No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

WILLIE R. BURGESS, JR.,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

_____

On Petition for Writ of Certiorari
to the Alabama Court of Criminal Appeals

_____

PETITION FOR WRIT OF CERTIORARI

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TY ALPER
Counsel of Record
ELISABETH A. SEMEL
UNIVERSITY OF CALIFORNIA,
BERKELEY SCHOOL OF LAW
DEATH PENALTY CLINIC
346 North Addition
Berkeley, CA 94720-7200
(510) 643-7849
talper@law.berkeley.edu
esemel@law.berkeley.edu

Counsel for Petitioner

CAPITAL CASE

QUESTION PRESENTED

In Alabama, the charge of capital murder requires an intent to kill. Petitioner Willie Burgess, Jr., was charged with shooting Louise Crow in the course of a store robbery in Decatur, Alabama. At trial, defense counsel conceded Mr. Burgess killed Mrs. Crow but argued that the gun fired unintentionally. The forensic firearms community was aware at the time that the Titan .25 semi-automatic pistol used in the shooting had a design defect making it prone to unintentional discharge. Yet counsel failed to present a firearms expert to explain the design defect to the jury. Counsel also failed to present other readily available expert testimony that would have directly supported their theory that the shooting was unintentional. Counsel repeatedly informed the trial court, on the record, that they were unprepared for trial, and they presented no evidence at the guilt phase. Mr. Burgess was convicted of capital murder and sentenced to death.

Alabama law requires an evidentiary hearing where a post-conviction petitioner alleges a facially meritorious claim. In state post-conviction proceedings, Mr. Burgess raised a claim under *Strickland v. Washington*, 466 U.S. 668 (1984), that his trial counsel had failed to present compelling, readily available expert testimony that would likely have raised a reasonable doubt as to his guilt on the charge of capital murder, thereby precluding his eligibility for the death penalty. With respect to the pistol's design defect, he specifically alleged 1) the substance of the expert testimony that should have been presented, 2) why that testimony would have mattered, 3) the fact that such testimony was available at the time of trial, and 4) the name of an expert who could have provided such testimony at his trial.

As the Alabama courts have done in more than half of all capital post-conviction cases over the last decade, the state courts denied Mr. Burgess's *Strickland* claim on the merits without giving him an opportunity to present evidence at a hearing. Instead, the Alabama courts held that even if accepted as true, Mr. Burgess's allegations would not warrant relief under *Strickland* because they were not specific enough.

The question presented is this:

> Under the extreme circumstances of this case, can a state court deny a *Strickland* claim on the merits without conducting an evidentiary hearing?

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *State v. Burgess*, No. CC-93-421 (Morgan Cnty. Cir. Ct.) (judgment entered on Aug. 24, 1994)
- *Burgess v. State*, No. CR-93-2054 (Ala. Crim. App.) (judgment entered on Nov. 20, 1998)
- *Ex parte Burgess*, No. 1980803 (Ala.) (judgment entered on Aug. 25, 2000)
- *Burgess v. Alabama*, No. 02-5374 (U.S.) (order denying certiorari issued on Oct. 21, 2002)
- *Burgess v. State*, No. CC-93-421.60 (Morgan Cnty. Cir. Ct.) (judgment entered on July 19, 2020)
- *Burgess v. State*, No. CR-19-1040 (Ala. Crim. App.) (judgment entered on June 23, 2023)
- *Burgess v. State*, No. SC-2024-0158 (Ala.) (order denying certiorari issued on Sept. 27, 2024)
- *Burgess v. Raybon*, No. 5:24-cv-01751-LCB (N.D. Ala) (pending federal habeas corpus proceedings)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Willie Burgess, Jr., respectfully petitions this Court for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The order of the Alabama Supreme Court denying Mr. Burgess's petition for a writ of certiorari is unpublished and is attached as Appendix A. Pet. App. 2a. The order of the Alabama Court of Criminal Appeals denying rehearing is unpublished and is attached as Appendix B. Pet. App. 4a. The opinion of the Alabama Court of Criminal Appeals affirming the denial of Mr. Burgess's petition for post-conviction relief is available on Westlaw, *see Burgess v. State*, No. CR-19-1040, 2023 WL 4146021 (Ala. Crim. App. June 23, 2023), and is attached as Appendix C. Pet. App. 6a–153a. The order of the Circuit Court of Morgan County, Alabama, denying Mr. Burgess's petition for post-conviction relief is unpublished and is attached as Appendix D. Pet. App. 155a–331a.

JURISDICTION

The Alabama Court of Criminal Appeals affirmed the denial of Mr. Burgess's post-conviction petition on June 23, 2023. Pet. App. 6a–153a. The court denied Mr. Burgess's timely application for rehearing, Pet. App. 4a, and the Alabama Supreme Court denied certiorari on September 27, 2024, Pet. App. 2a. This Court granted Mr. Burgess an extension of time within which to file a petition for writ of certiorari. *See Burgess v. Alabama*, No. 24A523 (Dec. 2, 2024). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Willie Burgess, Jr., has been on Death Row in Alabama since 1994. He was convicted of capital murder for fatally shooting Louise Crow during the course of a robbery of her store when he was eighteen years old. TC. 44, 49.[1]

A. Trial and Sentence

Immediately following his arrest, Mr. Burgess admitted to shooting Mrs. Crow in the small commode area of the store but maintained the shooting was unintentional. *See, e.g.*, TC. 13–15; R. 1141, 1148–49, 1409, 1412–14. Specifically, in pretrial statements entered into evidence at trial, Mr. Burgess stated that the Titan .25 pistol he used in the robbery discharged even though he had not pulled the trigger: "I'm sorry that I did what I did but I didn't mean to shoot the lady. . . . [W]hen she hit the gun, the gun went off . . . . And a .25 is known for going off without your hand being on it." State's Exhibit 101 (videotaped statement); *see also* State's Exhibit 2, TC. 15, (signed statement) ("I turned my head but my gun was still pointed at her and she hit my hand. The gun went off . . . .").

As the trial approached, Mr. Burgess's lawyers repeatedly informed the trial court they were unprepared for both phases of the trial. Three weeks before the trial began, counsel sought a continuance, representing that they could not "properly prepare the case for trial" because one was in the middle of a judicial campaign while the other was in the process of moving offices. TC. 160. The court denied the continuance. On the day trial was set to begin, one of Mr. Burgess's

[1] "TC." refers to the clerk's record of Mr. Burgess's trial. "R." refers to the reporter's trial transcript. "C." refers to the clerk's record of the Rule 32 proceedings.

lawyers again pleaded for a continuance, stating that, in his twenty years of practice, he did not "ever remember asking for a continuance in a criminal case because [he] wasn't prepared, but in this case, it's just, it's been impossible." R. 28–29. The guilt phase of the trial nevertheless began that same day. R. 41.

At trial, because there was no dispute that Mr. Burgess shot the victim, the central question for the jury was whether he did so intentionally. Defense counsel told the jury in closing argument: "My client is guilty of murder. I tell you that now with no hesitation, but he is not guilty of capital murder." R. 1547. Under Alabama law, Mr. Burgess would be ineligible for the death penalty if the prosecution could not prove beyond a reasonable doubt that he intentionally fired the pistol that killed Mrs. Crow. *See* Section 13A-5-40(a), Ala. Code 1975; *Phillips v. State*, 287 So. 3d 1063, 1087 (Ala. Crim. App. 2015) ("[T]he term 'murder' as that term is used in the capital-murder statute means 'intentional murder' as defined by § 13A-6-2(a)(1), Ala. Code 1975.").

The prosecution sought to prove the killing was intentional by asserting that Mr. Burgess shot Mrs. Crow "between the eyes at point blank range," R. 777, 1579, and that Mrs. Crow was seated on the toilet in the commode area when she was shot. R. 1567, 1570–72. The prosecutor argued in closing that "there's not a way in the world that that woman knocked that gun off." R. 1572–73.

Counsel presented no evidence to support the defense that the killing was unintentional. R. 1488. Instead, counsel argued that the shooting was unintentional because Mr. Burgess said so in his pretrial statements. R. 1547–49,

1562–63. They insisted that his statements were credible because, at the time he was questioned, Mr. Burgess did not know that intent to kill was an element of capital murder. R. 1561–63. This fact was not in evidence, however, as Mr. Burgess did not testify. This sole argument, based on a fact not in evidence, represented the full extent of trial counsel's efforts to raise a reasonable doubt about whether the shooting was intentional.

During the jury's deliberations, a juror asked the court for the aid of a firearms expert to provide additional testimony because one juror had "no knowledge of firearms whatsoever." R. 1635. The court responded that there would be no additional testimony, R. 1635–36, and the jury subsequently convicted Mr. Burgess of capital murder. R. 1640–41, 1643.

Following a brief penalty phase trial the next morning, the jury returned an 11-1 verdict for death, TC. 210, and the court sentenced him to death. TC. 51–52.

B. Relevant State Post-Conviction Proceedings

In post-conviction proceedings, Mr. Burgess raised a claim alleging that his trial counsel provided ineffective assistance of counsel in violation of *Strickland v. Washington*, 466 U.S. 668, 692 (1984). *See, e.g.*, C. 743–983. Specifically, as it related to the Titan .25 pistol, Mr. Burgess alleged that his trial counsel had performed deficiently by failing to seek readily available expert assistance that would have supported the defense of unintentional shooting. C. 745–91. Mr. Burgess alleged that, had counsel consulted with and presented the testimony of a firearms expert, there is a reasonable probability that at least one juror would

have had a reasonable doubt as to Mr. Burgess's guilt on the charge of capital murder. C. 759–61. Mr. Burgess also alleged that his counsel failed to present other readily available expert testimony that would have directly supported their defense theory that the shooting was unintentional. C. 761–91.

Mr. Burgess both amended and attempted to amend his petition over the next several years. *See, e.g.*, C. 720–26; C. 736–1037; C. 1294–1305. In 2017, in response to Mr. Burgess's detailed allegations regarding trial counsel's failure to consult with experts, C. 759–75, the State alleged that the petition was not specific enough because it did not include the names of such experts. *See, e.g.*, C. 1076, 1078–79, 1081, 1085. In response, Mr. Burgess moved to amend to provide the names of experts and provided the names in his proffered amendment. C. 1294–1305.

As relevant to the claim that counsel performed deficiently with respect to the defense of unintentional killing, Mr. Burgess alleged that it was common for capital defense counsel in Alabama at the time of Mr. Burgess's trial to consult with firearms experts. C. 1300 ("In 1993-94, firearms experts were regularly consulted and retained by defense counsel in capital cases.") (citing *Alabama Capital Trial Manual* (2d ed. 1992) at 84). His proffered amendment named an expert, Kelly Fite, and alleged that had counsel consulted with an expert "such as" Mr. Fite, they "would have learned that the weapon with which Mrs. Crow was shot, a Titan .25 caliber semi-automatic pistol, had a design defect that made it prone to unintentional discharge." C. 1300.

Finally, Mr. Burgess outlined with specificity the facts to which a qualified firearms expert such as Mr. Fite would have been able to testify at Mr. Burgess's trial:

> 1) [State's] Exhibit 72 [the Titan .25 used in the crime] has the potential for accidental discharge due to the fact that it was manufactured with a defective firing pin by reason of its design.
>
> 2) The defective firing pin would have been detected by a qualified firearms expert during a properly conducted inspection of State's Exhibit 72.
>
> 3) The defect is such that if the hammer is not cocked, the nose end of the firing pin protrudes through the breech face.
>
> 4) As a result of this defect, if an object strikes the hammer with sufficient force when it is in the uncocked position and the safety is not engaged, there is a high probability that the pistol will discharge unintentionally even if the trigger is not pulled.

C. 759–60.

Mr. Burgess also alleged prejudice: "The expert testimony that the jurors sought but counsel failed to present would have explained to the jury that the specific design defect in the Titan .25 semi-automatic is such that unintentional discharges are highly likely when the hammer is bumped. Had this testimony been presented to the jury, there is a reasonable probability that it would have raised a reasonable doubt as to whether the shooting was intentional. Thus, had counsel conducted an adequate investigation, there is a reasonable probability that Mr. Burgess would not have been convicted of capital murder." C. 761.

The state trial court refused to allow Mr. Burgess to amend his petition to add the names of the multiple experts he alleged counsel should have called.

C. 1292. The court then summarily denied all Mr. Burgess's ineffectiveness claims on the merits, including the one alleging failure to call a firearms expert. C. 1361–62. The court concluded that Mr. Burgess had not pleaded his *Strickland* claim with sufficient detail to warrant an opportunity to present evidence at an evidentiary hearing. C. 1361–62.

On appeal, the state appellate court reviewed Mr. Burgess's extensive allegations regarding counsel's ineffective investigation of the crime and concluded that dismissal of those claims was proper on the merits even though the trial court had not conducted an evidentiary hearing. *Burgess v. State*, No. CR-19-1040, 2023 WL 4146021, at *10 (Ala. Crim. App. June 23, 2023).[2] The Alabama Court of Criminal Appeals held that "even with the facts as alleged in the proposed amendment," the claims in Mr. Burgess's petition were not sufficient to warrant a hearing because Mr. Burgess did not specifically allege that the specific experts he named should have been called at trial. *Id.* at *6.[3] For this reason, the court held that "any error in the circuit court's refusal to grant Burgess leave to amend his

[2] The Eleventh Circuit has consistenly held that summary denials for failure to sufficiently state a claim under *Strickland* constitute merits rulings. *See, e.g.*, *Borden v. Allen*, 646 F.3d 785, 808 (11th Cir. 2011) ("[T]he state court summary dismissals of Borden's constitutional claims . . . were adjudications on the merits.").

[3] As explained above, Mr. Burgess's amendment alleged that "[h]ad trial counsel performed an adequate investigation of the physical evidence by consulting a firearms expert, such as Kelly Fite, with whom post-conviction counsel consulted in preparation of this petition, and obtaining access to the firearm for independent testing and analysis, trial counsel would have learned that the weapon with which Mrs. Crow was shot, a Titan .25 caliber semi-automatic pistol, had a design defect that made it prone to unintentional discharge. . . . A qualified firearms expert would have testified to the following reasonably available facts in support of the defense that the killing was unintentional . . . ." C. 1300.

petition was harmless." *Id.* at *7. The Alabama Supreme Court denied certiorari. Pet. App. 2a.

REASONS FOR GRANTING THE WRIT

This Court has long held that a petitioner who proves 1) his counsel performed deficiently and 2) their deficient performance resulted in prejudice has established a Sixth Amendment violation that requires a new trial. *Strickland*, 466 U.S. at 687.

States take different approaches to the mechanisms they provide for post-conviction petitioners to vindicate their federal rights under the Sixth Amendment. In some states, such as Georgia, all capital post-conviction petitioners receive evidentiary hearings by law. *See* Ga. Code § 9-14-47 (2022); Ga. R. Super. Ct. 44.9. In other states, courts grant evidentiary hearings only if a specific pleading standard is met. Alabama is one of these states; its courts purport to grant a hearing only where petitioner pleads a facially meritorious claim. However, over the last ten years, in well over half of all death penalty cases, Alabama courts ruled against capital post-conviction petitioners, on the merits, without taking any evidence at all. Appendix E. Pet. App. 333a–35a.

This is an extreme case that starkly demonstrates the trend in Alabama. Here, the Alabama courts have subverted the federal rights of a capital petitioner by preventing him from presenting evidence—even where his allegations, taken as true, unequivocally establish the elements of a *Strickland* violation. By denying the claim on the merits without taking evidence, Alabama has thwarted Mr. Burgess's ability to vindicate his Sixth Amendment rights. As a result, Alabama has provided him no meaningful opportunity to win relief under *Strickland*, even in a case where

he has pleaded a facially meritorious claim of ineffectiveness. This Court should grant certiorari, summarily reverse the judgment below, and remand for an evidentiary hearing.

I. The ineffective assistance of counsel claim in this case mirrors the claim in *Hinton v. Alabama*, where an evidentiary hearing was held and this Court determined that counsel performed deficiently.

"[A] criminal defendant's Sixth Amendment right to counsel is violated if his trial attorney's performance falls below an objective standard of reasonableness and if there is a reasonable probability that the result of the trial would have been different absent the deficient act or omission." *Hinton v. Alabama*, 571 U.S. 263, 264 (2014) (citing *Strickland*, 466 U.S. at 687–88). The deficient-performance inquiry turns on whether counsel's acts and omissions were unreasonable "under prevailing professional norms." *Strickland*, 466 U.S. at 688. As for prejudice, the standard is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Hinton illustrates well how this Court applies *Strickland* in the context of a claim very similar to the one Mr. Burgess raised. Like Mr. Burgess's case, *Hinton* was an Alabama case "'where the only reasonable and available defense strategy require[d] consultation with experts or introduction of expert evidence.'" 71 U.S. at 273 (quoting *Harrington v. Richter*, 562 U.S. 86, 106 (2011)). As in Mr. Burgess's case, the petitioner in *Hinton* alleged that 1) his counsel's failure to call a qualified expert to rebut the prosecution case and/or support the defense theory fell below the

norms of the profession at the time of trial and 2) but for that failure, there is a reasonable probability that the result of the trial would have been different. 71 U.S. at 270. In *Hinton*, at issue was "firearms and toolmark" evidence that allegedly linked a firearm in the defendant's house to the bullets found at the various crime scenes. *Id*. at 266. Mistakenly believing Alabama law limited the available funds to retain an expert to $1000, trial counsel hired a "badly discredited" expert to rebut the prosecution's forensic experts. *Id.* at 269. Hinton was convicted and sentenced to death. *Id.*

In state post-conviction proceedings, Hinton raised an ineffectiveness claim—as Mr. Burgess did in the instant case—related to his counsel's failure to secure expert assistance that would likely have raised a reasonable doubt in the guilt phase of the trial. *Id.* at 270. Specifically, Hinton alleged his trial counsel was ineffective for not seeking additional funds to hire an expert when counsel was aware the expert he hired was "incompetent and unqualified." *Id.* In Alabama, as in other jurisdictions, "an evidentiary hearing must be held" when a petitioner files a post-conviction petition "which is meritorious on its face, *i.e.*, one which contains matters and allegations (such as ineffective assistance of counsel) which, if true, entitle the petitioner to relief." *Ex parte Boatwright*, 471 So. 2d 1257, 1258 (Ala. 1985).[4] Having sufficiently pleaded such a claim, the court granted Hinton a post-

[4] Other jurisdictions employ similar standards. *See, e.g.*, *Barnes v. State*, 124 So. 3d 904, 911 (Fla. 2013) ("An evidentiary hearing must be held on an initial [motion for post-conviction relief] whenever the movant makes a facially sufficient claim that requires factual determination."); *State v. Anderson*, 547 P.3d 345, 353 (Ariz. 2024) ("In [post-conviction] proceedings, a defendant states a colorable claim entitling him to an evidentiary hearing when he has alleged facts which, if true,

conviction evidentiary hearing at which he presented credible expert firearms testimony that effectively rebutted the State's trial evidence. *Hinton*, 571 U.S. at 270. When the Alabama courts denied relief on the merits, Hinton sought certiorari.

This Court reversed. The Court held that Hinton had successfully established that his trial lawyer's "failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance." *Id.* at 274. As for prejudice, the Court explained that "if there is a reasonable probability that Hinton's attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton's guilt had the attorney known that the statutory funding limit had been lifted, then Hinton was prejudiced by his lawyer's deficient performance and is entitled to a new trial." *Id.* at 276. Because no court had yet evaluated this question "by applying the proper inquiry to the facts of this case," this Court remanded for the state courts to determine prejudice in the first instance. *Id.*

Mr. Burgess made allegations similar to the allegations in *Hinton*, a case in which relief was granted, yet he was not even afforded a hearing before the

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would probably have changed the verdict or sentence.") (internal quotations and original emphasis omitted); *Flubacher v. State*, 414 P.3d 161, 165 (Haw. 2018) ("[A] trial court should hold an evidentiary hearing on a . . . petition for post-conviction relief if the petition states a colorable claim for relief . . . alleg[ing] facts that, if taken as true, would change the verdict."); *Wilson v. State*, 726 N.W.2d 103, 107 (Minn. 2007) (noting that a postconviction court must hold an evidentiary hearing if the petitioner alleges facts that, if proven, would entitle him to the requested relief); *State v. Romero-Georgana*, 849 N.W.2d 668, 677 (Wis. 2014) (noting that the circuit court must hold an evidentiary hearing on a motion for post-conviction relief where the movant alleges sufficient facts that entitle the movant to relief).

Alabama courts denied his claim on the merits. Indeed, the facts here are even more egregious. In *Hinton*, trial counsel hired an inadequate expert based on an unreasonably mistaken understanding of the law providing for expert funding assistance. *Id.* at 274. Mr. Burgess's counsel hired no expert and presented no evidence in support of their defense theory. Despite specifically pleading allegations that, if true, would warrant relief under *Strickland*, Mr. Burgess was denied a hearing. The denial of an evidentiary hearing cannot be reconciled with this Court's *Strickland* caselaw.

II. Taken as true, Mr. Burgess's factual allegations unequivocally establish both prongs of *Strickland*, yet the Alabama courts denied his claim on the merits without allowing him to present evidence.

"If a state collateral proceeding is open to a claim controlled by federal law, the state court 'has a duty to grant the relief that federal law requires.'" *Montgomery v. Louisiana*, 577 U.S. 190, 204-05 (2016) (quoting *Yates v. Aiken*, 484 U.S. 211, 218 (1988)); *see also Haywood v. Drown*, 556 U.S. 729, 736 (2009) ("[A]lthough States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies."). In the *Strickland* context, this means that state courts cannot deprive a petitioner of an opportunity to prevail on an ineffectiveness claim if he alleges the elements necessary to establish a constitutional violation. A petitioner who does so is entitled to either a hearing at which he can attempt to prove his allegations, or a ruling in his favor as a matter of law if the facts alleged are assumed to be true. A court violates *Strickland* if it

provides a mechanism for review but then denies a facially meritorious claim, on the merits, without an evidentiary hearing.

Padilla v. Kentucky is instructive. 559 U.S. 356 (2010). There, a state post-conviction petitioner alleged that his trial counsel had failed to inform him that his guilty plea may result in his deportation. *Id.* at 359. The Kentucky Supreme Court denied the claim without affording Padilla an evidentiary hearing, holding that he had not established a *Strickland* violation as a matter of law. *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008). This Court granted certiorari and, assuming the facts Padilla alleged were true, went on to determine he had successfully alleged that his trial counsel had performed deficiently. *Padilla*, 559 U.S. at 369 ("Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*."); *id.* at 374 ("Taking as true the basis for his motion for postconviction relief, we have little difficulty concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient."). Because no court had yet evaluated Padilla's claim under the second *Strickland* prong, the Court, as in *Hinton*, remanded to the state courts to assess prejudice. *Id.* at 369 ("Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy *Strickland*'s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.").

Here, Mr. Burgess availed himself of the post-conviction process that Alabama has established, and he pleaded a *Strickland* claim in great detail. His allegations demonstrated that the central contested factual question at trial was

whether he fired the pistol at Mrs. Crow unintentionally and, consequently, whether he was eligible for the death penalty. His allegations demonstrated that his lawyers, by their own on-the-record admissions, were unprepared for trial. His allegations demonstrated that his lawyers had failed to consult with any forensic experts of any kind. His allegations demonstrated that, while his lawyers argued to the jury that the shooting was unintentional, they presented no evidence whatsoever in support of that theory—and had no strategic reason for their failure. His allegations demonstrated that firearms experts, such as the one named in Mr. Burgess's petition, were available to testify in Alabama at the time of his trial. And, finally, his allegations demonstrated that it was well known within the forensic firearms community at the time that the pistol Mr. Burgess used had a design defect that caused unintentional discharges, consistent with Mr. Burgess's account and his lawyers' defense theory. C. 745–91.

Taken as true, the allegations demonstrated that Mr. Burgess's lawyers performed deficiently and that, but for their deficient performance, there is a reasonable probability that the result of the trial would have been different. *See, e.g.*, *Rompilla v. Beard*, 545 U.S 374, 390, 393 (2005) (finding both deficient performance and prejudice where trial counsel failed to conduct a reasonable investigation); *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (finding both deficient performance and prejudice where trial counsel, "not because of any strategic calculation," failed to conduct a reasonable investigation). Especially in a case where jurors informed the court they had a question about the firearms evidence,

had the jury learned from a qualified expert that the pistol used in the robbery was prone to unintentional discharge when hit or bumped, there is a reasonable probability that at least one juror would have found a reasonable doubt as to whether the State had proved the elements of capital murder. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 513 (2003) (finding prejudice under *Strickland* where "there is a reasonable probability that at least one juror would have struck a different balance" but for counsel's deficient performance); *Silva v. Woodford*, 279 F.3d 825, 849–50 (9th Cir. 2002) (explaining that court's finding of *Strickland* prejudice was "bolstered" by two jury questions, which "suggest that death . . . was not a forgone conclusion").

In short, *Strickland* and its progeny require petitioners to prove nothing more than what Mr. Burgess alleged. Having alleged facts that, if true, warrant relief under *Strickland*, Mr. Burgess was entitled to an opportunity to prove his allegations at an adversarial hearing. In denying him this opportunity, the Alabama courts continued a trend over the past decade in post-conviction capital cases, where even petitioners who plead a facially meritorious federal claim are denied on the merits with no opportunity to present evidence. The extreme application of this phenomenon calls for this Court's intervention.

III. This Court should intervene to clarify that where petitioners allege facts that, if true, would warrant relief under *Strickland*, they must be afforded the opportunity to attempt to prove their allegations.

This Court proclaimed in *Padilla*, "It is our responsibility under the Constitution to ensure that no criminal defendant . . . is left to the 'mercies of

incompetent counsel.'" *Padilla*, 559 U.S. at 374 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Mr. Burgess asks the Court to clarify that where a state court creates a process for vindication of his Sixth Amendment right to counsel, it must not subvert the federal claim by precluding the ability to prove it. This Court should intervene to ensure that Mr. Burgess is not executed in violation of the Constitution where the state court refused to hold a hearing on his *Strickland* claim.

There is no uniform approach to the standards governing post-conviction practice in the state courts, nor need there be. In Georgia, for example, all capital post-conviction petitioners are entitled, by law, to an opportunity to prove their claims at an evidentiary hearing. Ga. Code § 9-14-47 (2022); Ga. R. Super. Ct. 44.9. In other states, such as Alabama, petitioners must sufficiently allege a facially meritorious claim in order to proceed to an evidentiary hearing. *See Ex parte Boatwright*, 471 So.2d at 1258. In jurisdictions where petitioners must make a preliminary showing that the claim is facially meritorious, there is no dispute that summary dismissal may be appropriate in some cases, even capital cases. But a troubling pattern has emerged in Alabama. Despite purporting to grant evidentiary hearings to capital post-conviction petitioners who allege facially meritorious claims, Alabama state courts have summarily denied well over half of all capital post-conviction cases over the last ten years. A review of these cases, detailed in Appendix E, reveals that of all the post-conviction denials in capital cases in

Alabama since 2015, at least 62% were denied on the merits without the benefit of an evidentiary hearing. *See* Pet. App. 333a–35a.

In this case, the summary dismissal is a bridge too far. Mr. Burgess made allegations similar to the allegations in *Hinton*, a case in which relief was granted, yet Mr. Burgess did not even get a hearing. Assumed to be true as *Padilla* instructs, the allegations Mr. Burgess pleaded warrant relief under *Strickland*. This Court should grant him the opportunity to present evidence in support of his claim.

This case is well suited for certiorari as it is a merits ruling that comes to the Court on review from the state post-conviction courts and does not present any of the complications that arise in the context of federal habeas corpus. This Court has not hesitated to review state post-conviction cases in which the state courts failed to conduct a proper analysis of a constitutional claim. *See, e.g.*, *Cruz v. Arizona*, 598 U.S. 17, 32 (2023) (vacating the Arizona Supreme Court's post-conviction ruling "that abruptly departed from and directly conflicted with" the state court's prior rulings); *Andrus v. Texas*, 590 U.S. 806, 808 (2020) (vacating the post-conviction judgment of the Texas Court of Criminal Appeals and remanding for the state court "properly to engage" with *Strickland*'s prejudice prong); *Flowers v. Mississippi*, 588 U.S. 284, 288 (2019) (applying *Batson v. Kentucky*, 476 U.S. 79 (1986), to the "extraordinary facts of this case," and reversing the post-conviction judgment of the Mississippi Supreme Court); *Sears v. Upton*, 561 U.S. 945, 946 (2010) (holding that the Georgia Supreme Court, on post-conviction review, failed to correctly apply

Strickland's prejudice prong); *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (holding that the Louisiana Supreme Court's post-conviction denial of relief on the petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), ran contrary to settled law); *Moore v. Texas*, 581 U.S. 1, 5 (2017) (vacating the Texas Court of Criminal Appeals's post-conviction ruling denying relief on petitioner's intellectual disability claim for failing to align with Texas's stated law). This case, like those, warrants this Court's intervention.

CONCLUSION

This Court should grant certiorari, summarily vacate the judgment of the Alabama Court of Criminal Appeals, and remand the case for an evidentiary hearing, as is consistent with this Court's Sixth Amendment case law.

Respectfully submitted,

/s/ Ty Alper
TY ALPER
Counsel of Record
ELISABETH A. SEMEL
UNIVERSITY OF CALIFORNIA,
BERKELEY SCHOOL OF LAW
DEATH PENALTY CLINIC
346 North Addition
Berkeley, CA 94720-7200
(510) 643-7849
talper@law.berkeley.edu

Counsel for Petitioner

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