No. 23-7128
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED
(Restated)

Harvey Windsor filed a 28 U.S.C. § 2254 petition and requested discovery. The district court granted limited discovery on his claim that trial counsel, Hugh Holladay and Ray Lowery, were ineffective for failing to present mitigation evidence showing that he suffered a head injury in a motorcycle accident that affected his mental health and personality. The court determined that "the efforts Holladay and Lowery made to investigate [mitigating factors] …, and their reasons for their failure to present any mitigating evidence they might have gathered are central to [his] claim." The court authorized Windsor to depose trial counsel and to subpoena the files of state postconviction counsel. The court gave him six months to complete discovery.

Habeas counsel requested and received five extensions of the discovery deadline. Even so, they waited until one week before the final deadline to try to serve Lowery with a subpoena for a deposition and the day before the deadline to depose Holladay. On the day of the deadline, Windsor moved for a sixth extension and to expand the scope of discovery. The district court denied his motion for lack of good cause, finding that he already had "more than sixteen months to conduct discovery" and had taken only Holladay's deposition, "which generally indicates that Holladay remembers very little of his work" on this case. The district court denied his claim "as effectively conceded and unproven" and denied a certificate of appealability. Windsor filed a Rule 59(e) post-judgment motion, but he did not ask the district court to reconsider its denial of a COA. The district court denied his motion, after which he moved the Eleventh Circuit for a COA. A single judge denied his request for a COA. He moved for reconsideration. A three-judge panel denied reconsideration.

The question presented is:

Did the Eleventh Circuit properly deny Windsor's request for a COA on his penalty-phase ineffectiveness claim?

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STATEMENT OF THE CASE

A. The facts of the crime

On February 25, 1988, Harvey Windsor and Lavon Guthrie robbed and killed Rayford W. Howard in St. Clair County, Alabama, and Randal Earl Pepper in Colbert County, Alabama. *Windsor v. State*, 683 So. 2d 1027, 1030 (Ala. Crim. App. 1994). Windsor and Guthrie visited Windsor's uncle, L.G. Windsor, the previous day. Vol. 21, Tab #R-69, C. 14.[1] They were driving a dark-colored Ford Mustang Boss 302. *Id.* The Mustang did not have a tag. *Id.* After they left, L.G. realized that the tag on his car was missing. *Id.* His tag number was 39BY845. *Id.* at 15.

Rayford Howard owned and operated a convenience store in St. Clair County. *Id.* at 16. Shortly before 2:00 p.m. on February 25, Frank Woodward drove into the parking lot of Howard's Store. *Id.* Woodward watched as a man carrying a sawed-off shotgun walked out of the store, reloaded the gun, and got in the passenger side of a black sports car with tinted glass. *Id.* Woodward decided to shop elsewhere. *Id.*

Minutes later, a customer went in the store. *Id.* The customer saw a body lying in a pool of blood and called the police. *Id.* Officers arrived, secured the scene, and found Howard dead from a shotgun blast to the chest. *Id.* at 16, 18. Howard's pants pockets were turned inside out, and the cash register had been emptied. *Id.* at 17. Officers found a spent shotgun shell outside the store. *Id.* at 16.

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[1] The citation format, with volume and tab numbers, refers to the state-court record. Respondents filed the record and the index of that record (i.e., the habeas checklist) in October 2012. Document numbers refer to the district court proceedings below.

Windsor and Guthrie were seen driving a black Mustang with gold stripes and the word "Boss" written on the side in St. Clair County that day. *Id.* at 15–16. Sammie Sue Osborne testified that Guthrie and another man came to her house in Pell City around 1:00 p.m. *Id.* at 15. She prepared sandwiches, and they ate together at her kitchen table. *Id.* She sat across from Guthrie's companion, whom she did not know. *Id.* She identified Windsor as the man who was with Guthrie, and she identified the black Mustang as the car they were driving. *Id.* Sammie Sue's house is located five miles from Howard's Store. *Id.* at 15–16.

The black Mustang was observed in several other counties that afternoon and evening. *Id.* at 19–21. Jerry Bishop was about to pass a vehicle on Highway 431 in Albertville when a car sped past him, causing him to yank his car back into the right lane. *Id.* at 19–20. As it sped past him at roughly seventy miles an hour, the car hit the back of a smaller vehicle. *Id.* at 20. Bishop took down the tag number, 39BY845, and called the police. *Id.* He described the car as black with gold pinstripes and the word "Boss" written on the right side. *Id.*

Robert Hester was driving on Highway 36 in Lawrence County around 5:30 p.m. *Id.* He was stopped at a stop sign when a car passed him, driving at a high rate of speed. *Id.* Hester made a note of the tag number, 39BY845, and described the car as a black Mustang or Capri with gold racing stripes down the side and on the hood. *Id.* He observed two occupants in the car. *Id.*

Michael Maxwell went to the Cheska Station in Colbert County around 8:00 p.m. *Id.* Maxwell noticed a black Mustang with the word "Boss" written on its side in

the parking lot. *Id.* The Mustang had a tag, but he recalled only that it had BY in it. *Id.* at 22. As he was about to enter the store, a man got out of the passenger side of the Mustang and went in ahead of him. *Id.* at 21–22. Maxwell saw the man walk up to another man in the store, say something, and go back outside to the Mustang. *Id.* at 22. Maxwell paid the owner, Randal Earl Pepper, and left. *Id.*

Jane Pepper and their son, Tommy, were at home when they heard a shotgun blast coming from the Cheska Station. *Id.* Jane hurried to her car as Tommy raced to the store on foot. *Id.* Tommy saw a man wearing blue jeans, a jacket, and a white T-shirt run from the store. *Id.* Tommy went into the store and found his father dead from a shotgun wound to the head. *Id.* When she drove into the parking lot, Jane saw two men get into a dark sports car with gold stripes and speed away. *Id.* Tommy identified Windsor as the man he saw that night. *Id.* Pepper carried a wallet and .25 automatic pistol when he was working, but neither was found on his body. *Id.*

On February 26, police officers in Chattanooga, Tennessee, found the Mustang Boss 302 in the parking lot of the Tiftonia Baptist Church. *Id.* The Mustang had been reported stolen on February 23, from Connie's Quick Shop in Tiftonia. *Id.* Guthrie's sister lived halfway between the church and the store. *Id.*

The Mustang was inventoried. *Id.* Officers recovered Pepper's wallet and a set of keys and a Parisian Department Store receipt, both belonging to Howard. *Id.* at 23–24. They found a spent shotgun shell and cigarette papers in the ashtray. *Id.* at 24. Latent fingerprints from the cigarette papers matched Windsor's known prints, and latent fingerprints from Howard's driver's license matched Guthrie's known

prints. *Id.* The shotgun shell in the Mustang and the shell that was recovered outside of Howard's Store were fired from the same weapon. *Id.*

On February 28, Chris Cook went to an event in Guntersville, Alabama. Vol. 4, Tab #R-11, R. 742–50. Windsor and Guthrie were there. *Id.* Windsor showed Cook a .25 automatic pistol and said that he took it from someone who had tried to kill him. Vol. 21, Tab #R-69, C. 25. Windsor also told Cook that he and Guthrie had hit "the back end of another vehicle" when they were "driving through Albertville in a black Mustang G.T. with a sunroof and stripe on the side" several days earlier. *Id.*

Windsor and Guthrie were apprehended by law enforcement officers at a rest stop on I-24 in Tennessee on March 5. *Id.* Windsor was in possession of Pepper's .25 automatic pistol at the time of his arrest. *Id.*

B. Facts elicited at the penalty phase

Windsor's counsel, Hugh Holladay and Ray Lowery, called his mother, Lillian, at the penalty phase of his trial. Vol. 6, Tab #R-22, R. 1079–96. Lowery examined her.

Relevant here, Lowery asked Lillian if Windsor was involved in a motor vehicle accident, and she testified:

> A: Yes, it was September 13, on a Friday morning, he had a motorcycle wreck and he had a broken leg and they came and told me he was in the hospital and they wanted to transfer him from Guntersville Hospital to Huntsville Hospital. They thought he was bleeding on the inside. From the 13th of that Friday to the 20th of the next Friday, of September, something snapped in his mind just like a rubber band.
>
> Q: Did he have a head injury?
>
> A. They didn't think so, but he must have did. When I went to see him, he didn't know who I was. I walked in that room, and he said,

> "Who are you?" He didn't know nobody and was talking crazy saying "nuts and bolts" and things like that. They transferred him from Huntsville to St. Margaret's Hospital so they could operate on his leg.
>
> Q: Do you know if he had a helmet on that night?
>
> A: Yes, sir, he did.
>
> Q: Did it break it?
>
> A: No.

Vol. 6, Tab #R-22, R. 1083–84.

Lillian thus testified that Windsor had a motorcycle wreck in 1985. *Id.* at 1083, 1086. He had "a broken leg" and was transferred to a hospital so that surgeons "could operate on his leg." *Id.* at 1083–84. He was wearing a helmet, and the helmet was not broken in the accident. *Id.* at 1084. His doctors told Lillian that he did not sustain a head injury, but she thought otherwise. *Id.* She implored the jury not to sentence him to death, testifying, "If he done anything, he did not know he was doing it. That is all I can say. Before he had that accident, he was a healthy, happy man. He could do anything he set his mind to do. All I can say is he is not the same." *Id.* at 1094.

The presentence investigation report is consistent with Lillian's testimony that Windsor broke his leg in a motorcycle accident. Vol. 8, Supplement 2, C. 6–10. The probation officer wrote, "Windsor states he is in good health. He said he broke a leg in 1985 in a motorcycle accident." *Id.* at 10. The officer noted, "Windsor did state that when he previously served a sentence in the Alabama State Penitentiary that he acted 'like crazy' and this got him some attention." *Id.* at 11.

C. The proceedings below

On June 8, 1992, a St. Clair County jury found Windsor guilty of the capital offense of murdering Rayford Howard during the course of a robbery, in violation of section 13A-5-40(a)(2) of the Code of Alabama. Doc. 64 at 2. The jury unanimously recommended that Windsor be sentenced to death. *Id.* The trial court agreed and sentenced him to death.[2] *Id.*

Holding that the prosecutor improperly commented on his failure to testify and that the circuit clerk impermissibly excused jurors, the Alabama Court of Criminal Appeals ("ACCA") reversed Windsor's conviction. *Windsor v. State*, 683 So. 2d 1013 (Ala. Crim. App. 1993). The Alabama Supreme Court reversed both rulings. *Ex parte Windsor*, 683 So. 2d 1021 (Ala. 1994). On remand, the ACCA affirmed his conviction and sentence. *Windsor v. State*, 683 So. 2d 1027 (Ala. Crim. App. 1994). The Alabama Supreme Court affirmed, *Ex parte Windsor*, 683 So. 2d 1042 (Ala. 1996), and this Court denied certiorari, *Windsor v. Alabama*, 520 U.S. 1171 (1997) (mem.).

In April 1998, Windsor filed a petition for postconviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. *Windsor v. State*, 89 So. 3d 805, 808 (Ala. Crim. App 2009). The State answered and moved for partial dismissal of the claims in his petition. *Id.* The circuit court granted the State's motion, after which

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[2] A Colbert County jury found Windsor guilty of the capital offense of murdering Randal Earl Pepper during the course of a robbery, and he was sentenced to death. *Windsor v. State*, 593 So. 2d 87, 88 (Ala. Crim. App. 1991). The ACCA reversed his conviction and remanded for a new trial. *Id.* at 92–93. Windsor was convicted of felony murder at his retrial. *Windsor v. Dunn*, 4:10-cv-2223, 2020 WL 6262431, at *1 n.3 (N.D. Ala. Oct. 23, 2020).

Windsor filed an amended petition. *Id.* at 808–09. The State answered and moved for partial dismissal. *Id.* at 809. The court granted the State's motion, dismissing most of his claims. *Id.* The court scheduled an evidentiary hearing on his remaining claims, but the hearing was continued multiple times. *Id.*

A new judge was assigned to Windsor's case in 2005. Vol. 17, Tab #R-61, R. 2. In February 2006, the circuit court resolved his outstanding claims and dismissed his amended petition. Vol. 17, C. 449–87. The ACCA affirmed. *Windsor*, 89 So. 3d at 826. The Alabama Supreme Court remanded his case for the ACCA to address a claim it had overlooked. *Id.* at 826–27. The ACCA did as ordered and again affirmed. *Id.* at 830. The Alabama Supreme Court denied certiorari. *Ex parte Windsor*, No. 1110338 (Ala. Feb. 17, 2012).

On August 17, 2010, Windsor filed a 28 U.S.C. § 2254 petition in the Northern District of Alabama, along with a motion for stay and abeyance pending exhaustion of his state-court remedies. Docs. 1, 3. The district court granted his motion. Doc. 8. In March 2012, the district court lifted the stay, and he filed an amended petition. Docs. 13, 16. Charles Flowers and William H. Broome were his habeas counsel. Doc. 16 at 72. Respondents answered and filed a merits brief, the state-court record, and the habeas checklist. Docs. 23–26. Windsor replied. Doc. 28.

Windsor moved for discovery on his penalty-phase ineffectiveness claim and his claim that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963). Doc. 29. Relevant here, he sought leave to (1) depose his trial counsel, Hugh Holladay and

Ray Lowery; (2) issue a subpoena duces tecum to the Equal Justice Initiative ("EJI")[3]; and (3) issue a subpoena duces tecum to attorney Walter Logan. *Id.* at 3–4. Stephen Greenwald was Windsor's lead Rule 32 counsel, but because he was an out-of-state attorney, the state court appointed Logan as local counsel to assist Greenwald. *Id.*; Vol. 15, C. 307, 335–36. Windsor also asked the court to order the State to review its files to determine whether any of the discovery that he had requested during his Rule 32 proceeding had been produced to the State. Doc. 29 at 4.

Flowers and Broome explained why they were requesting the subpoenas duces tecum. They had contacted Greenwald to inquire about the location of Windsor's Rule 32 files, and "Greenwald's recollection" was "that at least a portion of the evidence he accumulated for a hearing on [the ineffectiveness] issue was supplied from the Colbert County trial." Doc. 29 at 4. That information led them to contact Windsor's EJI attorneys, who were "very cordial" but did not "have much of a recollection of the trial." *Id.* Based on what they'd learned, they argued that a subpoena for EJI's files would "assure an opportunity to recover at least a portion of the mitigation evidence" that was needed to "litigate" his ineffectiveness claim. *Id.*

Further, Flowers and Broome had called Logan to ask him about the Rule 32 files, but it was their "impression that he was uncomfortable discussing the case with someone he did not know." *Id.* They thought that "an official request," in the form of a subpoena, would spur him to "find his file" and "determine if he [had] duplicates of

[3] Two EJI attorneys represented Windsor in his Colbert County case, in which he was charged with the murder of Randal Earl Pepper. Doc. 29 at 3–4.

the information Mr. Greenwald believes to exist." *Id.* Notably, they did *not* request leave to depose Greenwald or to issue a subpoena for his files. *Id.*

Several years later, Flowers and Bloome moved to withdraw. Doc. 30. Flowers was retiring from the practice of law, and Windsor did not want Bloome to serve "as lead counsel." *Id.* at 1–2. Windsor wanted an attorney who was licensed in Ohio "to take over his case." *Id.* at 2–4.

On September 29, 2017, the district court granted their motion to withdraw, appointed attorney J.D. Lloyd as Windsor's new habeas counsel, and granted in part and denied in part Windsor's discovery motion. Docs. 32, 33. The court found that he demonstrated good cause for limited discovery on his claim that his trial counsel were ineffective for failing to present mitigation evidence showing that he sustained a head injury in a motorcycle accident that affected his mental health and personality. Doc. 33 at 7–21. The court denied his request as to his *Brady* claim. *Id.* at 24–26. The court authorized Windsor to:

> (1) conduct depositions of his trial counsel, Mr. Hugh Holladay and Mr. Ray Lowery. Information about the efforts Holladay and Lowery made to investigate any factors that might have mitigated Windsor's death sentence, and their reasons for their failure to present any mitigating evidence they might have gathered are central to Windsor's claim.
>
> (2) issue a subpoena duces tecum to Walter Logan, Windsor's local Rule 32 counsel, allowing Windsor to inspect any records in Logan's possession that may have been produced during the Rule 32 process. Windsor has indicated that Logan may possess mitigation evidence that would support his ineffective assistance of penalty phase counsel claim. Doc. 29 at 4. To the extent that Mr. Logan's records do not contain the medical records he represented that he had subpoenaed from the Equal Justice Initiative, Windsor may renew his request that the court grant him leave to subpoena the records directly from the Equal Justice Initiative.

Id. at 23. The court denied his request to order the State to review its files. *Id.* at 24.

The district court ordered that "Windsor has until March 30, 2018 to conduct discovery. If either party wishes to move to hold an evidentiary hearing, it must file a motion by April 30, 2018." *Id.* at 26. The court's scheduling order thus gave Windsor six months to depose trial counsel, inspect Logan's records, and, if necessary, renew his request to subpoena EJI's records. *Id.* at 25–26.

On March 22, 2018, Windsor, through Lloyd, moved for a sixty-day extension of the deadlines. Doc. 34. Lloyd explained that he had not located Windsor's Rule 32 files. *Id.* at 1–3. He had been unable to "make contact with Logan," but he talked to Greenwald, who said that "Logan would not have had any of the pertinent files." *Id.* at 2. Greenwald said he would check his storage facility for the files, but he told Lloyd that he may have given them to Ed Tumlin, Windsor's Rule 32 appellate counsel. *Id.* Lloyd contacted Tumlin, and he, too, agreed to look for the files. *Id.* Lloyd requested the extension because "neither attorney has reported back." *Id.*

Lloyd had "reached out to Mr. Holladay and Mr. Lowery," and he noted that Holladay had "expressed a willingness to do whatever he can to help facilitate this matter." *Id.* But Lloyd was of the opinion that deposing them "would be of little avail without first reviewing the records central to" the claim. *Id.* at 2–3.

Respondents did not oppose the motion. *Id.* at 3. In fact, Respondents agreed that the requested extension would "help resolve" this issue. *Id.* The district court granted the motion, ordering that the "deadlines for completion of discovery and for

a motion to hold an evidentiary hearing are extended to May 29, 2018 and June 29, 2018, respectively." Doc. 35.

On May 10, 2018, Windsor, through Lloyd, moved for a second and "final" sixty-day extension of the deadlines. Doc. 36. Lloyd explained that Greenwald and Tumlin had not found time to look for the files. *Id.* at 2. Based on recent conversations with them, Lloyd reported that Greenwald "would [be] going to his off-site storage facility the following weekend (May 18–20th) to look" for them, and Tumlin "would finally get to his storage facility by the end of the week." *Id.* Lloyd reiterated his opinion that "carrying out the depositions outlined in this Court's discovery order would be of little avail without first reviewing the records." *Id.* Respondents did not oppose the motion, *id.*, and the district court granted it, ordering that the "deadlines for completion of discovery and for a motion to hold an evidentiary hearing are extended to July 28, 2018 and August 28, 2018," doc. 37.

On June 20, 2018, Windsor, through Lloyd, moved the district court to appoint Dustin J. Fowler as co-counsel. Doc. 38 at 1. Fowler, he wrote, will bring "experience and perspective from trial representation," and his "knowledge and experience will enable a more comprehensive and proper representation of a defendant sentenced to death." *Id.* at 2–3. Lloyd had "spoken extensively with Mr. Fowler about the matter," and he noted that Fowler "is aware of the deadlines set in this case" and "is available and ready to begin representation." *Id.* at 3.

On August 29, 2018, the parties requested a status conference for the purpose of "discuss[ing] outstanding issues as well as a roadmap for future proceedings." Doc.

39 at 1. The district court granted the motion the next day, scheduling a telephonic status conference for September 5. Doc. 40. On September 6, the court entered an order extending the discovery deadline to November 30, 2018, and setting the matter for an evidentiary hearing on January 17, 2019. Doc. 41. On September 7, the court appointed Fowler as Lloyd's co-counsel. Doc. 43.

On November 16, 2018, the parties moved to extend the discovery deadline to December 31, 2018. Doc. 46. The district court granted the motion. Doc. 47. Windsor, through Fowler, moved the court on December 12, 2018, for a fifth extension of the discovery deadline and to continue the evidentiary hearing. Doc. 48. Fowler told the court that he "has been diligently working on this case" but was facing health issues. *Id.* at 2. He had spoken to "opposing counsel, and based upon the personal nature of this filing, they d[id] not object to the filing of this motion *under seal*." *Id.* (emphasis added). Curiously, Fowler made no mention of Lloyd, and Lloyd's name and signature block are not on the motion. *Id.* at 2–3. The court cancelled the hearing and extended the discovery deadline to February 8, 2019. Doc. 49.

Windsor finally deposed Hugh Holladay on February 7, 2019, one day before the fifth discovery deadline. Doc. 58-1. As the district court found, the deposition "generally indicates that Holladay remembers very little of his work for Mr. Windsor." Doc. 61 at 3. Holladay could not remember if he and Lowery talked about bifurcating their duties, but he testified, "That may have been the way it turned out." Doc. 58-1 at 30. The transcript reflects that Holladay took twenty-eight guilt-phase witnesses

and that Lowery questioned Lillian, Windsor's mother, at the penalty phase of the trial. Doc. 58-1 at 30, 64; Vol. 6, Tab #R-22, R. 1079–96.

Holladay recalled that they had Windsor evaluated by a medical professional, who assessed his "competency" and "mental capacity." Doc. 58-1 at 21–22. He had no recollection of receiving a letter from that expert recommending that they obtain his medical records, testifying, "I just don't remember any problem being revealed from the psychologist, psychiatrist." *Id.* at 60. Their investigator "went to wherever Harvey grew up … and interviewed people there looking for someone that could testify in the penalty phase." *Id.* at 34. He could not remember, either way, if he spoke to Windsor's family members, read his letters to his mother, reviewed his records, or investigated whether he had substance abuse issues. *Id.* at 28–29, 31, 35–36.

On February 8, 2019, the day of the fifth deadline, Windsor, through Lloyd and Fowler, moved the district court to expand the scope of discovery "and/or" extend the discovery deadline "for at least ninety days." Doc. 58 at 1–8.

First, they asked for more time to depose Ray Lowery. *Id.* at 4–5. They alleged that Lowery was "uncooperative" when "Fowler reached [him] by phone in January to discuss a deposition" and "avoided service" when their process server tried to serve him on January 29, 2019, and several days thereafter. *Id.*

Second, they moved the court to vastly expand the scope of discovery. *Id.* at 5–8. They sought permission to depose the following eleven people: Stephen Greenwald, Edward Tumlin, Kevin Doyle, Patrick Dunne, Patrick Bruce Atkins, M.A. Windsor, Jr., Patricia Sue Smith, Dr. W.H. Goodson, Jr., Dr. Kynard Adams, Dr. A. Ward, and

Dr. W.L. Pinchback. *Id.* They asked for leave to issue subpoenas for Greenwald's and Tumlin's files from Windsor's "Rule 32 petition and/or his Rule 32 appeal." *Id.* They also sought leave to issue subpoenas to Dunne and Atkins "for files pertaining to any examination performed" on Windsor. *Id.* at 7. The expanded discovery was necessary, they said, because of information obtained during Holladay's deposition. *Id.* at 2–4.

Third, they moved the court to reconsider its denial of Windsor's request for discovery of the State's Rule 32 files. *Id.* at 8. They argued that discovery of the files was necessary because they had "diligently sought the Rule 32 files prepared by Rule 32 counsel" and "come to the conclusion that these records have either been destroyed in a house fire or have been lost." *Id.* They provided no basis for that conclusion, nor did they explain why they needed to issue subpoenas duces tecum for Greenwald and Tumlin's files if those files had been "destroyed in a house fire" or lost. *Id.* at 6, 8.

Respondents opposed Windsor's motion, arguing that he could not show good cause for a sixth extension of the discovery deadline or for an expansion of discovery because he had not been diligent in pursuing the limited discovery authorized in the district court's order of September 29, 2017. Doc. 59. Respondents had "tried to be accommodating," but the district court had already extended the deadline five times, giving him more than sixteen months to depose trial counsel and subpoena Logan's files. *Id.* at 3–4. Even so, he waited until the day before the fifth deadline to depose Holladay and the week before to first attempt service on Lowery. *Id.* Respondents further argued that Holladay's deposition did not produce any new information or evidence that would warrant an extension or expansion of discovery. *Id.* at 8–11.

On February 25, 2019, the district court denied Windsor's motion to extend the deadline and expand the scope of discovery. Doc. 61. The court found that he was not diligent in pursuing discovery and that Holladay's deposition did not provide good cause for extending the deadline or expanding discovery:

> Deadlines help the court to control its docket. *See Young v. City of Palm Bay,* 358 F.3d 859, 864 (11th Cir. 2004) ("A district court must be able to exercise its managerial power to maintain control over its docket."). And, a nine-year old case such as this is the quintessential example of one that needs effective controls. As Respondents note, Mr. Windsor had more than sixteen months to conduct discovery, between the court's order granting discovery on September 29, 2017 and the most recent discovery deadline of February 8, 2019. Moreover, despite the extended period, Mr. Windsor waited until the date of the most recent discovery deadline to request leave to subpoena the files of his Rule 32 counsel and to depose these two lawyers, *see* docs. 29, 58, and to request leave to depose and/or subpoena files from the other witnesses included in the motion, *see* doc. 58 at 5–8. He also waited until the day before the discovery deadline to depose Holladay. *See* docs. 58 at 2; 49. In light of the foregoing, the court does not find good cause to extend the discovery deadline.
>
> Finally, contrary to Mr. Windsor's contentions, the court does not find that Holladay's deposition testimony—which generally indicates that Holladay remembers very little of his work for Mr. Windsor—or the failure to obtain files from Mr. Windsor's Rule 32 counsel provides good cause to expand the scope of discovery as requested. *See* doc. 58 at 1–8; 58-1; *Arthur v. Allen*, 459 F.3d 1310, 1311 (11th Cir. 2006) ("[G]ood cause for discovery cannot arise from mere speculation.") *Stevens v. Zant*, 968 F.2d 1076, 1082 (11th Cir. 1992) ("[T]rial counsel's failure to present mitigating evidence is not per se ineffective assistance of counsel.").
>
> For all these reasons, Windsor's motion, doc. 58, is denied.

Id. at 3–4.

Windsor never moved the district court to reconsider that order. Doc. 67 at 4. Instead, through Lloyd and Fowler, he moved the district court on March 15, 2019,

to "allocate and approve expenses" for him to hire Dr. John Goff, a neuropsychologist.[4] Doc. 62. His services, they wrote, were "necessary to help prove counsel's performance was deficient" and "to aide [them] in preparation" for a hearing. *Id.* at 3, 6.

On October 23, 2020, the district court entered a Memorandum Opinion and a Final Judgment denying Windsor's petition. *Windsor v. Dunn*, 4:10-cv-2223, 2020 WL 6262431 (N.D. Ala. Oct. 23, 2020). The court denied his motion for expert funds and denied his penalty-phase ineffectiveness claim on the merits, reasoning:

> Windsor contends in Claim O that his trial counsel's ineffectiveness in presenting mitigation evidence during the penalty phase violated his Sixth Amendment rights under *Strickland* [*v. Washington*, 466 U.S. 668 (1984)]. Doc. 16 at 54–55 ¶ 93. Windsor raised this claim during the state collateral review process. Doc. 16 at 60, 61 ¶¶ 99, 102; Vol. 21, Tab 79 at 449–453, 458–462. The Rule 32 court observed that Windsor's trial counsel "appear[ed] … not [to] present more mitigating evidence because it was not available." Vol. 21, Tab 79 at 461. The court denied this claim because Windsor "fail[ed] to meet the specificity and full factual pleading requirements of Rule 32.6(b)." *Id.* at 462. The court identified several pleading deficiencies, including the absence of "a single witness [Windsor's] trial counsel could have interviewed that might have provided any beneficial information for the penalty phase" or "anyone that treated [Windsor] after his 1985 motorcycle wreck that could have provided any testimony about his physical or mental condition that might have been mitigating." *Id.* at 459. The ACCA adopted the Rule 32 court's findings and affirmed. *Windsor Rule 32*, 89 So. 3d at 824.
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> The Respondents argue that Windsor cannot show that the ACCA contradicted or unreasonably applied Supreme Court precedent in affirming the Rule 32 court. Doc. 28 at 56. In reply, Windsor concedes that "[w]ithout additional discovery, the undersigned cannot question the legal conclusion of the [ACCA] on this issue." Doc. 28 at 45. But, during the course of this habeas proceeding, Windsor failed to take advantage of the opportunity to conduct discovery to advance this *Strickland* claim. Doc. 61 at 2–3. The Court granted Windsor the right to conduct limited discovery under Rule 6 of the Rules Governing Section 2254 Cases. Doc. 33 at 22–23. In the September 29, 2017 order, the court

[4] They incorrectly identified Dr. Goff as a neuropsychiatrist. Doc. 62 at 1.

> set a deadline of March 30, 2018 for Windsor to complete discovery. Doc. 33 at 26. And the court subsequently extended the deadline five times, with the final order extending the deadline to February 8, 2019. In addition to the extensions, the court approved funds for Windsor to depose his trial counsel to substantiate his ineffective assistance claim. *See* doc. 54. After the last extension expired, Windsor requested additional time. Doc. 58. The Respondents opposed the motion, doc. 60, and the court denied the request for lack of good cause, doc. 61 at 3. The court noted, in part, that Windsor "had more than sixteen[] months to conduct discovery" and had waited until the day before the close of discovery to depose one of his trial lawyers. Doc. 61 at 3.
>
> Thereafter, Windsor moved for the allocation of expert expenses "to retain Dr. John Goff, a neuropsychiatrist, in preparation of an evidentiary hearing in this matter" on his *Strickland* claim. Doc. 62 at 1. The motion is tardy and, like Windsor's request to extend the discovery deadline, lacks good cause. *See* FED. R. CIV. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent."). "This good cause standard precludes modification unless the schedule cannot 'be met despite the diligence of the party seeking the extension.'" *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998) (quoting 1983 amended version of FED. R. CIV. P. 16(b)). Windsor has demonstrated a 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.* at 1419. And because "[d]eadlines are not meant to be aspirational; [and] counsel must not treat the goodwill of the court as a sign that, as long as counsel tries to act, he has carte blanche permission to perform when he desires," *Young v. City of Palm Bay*, 358 F.3d 859, 864 (11th Cir. 2004), the court will deny Windsor's untimely expert motion and will not hold an evidentiary hearing. Therefore, because 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 denied Claim O as effectively conceded and unproven.

Windsor, 2020 WL 6262431, at *55–56 (footnotes omitted).

The district court correctly summarized the standard for granting a certificate of appealability ("COA"):

> This court may issue a certificate of appealability "only if the applicant had made a substantial showing of the denial of a constitutional right."

> 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Pet. App. A. The court found that Windsor's "claims do not satisfy either standard for granting a certificate of appealability" and denied a COA. *Id.* at 2.

Windsor, through Lloyd and Fowler, filed a Rule 59(e) post-judgment motion. Doc. 66. He argued that the district court erred in finding that he was not diligent in pursuing the discovery authorized in its order of September 29, 2019, because it failed to consider the "problems he had been encountering in trying to carry out the limited discovery." *Id.* at 2–8. He further argued that the court erred in denying his motions to expand discovery and for funds because Holladay's "answers during his deposition demonstrate that counsel's performance was deficient … and prejudicial." *Id.* at 14. But notably, he did *not* ask the court to reconsider its denial of a COA. *Id.* at 1–15. The phrase "certificate of appealability" appears nowhere in his motion. *Id.*

The district court denied Windsor's motion. Pet. App. C. The court corrected his misunderstanding of its decision, clarifying that it "was mindful of the challenges [he] faced and extended the discovery deadline multiple times as a result." *Id.* at 4. The court explained that it considered the "totality of the record" in finding that he had not shown good cause for "his last extension request" and that its "dismissal of [his] *Strickland* claim is consistent with that prior good cause determination." *Id.* The court noted that he "cites no cases that suggest the court erred, much less manifestly

so." *Id.* The court also observed that he "never sought reconsideration of the February 2019 discovery order." *Id*

The district court turned to his argument that it erred in denying his motion for funds. *Id.* Lest there be any doubt, the court made clear that it "was aware of and considered Mr. Holladay's deposition testimony when it denied [his] last discovery extension request for lack of good cause and later found that [his] late funding request also lacked good cause." *Id.* at 4–5 (citations omitted). The court held that Windsor's reliance on *Ayestas v. Davis*, 584 U.S. 28 (2018), was misplaced because "*Ayestas* does not hold that a district court abuses its discretion when, as was the case here, it denies a petitioner's § 3599(f) funding request filed after the expiration of an extended discovery period." *Id.* at 5. The court added that, even now, he "offers no explanation for seeking expert funding after the discovery window had closed." *Id.*

Windsor moved the Eleventh Circuit for a COA on two procedural issues. *See* Petitioner's Am. Request for Cert. of Appealability, No. 21-11517 (11th Cir. filed July 14, 2021). As grounds for granting a COA, he argued that "the district court committed two fundamental errors regarding" his ineffectiveness claim. *Id.* at 9. The district court, he said, "erred in denying [his] reasonable request to expand discovery in light of the evidence developed in the initial limited discovery" and "erred in denying [his] reasonable request for funding for a neuropsychologist pursuant to 18 U.S.C. § 3599(f)." *Id.* at 9–10. He contended:

> Reasonable jurists could debate whether the district court's decision to deny the expansion of discovery, including funds for an expert, constituted an abuse of discretion. Therefore, this Court should grant

> Mr. Windsor's certificate of appealability and review the district court's decisions regarding Mr. Windsor's habeas petition.

Id. at 10.

A single judge denied Windsor's request for a COA on January 13, 2023. Pet. App. D. Windsor moved for reconsideration. On November 29, 2023, a three-judge panel denied his motion. Pet. App. E.

REASONS FOR DENYING THE PETITION

Windsor presents no "compelling reasons" for granting certiorari. SUP. CT. R. 10. This is a fact-bound case that presents no important federal question for this Court to answer and no division among the lower courts requiring resolution. Windsor was given more than a year to conduct limited discovery, yet he delayed, thereby delaying his execution. The district court plainly did not abuse its discretion in declining to grant Windsor a *sixth* extension of time to conduct discovery. And because Windsor failed to develop evidence to support his *Strickland* claim, it plainly failed. For the reasons set forth below, Windsor's petition should be denied.

I. The Eleventh Circuit properly denied Windsor a COA on his ineffectiveness claim because reasonable jurists would not find the district court's denial of that claim "debatable or wrong."

Windsor contends that the Eleventh Circuit's denial of his request for a COA on his ineffectiveness claim conflicts with *Slack v. McDaniel*, 529 U.S. 473 (2000). Pet. i, 14–15. He "faces a high bar" in showing that he was entitled to a COA. *Tharpe v. Sellers*, 583 U.S. 33, 35 (2018) (per curiam). Because he did not and cannot meet that bar, certiorari should be denied.

A. "A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an automatic right to appeal." *Buck v. Davis*, 580 U.S. 100, 115 (2017). He "must first seek and obtain a COA." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

"The COA process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels." *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012). "The rationale for these rules is simple: If a prisoner must eventually prove a constitutional violation to secure release from custody, his appeal should proceed only if he can prove a debatable constitutional issue at the outset. A procedural-only appeal is much ado about nothing." *United States v. Castro*, 30 F.4th 240, 244 (5th Cir. 2022).

B. Windsor appears to argue that he's made a substantial showing of the denial of a constitutional right because the district court initially found that he pleaded a claim that, if true, would entitle him to relief. Pet. i, 15–18. He says he "undoubtedly met" the "requirements for the issuance of a COA" because (1) the district court found that, if proven, he was prejudiced by trial counsel's failure to present mitigating evidence about his head injury, and (2) the district court's discovery rulings are

debatable among jurists of reason. *Id.* at 14–15. That cannot be correct. Indeed, Windsor cites no authority for the proposition that a habeas petitioner who merely pleads a colorable claim is entitled to a COA if he shows the district court's ruling on an ancillary procedural matter is debatable.

What the district court said in its initial ruling granting an evidentiary hearing is entirely unremarkable:

> if Windsor is able to develop his claim and accumulates evidence supporting his assertions, namely that his counsel knew that he may have suffered psychological injuries as the result of a motorcycle accident and failed to investigate the existence, extent, and whether they could potentially mitigate his sentence, Windsor will have satisfied *Strickland's* deficient performance prong.

Doc. 33 at 19. In other words, *if* Windsor develops evidence to prove prong one of *Strickland*, then he will have proven prong one of *Strickland*. This statement reflected the district court's initial openness to Windsor's claim; it says nothing about whether Windsor actually "develop[ed] … and accumulate[d] evidence" *after* eighteen months of discovery and five extensions of the deadline. Whether Windsor's claim "deserve[d] encouragement to proceed further," *Miller-El*, 537 U.S. at 327, must be evaluated at the time the COA was denied, not when the claim was first pleaded. At the time of denial, the claim had remained unproven and undeveloped despite ample opportunity, so further encouragement would have been wholly undeserved.

A COA was rightly denied in this case because Windsor failed to present even a shred of evidence to support his ineffectiveness claim. A habeas petitioner must establish that counsel's performance was deficient because it fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced him

by depriving him of "a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). "The benchmark for judging any claim of ineffectiveness" is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

"Even under de novo review, the standard for judging counsel's representation is a most deferential one." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). There is a strong presumption that counsel's conduct falls within the "wide range of professional assistance." *Strickland*, 466 U.S. at 689. Because counsel is presumed to have acted reasonably, the "burden of persuasion is a heavy one: petitioner must establish that no competent counsel would have taken the action that his counsel did take." *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1209 (11th Cir. 2007) (cleaned up).

"Counsel has a duty to make *reasonable* investigations or make a *reasonable* decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "[N]o absolute duty exists to investigate particular facts or a certain line of defense." *Chandler v. United States*, 218 F.3d 1305, 1317 (11th Cir. 2000) (en banc). "Under *Strickland*, counsel's conducting or not conducting an investigation need only be reasonable to fall within the wide range of competent assistance." *Id.*

"In assessing attorney performance, the reviewing court should make every effort to eliminate the distorting effects of hindsight and evaluate the conduct from counsel's perspective at the time." *Perkins v. United States*, 73 F.4th 866, 879 (11th Cir. 2023) (cleaned up). "[A] court deciding an actual ineffectiveness claim must judge

the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 446 U.S. at 690.

"[T]he absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 571 U.S. 12, 23 (2013) (quoting *Strickland*, 466 U.S. at 689). "[W]hen the evidence is unclear or counsel cannot recall specifics about his actions due to the passage of time and faded memory, [courts] presume counsel performed reasonably and exercised reasonable professional judgment." *Blankenship v. Hall*, 542 F.3d 1253, 1274 (11th Cir. 2008); *see also Dunn v. Reeves*, 594 U.S. 731, 740 (2021) ("[W]e simply do not know what information and considerations emerged as counsel reviewed the case and refined their strategy.").

Under *Strickland* and its progeny, Windsor's claim was never debatable because he never developed any evidence for it. Indeed, Windsor "admitted … its deficiency" when he initially sought an evidentiary hearing. *Windsor*, 2020 WL 6262431, at *56; *see also* Doc. 64 at 151 ("[T]he status of Windsor's ineffective assistance of trial counsel claim remains … effectively conceded and unproven.").

Despite being given ample time to prove his claim, Windsor never did. The district court granted Windsor limited discovery on September 29, 2017, and set the discovery deadline for March 30, 2018, giving him *six months* to depose trial counsel. Doc. 33. On March 22, 2018, Windsor filed his first motion to extend the deadline. Doc. 34. Habeas counsel informed the court that he had "reached out to Mr. Holladay and Mr. Lowery" and that Holladay "expressed a willingness to do whatever he can

to help facilitate this matter." *Id.* at 2. The court extended the deadline. *Id.* Habeas counsel then requested and received four more extensions, for a total of five, with the final order extending the deadline to February 8, 2019. *Windsor*, 2020 WL 6262431, at *56. Even though Holladay was available and willing to be deposed as of March 2018, counsel waited to depose him until February 7, 2019, the day before the fifth deadline. Doc. 58-1. Counsel waited until January 2019 "to discuss a deposition" with Lowery and waited until January 29 to first attempt service on him. Doc. 58 at 4–5. Due to Windsor's lack of diligence, Lowery was never deposed, and Windsor never developed the sort of facts that the district court initially surmised could, if proven, justify relief.

In these circumstances, no reasonable jurist would find the district court's assessment of Windsor's ineffectiveness claim debatable or wrong. The record is silent. He entirely failed to prove deficient performance. In fact, he failed to prove that he ever had a head injury, let alone that he sustained a head injury in a motorcycle accident in 1985 that affected his mental health and personality. While Windsor spends much of his petition complaining that he did not receive a sixth extension of the discovery deadline, whether he had good reasons for failing to prove his claim is immaterial. The COA standard asks only whether his underlying claim is debatable, and the answer is no.

Windsor seems to think the COA standard is satisfied so long as he has pleaded a claim that, if true, would entitle him to relief. That's wrong. But even if it were the proper approach, his *Strickland* claim failed—notwithstanding the district court's

initial amenability to it. The petition cites no case in which this Court found ineffectiveness for failure to present mitigation *solely* based on an alleged injury. *Cf., e.g.*, *Porter v. McCollum*, 558 U.S. 30 (2009) (detailing horrific child abuse, war trauma, brain abnormalities, and extreme mental and emotional disturbance). Windsor's unproven claim—even if proven—would not come close to the facts of any of this Court's mitigation precedents. Because Windsor's claim is so poor, the proper COA standard is immaterial, making this case a poor vehicle for reviewing the question presented. His petition should be denied.

II. The Eleventh Circuit properly denied Windsor a COA on his claim that the district court abused its discretion in denying his sixth request to extend the discovery deadline.

Windsor argues that reasonable jurists could debate the correctness of the district court's denial of his request to extend the discovery deadline. Pet. 18–23. He is wrong, and he failed to present a constitutional issue worthy of appeal.

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). "Discovery in § 2254 litigation proceeds according to Rule 6 of the Rules Governing § 2254 cases." *Williams v. Beard*, 637 F.3d 195, 209 (3d Cir. 2011). "That provision states, 'A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery.'" *Id.* (quoting Rule 6(a), Rules Governing Section 2254 Cases). "Rule 6(a) makes it clear that the scope and extent of such discovery is a matter confided to the discretion of the District Court." *Bracy*, 520 U.S. at 909.

"When parties wait until the last minute to comply with a deadline, they are playing with fire." *Spears v. City of Indianapolis*, 74 F.3d 153, 157 (7th Cir. 1996). "Case management depends on enforceable deadlines, and discovery must have an end point. In managing their caseloads, district courts are entitled to—indeed they must—enforce deadlines." *Flint v. City of Belvidere*, 791 F.3d 764, 768 (7th Cir. 2015) (cleaned up). That is what happened here, and the district court's explanation for why it denied Windsor's final extension request was eminently reasonable. *See* Doc. 64 at 150–51 ("Windsor has demonstrated a lack of diligence in pursuing this claim. … Deadlines are not meant to be aspirational; and counsel must not treat the goodwill of the court as a sign that, as long as counsel tries to act, he has carte blanche permission to perform when he desires." (cleaned up)).

Reasonable jurists would not debate the district court's finding that Windsor failed to show good cause for a sixth extension of the discovery deadline or its denial of his request to extend the deadline. Windsor was not diligent in pursuing the limited discovery authorized by the district court. *Windsor*, 2020 WL 6262431, at *56. The court authorized funds for him to depose trial counsel and extended the discovery deadline five times. *Id.* He had more than sixteen months to depose trial counsel and issue a subpoena duces tecum for Walter Logan's Rule 32 files. *Id.* Nevertheless, he waited until one week before the fifth deadline to attempt service on Lowery, and he waited until the day before the deadline to depose Holladay. *Id.* "A reasonably diligent plaintiff would have" completed discovery sooner. *Mills v. Hamm*, No. 24-11689, 2024 WL 2721521, at *4 (11th Cir. May 28, 2024), *cert. denied*, No. (23A1065), 2024 WL

2762355 (U.S. May 30, 2024). Windsor's delay should not be rewarded with a rare cert grant on this fact-bound issue.

Moreover, Windsor has not made and cannot make a substantial showing of the denial of a constitutional right. Windsor complains that he "was given no warning that the court would not grant any further extensions of time," Pet. 22, but there is no *constitutional right* to a warning before a sixth request to extend a discovery deadline is denied. Windsor identifies no source for the alleged right—no specific constitutional provision and no support in this Court's caselaw. Accordingly, his request for a COA failed on its face to show "the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Windsor presents no compelling reason to grant a COA, let alone certiorari. His petition should be denied.

CONCLUSION

This Court should deny Windsor's petition for writ of certiorari.

Respectfully submitted,

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