No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2023

HARVEY WINDSOR,

Petitioner,

v.

STEVEN T. MARSHALL,
ATTORNEY GENERAL OF ALABAMA, et al.,

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

ANGELA L. SETZER
COUNSEL OF RECORD
JAMES M. HUBBARD
122 Commerce Street
Montgomery, AL 36104
Phone: (334) 269-1803
Fax: (334) 269-1806
Email: asetzer@eji.org
mhubbard@eji.org

March 28, 2024

Counsel for Harvey Windsor

CAPITAL CASE

QUESTION PRESENTED

Harvey Windsor was convicted of capital murder during a robbery on a theory of accomplice liability, and he was sentenced to death following a penalty phase in which the State presented only one aggravating circumstance, the one established by the jury's guilt-phase verdict, and his defense counsel presented only a single, brief witness. In state postconviction and federal habeas proceedings, Mr. Windsor alleged that trial counsel were constitutionally ineffective because they did not present available and compelling mitigating evidence regarding a head injury caused by a motorcycle accident he was involved in three years before the offense. Both the original trial judge and the district court below recognized that, if he could establish that the head injury provided a mitigating explanation for the crime, Mr. Windsor's death sentence likely would not stand. Yet, in federal habeas proceedings, despite well-taken motions for extensions of time in which to complete the discovery about his head injury, to which Mr. Windsor was found entitled, the district court ended the discovery process as habeas counsel was continuing to engage in good faith efforts to complete it. The district court denied Mr. Windsor's habeas petition without an evidentiary hearing and denied him a certificate of appealability. Without opinion, the Court of Appeals for the Eleventh Circuit likewise denied him a certificate of appealability.

The question presented is:

> Whether, when both the state trial court and the federal district court agree that a habeas petitioner has pleaded a claim that, if true, would warrant relief and when reasonable jurists could debate whether the district court erred in limiting discovery, a Court of Appeals should issue a Certificate of Appealability.

RELATED PROCEEDINGS

State v. Windsor, St. Clair County Circuit Court, No. CC-1988-115. Convicted June 8, 1992; sentenced June 12, 1992.

Windsor v. State, Alabama Court of Criminal Appeals, No. CR-91-1487. Opinion reversing conviction and sentence issued August 13, 1993.

Ex parte State (Windsor v. State), Alabama Supreme Court, No. 1930048. Opinion reversing and remanding case issued February 18, 1994.

Windsor v. State, Alabama Court of Criminal Appeals, No. CR-91-1487. Opinion on remand issued June 17, 1994; rehearing denied August 19, 1994.

Ex parte Windsor, Alabama Supreme Court, No. 1931643. Opinion issued August 23, 1996; rehearing denied October 18, 1996.

Windsor v. Alabama, United States Supreme Court, No. 96-7532. Petition for writ of certiorari denied April 14, 1997.

Windsor v. State, St. Clair County Circuit Court, No. CC-1988-115.60. Petition for postconviction relief pursuant to Ala. R. Crim. P. 32 dismissed February 17, 2006.

Windsor v. State, Alabama Court of Criminal Appeals, No. CR-05-1203. Opinion issued August 7, 2009; rehearing denied September 25, 2009.

Ex parte Windsor, Alabama Supreme Court, No. 1110338. Order remanding case issued July 16, 2010.

Windsor v. State, Alabama Court of Criminal Appeals, No. CR-05-1203. Opinion on remand issued August 26, 2011; rehearing denied Dec. 2, 2011.

Ex parte Windsor, Alabama Supreme Court, No. 1110338. Petition for writ of certiorari denied February 17, 2012.

Windsor v. Dunn, United States District Court for the Northern District of Alabama, No. 4:10-cv-02223-AKK. Habeas petition dismissed October 23, 2020.

Windsor v. Attorney General, State of Alabama, et al., United States Court of Appeals for the Eleventh Circuit, No. 21-11517. Order denying certificate of appealability issued January 13, 2023; order denying motion for reconsideration issued November 29, 2023.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The order of the United States District Court for the Northern District of Alabama denying Mr. Windsor's habeas petition and denying a certificate of appealability on all issues is unreported and is attached as Appendix A. The district court's contemporaneously issued memorandum opinion, *Windsor v. Dunn*, No. 4:10-cv-2223-AKK, 2020 WL 6262431 (N.D. Ala. Oct. 23, 2020), is attached as Appendix B. The district court's order denying Mr. Windsor's motion to alter or amend judgment and again denying a certificate of appealability on all issues is unreported and is attached as Appendix C. The order of the United States Court of Appeals for the Eleventh Circuit denying Mr. Windsor's motion for certificate of appealability is unreported and is attached as Appendix D. The order of the United States Court of Appeals for the Eleventh Circuit denying Mr. Windsor's motion for reconsideration is unreported and is attached as Appendix E.

STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Alabama denied Mr. Windsor's habeas petition and a certificate of appealability on October 23, 2020, *Windsor v. Dunn*, No. 4:10-cv-2223-AKK, 2020 WL 6262431

(N.D. Ala. Oct. 23, 2020), and denied his motion to alter or amend the district court's judgment on April 2, 2021, Memorandum Opinion and Order, *Windsor v. Dunn*, No. 4:10-cv-2223-AKK (N.D. Ala. Apr. 2, 2021). The United States Court of Appeals for the Eleventh Circuit denied Mr. Windsor's motion for certificate of appealability on January 13, 2023, Order, *Windsor v. Attorney General, State of Alabama, et al.*, No. 21-11517 (11th Cir. Jan. 13, 2023), and subsequently denied his motion for reconsideration on November 29, 2023, Order, *Windsor v. Attorney General, State of Alabama, et al.*, No. 21-11517 (11th Cir. Nov. 29, 2023). This Court granted Mr. Windsor's application to extend the time to file a petition for writ of certiorari on February 16, 2024, until March 28, 2024. *Windsor v. Steven T. Marshall, Attorney General of Alabama, et al.,* No. 23A756 (Feb. 16, 2024). 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

A. Mr. Windsor's Capital Trial and Counsel's Ineffective Penalty Phase Presentation.

Harvey Windsor was convicted as an accomplice of capital murder during a robbery for the killing of Rayford Howard at a convenience store in St. Clair County, Alabama. As the district court noted, "[t]he State tried Windsor as an accomplice to [Lavon] Guthrie in the murder," *Windsor v. Dunn*, No. 4:10-cv-2223-AKK, 2020 WL 6262431, at *33 (N.D. Ala. Oct. 23, 2020), because "[d]uring the robbery, Guthrie killed Rayford Howard, the store's proprietor, by shooting him in the chest with a sawed-off shotgun," *Ex parte Guthrie*, 689 So. 2d 951, 952 (Ala. 1997).[1] *See also Windsor*, No. 4:10-cv-2223-AKK, 2020 WL

[1]Mr. Windsor and Mr. Guthrie were also charged in the killing, on the same day, of Randal Pepper in Colbert County, and Mr. Windsor was ultimately sentenced to life imprisonment after being convicted of felony murder. *Windsor*,

6262431, at *1 (noting trial court found evidence established beyond reasonable doubt that Mr. Windsor was accomplice).[2]

At the penalty phase, the State relied on one aggravating circumstance, which was established during the guilt phase of the trial, that the murder was committed during the course of the robbery, and presented no new evidence, simply incorporating the guilt-phase evidence it had previously introduced.[3] (Vol. 6, Tabs #R-19 (Tr. 1074), -21 (Tr. 1077–78).) During penalty-phase opening argument, which spanned barely three pages of transcript, trial counsel argued that the jury should not impose death because Mr. Windsor lacked intent to kill despite the guilt-phase verdict, that he "had some family problems," and that "he has a criminal record; but it is not serious--nothing violent." (Vol. 6, Tab #R-20 (Tr. 1076–77).) Counsel then presented only the testimony of Mr. Windsor's mother, which spanned approximately 17 pages of transcript. (Vol. 6, Tab #R-22 (Tr. 1079–96).) Trial counsel's closing argument, also amounting to three pages of transcript, consisted of arguing that Mr. Windsor did not enter the store

---

No. 4:10-cv-2223-AKK, 2020 WL 6262431, at *1 n.3. Mr. Guthrie was sentenced to death but died of natural causes while awaiting execution.

[2] Citations are to the record as contained in the habeas checklist and to the ECF document number as filed in the district court below. *Windsor*, No. 4:10-cv-2223-AKK, 2020 WL 6262431.

[3]At the judicial sentencing hearing following trial, the State likewise presented no evidence. (*See* Vol. 6, Tab #R-28 (Tr. 1128–29).)

where Guthrie had killed Mr. Howard and so Mr. Windsor lacked intent to kill, again despite the jury's guilt-phase verdict. (Vol. 6, Tab #R-24 (Tr. 1104–07).)

Mr. Windsor's mother testified that Mr. Windsor was a happy child, but that he dropped out of school at eighth or ninth grade, later earning his GED, and that his first "brushes with the law" were at age 13 or 14 years old. (Vol. 6, Tab #R-22 (Tr. 1080–82).) Counsel further elicited testimony that Mr. Windsor "spent a lot of his time in the penitentiary," that he was talented at drawing, and that the family was "of very modest means financially" so could not afford to allow him to participate in things like the Boy Scouts or baseball or to take him to the movies or the fair. (Vol. 6, Tab #R-22 (Tr. 1082–83, 1088–89, 1091–92).)

Mr. Windsor's mother also testified that Mr. Windsor was involved in a serious motorcycle accident three years before the crime in this case in 1985, after which he spent months in the hospital. (Vol. 6, Tab #R-22 (Tr. 1083–85).) She repeatedly testified that Mr. Windsor "has not been the same" since, that "something snapped in his mind just like a rubberband," and that "he was not the man I knew" and "[h]e don't act like the same one I gave birth to." (Vol. 6, Tab #R-22 (Tr. 1083, 1086, 1088).) Counsel elicited hardly any meaningful testimony on the differences Mr. Windsor's mother noticed after the accident, and introduced no testimony from any expert, other family, or friends, and no records to explain precisely how the accident harmed Mr. Windsor, his brain, or

his mental health. Further, counsel made no reference to Ms. Windsor's testimony in closing argument.

Following trial counsel's paltry presentation, the jury voted unanimously to recommend death after only 25 minutes of deliberation. (Vol. 6, Tab #R-27 (Tr. 1126).)

B. Mr. Windsor Attempted to Prove His Claim of Ineffective Assistance of Counsel in State Court.

After the conclusion of his direct appeal,[4] Mr. Windsor timely filed a petition for relief pursuant to Ala. R. Crim. P. 32 (Vol. 14, Tab #R-47 (C. 13–52)), which was subsequently amended (Vols. 14–15, Tab #R-52 (C. 176–230)). Mr. Windsor raised numerous claims, primarily concerning trial counsel's ineffective assistance of counsel before, during, and after trial. The State answered each petition and moved for partial dismissal of certain claims (Vol. 14, Tabs #R-48, -49, -50 (C. 55–65, 102–16); Vol. 15, Tabs #R-53, -54, -55, -56 (C. 231–37, 244–57, 263–66, 309–19)), several of which the circuit court summarily dismissed on November 18, 1998 (Vol. 14, Tab #R-50 (C. 164–66)). Among the claims that were not dismissed was Mr. Windsor's claim that trial counsel were ineffective for

[4]Mr. Windsor's conviction was initially reversed because the prosecutor commented on Mr. Windsor's decision not to testify and because the circuit court clerk rather than the circuit court itself had excused some potential jurors, though the Alabama Supreme Court subsequently reversed that ruling. *Ex parte State (Windsor v. State)*, 683 So. 2d 1021, 1024, 1027 (Ala. 1994).

failing to investigate and present at the penalty phase of trial evidence related to his motorcycle accident and the extreme impact it had on him, his brain, and his mental health. (Vols. 14–15, Tab #R-52 (C. 196–207).)

In his petition, Mr. Windsor sufficiently pleaded that trial counsel were ineffective because information learned from his mother about the motorcycle accident was "evidence that should have led Mr. Windsor's trial counsel to conduct a thorough investigation of the accident and its effect on Mr. Windsor's mental condition." (Vol. 14, Tab #R-52 (C. 197).) Yet, trial counsel did not meet with any friends, family, or others with the exception of Mr. Windsor and his mother (Vol. 14, Tab #R-52 (C. 200)), and counsel did not obtain available medical records or interview treating physicians and other care providers regarding the accident (Vol. 15, Tab #R-52 (C. 202)). Counsel failed to hire any experts that would "have explained the likely causes and consequences of Mr. Windsor's mental and emotional problems." (Vol. 15, Tab #R-52 (C. 205–06).)

As a result, counsel failed to present, and the jury never heard, available evidence "that Mr. Windsor's mental, emotional and psychological condition changed radically after the accident." (Vol. 15, Tab #R-52 (C. 205).) Such evidence "had a direct bearing on two statutory mitigating circumstances: that the offense was committed while Mr. Windsor was under the influence of extreme mental or emotional disturbance; and that [he] lacked the capacity to

appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." (Vol. 15, Tab #R-52 (C. 201).) As Mr. Windsor further pleaded, the available evidence would have also supported nonstatutory mitigation that "lessened his culpability for the crime . . . and led the jury to impose a sentence of life without possibility of parole." (Vol. 15, Tab #R-52 (C. 205).)

In response to this claim, the circuit judge, who had also presided over trial,[5] granted discovery and set a preliminary date for an evidentiary hearing. (Vol. 15, Tab #R-55 (C. 275–76).) While discussing Mr. Windsor's related pending discovery requests during a subsequent status conference, the circuit judge agreed that evidence related to "mental disability . . . would be relevant" and "surely the defense attorneys could have hired somebody . . . and at least throw it out during the sentencing." (Vol. 17, Tab #R-60 (Tr. 38).) The court subsequently noted that: "The one thing that might disturb me in this case is the issue of if there were psychological problems with the defendant that were not brought out in the penalty phase. To me, that is significant. . . . That could have changed the decision of life without parole versus death." (Vol. 17, Tab #R-60 (Tr. 53–54).) More pointedly, the circuit judge stated regarding Mr. Windsor's claim,

[5](*See* Vol. 15, Tab #R-56 (C. 331) (order of Alabama Supreme Court temporarily reassigning trial judge to circuit to consider Rule 32 proceedings).)

"If we hear this case and that is it, I don't have a problem vacating the judgment." (Vol. 17, Tab #R-60 (Tr. 58).)

Ultimately, however, the circuit judge that presided over trial and most of the Rule 32 proceedings assigned the case to a new circuit judge. (Vol. 16, Tab #R-59 (C. 447).) Despite subsequent agreement between Mr. Windsor, the new judge, and the State that Mr. Windsor was due additional discovery on his claims related to penalty-phase ineffectiveness and a further opportunity to amend his petition (*see* Vol. 16, Tab #R-59 (C. 401, 430–35)), the new circuit judge summarily dismissed Mr. Windsor's Rule 32 petition without an evidentiary hearing ever having been held (Vol. 16, Tab #R-59 (C. 449–67)). The Alabama Court of Criminal Appeals ("ACCA") subsequently affirmed this dismissal, finding that "Windsor did not make sufficient allegations to satisfy his burden." *Windsor v. State*, 89 So. 3d 805, 824 (Ala. Crim. App. 2009) (citing Ala. R. Crim. P. 32.3, 32.6(b)). After initially remanding the case for the ACCA to address a claim it had not addressed in its earlier opinion, the Alabama Supreme Court denied certiorari review of all claims on February 17, 2012. *Ex parte Windsor*, No. 1110338 (Ala. Feb. 17, 2012).

C. Mr. Windsor Attempted to Prove His Ineffective Assistance of Counsel Claim in Federal Court.

During the pendency of Mr. Windsor's Rule 32 appeal, he filed a petition for a writ of habeas corpus on August 17, 2010. (Doc. 1.) After the conclusion of

the Rule 32 appeal, the district court lifted the stay it had granted, issued a scheduling order, and permitted Mr. Windsor to amend his habeas petition. (Doc. 13.) In his amended petition, filed on June 22, 2012, Mr. Windsor challenged the ACCA's ruling affirming the summary dismissal, without evidentiary hearing, of his penalty-phase ineffectiveness claim regarding trial counsel's failure to investigate and present mitigating evidence on his motorcycle accident and its dramatic impacts on his mental health. (Doc. 16 at 55–65.)

Notably, in its scheduling order, the district court notified the parties that discovery could not commence until approved by the court, stating: "The parties may not engage in discovery without the express permission of the court." (Doc. 13 at 6.)

The district court did not give this permission until late 2017, when it granted Mr. Windsor's motion for discovery and an evidentiary hearing as it related to the penalty-phase ineffectiveness claim. (Doc. 33.) In that order, the district court recognized that "Windsor was diligent in his attempts to investigate and pursue this claim in State court" and "vigorously attempted to conduct discovery relevant to his ineffective assistance claim while his Rule 32 petition was pending before the circuit court." (Doc. 33 at 8–9.) The district court further explained that any finding by the state court of failure to sufficiently plead this claim was based upon "two unreasonable determinations of fact." (Doc.

33 at 14–15.) If permitted to develop the claim and evidence supporting it, the district court found that "Windsor will have satisfied *Strickland*'s deficient performance prong" (Doc. 33 at 19), and, echoing the state court trial judge, "that if the evidence Windsor's trial counsel allegedly erred in failing to obtain had been introduced at his sentencing, there is a reasonable probability that the result of the sentencing would have been different" (Doc. 33 at 21–22).

On the same day the district court granted discovery and an evidentiary hearing, the court appointed new counsel for Mr. Windsor. (Doc. 32.) Over the next 17 months, habeas counsel sought to conduct discovery and requested several times that the district court extend the time for completion of discovery, which the court did. First, in an unopposed motion, habeas counsel explained that he had been unable to "figure out which set of former attorneys possesses Mr. Windsor's files relevant to Mr. Windsor's claim about the ineffective assistance of his trial counsel during the penalty phase of his trial" because the former attorneys were either yet to be located or had not yet "reported back." (Doc. 34 at 1–2.) Counsel further noted that the depositions authorized in the district court's order granting discovery could not occur until counsel obtained and reviewed the files. (Doc. 34 at 3.) In the second unopposed extension motion, habeas counsel documented continued difficulty obtaining files from prior attorneys on the case "[d]espite numerous phone calls and emails" and

assurances by those attorneys that they "would finally" look for the files. (Doc. 36 at 2.)

At this point, habeas counsel recognized the need to move the case forward and requested that the district court appoint co-counsel. (*See* Doc. 38 at 3; *see also* Doc. 43 (order appointing co-counsel).) Before the district court appointed co-counsel, the parties and court held a status conference in September 2018, after which the district court again extended the time for completion of discovery. (Doc. 41.) After this extension, the parties filed a joint request for more time. In this request, the parties explained that newly appointed co-counsel "underwent significant sinus surgery," the recovery for which was "slow-going and difficult." (Doc. 46.) In addition, the parties explained that a new attorney had entered an appearance for the State, with the prior attorney withdrawing. (Doc. 46.) Soon after, habeas counsel again sought an unopposed extension based on co-counsel's ill health, explaining that co-counsel was now being treated for a "severe bacterial infection" that required hospitalization and "vast amount of treatment." (Doc. 48.) After this extension, habeas counsel was finally able to depose one of Mr. Windsor's trial attorneys, Hugh Holladay, though one remained defiantly uncooperative, and continued pursuit of other discovery items. (*See* Docs. 58, 60.)

This prompted counsel to seek not only an additional extension of time, but

the expansion of discovery allowing them to depose additional witnesses and subpoena related records. (Doc. 58.) In the request, counsel documented the deposition of Mr. Holladay and the portions of his testimony that demonstrated further discovery was needed. (Doc. 58 at 3–4.) Counsel also documented efforts by the second trial attorney at avoiding any deposition and a process server, including that second attorney's statement that habeas counsel "can go to hell, you bastard." (Doc. 58 at 4.) In addition, counsel requested leave to depose and subpoena Rule 32 counsel as well as experts previously hired in the case and family members of Mr. Windsor. (Doc. 58 at 7.)

The State opposed this extension request in a response filed on February 13, 2019 (Doc. 59), and the district court denied the motion for an extension of time on February 25, 2019 (Doc. 61). The district court subsequently denied Mr. Windsor's habeas petition, finding that "Windsor has demonstrated a lack of diligence in pursuing this claim." *Windsor*, No. 4:10-cv-2223-AKK, 2020 WL 6262431, at *56. As a result, the district court found the penalty-phase ineffectiveness claim to be "the same as it was in 2012 when he filed his amended petition" and "unproven." *Id.* The district court also declined to hold an evidentiary hearing and denied Mr. Windsor a Certificate of Appealability ("COA"). (Docs. 64, 65.) Without opinion, the Court of Appeals for the Eleventh Circuit also denied Mr. Windsor a COA. *Windsor v. Attorney General, State of*

Alabama, et al., No. 21-11517 (11th Cir. Jan. 13, 2023).

This petition follows.

REASONS FOR GRANTING THE WRIT

The standard for issuance of a certificate of appealability ("COA") is extremely low. A court should issue a COA where "reasonable jurists would find the district court's assessment of the constitutional claims debatable." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This Court has held that a petitioner is not required "to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*

The requirements for the issuance of a COA were undoubtedly met in this case. First, both the state trial court and the federal district court agreed that, if proven, trial counsel's failure to present mitigating evidence of the head injury Mr. Windsor suffered as a result of his motorcycle accident and his resulting mental change and deterioration to the jury was "significant" as it "could have changed the decision of life without parole versus death." (Vol. 17, Tab #R-60 (Tr. 53–54); *see also* Doc. 33 at 21–22.) Second, reasonable jurists could certainly debate the correctness of the district court's decision to terminate discovery even

though habeas counsel were diligently and actively completing discovery when the district court denied the motion.

Because it is clear that Mr. Windsor has made out a claim that, if established, renders unreliable his sentence of death, the denial of a COA in this case is especially alarming. *See Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) ("In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause."); *see also Rudd v. Johnson*, 256 F.3d 317, 319 (5th Cir. 2001) ("[B]ecause the present case involves the death penalty, any doubts as to whether a COA should issue must be resolved in [petitioner]'s favor."). This Court should grant certiorari because the Eleventh Circuit's denial of a COA in this extraordinary case, without any opinion, conflicts with this Court's opinion in *Slack*, 529 U.S. at 484, that the requirements of 28 U.S.C. § 2253(c) are met where a petitioner demonstrates that "reasonable jurists would find the district court's assessment of the constitutional claims debatable," Sup. Ct. R. 10(c), and "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power," Sup. Ct. R. 10(a).

I. REASONABLE JURISTS HAVE CONCLUDED THAT MR. WINDSOR'S PENALTY-PHASE INEFFECTIVENESS CLAIM PRESENTS A VALID CLAIM OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

Mr. Windsor pleaded in his Rule 32 and habeas petitions that, under

Strickland v. Washington, 466 U.S. 668 (1984), his right to effective assistance of counsel was violated because trial counsel failed to investigate and present compelling mitigating evidence about a serious motorcycle accident that Mr. Windsor was involved in three years before the offense in this case and his resulting brain damage and radical mental changes. (Vols. 14–15, Tab #R-52 (C. 196–207); Doc. 16 at 55–65.) Although counsel knew about the accident and elicited minimal testimony on it from the lone penalty-phase witness, Mr. Windsor's mother, trial counsel undertook no effort to interview other family members, locate relevant medical records documenting the accident and Mr. Windsor's months-long hospital stay, or hire an expert to evaluate Mr. Windsor for the effects the accident had on his brain and mental functioning. (Vols. 14–15, Tab #R-52 (C. 197, 200–02, 205–06); Doc. 16 at 57–64.) Counsel took no action to investigate despite a letter from a psychologist recommending trial counsel obtain hospital records that reference "acute organic brain syndrome" and "psychosis." (Doc. 16 at 62.) Without investigation, counsel's bare bones penalty-phase presentation amounted to just a handful of transcript pages of argument and 17 pages of testimony by Mr. Windsor's mother that deprived the jury of evidence that would have supported multiple statutory and nonstatutory mitigating circumstances. (Vols. 14–15, Tab #R-52 (C. 201, 205); Doc. 16 at 58–59.)

The case for death at Mr. Windsor's trial was not strong. Having secured a conviction for capital murder during a robbery based on a theory of accomplice liability, the State relied on the guilt-phase verdict to establish the one aggravating circumstance it sought to prove at the penalty phase of trial. The State introduced no new evidence and called no witnesses at the penalty phase. (Vol. 6, Tab #R-19 (Tr. 1074, 1077–78).)

For the judge that presided over Mr. Windsor's trial, the penalty-phase ineffectiveness claim prompted him to tell the parties in Rule 32 proceedings that "[i]f we hear this case and that is it, I don't have a problem vacating the judgment." (Vol. 17, Tab #R-60 (Tr. 58).) The trial judge noted that "[t]he one thing that might disturb me in this case is the issue of if there were psychological problems with the defendant that were not brought out in the penalty phase. To me, that is significant. . . . That could have changed the decision of life without parole versus death." (Vol. 17, Tab #R-60 (Tr. 53–54).)

It was partly due to the trial judge's opinion on this claim that the district court granted Mr. Windsor discovery on it. In its order, the district court recounted the trial judge's comments and explained:

> In other words, the ultimate arbiter of Windsor's death sentence stated that if Windsor's trial counsel had presented at trial the mitigating evidence Windsor seeks, he might have sentenced Windsor to life imprisonment without parole, rather than death. The court thinks that Judge Austin's statements are a strong indication that if the evidence Windsor's trial counsel allegedly

> erred in failing to obtain had been introduced at his sentencing, there is a reasonable probability that the result of the sentencing would have been different.

(Doc. 33 at 22.) Having considered Mr. Windsor's pleadings and these comments, the district court found that "Windsor has made a claim that, if fully developed, satisfies *Strickland*'s performance and prejudice prongs" and "entitles him to relief." (Doc. 33 at 22.)

Unquestionably then, Mr. Windsor has satisfied the requirement that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

II. THE CORRECTNESS OF THE DISTRICT COURT'S DISCOVERY RULING THAT PROVIDED THE BASIS FOR DENIAL OF HABEAS RELIEF IS DEBATABLE AMONG JURISTS OF REASON.

The district court denied habeas relief on Mr. Windsor's penalty-phase ineffectiveness claim because, having denied his request for more time to complete discovery, "the status of Windsor's ineffective assistance of trial counsel claim remains the same as it was in 2012 when he filed his amended petition and admitted in reply its deficiency, the court denies Claim O as effectively conceded and unproven." *Windsor v. Dunn*, No. 4:10-cv-2223-AKK, 2020 WL 6262431, at *56 (N.D. Ala. Oct. 23, 2020). The court noted that its denial on this claim resulted from Mr. Windsor's "demonstrated [] lack of diligence in pursuing

this claim, and '[t]he record makes clear that [Windsor's] failure to comply with the court's scheduling order resulted from a lack of diligence in pursuing [his] claim.'" *Id.* (quoting *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998)). The correctness of this ruling, however, is debatable among jurists of reason, and the Eleventh Circuit should have issued a certificate of appealability ("COA"). *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

It is well established that habeas petitioners are "not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rather, discovery may only be granted in limited circumstances where a habeas petitioner has established "good cause." Rules Governing Section 2254 Cases 6(a). Further, under 28 U.S.C. § 2254(e)(2), the district court may not hold an evidentiary hearing to consider evidence adduced in discovery unless the petitioner diligently pursued such a hearing in state court. *Williams v. Taylor*, 529 U.S. 420, 435, 437 (2000). As this Court has cautioned, "[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings." *Id.* at 437.

Here, in this unusual case, the district court found Mr. Windsor had met the high bars for both discovery and an evidentiary hearing. The district court granted discovery on Mr. Windsor's penalty-phase ineffectiveness claim because "Windsor has made a claim that, if fully developed, satisfies *Strickland*'s

performance and prejudice prongs," which would entitle him to relief, and therefore "demonstrated good cause for his requests." (Doc. 33 at 11, 22.) The likelihood of prejudice was particularly pronounced because, as the district court explained, "[m]edical evidence about Windsor's injuries and mental health would not be duplicative of his mother's testimony" (Doc. 33 at 21), and because "the ultimate arbiter of Windsor's death sentence stated that if Windsor's trial counsel had presented at trial the mitigating evidence Windsor seeks, he might have sentenced Windsor to life imprisonment without parole, rather than death" (Doc. 33 at 22). The district court found that it could reach the merits of this claim "[b]ecause Windsor has demonstrated that the Rule 32 circuit court dismissed his ineffective assistance of penalty phase counsel based on two unreasonable determinations of fact." (Doc. 33 at 15.) Additionally, for purposes of determining that the court was not barred from conducting an evidentiary hearing, the district court found that Mr. Windsor was diligent in pursuing an evidentiary hearing in state court and "vigorously attempted to conduct discovery" during the almost eight years his Rule 32 petition remained pending in state circuit court. (Doc. 33 at 8–11.) Regarding an evidentiary hearing, the district court found, "The same due diligence and good cause Windsor has demonstrated with regard to his discovery requests are a sufficient basis for this court, at its discretion, to hold an evidentiary hearing." (Doc. 33 at 24.)

It was not until the district court issued its order granting discovery in September 2017 that discovery could begin. (Doc. 33.) Until that time, as the court's scheduling order stated, the parties were barred from pursuing discovery. (Doc. 13 at 6 ("The parties may not engage in discovery without the express permission of the court.").) Notably, on the same day the court partially granted Mr. Windsor's discovery motion, the district court appointed new habeas counsel for Mr. Windsor. (Doc. 32.) In granting the discovery order, the district court permitted new habeas counsel to depose trial counsel and obtain subpoenas for related records possibly obtained during Rule 32 proceedings. (Doc. 33 at 23.)

Over the next seventeen months, habeas counsel attempted to complete discovery, but encountered various obstacles and difficulties, ranging from uncooperative and difficult prior counsel to unexpected serious medical conditions, that prevented completion of discovery. As a result, habeas counsel sought multiple extensions of the time for completing discovery, each of which was unopposed or jointly requested with the State. (Docs. 34, 36, 46, 48.) The district court granted each request. (Docs. 35, 37, 41, 47, 49.) However, in response to habeas counsel's request for an extension and expansion of discovery, which noted that counsel had finally been able to depose one of Mr. Windsor's trial attorneys (Doc. 58), the State filed a response in opposition (Doc. 59). The district court then denied the extension request, terminating discovery because

"the court does not find good cause to extend the discovery deadline." (Doc. 61 at 3.) Subsequently, the district court denied Mr. Windsor's habeas petition. *Windsor*, No. 4:10-cv-2223-AKK, 2020 WL 6262431, at *56, 58.

Reasonable jurists could debate whether the court abused its discretion in finding that counsel had not been diligent and could not establish good cause for more time because the underlying claim established a right to relief and good cause had been established for the discovery. *See Ayestas v. Davis*, 584 U.S. 28, 46 (2018) ("A natural consideration informing the exercise of [] discretion is the likelihood that the contemplated services will help the applicant win relief.") Moreover, the district court had found each of the prior extension requests, which were unopposed or jointly made, to be well-taken and granted them. Mr. Windsor was given no warning that the court would not grant any further extensions of time in which to complete discovery.

In the end, the district court's decision to terminate discovery and deny relief has deprived Mr. Windsor of careful review of a claim that the district court itself recognized would undermine any confidence in the sentencing verdict that has him on death row. The Eleventh Circuit then abdicated its gatekeeping function when, without explanation or opinion, it failed to issue Mr. Windsor a COA despite his well pleaded claim and the debatability of the district court's discovery-related decision. This Court should now grant certiorari to reaffirm the

federal judiciary's commitment to the careful review of constitutional claims in death penalty cases.

CONCLUSION

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

Respectfully Submitted,

/s/ James M. Hubbard

ANGELA L. SETZER
COUNSEL OF RECORD
JAMES. M. HUBBARD
122 Commerce Street
Montgomery, AL 36104
Phone: (334) 269-1803
Fax: (334) 269-1806
Email: asetzer@eji.org
mhubbard@eji.org

March 28, 2024

Counsel for Harvey Windsor