No. _____

In The Supreme Court of the United States

BRANDON WASHINGTON,

Petitioner,

v.

STEVE MARSHALL, ATTORNEY GENERAL OF THE STATE OF ALABAMA, JEFFERSON S. DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, AND CYNTHIA STEWART, WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. § 2254(d)(2), a state prisoner can obtain federal habeas relief only by showing that the state court's denial of his claim was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." To meet the "unreasonable determination" standard, must a state prisoner dispel "any potential justification" for the state court's factual finding, even where the state prisoner was unjustifiably denied an evidentiary hearing in state court and had no opportunity to develop the factual record?

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed.

RELATED PROCEEDINGS

Circuit Criminal Court of Jefferson County, Alabama:

State v. Brandon Washington, No. 01-CC-1757 (Mar. 30, 2012)

Alabama Court of Criminal Appeals:

Brandon Washington v. State, No. CR-05-1297 (Oct. 02, 2012)

Brandon Washington v. State, No. CR-16-0510 (Apr. 20, 2018)

Supreme Court of Alabama:

Ex parte Brandon Washington, No. 1071607 (Apr. 15, 2011)

United States District Court for the Northern District of Alabama:

Brandon Washington v. Steve Marshall, *Attorney General of the State of Alabama, et al.*, No. 2:18-cv-01091-ACA-GMB (Sep. 27, 2021)

United State Court of Appeals for the Eleventh Circuit:

Brandon Washington v. Attorney General of the State of Alabama, et al., No. 21-13756 (Nov. 08, 2023)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brandon Washington respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The panel opinion of the court of appeals granting rehearing (Pet. App. 1a–13a) is unreported but is available at 2023 WL 7391693. The vacated panel opinion of the court of appeals (Pet. App. 14a–35a) is reported at 75 F.4th 1164. The order of the district court denying the petition for a writ of habeas corpus (Pet. App. 36a–48a) is unreported but is available at 2021 WL 4409096. The order of the Supreme Court of Alabama denying Mr. Washington's petition for certiorari is unpublished but is available at 28 So.3d 426. The memorandum opinion of the Alabama Court of Criminal Appeals affirming the denial of postconviction relief (Pet. App. 73a–103a) and the order of the Circuit Court of Jefferson County, Alabama (Pet. App. 104a–119a) denying postconviction relief are unreported.

JURISDICTIONAL STATEMENT

The Eleventh Circuit Court of Appeals issued a published opinion granting Mr. Washington relief on July 23, 2023. On November 8, 2023, the panel granted the State's petition for rehearing, vacated and withdrew its previous opinion, and substituted an unpublished opinion denying Mr. Washington relief. On February 6, 2024, the panel denied Mr. Washington's petition for rehearing. On April 30, 2024, Justice Thomas extended the time to file a petition for a writ of certiorari until June

5, 2024. *Washington v. Marshall*, No. 23A970 (mem.). This petition is therefore timely and the jurisdiction of this Court is invoked under 22 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Title 28 U.S.C. § 2254 provides, in relevant part:

§2254. State custody; remedies in Federal courts

. . . .

(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.

INTRODUCTION

Brandon Washington is an Alabama prisoner serving a sentence of life without parole. He seeks relief from that sentence because his trial counsel provided ineffective assistance by failing to convey a favorable mid-trial plea offer of thirty years' imprisonment. Mr. Washington first learned of the thirty-year offer when the State referenced it in its response to his state postconviction petition. Following this revelation, Mr. Washington amended his petition and asserted a well-pleaded ineffective assistance of counsel claim pursuant to *Missouri v. Frye*, 566 U.S. 134 (2012).

Even though he met his burden of pleading under Alabama law, Mr. Washington never was afforded an evidentiary hearing on his claim, either in state or federal court. The Eleventh Circuit interpreted 28 U.S.C. § 2254(d)(2) to require federal courts to defer to state court factual findings for which there is "any potential justification," even when the state courts fail to afford a petitioner an opportunity to develop his claim at an evidentiary hearing. The court of appeals concluded "there is a potential justification" for the Alabama Court of Criminal Appeal's conclusion that Washington was told about the thirty-year offer, and found that therefore, his trial counsel's performance was not defective. Pet. App. 2a–3a.

The decision below conflicts with decisions from the Ninth and Tenth Circuits, which both hold that a state court's fact-finding process bears on whether its ultimate factual findings are reasonable under §2254(d)(2). This Court's intervention is needed to resolve the Circuit split and clarify the interpretation of this important federal statute. This case is an excellent vehicle to resolve this question because it illustrates how the Eleventh Circuit's "any potential justification" standard creates an impossible hurdle for habeas petitioners who have never had an opportunity to develop the underlying facts of their claims at an evidentiary hearing.

STATEMENT

A. Proceedings in State Court

1. State trial and direct appeal proceedings

This case began as a capital case. The State indicted Brandon Washington with one count of capital murder during a robbery in violation of Ala. Code § 13A-5-40(a)(2)

for killing Justin Campbell at a RadioShack where Mr. Campbell worked, and sought the death penalty against him. *Washington v. State*, 106 So.3d 423, 425 (Ala. Crim. App. 2007). At the time of his arrest, Mr. Washington was an 18-year-old freshman at Miles College. *Id.* at 439.

After a 2-day trial in January 2006, Mr. Washington was convicted of the charge, and the jury recommended a sentence of death by a vote of 11-1. *Id*. The trial court accepted the jury's recommendation, and formally sentenced Mr. Washington to death in March 2006. *Id.*

In January 2007, the Alabama Court of Criminal Appeals (hereinafter, the "ACCA") remanded Mr. Washington's case to the trial court, finding that it was plain error to sentence him without the benefit of a presentence investigation report. *Id.* at 432-33. At resentencing, the trial court again sentenced Mr. Washington to death. *Id.* at 436 (Ala. Crim. App. 2008). However, the Alabama Supreme Court overturned that sentence because the trial court plainly erred by admitting improper victim-impact testimony. *See Ex parte Washington*, 106 So. 3d 441, 447 (Ala. 2011).

At Mr. Washington's third sentencing hearing in March 2012, the State declined to seek a death sentence, and the trial court resentenced Mr. Washington to life without the possibility of parole. Pet. App. 4a.

2. State postconviction proceedings

In October 2013, Mr. Washington petitioned the state trial court for relief from his conviction pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, alleging ineffective assistance of trial counsel. The State moved to dismiss the

petition, arguing that trial counsel could not have been ineffective because the prosecutor was so impressed by trial counsel's performance that he extended a mid-trial offer of 30 years to Mr. Washington. Pet. App. 4a.[1]

Upon learning about the State's 30-year offer, Mr. Washington amended the Rule 32 petition, alleging that he was not informed of this offer, that he would have accepted the offer if he had known about it, and that trial counsel's failure to communicate this plea offer constituted ineffective assistance of counsel pursuant to *Missouri v. Frye*, 566 U.S. 134 (2012). *Id.* Mr. Washington requested an evidentiary hearing on this issue in his amended petition, and reiterated this request in several subsequent pleadings. Pet. App. 4a.

While Mr. Washington's amended Rule 32 petition was pending, he moved for leave to take a perpetuation deposition of his grandmother, Amanda Washington, because she was in poor health. Pet. App. 4a–5a.[2] In support of this request, Mr. Washington attached a sworn affidavit from Ms. Washington stating that she was present when trial counsel communicated a life offer to Mr. Washington, but that she never "heard of a plea offer for 30 years" that "Anthony [never] mention[ed] any plea offer other than for life in prison." Pet. App. 5a.

The trial court granted the motion to take the deposition unless the parties stipulated "for the Court to consider the content of [Amanda's] Affidavit as true."

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[1] The trial record includes evidence that Mr. Washington rejected a mid-trial offer of life with parole, but there is nothing in the record concerning an offer to a term of years. *Id.*

[2] Ms. Washington adopted Brandon when he was 13 years old after his mother abandoned him, 106 So.3d at 425. She hired attorney Emory Anthony to represent her grandson at his trial.

Id. Following the court's order, the parties agreed to this proposed stipulation and as a result, the deposition never took place. *Id.*

The court later ordered trial counsel Emory Anthony and Assistant District Attorney Mike Anderton to submit affidavits addressing whether the State extended a 30-year plea offer during trial. In response, Mr. Anderton attested that he extended an offer "that involved a number of years." *Id.* He stated that although he could not recall the exact number of years offered, the offer was "for a term of less than a life sentence." *Id.* Mr. Anthony submitted an affidavit stating that Mr. Anderton had extended an offer of 30 years and that he "talked with Brandon Washington and his Grandmother, [but] Brandon refused to accept the plea offer." Pet. App. 5a–6a.

Throughout this time period, Mr. Washington made multiple requests for an evidentiary hearing, but the state habeas court subsequently issued a ruling denying his claim without notifying Mr. Washington that it intended to resolve his petition by taking "evidence by affidavits, written interrogatories, or depositions, in lieu of an evidentiary hearing," as required by state law.[3] In its order denying relief, the court acknowledged that Ms. Washington's stipulated-as-true affidavit conflicted with Mr. Anthony's and Mr. Anderton's recollections, but held that Mr. Washington's claim of deficient performance must fail because "[r]egardless of whether this offer of 30 years was placed on the record, it is both Mr. Anderton's and Mr. Anthony's recollection,

[3] *See* Ala. R. Crim. P. 32.9(a). Alabama law provides that "when a petition contains matters which, if true, would entitle the petitioner to relief, an evidentiary hearing must be held." *Ex parte Hodges*, 147 So.3d 973, 976-77 (Ala. 2011). While Rule 32.9 of the Alabama Rules of Criminal Procedure permits a circuit court, "in its discretion . . . [to] take evidence by affidavits, written interrogatories, or depositions, in lieu ofan evidentiary hearing," the court must provide a petitioner of notice of its intent to do so. *See Yeomans v. State*, 195 So.3d 1018, 1051 (Ala. Crim. App. 2013).

that *any* offer of settlement for less than Life was communicated and rejected by the Defendant." Pet. App. 6a. The court further concluded that Mr. Washington had not met his burden of proving prejudice. Pet. App. 27a.

Mr. Washington appealed. On appeal, the question for the ACCA was whether Mr. Washington had satisfied his *burden of pleading* below and was therefore entitled to an opportunity to meet his *burden of proof* at an evidentiary hearing (or, at a minimum, a fair opportunity to supplement the record with additional affidavits and other paper evidence). In an unpublished opinion, the ACCA denied relief, holding that Mr. Washington failed to meet his burden of proof on the deficient performance prong of *Strickland*. The Court held that "[t]he affidavits of Mr. Anthony and Mr. Anderton, though contrary to Washington's assertion in his petition, constitute sufficient evidence on which the circuit court could have based its findings, i.e., that defense counsel did in fact communicate a 30-year plea deal to Washington that he rejected." Pet. App. 103a. To reconcile the State's stipulation to the truth of Amanda Washington's affidavit with the trial court's inconsistent finding, the ACCA suggested that Mr. Anthony may have communicated the 30-year offer to Mr. Washington outside of his grandmother's presence. The appellate court held:

> Ms. Washington's affidavit stated that she 'never heard Mr. Anthony mention any plea offer other than for life in prison' and that based on her relationship with Washington, she was 'confident' that he would have told her about any other plea offers. Thus, her testimony does not rule out the possibility that Washington may have chosen not to tell her about the offer."

Pet. App. 102a. Neither the State nor the trial court had made this argument during state postconviction proceedings below.

B. Proceedings in Federal Court

Mr. Washington next filed a habeas petition in the U.S. District Court for the Northern District of Alabama. The district court denied the petition, Pet. App. 36a-48a, but an Eleventh Circuit panel reversed and remanded for an evidentiary hearing in a published opinion. Pet. App. 14a–35a. However, several months later, the same panel granted the State's petition for rehearing, withdrew its previous opinion, and denied relief. Pet. App. 1a–13a. Mr. Washington unsuccessfully petitioned for rehearing.

1. Initial panel decision

The panel initially found that the state courts' factual findings as to both prejudice and deficient performance were unreasonable under 28 U.S.C. § 2254(d)(2). Pet. App. 27a–34a. The panel found that the state habeas court's conclusions regarding prejudice were unsupported by the record and were therefore unreasonable, particularly in light of the fact that the court "relied on its own assumption[s]" and reached its conclusions "without briefing or input from the parties[.]" Pet. App. 33a. As to deficient performance, the panel held that the state court's finding that the affidavits of Amanda Washington and Emory Anthony could be reconciled was also unreasonable because it was unsupported by the record. Pet. App. 34a. The panel noted that the State had stipulated to the truth of Amanda Washington's affidavit, in which she indicated that she was present when Mr.

Anthony conveyed a life offer to her grandson, but "never heard Mr. Anthony mention any plea offer other than for life in prison," and that Ms. Washington's affidavit was in direct conflict with Mr. Anthony's attestation that he "talked with Brandon Washington and his Grandmother" about the 30-year offer. Pet. App. 33a–34a.

The panel further acknowledged that "there is very little evidence" in the record about the 30-year offer. Pet. App. 34a. It noted that "Washington has repeatedly requested an evidentiary hearing, and in light of him clearing the AEDPA hurdle, he should be given an opportunity to present his evidence." Pet. App. 35a.

2. Revised panel decision

After the State sought rehearing, the panel vacated and withdrew its previous opinion and substituted a new opinion denying Mr. Washington relief. Pet. App. 1a–13a. In the new opinion, the panel addressed only the deficient performance prong of *Strickland*.

In its prior opinion, the panel held that "Anthony's affidavit clearly indicates that—if at all—he told Washington and Amanda *together* about the thirty-year plea offer." Pet. App. 33a. In its revised opinion, the panel contradicted its earlier finding and concluded that it was, in fact, also possible that "Anthony told Washington and Amanda *separately* about the plea offer[.]" Pet. App. 12a. The Court concluded that if Mr. Anthony's affidavit was interpreted in this way, then Amanda's affidavit, taken as true, "discounts Anthony's narrative [but] does not foreclose the possibility that the plea offer was still communicated to Washington without Amanda present." *Id.* Therefore, the panel concluded, Mr. Washington "failed to show that the ACCA's

conclusion that he received the thirty-year plea offer was unreasonable[.]" *Id.* at *5. The Court's opinion did not address the fact that Mr. Washington never received an evidentiary hearing on his claim—either in state or federal court.

REASON FOR GRANTING THE PETITION

When a federal court reviews a state court's factual determinations under 28 U.S.C. §2254(d)(2), it is presently unsettled whether, and how, the reasonableness of the state court's fact-finding procedures should inform the federal court's assessment. This Court's intervention is needed to resolve a circuit split and clarify this important question.

Following its published decision in *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1035 (11th Cir. 2022), the Eleventh Circuit held that §2254(d)(2) required deference to the state court's factual findings so long as there existed "any potential justification" for those findings. In applying this standard, the Eleventh Circuit ignored that the state courts failed to provide Mr. Washington the opportunity to prove his well-pleaded *Frye* claim at an evidentiary hearing or through an adequate substitute for one. In this regard, the lower court's opinion conflicts with decisions of the Ninth and Tenth Circuits, as well as precedent from this Court, which recognize that a state court's fact-finding procedures are relevant to a federal court's assessment of the reasonableness of its factual determinations. This Court should grant certiorari to resolve the split and clarify whether, and how, a state court's deficient fact-finding procedures should factor into a federal court's assessment of the reasonableness of its factual determinations pursuant to §2254(d)(2).

AEDPA requires federal courts to uphold state court factual determinations in all but the narrowest of circumstances. Pursuant to 28 U.S.C. §2254(d)(2), a federal court may not grant federal habeas relief on a claim that was adjudicated on the

merits in State court proceedings unless the adjudication of the claim "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." The stringent standard for federal habeas relief set forth in AEDPA "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (quoting *Jackson v. Virginia,* 443 U.S. 307, 332, n. 5, 99 (1979) (Stevens, J., concurring in judgment)). The standard "is difficult to meet" because "it was meant to be." *Id.* at 102. While AEDPA "stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings," it "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree" that the state court erred. *Id.*

With respect to subsection (d)(2), this means that a state court's determination of the facts is afforded a high degree of deference and is rarely found to be unreasonable. *See Miller-El v. Cockrell*, 537 U.S. 332, 340 (2003). Nevertheless, several federal circuits have acknowledged that there are circumstances when a state court's determination of the facts was unreasonable in light of deficiencies in its fact-finding procedures. Even so, the precise standard that applies to a § 2254(d)(2) claim involving an argument that a state court used unreasonable fact-finding procedures remains unresolved.

At least three federal circuits have recognized that, in some form, § 2254(d)(2) allows for challenges to a state court's fact-finding procedures. For instance,

recognizing that "the procedures a state court employs to make factual determinations… can affect the reasonableness of the court's subsequent factual determinations," the Tenth Circuit has held that "a state court's decision not to hold an evidentiary hearing only renders its factual findings unreasonable… if all 'reasonable minds' agree that the state court needed to hold a hearing in order to make those factual determinations." *Smith v. Aldridge*, 904 F.3d 874, 883 (10th. Cir. 2018) (quoting *Brumfield v. Cain*, 576 U.S. 305, 314 (2015)). In the Ninth Circuit,"[a] state court's decision not to hold an evidentiary hearing does not render its fact-finding process unreasonable so long as the state court could have reasonably concluded that the evidence already adduced was sufficient to resolve the factual question." *Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9th Cir. 2012). And, even though the panel below did not address Mr. Washington's argument that the state court employed unreasonable fact-finding procedures, the Eleventh Circuit has "not foreclose[d] the possibility that a state court's fact-finding procedure could be so deficient and wholly unreliable as to result in an unreasonable determination of facts under § 2254(d)(2)." *Landers v. Warden, Atty. Gen. of Ala.*, 776 F.3d 1288, 1297 (11th Cir. 2015).

On the other hand, the Fifth Circuit has rejected efforts to challenge the reasonableness of state court fact-finding procedures. In *Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001), it held that that "a full and fair hearing is not a precondition to… applying § 2254(d)'s standards of review" and declined to consider egregious deficiencies in the state court's fact-finding process. *Id.* at 951.

While this Court has not addressed this important question directly, its decision in *Brumfield v. Cain* suggests that the reasonableness of a state court's fact-finding procedures is intertwined with the ultimate reasonableness of its factual findings. 576 U.S. 305 (2015). In *Brumfield*, the Louisiana courts denied a death-sentenced petitioner's claim of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002) without an evidentiary hearing. *Id.* at 310. In Louisiana, a death-sentenced individual "needed only to raise a 'reasonable doubt' as to his intellectual disability to be entitled to an evidentiary hearing." *Id.* at 310. Relying on an IQ test that placed Brumfield slightly above the 70-point threshold for intellectual disability and a determination that he could not show adaptive deficits that had been made prior to *Atkins*,[4] the state court held that Brumfield was not entitled to an evidentiary hearing. *Id.* at 315–17.

This Court held that the state court's decision was unreasonable, pointing out that, in state court, the petitioner "was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much" in order to get a hearing. *Id.* at 320-22. Rather, he only needed to "raise a 'reasonable doubt' as to his intellectual disability" to be afforded the opportunity to prove his claim. *Id.* Put a different way, the Court found that Brumfield had satisfied his burden of pleading in state court and was therefore entitled to an opportunity to meet his

[4] Brumfield had been convicted and sentenced to death prior *Atkins* and therefore relied on evidence of intellectual disability that was already in the record in this case at the time *Atkins* was decided.

burden of proof—and that the state court's determination of the facts was unreasonable for failing to appreciate this distinction.

While *Brumfield* implicitly found that a state court's fact-finding procedures are relevant to a federal court's §2254(d)(2) analysis, it did not expressly articulate the standard that federal courts should use when a habeas applicant argues that a state court made an unreasonable factual determination because it used unreasonable fact-finding procedures.

It is important for this Court to provide clarity. Under §2254(d)(2), a federal court's review is based on "the evidence presented in the state court proceeding." However, without guidance from this Court, federal courts may continue to overlook glaring and unreasonable defects in state court procedures used to resolve issues of fact, which is precisely what happened here. In Mr. Washington's case, the Eleventh Circuit articulated an unattainable standard for federal habeas relief that required him to dispel "potential justifications" for the state court's factual findings even though he was never given an opportunity to do so. Review under § 2254(d)(2) is only meaningful if it authorizes relief in situations where unreasonable fact-finding procedures wrongly foreclosed a petitioner from developing the state court record.

"Comity and federalism are not served by deferring to a state finding where the fact-finding process itself was defective." Justin F. Marceau, *Deference and Doubt: The Interaction of AEDPA § 2254(d)(2) and (e)(1)*, 82 Tul. L. Rev. 385, 409–10 (2007). *See also Brown v. Allen*, 344 U.S. 443, 545 (1953) (Jackson, J., concurring) (criticizing federal habeas review generally, but agreeing that it is necessary for federal courts

to entertain habeas petitions in cases where the petitioner shows "that although the law allows a remedy, he was actually improperly obstructed from making a record upon which the question could be presented.").

CONCLUSION

For the foregoing reasons, Mr. Washington prays that this Court grant a writ of certiorari and reverse.

Respectfully submitted this, the 5th day of June, 2024.

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