

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

ELLIS MASHBURN, JR.,
Petitioner,

v.

JOHN HAMM,
Commissioner,
Alabama Department of Corrections,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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February 9, 2024

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CAPITAL CASE

QUESTION PRESENTED

On advice of counsel, Mr. Mashburn pleaded guilty to five counts of capital murder for killing his grandmother and her husband, a tragic crime for which Mr. Mashburn has never denied responsibility. The only question in this case has always been whether Mr. Mashburn should receive the death penalty. At trial, counsel cobbled together a last minute slate of witnesses, including two experts hired a month before trial, and failed to present compelling mitigating evidence of untreated mental illness and Mr. Mashburn's state of mind at the time of the offense. Although lower courts agreed that counsel had performed deficiently, the Eleventh Circuit affirmed the summary dismissal of Mr. Mashburn's habeas corpus petition, finding that Mr. Mashburn failed to show that he was prejudiced by trial counsel's deficient performance.

This Court has held that with respect to the "prejudice" prong of a Sixth Amendment ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984), a "probing and fact-specific analysis" of both evidence adduced at trial and in the habeas proceeding "applies . . . regardless of how much or how little mitigation evidence was presented during the initial penalty phase." *Sears v. Upton*, 516 U.S. 945, 955–56 (2010) (per curiam).

The question presented here is:

Whether, under *Strickland v. Washington*, a death row inmate is precluded from establishing prejudice from his trial counsel's deficient performance during the penalty phase if his counsel did present some mitigating evidence at his capital trial?

RELATED PROCEEDINGS

State v. Mashburn, Calhoun County Circuit Court, No. CC-2003-413. After pleading guilty, convicted September 19, 2006; sentenced January 8, 2007.

Mashburn v. State, Alabama Court of Criminal Appeals, No. CR-06-0328. Opinion remanding the case issued November 2, 2007; opinion on return to remand issued April 25, 2008; rehearing denied June 13, 2008.

Ex parte Mashburn, Alabama Supreme Court, No. 1071307. Petition for writ of certiorari denied October 24, 2008.

Mashburn v. Alabama, United States Supreme Court, No. 08-8957. Petition for writ of certiorari denied June 1, 2009.

Mashburn v. State, Calhoun County Circuit Court, No. CC-2003-413.60. Petition for postconviction relief pursuant to Ala. R. Crim. P. 32 dismissed April 1, 2010.

Mashburn v. State, Calhoun County Circuit Court, No. CC-2003-413.61. Order granting out of time appeal issued October 12, 2011.

Mashburn v. State, Alabama Court of Criminal Appeals, No. CR-11-0321. Opinion issued July 12, 2013; rehearing denied September 27, 2013.

Ex parte Mashburn, Alabama Supreme Court, No. 1121548. Petition for writ of certiorari denied February 21, 2014.

Mashburn v. Thomas, United States District Court for the Northern District of Alabama, No. 1:14-cv-01829-LSC. Habeas petition dismissed January 20, 2015.

Mashburn v. Commissioner, Alabama Department of Corrections, United States Court of Appeals for the Eleventh Circuit, No. 15-11408. Opinion reversing habeas petition dismissal issued October 26, 2017.

Mashburn v. Dunn, United States District Court for the Northern District of Alabama, No. 1:14-cv-01829-LSC. Habeas petition dismissed March 31, 2021.

Mashburn v. Commissioner, Alabama Department of Corrections, United States Court of Appeals for the Eleventh Circuit, No. 22-10329. Opinion issued September 5, 2023; panel rehearing denied October 12, 2023.

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OPINIONS BELOW

The order of the United States District Court for the Northern District of Alabama dismissing Mr. Mashburn's habeas petition is unreported and is attached as Appendix A. The district court's contemporaneously issued memorandum of opinion, *Mashburn v. Dunn*, No. 1:14-cv-01829-LSC, 2021 WL 1208868 (N.D. Ala. Mar. 31, 2021), is attached as Appendix B. The district court's order denying Mr. Mashburn's motion to alter or amend judgment is unreported and is attached as Appendix C. The opinion of the United States Court of Appeals for the Eleventh Circuit affirming the dismissal of Mr. Mashburn's habeas petition, *Mashburn v. Commissioner, Alabama Department of Corrections*, 80 F.4th 1292 (11th Cir. 2023), is attached as Appendix D. The order of the United States Court of Appeals for the Eleventh Circuit denying Mr. Mashburn's motion for panel rehearing is unreported and is attached as Appendix E.

STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Alabama dismissed Mr. Mashburn's habeas petition on March 31, 2021, *Mashburn v. Dunn*, No. 1:14-cv-01829-LSC, 2021 WL 1208868 (N.D. Ala. Mar. 31, 2021), and

denied his motion to alter or amend the district court's judgment on January 4, 2022, Order Denying Rule 59(e) Motion, *Mashburn v. Dunn*, No. 1:14-cv-01829-LSC (N.D. Ala. Jan. 4, 2022). The United States Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal of Mr. Mashburn's habeas petition on September 5, 2023, *Mashburn v. Commissioner, Alabama Department of Corrections*, 80 F.4th 1292 (11th Cir. 2023), and subsequently denied his motion for panel rehearing on October 12, 2023, Order, *Mashburn v. Commissioner*, No. 22-10329 (11th Cir. Oct. 12, 2023). This Court granted Mr. Mashburn's application to extend the time to file a petition for writ of certiorari on December 27, 2023, extending the time to file to February 9, 2024. *Mashburn v. Hamm*, No. 23A583 (Dec. 27, 2023). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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

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

STATEMENT OF THE CASE

Mr. Mashburn is one of the very few individuals on death row in this country whose lawyers advised him to enter a guilty plea to capital murder in open court without any plea deal in place for a sentence less than death. (Doc. 24 at 5 ¶ 2.)¹ In such a situation, counsel obviously should have invested a reasonable amount of time and effort into preparing for the presentation of mitigating evidence, but counsel repeatedly failed to complete basic tasks required to prepare for the penalty phase. That meant the jury did not hear evidence that Mr. Mashburn's state of mind at the time of the offense was altered by methamphetamine intoxication and lack of sleep and that this was related to his struggle with untreated bipolar disorder.

¹ Citations are to the ECF document number as filed in the district court below. *Mashburn v. Dunn*, No. 1:14-cv-01829-LSC, 2021 WL 1208868 (N.D. Ala. Mar. 31, 2021)

A. Statement of Facts Establishing Deficient Performance of Trial Counsel.

On September 13, 2006, Ellis Mashburn pleaded guilty to five counts of capital murder related to the deaths of his grandmother, Clara Eva Birmingham, and his step-grandfather, Henry Owen Birmingham, Jr. (Doc. 10 at 2–3.) Mr. Mashburn pleaded guilty on advice of counsel though counsel had not secured any plea deal for a sentence less than death. After his guilty plea and trial, the jury voted 11 to 1 for the death penalty, and the trial judge sentenced Mr. Mashburn to death.² (Doc. 42 at 6.)

Trial counsel failed to begin any mitigation investigation until two years after appointment, only relying upon an unqualified mitigation specialist whom they did not supervise and at no point assisting or conducting their own mitigation investigation. (Doc. 24 at 22 ¶ 80, 24 ¶ 87.) As the trial date approached, counsel eventually hired a “mitigation specialist” but did so without verifying her credentials. She was not a licensed clinical social worker and did

² In addition to Mr. Mashburn, codefendant Tony Brooks was arrested during the investigation of this case and witnesses testified in Mr. Mashburn’s case that Brooks took part in the killings. *See Mashburn v. State*, 7 So. 3d 453, 456–57 (Ala. Crim. App. 2007). Brooks was charged with five counts of capital murder. *State v. Brooks*, No. CC-2003-407.00 (Calhoun Cnty. Cir. Ct. Mar. 25, 2003). However, though he did not testify against Mr. Mashburn, he was permitted to plead guilty to a lesser offense of murder and sentenced to life with parole. He was subsequently released, though he has since been reincarcerated for new offenses. *See Search for Inmates*, Ala. Dep’t of Corr., <https://doc.alabama.gov/inmatesearch> (search AIS # “227135”).

not have sufficient time to complete a full mitigation investigation in the case, and the prosecutor impeached her at trial accordingly. (Doc. 24 at 23–25 ¶¶ 81–92, 30–32 ¶¶ 112–17.)

Similarly, when counsel finally retained private investigators, they failed to adequately confirm these investigators' credentials. (Doc. 24 at 22 ¶¶ 78–79, 27–29 ¶¶ 98–106.) These investigators were fired when the State, not defense counsel, discovered that one was a fraud and had not actually graduated from the University of Maryland, Georgetown University, M.I.T., and Harvard University, had not written any scholarly articles in the field of forensic science, was not a member of Mensa, and claimed a medical license that belonged to an individual in Texas who had been born in 1918.³ (Doc. 24 at 27–28 ¶¶ 100–02.) The fraudulent investigator was, in fact, a former assistant pet groomer in Salt Lake City, Utah. (Doc. 24 at 27 ¶ 100.)

Trial counsel also failed to arrange for an adequate psychiatric or neurological examination of Mr. Mashburn with any expert until one month before trial. (Doc. 24 at 20 ¶ 70, 24–25 ¶ 89.) Trial counsel did not take reasonable measures to locate Mr. Mashburn's pediatric medical records, which

³See also Frederick Burger, *For the Expert Witness, A Few Tough Questions*, Wash. Post (April 10, 2005), D01, available at <https://www.washingtonpost.com/archive/lifestyle/2005/04/10/for-the-expert-witness-a-few-tough-questions/b919d34b-d077-4291-ae63-cde306b8e87c/>.

indicated a normal birth and contradicted the basis for both defense experts' findings. (Doc. 24 at 26 ¶ 95.) Rather, counsel provided the two experts with information of an abnormal birth that was inaccurate and that came from an unlicensed mitigation specialist, and the prosecution, which did obtain the pediatric medical records, impeached them on that basis. (Doc. 24 at 24 ¶ 89, 26 ¶¶ 95–97, 35 ¶ 132.) Similarly, counsel failed to secure necessary brain imaging with sufficient time for review and follow-up by their experts. (Doc. 24 at 35 ¶ 131; *see* Doc. 42 at 79.)

B. Statement of Facts Regarding Prejudice Resulting from Counsel's Deficient Performance.

Following their deficient investigation and preparation, counsel failed to present any coherent theory of mitigation at trial. Counsel cobbled together several mitigation witnesses such as family members and former educational figures that were easily contacted as well as two experts contacted a month before trial, but utterly failed to deliver the central thrust of available mitigation in this case.

As a result, counsel did not present evidence of Mr. Mashburn's compromised state of mind at the time of the offense as a result of methamphetamine intoxication and his untreated bipolar disorder. (Doc. 24 at 60 ¶ 232, 62 ¶ 240.) Counsel never explained to the judge and the jury the severe neurological and psychological effects of Mr. Mashburn's childhood drug abuse,

nor did counsel ever connect these persistent problems to the fact that Mr. Mashburn was under the influence of hallucinogenic and other drugs at the time of the crime. (Doc. 24 at 42–43 ¶¶ 162–64.) Counsel also failed to present medical evidence concerning the effect of sleep deprivation and illegal drugs on Mr. Mashburn’s behavior at the time of the crime. (Doc. 24 at 54 ¶¶ 206–08.)

While stating that Mr. Mashburn’s substance abuse began at age eleven and escalated into adulthood, counsel contended this was due only to Mr. Mashburn trying to feel normal and escape reality. (Doc. 24 at 42 ¶ 162.) Counsel never explained that Mr. Mashburn’s substance abuse was actually an attempt to cope with his severe psychiatric and emotional disabilities that began at the age of eight, when Mr. Mashburn’s mother and grandmother forced him to take excessive amounts of Robitussin, which causes sedative and dissociative effects in improperly high dosages, on a daily basis to deal with his hyperactivity. (Doc. 24 at 42 ¶ 163.) This inappropriate medication consistently forced upon him by his own caretakers started an escalation of substance use to cope with increasingly severe neurological and psychological problems throughout childhood, ultimately resulting in serious substance addiction. (Doc. 24 at 42-43 ¶¶ 163–66.)

Significant and crucial mitigation evidence that tied into this history of drug abuse and would have been discovered with any reasonable investigation

was never presented to the judge and jury. Mr. Mashburn's childhood was marked by fear, confusion, and self-destructive behavior resulting from his parental abandonment and neglect. (Doc. 24 at 49 ¶ 193.) Mr. Mashburn received brutal whippings from his father, leading to bruises, welts, and weeping wounds. (Doc. 24 at 50 ¶ 194.) Mr. Mashburn would wander the woods alone, compulsively retracing his steps exactly. (Doc. 24 at 50 ¶ 195.) Due to his chronic headaches and mental struggles, he would slam his head against walls and pull his hair. (Doc. 24 at 50 ¶ 195.) Counsel never explained that Mr. Mashburn's chronic migraines were an indicator of brain trauma and psychiatric disorders, and that Mr. Mashburn's substance abuse was an attempt to self-medicate these headaches. (Doc. 24 at 43 ¶ 166, 57–58 ¶¶ 221–24.)

As a result of neglect and behavior modeled by the adults around him, Mr. Mashburn was left to deal with his chronic migraines, psychiatric problems, and voices inside his head by using substances made available around him. (Doc. 24 at 42 ¶ 163.) At age eleven, Mr. Mashburn was permitted to play with imaginary friends alone in the woods behind his house for hours while huffing paint and gasoline. (Doc. 24 at 51 ¶ 197.) He subsequently turned to using marijuana that was made available to him. (Doc. 24 at 42 ¶ 163.) With poorly modeled behavior by the adults around him and poor supervision, he began drinking wine and taking his parents' prescription medications at age thirteen to deal with his

father's beatings and his mother's abandonment of him during these beatings and in general. (Doc. 24 at 51 ¶ 197.) At sixteen, his older brother, upon his release from incarceration, introduced Mr. Mashburn to hard drugs, leading to his addiction to methamphetamine and psychotropic pills. (Doc. 24 at 42 ¶ 163.)

The haphazard evidence presented by counsel at the sentencing phase only hinted at the true extent of Mr. Mashburn's severely dysfunctional family and the family's history of mental illness, substance abuse, and physical abuse. (Doc. 24 at 56 ¶¶ 216–18.) Although an unlicensed mitigation specialist testified that Mr. Mashburn began huffing paint at age 11, smoking marijuana at age 13, and using cocaine, methamphetamine, and prescription psychotropic medications by age 22, Mr. Mashburn's lawyers failed to introduce evidence that Mr. Mashburn's evolving drug abuse, which actually began around age eight, escalated due to his severe migraines and psychiatric problems, including hearing voices in his head. (Doc. 24 at 57–58 ¶¶ 220–24.) Counsel failed to establish that Mr. Mashburn sought help from his drug dependency as a young child at many times during his life, but his mother only responded by sending him to other dysfunctional caretakers, such as his half-brother, who introduced Mr. Mashburn to even more drugs. (Doc. 24 at 58–59 ¶¶ 226–28.)

Counsel also failed to explain Mr. Mashburn's diagnosis of bipolar disorder and present how, untreated and in the context of substance abuse, it would have

negatively impacted his impulsivity, emotional regulation, and aggression at the time of the offense and generally negatively impacted his life. (Doc. 24 at 46 ¶ 181, 62 ¶ 240.) Likewise, counsel did not present any formal diagnosis of Mr. Mashburn's frontal lobe and organic brain damage, or any evidence that Mr. Mashburn was only marginally competent to stand trial and suffered from age-inappropriate cognitive impairment as well as bilateral hand posturing and overflow mirror movements that indicate some kind of further neurological abnormality. (Doc. 24 at 60–63 ¶¶ 233–42.)

C. How the Federal Question Was Raised and Addressed in the Courts Below.

The Alabama Court of Criminal Appeals affirmed Mr. Mashburn's convictions and death sentence on direct appeal. *Mashburn v. State*, 7 So. 3d 453 (Ala. Crim. App. 2007). Both the Alabama Supreme Court, *Ex parte Mashburn*, No. 1071307 (Ala. Oct. 24, 2008), and this Court, *Mashburn v. Alabama*, 556 U.S. 1270 (2009), denied certiorari review.

On October 21, 2009, Mr. Mashburn timely filed a Rule 32 petition for postconviction relief in state court. (Doc. 10 at 4.) On February 8, 2010, the State answered and moved to dismiss, and Mr. Mashburn moved for discovery necessary to support his allegations. (Doc. 10 at 4–5.) The Rule 32 court proceeded to summarily dismiss Mr. Mashburn's petition on April 1, 2010, adopting verbatim the State's proposed order submitted just two days earlier,

without ruling on Mr. Mashburn’s discovery motion or his request for a full evidentiary hearing and without allowing further briefing. *Mashburn v. State*, 148 So. 3d 1094, 1109–10 (Ala. Crim. App. 2013). The trial court did not serve either party notice of this order until August 23, 2011, months after the appeal deadline had passed. *See Mashburn v. Commissioner, Alabama Department of Corrections*, 713 F. App’x 832, 834 (11th Cir. 2017).

Mr. Mashburn promptly moved to set aside the judgment and asked for an out-of-time appeal. (Doc. 42 at 9.) While the Rule 32 court allowed Mr. Mashburn’s appeal, it denied his petition—again without providing Mr. Mashburn an opportunity to prove his case through discovery or an evidentiary hearing. (Doc. 42 at 9.) The Alabama Court of Criminal Appeals affirmed. *Mashburn*, 148 So. 3d at 1162. The Alabama Supreme Court denied review. *Ex parte Mashburn*, No. 1121548 (Ala. Feb. 21, 2014).

Mr. Mashburn filed his habeas corpus petition in the district court on September 26, 2014. (Doc. 1; Doc. 42 at 10.) On January 20, 2015, the district court dismissed Mr. Mashburn’s petition as time-barred by 28 U.S.C. § 2244(d)(1)’s one-year statute of limitations. (Docs. 10, 11.) The Eleventh Circuit reversed, finding that the district court erred by refusing to apply equitable tolling, and remanded. *Mashburn v. Commissioner, Alabama Department of Corrections*, 713 F. App’x 832, 833 (11th Cir. 2017). On remand, Mr. Mashburn

amended his petition (Doc. 24), and the State answered (Doc. 32). Because the State never filed a brief on the merits, Mr. Mashburn replied to its answer. (Doc. 40.)

On March 31, 2021, the district court denied an evidentiary hearing and habeas relief. (Doc. 43.) Although, like the Alabama Court of Criminal Appeals, the district court accepted that Mr. Mashburn’s ineffective assistance of counsel allegations were “sufficient to establish that counsel’s deficient investigation, including a lack of tactical deliberation to the extent applicable, resulted in an incomplete mitigation case,” the district court determined that Mr. Mashburn’s allegations were “insufficient to establish *Strickland* prejudice.” (Doc. 42 at 94.)

Mr. Mashburn requested a Certificate of Appealability from the Eleventh Circuit, which was granted on May 31, 2022.⁴ The Eleventh Circuit subsequently affirmed the district court’s summary dismissal and denial of an evidentiary hearing.

⁴ The Eleventh Circuit granted the COA on three issues: First, whether Mr. Mashburn’s trial counsel provided ineffective assistance, pursuant to *Strickland*, 466 U.S. at 668, in the penalty phase of his trial by failing to present evidence regarding his state of mind at the time of the crimes; second, whether Mr. Mashburn’s trial counsel provided ineffective assistance, pursuant to *Strickland*, 466 U.S. at 668, in the penalty phase of his trial by failing to present medical evidence regarding his bipolar disorder diagnosis; and third, whether Mr. Mashburn was entitled to an evidentiary hearing in the district court. Order, *Mashburn v. Commissioner, Alabama Department of Corrections*, No. 22-10329 (11th Cir. May 31, 2022).

This petition follows.

REASONS FOR GRANTING THE WRIT

Appointed counsel advised Mr. Mashburn to plead guilty to five counts of capital murder with no plea deal in place, and did so without adequately investigating and presenting evidence that would have provided the jury compelling mitigation that at the time of the offense he was high on methamphetamine and had been awake for several days and that his drug use and the crime related to his years-long struggle with untreated bipolar disorder. The jury did not learn about this evidence bearing directly on the facts of the offense and offering a mitigating narrative about his childhood. Nonetheless, the Eleventh Circuit affirmed the district court's denial of habeas relief and an evidentiary hearing and found that Mr. Mashburn, who had established that counsel's investigation was deficient, could not establish he was prejudiced by counsel's deficient performance because counsel did not fail to present any evidence: "Mashburn's argument is not that he was prejudiced by his counsel's failure to produce *any* evidence, but that he was prejudiced by his counsel's failure to produce *even more* evidence." *Mashburn v. Commissioner, Alabama Department of Corrections*, 80 F.4th 1292, 1302 (11th Cir. 2023) (emphasis in original).

This Court has made clear "that the *Strickland* inquiry requires [a]

probing and fact-specific analysis” and that a reviewing court must evaluate the impact of any new evidence “regardless of how much or how little mitigation evidence was presented during the initial penalty phase.” *Sears v. Upton*, 561 U.S. 945, 955–56 (2010) (per curiam); see also *Andrus v. Texas*, 140 S. Ct. 1875, 1887 (2020) (per curiam) (“We have never limited the prejudice inquiry under *Strickland* to cases in which there was ‘little or no mitigation evidence’ presented.” (quoting *Sears*, 561 U.S. at 954)). This Court “certainly ha[s] never held that counsel’s effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant.” *Sears*, 561 U.S. at 955.

Here, however, the Eleventh Circuit engaged in exactly “the type of truncated prejudice inquiry” this Court has rejected. *Id.* This Court should therefore grant certiorari because the Eleventh Circuit’s new, diminished standard of prejudice that was engineered in this case conflicts with established precedent from this Court. Sup. Ct. R. 10(c).

I. MR. MASHBURN PLEADED FACTS ESTABLISHING HE WAS PREJUDICED BY COUNSEL’S DEFICIENT PERFORMANCE BECAUSE THE JURY DID NOT HEAR CRITICAL MITIGATING EVIDENCE REGARDING (A) MR. MASHBURN’S STATE OF MIND AT THE TIME OF THE OFFENSE AND (B) THE IMPACT MR. MASHBURN’S BIPOLAR DISORDER HAD ON THE CRIME AND HIS LIFE.

Mr. Mashburn was prejudiced by trial counsel’s deficient performance

because the jury at his trial did not learn compelling mitigating evidence that he was high on methamphetamine at the time of the offense and had been awake for several days, nor did the jury learn compelling mitigating evidence regarding his untreated bipolar disorder. The jury did not hear substantial evidence regarding Mr. Mashburn's childhood, including abuse and neglect, substance use encouraged by adults around him, and untreated symptoms of mental illness, which lead directly to his compromised and volatile state of mind at the time of the offense.⁵ In specifically pleading these allegations in state court and in the district court below, Mr. Mashburn demonstrated that had this evidence been before the jury there is a reasonable probability he would not have been sentenced to death. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

As Mr. Mashburn pleaded, the jury never learned that Mr. Mashburn was on methamphetamine and had gone without sleep for four or five days at the time. (Doc. 30-24 at 24 ¶¶ 224–26, 30 ¶ 250; Doc. 24 at 54 ¶¶ 206–07, 60 ¶ 232.) Considering this evidence, the jury would have evaluated differently his intent

⁵ Counsel could have presented this evidence about Mr. Mashburn's state of mind through the mitigation expert and through Dr. Sachy, each of whom could have explained how this evidence would have affected him at the time of the offense. (Doc. 30-24 at 16 ¶ 199, 33 ¶ 222, 32–33 ¶¶ 258–60; Doc. 24 at 46 ¶ 181, 53 ¶ 204, 62–63 ¶¶ 240–42). Thus, it is simply incorrect that, as the Eleventh Circuit found, "Mashburn did not identify the names of any medical experts who would have testified at his trial had they been contacted, nor did he supply evidence of what information experts might have provided." *Mashburn*, 80 F.4th at 1299 n.11; *see also id.* at 1300 n.12 (same).

and self-control at the time of the offense. (Doc. 30-24 at 24 ¶¶ 227–28; 29 ¶ 248; Doc. 24 at 54 ¶¶ 209–10; 59 ¶ 230.) The jury did not learn that prolonged substance use, especially when combined with his mental illness, history of abuse, and brain injury, impaired Mr. Mashburn’s judgment and made him more impulsive, less inhibited, aggressive, and unable to control his anger. (Doc. 30-24 at 14–15 ¶¶ 187–88, 190, 192, 16 ¶ 199, 17 ¶ 200, 33–34 ¶¶ 259–60; Doc. 24 at 43-45 ¶¶ 164, 169–70, 172, 174, 46 ¶ 181–82, 62–63 ¶¶ 240–42).

Additionally, defense counsel elicited no testimony regarding Mr. Mashburn’s bipolar disorder except the bare fact that defense expert Dr. Sachy had diagnosed Mr. Mashburn with the disorder. In full, the expert testified, “What I believe he has is he’s in the Bipolar spectrum. In other words, he’s got some form of Bipolar disorder. Chances are likely he has behavioral disturbance in my opinion as consistent with that.” (Doc. 30-17 at 50.) Defense counsel did not elicit any other testimony about the diagnosis from Dr. Sachy or any other witness, how Dr. Sachy had arrived at it, how it manifested generally and in Mr. Mashburn both throughout his life and in the period leading up to the offense, how it interacted with Mr. Mashburn’s substance abuse and brain injury, what “behavioral disturbance” meant, whether it was treatable, or how the diagnosis and related symptoms were relevant to the case at all.

Most importantly, Mr. Mashburn pleaded that the jury lacked testimony

by defense experts explaining the effects Mr. Mashburn's bipolar disorder had on him. (Doc. 30-24 at 16 ¶ 199, 32–33 ¶¶ 258–60; Doc. 24 at 46 ¶ 181, 62–63 ¶¶ 240–42). Indeed, “Bipolar disorder [] causes impulsivity and episodic extreme dyscontrol, which can lead to unpredictable, involuntary combative behavior.” (Doc. 30-24 at 32 ¶ 258; Doc. 24 at 62 ¶ 240.) Further, the jury lacked any expert testimony explaining that these effects are exacerbated in individuals like Mr. Mashburn that also suffer polysubstance abuse and brain damage. (Doc. 30-24 at 32 ¶ 258; Doc. 24 at 62 ¶ 240.)

Trial counsel's deficient performance meant the jury lacked critical mitigating evidence that, at the time of the offense, Mr. Mashburn was high on methamphetamine, was suffering untreated bipolar disorder, and had been awake for four or five days, and that his state of mind at that time, exhibiting greater impulsivity and increased aggression, was the culmination of years struggling with prolonged substance use, childhood abuse, untreated mental illness, and brain damage. The state court's failure to find that there is a reasonable probability that, had counsel not been deficient, Mr. Mashburn would not have been sentenced to death was therefore unreasonable and Mr. Mashburn should have been granted an evidentiary hearing in the district court to offer this evidence. *Strickland*, 466 U.S. at 694.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ELEVENTH CIRCUIT’S OPINION CREATED A BAR TO FINDING *STRICKLAND* PREJUDICE THAT CONFLICTS WITH THIS COURT’S OPINIONS IN *SEARS V. UPTON* AND *ANDRUS V. TEXAS*.

In affirming the district court’s denial of habeas relief, the Eleventh Circuit engaged in a “truncated prejudice inquiry” that precludes the granting of an evidentiary hearing and relief in cases where counsel presented some mitigating evidence at trial. The Eleventh Circuit’s opinion conflicts with this Court’s decisions in *Strickland v. Washington*, 466 U.S. 668 (1984), *Sears v. Upton*, 561 U.S. 945, 955–56 (2010) (per curiam), and *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (per curiam), which require “[a] probing and fact-specific analysis,” do not foreclose a finding of prejudice merely because of “counsel’s effort to present some mitigation,” and do not limit a finding of prejudice “to cases in which there was only ‘little or no mitigation evidence’ presented.” *Sears*, 561 U.S. at 954–55; *see also Andrus*, 140 S. Ct. at 1887 (same). The Eleventh Circuit was incorrect as a legal and factual matter, and this Court should now grant certiorari to resolve the conflict created by the Eleventh Circuit’s opinion in this case.

The Eleventh Circuit’s primary reason for affirming the denial of an evidentiary hearing and relief was “Mashburn’s argument is not that he was prejudiced by his counsel’s failure to produce *any* evidence, but that he was

prejudiced by his counsel’s failure to produce *even more* evidence.” *Mashburn*, 80 F.4th at 1302 (emphasis in original). Indeed, the Eleventh Circuit distinguished similar cases of that circuit, which Mr. Mashburn had cited in his pleadings, because, “[i]n those cases, we reached our conclusion because counsel either failed to present *any* important mitigating evidence at trial or presented only a sliver of significant evidence.” *Id.* at 1301–02 (emphasis in original). *See also id.* at 1303 (“*Mashburn’s counsel presented enough evidence* for the trial court to determine that twelve mitigating circumstances had been invoked and ten had been proven.” (emphasis added)); 1303 n.15 (“Mashburn argues that the jury should have heard *more* testimony” (emphasis added)); 1303 n.16 (noting “the[] [jury] just did not learn *more* information” (emphasis added)).

As a legal matter, this is the wrong inquiry. In *Sears*, this Court addressed a similar error in which a state court failed to engage in the complete *Strickland* prejudice inquiry because trial counsel in that case “did present some mitigation evidence during his penalty phase,” primarily through seven penalty-phase witnesses. 561 U.S. at 952. This Court held that “counsel’s effort to present some mitigation evidence should [not] foreclose an inquiry” into prejudice. *Id.* at 955. Emphasizing this point, this Court affirmed that it has “never limited the prejudice inquiry under *Strickland* to cases in which there was only ‘little or no mitigation evidence’ presented,” and has repeatedly “found deficiency *and*

prejudice in [] cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase.” *Id.* at 954.

Subsequently, in *Andrus*, this Court reaffirmed that principle. In *Andrus*, trial counsel introduced testimony from the petitioner’s mother, father, an expert on the effects of drug use on adolescent brains, a prison counselor, and the petitioner himself. 140 S. Ct. at 1878–79. Mr. Andrus testified at trial about his own difficult childhood and early drug use, but counsel failed to investigate and introduce evidence of mental illness. *Id.* at 1879, 1882–83. Considering prejudice, this Court again repudiated a lower court’s truncated inquiry and reaffirmed what it had said in *Sears*, that a petitioner may still be prejudiced despite counsel’s presentation of some mitigation at trial. *Id.* at 1887 (citing *Sears*, 561 U.S. at 954, 956).

Contrary to *Sears* and *Andrus*, the Eleventh Circuit repeatedly emphasized that counsel had presented mitigating evidence in this case as a basis for declining to find prejudice. After outlining the relevant standards, the Eleventh Circuit oriented its discussion of prejudice around the trial presentation without regard to the new mitigating evidence on his state of mind at the time of the offense and untreated bipolar disorder. “Looking first at the mitigating circumstances,” the court determined that “the state trial court acknowledged that Mashburn’s counsel presented evidence” on several

mitigating circumstances and that Eleventh Circuit cases cited by Mr. Mashburn were “distinguishable” “because counsel either failed to present any important mitigating evidence at trial or presented only a sliver of significant evidence.” 80 F.4th at 1301–02. This orientation continued through the court’s meager analysis to its conclusion that “[i]n sum, Mashburn’s counsel presented enough evidence” *Id.* at 1303.

As to the actual consideration of evidence offered by Mr. Mashburn in his petitions for postconviction and habeas relief, the Eleventh Circuit’s review was faulty and minimal. Regarding Mr. Mashburn’s evidence that he had been without sleep for several days and under the influence of methamphetamine, the court merely said “we have repeatedly stressed that evidence of intoxication or alcoholism is a double-edged sword that itself could harm a petitioner’s case.” *Id.* at 1302 (quoting *Brooks v. Commissioner, Alabama Department of Corrections*, 719 F.3d 1292, 1304 (11th Cir. 2013)). But trial counsel’s incomplete presentation had already meant Mr. Mashburn had been disadvantaged by the presentation of drug use. The Eleventh Circuit’s paltry analysis did not consider that, as Mr. Mashburn pleaded, the new evidence alleged in his Rule 32 petition regarding his use of methamphetamine at the time of the offense and its origins in being given drugs starting at age six would have rendered as mitigating the incomplete evidence presented by trial counsel. Instead, trial counsel’s

presentation only served to paint Mr. Mashburn's addiction as a result of bad choices and not the result of influence by adult caretakers and untreated mental health needs.

The Eleventh Circuit made repeated references to Mr. Mashburn arguing that trial counsel should have presented "even more," *Mashburn*, 80 F.4th at 1302, but did not engage with the fact that neither the trial court nor the jury knew that *at the time of the offense* Mr. Mashburn was suffering untreated bipolar disorder, was high on methamphetamine, and had been without sleep for days. The court faulted Mr. Mashburn for simply wanting "more expert testimony of the potential deleterious effects of bipolar disorder," *id.*, but the jury heard *absolutely no testimony* on the effects of bipolar disorder, either at the time of the offense or more generally in Mr. Mashburn's life. Citing the expert's testimony at trial that Mr. Mashburn suffered from "some form of bipolar disorder," *id.* at 1303 n.15, the Eleventh Circuit conducted no analysis, probing or otherwise, of Mr. Mashburn's sufficiently pleaded claims that the jury should have heard more than just a bare diagnosis. Having concluded that evidence of intoxication is double-edged, the Eleventh Circuit neglected to consider that trial counsel's elicitation of a bare diagnosis of mental illness, unexplained and uncontextualized, was likewise double edged.

Even the Eleventh Circuit's consideration of the evidence that was

presented at trial was insufficient, noting that the trial court found 10 mitigating circumstances, *id.* at 1302, but engaging in no qualitative analysis of how those mitigating circumstances compared to the new evidence alleged in Mr. Mashburn’s Rule 32 petition. This analysis is wrong under Alabama law, which makes clear that “[t]he determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation.” *Ex parte Clisby*, 456 So. 2d 105, 108–09 (Ala. 1984); *see also Smith v. State*, No. CR-17-1014, 2022 WL 4007496, at *48 (Ala. Crim. App. Sept. 2, 2022) (same); Ala. Code § 13A-5-48 (weighing process is not “mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison,” but “process by which circumstances relevant to a sentence are marshalled and considered in an organized fashion”).

Thus, the Eleventh Circuit’s decision in this case has erected a standard for evaluating *Strickland* prejudice that is at odds with this Court’s precedent explicitly rejecting such a “truncated prejudice inquiry.” *Sears*, 561 U.S. at 955. The court’s analysis stalled with its conclusion that trial counsel presented some mitigating evidence, and what analysis it did do was neither “probing” nor “fact-specific.” *Id.* *Strickland* requires more.

CONCLUSION

Since he filed his initial Rule 32 petition in state court in 2011, Mr. Mashburn has been seeking an opportunity to prove that he was denied his right to effective assistance of counsel at trial and that his death sentence is unreliable as a result. In that petition, Mr. Mashburn asked the trial court to “conduct a full evidentiary hearing at which proof may be offered concerning the allegations in the petition.” (Doc. 30-24 at 40.) He presented his claim in a manner that entitled him to an evidentiary hearing under Alabama law, *Ex parte Williams*, 651 So. 2d 569, 572–73 (Ala. 1992); *Ex parte Boatwright*, 471 So. 2d 1257, 1258–59 (Ala. 1985), but he was denied such an evidentiary hearing. Because the state court rejected Mr. Mashburn’s arguments and dismissed his ineffectiveness claim without an evidentiary hearing, the failure to develop that evidence in support of the claim cannot be attributed to a lack of diligence. *Williams v. Taylor*, 529 U.S. 420, 435, 437 (2000).

To this day, no court has considered fairly and adequately the merits of Mr. Mashburn’s *Strickland* claim. The district court below denied Mr. Mashburn an evidentiary hearing because it found that Mr. Mashburn’s *Strickland* claim “lack[ed] the requisite factual and legal specificity to substantiate an entitlement to habeas relief” (Doc. 42 at 111), but there is no question that Mr. Mashburn fairly presented the claim in his Rule 32 petition as discussed above. He merely

seeks what this Court has repeatedly emphasized as integral to the protection of constitutional rights, especially the right to effective counsel, and fair process: at least one fair collateral-review proceeding. *See Martinez v. Ryan*, 566 U.S. 1, 10–17 (2012) (holding that procedural default rules should not prevent petitioner from presenting legal and factual basis of trial counsel ineffectiveness claim).

For the foregoing reasons, Petitioner Ellis Mashburn prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

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