–117, *Freeman v. Dunn*, 2:06-cv-00122 (M.D. Ala. May 4, 2006), ECF No. 20-51.
41. *Id.* at 117–25. The court granted the State's motion to exclude the affidavit and sealed it, and CCA found no abuse of discretion in this decision. App'x J at 499a–503a.

    Freeman attempted to bring Ms. Howell's affidavit before the Eleventh Circuit in March 2021 via motion to supplement the record, which was denied. Order, *Freeman v. Comm'r, Ala. Dep't of Corr.*, 18-13995 (11th Cir. Apr. 1, 2021). Despite its repeated exclusion from the record, Freeman has now incorporated this rejected affidavit into his appendix in this Court.
42. App'x I at 452a–53a.

> was about his background or mental health history that his counsel did not present or what "manner" he believes his counsel should have presented the unidentified evidence. Likewise, other than the conclusory allegation that but for counsel's conduct in this regard, there was a reasonable probability that the outcome of his trial would have been different, 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. His contentions in this regard are vague and conclusory and wholly insufficient to satisfy his burden of pleading. Therefore, denial of these allegations of ineffective assistance of trial counsel was proper.[43]

Again, both the Alabama Supreme Court[44] and this Court[45] denied certiorari in 2006.

C. Habeas

i. District court

Freeman initiated habeas proceedings in the Middle District of Alabama in February 2006.[46] In his 2007 brief on the merits, Freeman raised the Rule 32 claims discussed above concerning counsel's penalty-phase ineffectiveness, but he did so in grossly expanded form, moving from the ninety-two words of his Rule 32 petition to approximately thirty-eight pages of newly presented alleged facts and argument.[47]

The district court denied relief in a 270-page memorandum opinion in 2018. Regarding the claims of penalty-phase ineffective assistance for failure to investigate and present mitigating evidence, the court thoroughly addressed Freeman's arguments and found them lacking. First, the court conducted "AEDPA review"—i.e.,

43. App'x J at 489a–90a.
44. App'x K.
45. *Freeman v. Alabama*, 548 U.S. 910 (2006) (mem.).
46. Petition, *Freeman v. Dunn*, 2:06-cv-00122 (M.D. Ala. Feb. 16, 2006), ECF No. 5.
47. Petitioner's Brief on the Merits at 118–46, 152–61, *Freeman v. Dunn*, 2:06-cv-00122 (M.D. Ala. Apr. 16, 2007), ECF No. 64. This claim incorporated a claim about failure to retain a neurological expert, which was not before the Eleventh Circuit.

28 U.S.C. § 2254(d) review—of the claims, noting that Freeman "alleged no specific facts and presented no evidence" during in his Rule 32 proceedings.[48] As such, the court held that the state courts' decisions were neither contrary to clearly established federal law nor unreasonable determinations of the facts.[49]

But second, the district court took an unnecessary additional step and conducted de novo review of the twenty-eight pages of new information pursuant to § 2254(b)(2). The court reviewed the trial record, "including the extensive documentation regarding [Freeman]'s background and mental health history," and concluded that "with two exceptions, all of the 'new' mitigating evidence [Freeman] identifies in his pleadings in this court in support of his *Wiggins* [*v. Smith*] claims was either available to [Freeman]'s trial counsel or actually presented to [Freeman]'s capital sentencing jury in June 1996."[50] Specifically, the court found:

> [Freeman]'s trial counsel presented an extensive case in mitigation during [Freeman]'s June 1996 capital murder trial, through the testimony of Dr. Renfro, Dr. Burkhart, and [Freeman]'s former childcare case-worker Yvonne Price Copeland. [Freeman]'s capital sentencing jury also had before it extensive documentation concerning [Freeman]'s social history, mental health history, academic history, and history of behavioral problems at a variety of state-sponsored institutions throughout his developmental period. Thus, this is not a case in which defense counsel failed to present extensive available mitigating evidence. On the contrary, [Freeman]'s trial counsel presented substantial expert witness testimony (through Dr. Burkhart and Dr. Renfro) which (1) described in great detail [Freeman]'s long history of behavioral problems throughout childhood, (2) suggested mitigating explanations for those problems (i.e., [Freeman]'s removal from his family at an early age, the State of Alabama's subsequent inability to furnish [Freeman] with either a stable living situation or the intensive, activity-based, psychotherapy numerous mental health professionals

48. App'x D at 260a.
49. *Id.* at 260a–61a.
50. *Id.* at 263a–64a.

> recommended, and [Freeman]'s resulting personality disorders), and (3) identified [Freeman]'s resulting difficulty handling abandonment and rejection in interpersonal relationships as a major contributing factor in his violent capital offenses. Simply put, [Freeman]'s trial counsel employed the testimony of Ms. Copeland, Dr. Burkhart, and Dr. Renfro to (1) "humanize" [Freeman] and (2) offer a rational explanation for [Freeman]'s otherwise incomprehensibly violent response to Sylvia Gordon's rejection of his romantic overtures.[51]

The court found neither *Strickland* prong satisfied by the new evidence.[52] Particularly considering prejudice, the court noted that beyond Freeman's failures to present evidence, the guilt-phase evidence against him was "overwhelming."[53] His crimes were vicious and heinous, he admitted that he recalled stabbing the victims and that he tore their phones from the walls, and he cleaned up and went to work after the murders.[54] Thus, the court denied relief under both § 2254(d) and § 2254(b)(2).[55]

ii. Eleventh Circuit

The Eleventh Circuit granted a certificate of appealability on only one ground: "Whether trial counsel provided ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution when at the penalty phase of trial, it failed to conduct a reasonable mitigation investigation and failed to uncover and present mitigation evidence."[56]

Despite the fact that the district court had reviewed Freeman's claims under

51. *Id.* at 264a–65a.
52. *Id.* at 265a–84a.
53. *Id.* at 282a.
54. *Id.* at 282a–83a.
55. *Id.* at 285a.
56. App'x C at 74a.

§ 2254(d), Freeman's principal brief made no mention of the statute, nor of AEDPA. Instead, he focused on the district court's de novo review of his new information. By contrast, the State began its analysis with § 2254(d), focusing on Freeman's deficient state pleading. As for the new information presented in habeas, the State argued that de novo review was unnecessary; this information had not been fairly presented below, so the court should deem it unexhausted. In the alternative, the State argued that the district court's de novo analysis was correct. When Freeman replied, he still failed to grapple with § 2254(d) and the reasonableness of the state courts' decisions to dismiss his claims. Rather, he again stressed the alleged failures of trial counsel and argued that the question of whether the district court should have conducted de novo review was not before the circuit court, based on the issue presented in the COA.

During oral argument, the panel brought up the district court's finding that CCA's decision was not unreasonable because of Freeman's poor pleading.[57] Counsel claimed that they never briefed the § 2254(d) argument below "because the State continued to argue this claim was procedurally defaulted."[58] In July 2007, when the State filed its brief on the merits in district court, it argued that (1) the claims at issue were procedurally defaulted because they failed to meet Rule 32's pleading requirements, (2) the new information was not exhausted below, and (3) in the alternative, § 2254(d) foreclosed relief.[59] In the years between that 2007 filing and the 2018 opinion, the Eleventh Circuit held that Rule 32 claims dismissed for

57. App'x N at 555a–56a.
58. *Id.* at 555a.
59. Respondent's Brief on the Merits at 49–54, *Freeman v. Dunn*, 2:06-cv-00122 (M.D. Ala. July 17, 2007), ECF No. 80.

insufficient pleading under Rule 32.6(b) were merits determinations for habeas purposes, to be reviewed with AEDPA deference,[60] and the district court thus reviewed Freeman's claim under § 2254(d), at least in part. By the time the matter reached the Eleventh Circuit, the status of Rule 32.6(b) decisions had been solidified, and so the State argued that the district court's § 2254(d) review was proper. Freeman could have addressed this holding in his Eleventh Circuit brief, but he failed to do so.

The circuit court affirmed in a published opinion. First, the court explained that it would determine whether the district court's de novo review was proper because that was a threshold issue to the issue identified in the COA:

> Pursuant to 28 U.S.C. § 2253(c)(3), a COA "shall indicate which specific issue or issues" are subject to review from a final habeas corpus proceeding. To that end, this Court has held that "[i]t is abundantly clear that 'our review is restricted to the issues specified in the certificate of appealability.'" *Spencer v. Sec y, Dep't of Corr.*, 609 F.3d 1170, 1180 (11th Cir. 2010) (quoting *Williams v. Allen*, 598 F.3d 778, 795 (11th Cir. 2010)). However, we will construe the issue specified in the COA "in light of the pleadings and other parts of the record." *Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998); *see also, e.g.*, *McClain v. Hall*, 552 F.3d 1245, 1254 (11th Cir. 2008) (refusing to consider appellant's claim that his trial counsel was ineffective for failing to discover and present certain mitigating evidence where this Court granted a COA as to whether appellant's trial counsel "rendered ineffective assistance in his investigation of mitigating evidence for the penalty phase of the trial" and the specific claim was not made in appellant's request for a COA or in his state and federal habeas petitions). We will also construe the COA to encompass any issue that "must be resolved before reaching the merits" of a claim identified in the COA. *Santos v. United States*, 982 F.3d 1303, 1309 n.3 (11th Cir. 2020).
>
> Here, Freeman contends the State's argument about the district court's de novo review of his claims that the State asserts are unexhausted and procedurally defaulted is beyond the scope of the COA in this case and should not be considered by this Court. But whether

60. *Powell v. Allen*, 602 F.3d 1263, 1273 (11th Cir. 2010); *Borden v. Allen*, 646 F.3d 785, 812–16 (11th Cir. 2011).

> Freeman's claims are barred from federal review, and if not, what legal standard applies, are threshold procedural issues that must be resolved before we can reach the merits of his Sixth Amendment claims. *See McCoy v. United States*, 266 F.3d 1245, 1248 n.2 (11th Cir. 2001) (resolving procedural-default and retroactivity issues not specified in the COA).
>
> Thus, we will consider the issue of whether Freeman's claims that his trial counsel provided ineffective assistance during the penalty phase were exhausted or procedurally defaulted. *See id.*, 266 F.3d at 1248 n.2; *c.f. Rozzelle v. Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000, 1009–10 (11th Cir. 2012) (determining that a threshold issue was "[n]ecessarily subsumed" within the COA, even though the COA did not expressly include the issue).[61]

With that in mind, the court turned to the district court's de novo review and found it to be misguided. The new information Freeman alleged in habeas did not constitute a new claim. His claims of penalty-phase ineffective assistance were exhausted, albeit poorly pleaded, below:

> Freeman's claim in state court did not contain any factual allegations in support of his claim that his trial counsel were ineffective in failing to investigate and present "substantial evidence" of mitigation. His allegations remained largely unchanged in his briefing to the Alabama Court of Appeals and the Supreme Court of Alabama.
>
> And Freeman's federal habeas petition raised the same legal (and conclusory) basis for his claim of ineffective assistance of counsel as it was presented in the Alabama state courts. Freeman claimed that his trial counsel failed "to investigate, develop, and present evidence of [Freeman's] background and mental health problems in a manner that would have allowed the jury to give it mitigating effect." Freeman reiterated the argument he made to the Alabama courts—that trial counsel had "squandered the mitigating value of the information about [Freeman's] background" by couching this information "almost entirely" in terms of the "ill-conceived effort to establish that petitioner was not guilty by reason of mental disease or defect." He repeated his argument that, with the documentation about Freeman's life that was available at trial, and with the assistance of a mitigation investigator, a social worker, and a neuropsychologist, trial counsel could have presented the

61. App'x A at 47a–49a.

> jury with substantial evidence of mitigation. He further argued that trial counsel's decision to rely "strictly on an insanity defense that lacked evidentiary support" was "objectively unreasonable," and diverted resources from the case for mitigation.[62]

While Freeman presented new evidence in habeas, "[u]ltimately, the new factual allegations do not change the substance of Freeman's claim," which was exhausted.[63]

The circuit court agreed with the district court's § 2254(d) analysis, noting that "a state court's rejection of a claim under Rule 32.6(b)," as was CCA's here, "is a ruling on the merits."[64] As for the "new claims" reviewed de novo, the court *also* reviewed this information under "AEDPA's highly deferential standard of review"[65] because it was part and parcel of the exhausted claims. Because the record under review for § 2254(d) purposes "is limited to the record that was before the state court that adjudicated the claim on the merits,"[66] the circuit court looked to Freeman's Rule 32 petition and found it lacking:

> [B]eyond the bald assertions in Freeman's Rule 32 petition, Freeman failed to plead any factual allegation with sufficient specificity in support of his claim. *See Boyd* [*v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1333–34 (11th Cir. 2012)]. And while Freeman now raises additional allegations in support of his claim, "we do not consider such supplemental allegations . . . when reviewing the reasonableness of the state court's resolution of this claim, which was based on the allegations before it," in accordance with AEDPA. *Powell* [*v. Allen*, 602 F.3d 1263, 1273 n.8 (11th Cir. 2010)]; *accord Borden* [*v. Allen*, 646 F.3d 785, 816 (11th Cir. 2011)] ("[W]e believe that a review of a state court adjudication on the merits in light of allegations not presented to the state court—for example, by examining additional facts or claims presented for the first time in a petitioner's federal habeas petition—

62. *Id.* at 53a–54a.
63. *Id.* at 56a–57a.
64. *Id.* at 60a, 62a.
65. *Id.* at 64a.
66. *Borden v. Allen*, 646 F.3d 785, 817 (11th Cir. 2011) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)).

> would insufficiently respect the 'historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts.'" (quoting *Williams v. Taylor*, 529 U.S. 420, 436 (2000))).[67]

Thus, the Eleventh Circuit affirmed the denial of habeas relief.

Writing separately, Judge Jill Pryor was sympathetic to Freeman, noting his "challenging circumstances" and "nightmarish childhood"[68] and criticizing trial counsel, but even still, she concurred in the judgment:

> In his merits brief, Mr. Freeman specifically alleged, for the first time, the universe of mitigating evidence trial counsel should have uncovered had they conducted a reasonable investigation of Mr. Freeman's background and mental health. The allegations—because, without any evidence to support them, that is all they are—paint a truly tragic portrait of Mr. Freeman's life leading up to the crime. Nonetheless, I must concur in the majority opinion's decision to deny him relief. These allegations were not presented to the state court, and "the record under review [of a state court's decision] is limited to the record in existence at that same time, i.e., the record before the state court." *Cullen v. Pinholster,* 563 U.S. 170, 181–82 (2011). So, Mr. Freeman could not rely on new evidence (let alone mere allegations) not in the state court record to argue that federal courts should grant habeas relief.[69]

Rehearing and rehearing en banc were denied,[70] and the present petition for a writ of certiorari followed.

REASONS THE PETITION SHOULD BE DENIED

Freeman claims that the Eleventh Circuit's entirely reasonable decision to affirm the district court's denial of habeas relief based upon the provisions of § 2254(d) is an overreach because the circuit court considered an issue outside the COA and did

67. App'x A at 66a.
68. *Id.* at 68a.
69. *Id.* at 69a–70a.
70. App'x B at 72a.

not permit supplemental briefing on the issue of § 2254(d)'s applicability. Here, however, the circuit court correctly addressed a threshold issue before turning to the merits of the claim identified in the COA, which does not run afoul of this Court's precedent. Moreover, Freeman could have addressed the issue of whether the district court correctly applied § 2254(d)—and by extension, whether the court should have ended its analysis there instead of proceeding to de novo review. The district court began its analysis with § 2254(d), as did the State in its brief to the Eleventh Circuit. That Freeman chose to ignore this portion of the district court's decision does not mean that he was never given an opportunity to discuss it.

Freeman also claims that by resolving the case in the manner in which it did, the circuit court "disregard[ed] 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."[71] In so doing, Freeman misinterprets what fair presentation to the state courts is all about. The issue is not whether Freeman factually developed his claim below to the degree to which he would prefer, but rather whether he exhausted the claims by "'fairly presen[ting]' federal claims to the state courts in order to give the State the 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights."[72] Specifically, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process" before

71. Pet. 27.
72. *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)) (some quotation omitted).

bringing their claims in federal habeas.[73] And this is what Freeman did: those claims he poorly briefed in Rule 32 were the same claims he brought in habeas, albeit with nearly thirty new pages of alleged mitigation information. The circuit court did not err by determining that the "new claims" were, for AEDPA purposes, simply information added to the claims raised and exhausted below, and then by correctly reviewing the state court decisions with § 2254(d) deference.

Finally, additional briefing on the application of § 2254(d) would have been futile in this case. The parties do not dispute that Freeman raised the same legal arguments in Rule 32 and federal habeas.[74] Freeman wants the federal courts to overlook his pleading deficiencies in state court and treat his expanded versions of these exhausted claims as new claims (and overlook any procedural default for failure to bring them earlier). But as the *legal arguments* have not changed, the Eleventh Circuit did what it was required to do under AEDPA and reviewed the record that was before the state courts. Thus, certiorari is unwarranted.

I. Freeman had a fair opportunity to brief the issue of how the district court denied relief.

Freeman asserts that certiorari is necessary because the Eleventh Circuit has "depart[ed] from the principle of party presentation" by not giving the parties fair notice and an opportunity to brief the issue of § 2254(d)'s applicability and the propriety of the district court's de novo review.[75] He is mistaken.

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73. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).
74. *See* Petitioner's Brief on the Merits at 121, ECF No. 64.
75. Pet. 28 (quoting *Wood v. Milyard*, 566 U.S. 463, 472 (2012)).

First, Freeman could—and should—have briefed the circuit court on his position concerning the district court's application of § 2254(d). The district court began its analysis with "AEDPA review of the claim asserted in state habeas court"[76] and found that the state courts' decision denying relief was not contrary to clearly established federal law or an unreasonable determination of the facts.[77] These state decisions concerned the very claims referenced in the COA: penalty-phase ineffective assistance of counsel concerning their mitigation investigation and presentation.[78] The fact that the district court denied relief in part based upon § 2254(d) should have been a signal to Freeman to address this issue in his brief. If that was insufficient, the State's first argument on appeal was that the district court's AEDPA analysis was correct.[79] Freeman could have rebutted the State's argument in his reply brief, but he did not. His request for supplemental briefing during oral argument[80] does not take into account the opportunity he had to address this claim.

Likewise, the State argued that de novo review was improper in its brief,[81] albeit on different grounds than those found by the circuit court. Instead of addressing the merits of this argument, Freeman opted only to argue that the

76. App'x D at 260a (case edited).
77. *Id.* at 260a–61a.
78. *See* App'x C at 74a.
79. Brief of the Respondent-Appellee at 30–32, *Freeman v. Comm'r, Ala. Dep't of Corr.*, 18-13995 (11th Cir. Mar. 20, 2020).
80. App'x N at 555a.
81. Brief of the Respondent-Appellee at 32–33.

question of whether de novo review was proper was not before the court.[82] Again, Freeman could have rebutted the State's claim on merits grounds but did not.

Second, the fact that the State argued procedural default in its district court filings is an artifact of the time in which they were filed. As discussed above, and as Freeman notes,[83] when the State submitted its merits brief in July 2007, the Eleventh Circuit had yet to hold that claims dismissed on Rule 32.6(b) grounds were merits determinations for habeas purposes. Had the district court ruled on Freeman's petition in the year or two following briefing,[84] it could have dismissed based upon procedural default.[85] Moreover, the State argued in the alternative that § 2254(d) foreclosed relief.[86] While the State's primary argument was indeed procedural default, the State made § 2254(d) arguments in district court.

By the time the district court ruled in 2018, nearly eleven years after the State's brief was filed, the status of Rule 32.6(b) decisions as merits decisions had been solidified,[87] and so the district court correctly considered the state courts'

82. Reply Brief of Appellant at 1–2, *Freeman v. Comm'r, Ala. Dep't of Corr.*, 18-13995 (11th Cir. Apr. 24, 2020).

83. Pet. 19 n.10.

84. Why the district court took so long to rule is unclear. Briefing concluded in 2007, but other than appearances and withdrawals, there was virtually no movement in the case until the Honorable W. Keith Watkins, then the chief judge, reassigned the matter to himself in July 2016.

From that point, the delay was understandable. Judge Watkins served as the lone active district judge in the Middle District of Alabama from August 2014 until August 2018, and all death penalty cases, including 42 U.S.C. § 1983 actions, were assigned to him. When another district judge was appointed to the bench in August 2018, Judge Watkins was overseeing eighteen capital § 2254 cases and had only dismissed Freeman's the month before. *See* Order, *Carruth v. Dunn*, 2:14-cv-01107 (M.D. Ala. Sept. 6, 2018), ECF No. 43 (explaining judicial emergency).

85. *See Jenkins v. Bullard*, 210 F. App'x 895, 899–901 (11th Cir. 2006).

86. Respondent's Brief on the Merits at 54, ECF No. 80.

87. *Powell*, 602 F.3d at 1273; *Borden*, 646 F.3d at 812–16.

holdings under § 2254(d). The State then argued for the propriety of the § 2254(d) analysis, and Freeman could have, but did not, address it.

II. The Eleventh Circuit did not err by addressing the propriety of de novo review as a threshold issue.

Freeman also contends that the circuit court erred by considering issues not contemplated by the COA. Here, however, the court correctly considered the procedural issue of whether de novo review was proper before turning to the merits issue.

The circuit court pointed to its 2001 decision in *McCoy v. United States*[88] to explain why it was addressing the threshold issue.[89] In that matter, a § 2255 appeal, the circuit court granted a COA on the issue of whether the district court correctly applied *In re Joshua*,[90] a case concerning *Apprendi v. New Jersey*'s[91] retroactivity, to dismiss a habeas petition. The government conceded in briefing that the district court had erred, but it argued that the petitioner's *Apprendi* claim was still barred by *Teague v. Lane*'s[92] rules concerning retroactivity and that the petitioner could not establish cause and prejudice for his default.[93] While these issues were not specifically contemplated in the COA, the circuit court decided to hear them, citing both its own case law and that of the Ninth Circuit:

> Although our review is limited to the issues specified in the COA, "we will construe the issue specification in light of the pleadings and other

88. 266 F.3d 1245 (11th Cir. 2001).
89. App'x A at 48a.
90. 224 F.3d 1281 (11th Cir. 2000).
91. 530 U.S. 466 (2000).
92. 489 U.S. 288 (1989).
93. *McCoy*, 266 F.3d at 1248.

> parts of the record." *Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998). The application of *Teague v. Lane* and of the cause and prejudice standard are procedural issues which must be resolved before this Court can reach the merits of McCoy's underlying *Apprendi* claim. Because these arguments have not been addressed by the district court, we read the COA to encompass these issues. *See, e.g.*, *Jones v. Smith,* 231 F.3d 1227, 1231 (9th Cir. 2000) ("Absent an explicit statement by the district court, in cases where a district court grants a COA with respect to the merits of a constitutional claim but the COA is silent with respect to procedural claims that must be resolved if the panel is to reach the merits, we will assume that the COA also encompasses any procedural claims that must be addressed on appeal.").[94]

The Eleventh and Ninth Circuits are not outliers in this reading of a COA.[95] Indeed, in discussing *Teague* retroactivity in *McCoy*, the court noted that "a district court's decision may be affirmed on grounds the district court did not address."[96] The circuit court ultimately affirmed the district court's dismissal on both grounds raised by the government,[97] and this Court denied certiorari.[98]

Freeman's case put the circuit court in a similar position. While the issue in the COA concerned the merits of trial counsel's penalty-phase performance,[99] to get to that point, the court first needed to consider the procedural matter of whether the district court's de novo review was proper under AEDPA. It did so, correcting the

94. *Id.* at 1248 n.2; *see, e.g.*, *Genge v. United States*, 279 F. App'x 897, 898 (11th Cir. 2008) ("Procedural issues that must be resolved before we can address the underlying claim specified in a COA are presumed to be encompassed within the COA. *McCoy v. United States,* 266 F.3d 1245, 1248 n.2 (11th Cir. 2001). *See also Wright v. Sec'y Dep't of Corr.,* 278 F.3d 1245, 1258 (11th Cir. 2002) (explaining that where a COA is granted with respect to the merits of a constitutional claim, we assume that the COA encompasses any threshold procedural issues that must be addressed before reaching the merits, even if the COA is silent with respect to those threshold issues).").
95. *See, e.g.*, *Panetti v. Stephens*, 727 F.3d 398, 408 n.68 (5th Cir. 2013) (citing unpublished Fifth Circuit decision quoting *Jones* and permitting circuit court to consider threshold procedural claim); *Becht v. United States*, 403 F.3d 541, 544–45 (8th Cir. 2005) (citing *McCoy* and reading confusing COA as authorizing appeal of two constitutional claims)
96. *McCoy*, 266 F.3d at 1254 (quoting *Spaziano v. Singletary*, 36 F.3d 1028, 1041 (11th Cir. 1994)).
97. *Id.* at 1258.
98. *McCoy v. United States*, 536 U.S. 906 (2002) (mem.).
99. App'x C at 74a.

error the district court made and considering only what it was allowed to consider under § 2254(d): the information before the state courts.

III. The circuit court correctly applied § 2254(d), as Freeman exhausted the claims at issue.

While Freeman claims that "the Eleventh Circuit decided a complex habeas issue without the benefit of briefing by the parties,"[100] the matter was far less complex than Freeman would have the Court believe. The circuit court did precisely what it was obligated to do by § 2254(d) when presented with a claim properly exhausted below and determined whether the state rulings were contrary to this Court's precedent or unreasonable in light of the facts "presented in the State court proceeding."[101]

To briefly reiterate the facts set forth above, Freeman poorly pleaded his penalty-phase ineffective assistance claims in his Rule 32 petition, his petition was denied after an evidentiary hearing, and CCA affirmed the denial, noting that Freeman should never have been granted a hearing because his pleading was so deficient.[102] Dismissal was therefore proper for failure to satisfy Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure,[103] which is a merits determination for AEDPA purposes. In habeas, Freeman raised the same penalty-phase ineffective assistance claims, insisting that he "ha[d] not fundamentally

100. Pet. 27.
101. 28 U.S.C. § 2254(d).
102. App'x J at 480a.
103. *Id.* at 480a, 489a–90a.

altered his legal claim in the petition submitted to" the district court,[104] but he then expanded those claims with pages of unsworn supporting facts produced by unidentified witnesses that he never gave to the state courts to consider.[105] As Freeman's legal claims were exhausted in state court, the Eleventh Circuit correctly reviewed them under the deferential § 2254(d) standard and determined that the state courts were not unreasonable for denying relief based on the paucity of Freeman's Rule 32 pleadings.

Freeman misconstrues *O'Sullivan v. Boerckel*,[106] arguing that the circuit court reached a decision without giving the state courts the first opportunity to consider his claims.[107] He is mistaken. Freeman raised the same claims in Rule 32 as he did in habeas, and the state courts had a fair opportunity to consider them. As the Court explained in *O'Sullivan*:

> Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.[108]

Freeman had a chance to present all of the factual allegations he believed supported his claims—he even had an evidentiary hearing despite his poor pleading. His failure to offer the state courts the pages of factual allegations he presented the district court does not turn into a violation of *O'Sullivan* or of the exhaustion doctrine. The state

104. Petitioner's Brief on the Merits at 121, ECF No. 64.
105. *See* App'x D at 261a.
106. 526 U.S. 838 (1999).
107. Pet. 30–31.
108. 526 U.S. at 845.

courts fairly considered the claims with which they were presented, and the Eleventh Circuit, applying § 2254(d), correctly found that the state courts' decisions on that basis were not unreasonable.

CONCLUSION

The Court should deny certiorari.

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