

No. 25-1410

Supreme Court of the United States

◆

JIMMY DAVIS, JR.,
Petitioner,

v.

GREG LOVELACE, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

◆

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

BRIEF IN OPPOSITION

Steve Marshall
Attorney General

Robert M. Overing
*Principal Deputy
Solicitor General*

Henry M. Johnson
Assistant Attorney General

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
(334) 242-7300
Henry.Johnson@AlabamaAG.gov

Counsel for Respondent

**CAPITAL CASE
QUESTIONS PRESENTED
(Rephrased)**

More than thirty years ago, Jimmy Davis, Jr. was convicted of capital murder and sentenced to death for killing Johnny Hazel during a robbery. After his conviction and sentence were affirmed on direct appeal, Davis sought state postconviction relief, arguing that trial counsel were ineffective for failing to investigate and present mitigation evidence. Following an evidentiary hearing, the state circuit court denied relief, and the Alabama Court of Criminal Appeals (ACCA) affirmed. In federal habeas, Davis was required to show that the ACCA's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The district court denied relief, and the Eleventh Circuit affirmed. The questions presented are:

1. Should the Court review Davis's first question—whether courts must weigh a jury's hesitation to impose the death penalty when assessing the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984)—despite that Davis did not raise it below or in state court, the lower courts did not rule on it, any ruling would not affect the outcome of his case, and Davis failed to show that every fairminded jurist would disagree with the ACCA's denial of his *Strickland* claims.

2. Should the Court deny certiorari where the ACCA's denial of Davis's penalty-phase ineffectiveness claims was neither contrary to nor an unreasonable application of *Rompilla v. Beard*, 545 U.S. 374 (2005), or *Williams v. Taylor*, 529 U.S. 362 (2000).

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE	1
A. The facts of the crime.....	1
B. Facts elicited at the penalty phase.....	2
C. The jury’s penalty-phase deliberations and verdict.....	7
D. The proceedings below	9
REASONS FOR DENYING THE PETITION.....	13
I. This case is an exceptionally bad vehicle for addressing the first question presented.....	14
A. Davis did not raise this claim below.	14
B. Davis’s claim is procedurally defaulted because he failed to exhaust it in state court.....	16
C. The outcome of this case would not change even if the Court granted certiorari and reversed on the question presented.....	17

D. The panel majority faithfully applied AEDPA deference and this Court’s precedents in holding that the ACCA’s decision that Davis failed to show prejudice was neither contrary to nor involved an unreasonable application of clearly established law.....	19
II. Certiorari should be denied on the second question presented.....	26
CONCLUSION	31

TABLE OF AUTHORITIES

Cases

<i>Brown v. Davenport</i> , 596 U.S. 118 (2022).....	20, 21
<i>Cullen v. Pinholster</i> , 563 U.S. 170 (2011).....	21, 24, 27
<i>Davis v. Allen</i> , CV-07-S-518-E (N.D. Ala. May 26, 2016)	11
<i>Davis v. State</i> , 718 So. 2d 1148 (Ala. Crim. App. 1995)	9
<i>Dugas v. Coplan</i> , 428 F.3d 317 (1st Cir. 2005)	24
<i>Ex parte Davis</i> , 9 So. 3d 537, 539 (Ala. 2007)	10
<i>Ex parte Davis</i> , 9 So. 3d 571 (Ala. 2008) <i>aff'd</i> , 718 So. 2d 1166 (Ala. 1998), <i>cert. denied</i> , 525 U.S. 1179 (1999).....	9
<i>Greene v. Fisher</i> , 565 U.S. 34 (2011).....	21
<i>Harrington v. Richter</i> , 562 U.S. 86 (2011).....	19, 21, 22, 30
<i>Herb v. Pitcairn</i> , 324 U.S. 117 (1945).....	18

<i>Klehr v. A.O. Smith Corp.</i> , 521 U.S. 179 (1997).....	18
<i>Klein v. Martin</i> , 607 U.S. 213 (2026).....	21
<i>Knowles v. Mirzayance</i> , 556 U.S. 111 (2009).....	20, 22
<i>Lockyer v. Andrade</i> , 538 U.S. 63 (2003).....	23
<i>Marshall v. Rodgers</i> , 569 U.S. 58 (2013).....	20
<i>Mason v. Scully</i> , 16 F.3d 38 (2d Cir. 1994)	24
<i>McCarthy v. Hernandez</i> , 146 S. Ct. 1873 (2026).....	20
<i>Medellin v. Dretke</i> , 544 U.S. 660 (2005).....	16
<i>Medina v. Barnes</i> , 71 F.3d 363 (10th Cir. 1995).....	24
<i>O’Sullivan v. Boerckel</i> , 526 U.S. 838 (1999).....	16
<i>Powell v. Collins</i> , 332 F.3d 376 (6th Cir. 2003).....	24
<i>Raleigh v. Sec’y, Fla. Dep’t of Corr.</i> , 827 F.3d 938 (11th Cir. 2016).....	16, 17

<i>Relford v. Commandant, U.S. Disciplinary Barracks</i> , 401 U.S. 355 (1971).....	18
<i>Rita v. United States</i> , 551 U.S. 338 (2007).....	15
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005).....	i, 27
<i>Sanders v. Davis</i> , 23 F.4th 966 (9th Cir. 2022)	24
<i>Sanders v. Trickey</i> , 875 F.2d 205 (8th Cir. 1989).....	24
<i>Scott v. State</i> , 163 So. 3d 389 (Ala. Crim. App. 2012)	8, 12
<i>Sexton v. Beaudreaux</i> , 585 U.S. 961 (2018).....	22
<i>Shinn v. Kayer</i> , 592 U.S. 111 (2020).....	21, 22
<i>Silva v. Woodford</i> , 279 F.3d 825 (9th Cir. 2002).....	24
<i>Sprietsma v. Mercury Marine</i> , 537 U.S. 51 (2002).....	15
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	i, 22
<i>Taylor v. Freeland & Kronz</i> , 503 U.S. 638 (1992).....	14

<i>The Monrosa v. Carbon Black Exp., Inc.</i> , 359 U.S. 180 (1959).....	18
<i>Thornell v. Jones</i> , 602 U.S. 154 (2024).....	22
<i>United States v. Burke</i> , 504 U.S. 229 (1992).....	15
<i>United States v. Dolbin</i> , 457 F. App'x 112 (3d Cir. 2012).....	29
<i>Waddington v. Sarausad</i> , 555 U.S. 179 (2009).....	19
<i>White v. Woodall</i> , 572 U.S. 415 (2014).....	20
<i>Williams v. Stirling</i> , 914 F.3d 302 (4th Cir. 2019).....	25
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000).....	i, 20
<i>Yarborough v. Alvarado</i> , 541 U.S. 652 (2004).....	22
<i>Youakim v. Miller</i> , 425 U.S. 231 (1976).....	15

StatutesCode of Alabama

§ 13A-5-40(a)(2)	9
§ 13A-5-46(f)	8
§ 13A-5-46(g).....	8
§ 13A-5-47(e).....	8

United States Code

28 U.S.C. § 2254	i, 11, 19
28 U.S.C. § 2254(b)(1)	16

RulesAlabama Rules of Criminal Procedure

Rule 32	9
Rule 32.2(b).....	17
Rule 32.2(c)	17

Supreme Court Rule

Rule 10	14, 26
---------------	--------

STATEMENT OF THE CASE

A. The facts of the crime

On March 17, 1993, Jimmy Davis, Jr. devised a plan to rob the Direct Oil gasoline station in Anniston, Alabama. Pet. App. 3. Davis, aged twenty-two, armed himself with a .25 caliber semiautomatic pistol and enlisted a pair of teenage cousins, Alphonso and Terrance Phillips, to help with the robbery. *Id.* Alphonso was seventeen, and Terrance was sixteen. *Id.* at 4 n.2. According to his plan, Davis would brandish the pistol, Alphonso would take the money, and Terrance would serve as lookout. *Id.* Terrance changed his mind at the last moment; he abandoned the conspiracy and walked home. *Id.* at 3-4.

As they approached the gas station, Davis and Alphonso pulled up their bandannas to conceal their faces. *Id.* at 228. Davis confronted Johnny Hazel, the station attendant, at the front entrance. *Id.* at 4. He pointed the pistol at Hazel and shouted, “Give it up, fuck-n[*****].” *Id.* Hazel glanced inside the station, looked back at Davis, and smiled. *Id.* Davis shot Hazel twice, once in the chest and once in the abdomen. *Id.* Davis and Alphonso ran off. *Id.* Hazel started to dial emergency 911 but collapsed to the floor. *Id.* at 564. Hazel died from multiple gunshot wounds. *Id.*

“The evidence against Davis was overwhelming.” *Id.* at 613. Alphonso and Terrance pleaded guilty to conspiracy to commit robbery in the first degree in exchange for their testimony against Davis. *Id.* at 227. The State’s evidence showed that Davis bragged about the murder, *id.* at 445-54, telling witnesses that he shot Hazel because he “wasn’t going to let no cracker

laugh at him,” *id.* at 453. “Man, I shot that fuck-n[*****]. I shot him,” Davis boasted, adding, “The second time felt even better than the first time.” *Id.* at 598.

B. Facts elicited at the penalty phase

Davis says the jury “only heard unsupported pleas for mercy” from his mother, Lillie Bell Davis, and cousin, Andre Sigler, and “testimony from a psychometrist that [he] has an IQ of 77” in mitigation. Pet. 9. He misrepresents the record evidence. True, counsel called his mother, cousin, and a psychometrist (Annie M. Storey), but their testimony was far more mitigating than he lets on.¹

Lillie Bell Davis told the jury that she and Davis’s father were married when Davis was born, but they separated fifteen months later. ECF 37-1 at 62.² His father moved to New York and later, to Detroit, *id.* at 63, 69, but never paid her child support, *id.* at 63. So, Lillie Bell raised Davis and his siblings on her own. *Id.* at 63. She told the jury that she didn’t apply for

¹ Davis says he “endur[ed] extraordinary sexual abuse as a two-year-old,” Pet. 7, and he faults trial counsel for failing to investigate and present his “extensive” sexual abuse in mitigation, *id.* at 3. As the panel majority correctly found, Davis raised the same allegation in state court, but he failed to present any evidence to prove it. Pet. App. 24 n.13. Davis called Jan Vogelsang, a clinical social worker, at his state-court hearing. *Id.* at 24 n.12. “Vogelsang testified that, when Davis was two years old, a DHR report was made suggesting that Davis and [his sister] Mary had been molested after a doctor observed that Davis’s ‘penis was bleeding and was swollen.’ However, the alleged molestation was only briefly investigated by DHR and later dropped.” *Id.*

² “ECF” citations refer to entries on the Eleventh Circuit docket.

public assistance, testifying, “The reason why, because I don’t want my kids to bring home welfare. I feel like the welfare didn’t give me those kids. This was my and my husband’s responsibility. After he left, I took care of my kids.” *Id.* at 64. She worked to support herself and her children. *Id.* At the time of Davis’s trial, she was employed as a maid at the local Holiday Inn. *Id.* at 64.

Lillie Bell sent Davis to live with his father in Detroit when he turned fifteen. *Id.* at 64, 69. She made that decision for two reasons. *Id.* at 69. First, she was having some trouble communicating with her now-teenaged son, although she quickly clarified that their problems were “little simple, minor little things.” *Id.* Second, she worried that Davis was associating with the “wrong crowd” in Anniston and wanted to protect him from that negative influence. *Id.*

Davis stayed with his father in Detroit for two months and one week, but tragedy struck. *Id.* at 64. His father unexpectedly passed away, after which he returned to his mother in Anniston. *Id.* Lillie Bell told the jury that his father’s death had a huge impact on Davis, *id.* at 75, recalling that he often would say that he wished he could be with his father and that his parents were still together, *id.* at 65.

Davis lived with Lillie Bell until he was nineteen. *Id.* at 70. She had been having problems with him for a couple of years. *Id.* at 70-71. Davis dropped out of school at age sixteen, stayed out all night, and started stealing. *Id.* Because she could no longer discipline him, Lillie Bell asked Davis to move out, which he did. *Id.* at 71-72. But Davis was always welcome in her

home. *Id.* at 73. “The door be open for him all the time. Every time he wants to come, I let him,” she said. *Id.*

Lillie Bell asked the jury to show mercy to her son. *Id.* at 67. She agreed that Davis should be punished for murdering Johnny Hazel, but she implored the jury to recommend a sentence of life without parole. *Id.* If not for Davis, then for his younger sisters—Patricia (age sixteen), Linda (age fourteen), and Angie (age thirteen)—who, she explained, love and need him. *Id.* at 73.

Andre Sigler and Davis are first cousins, but they had very different upbringings. *Id.* at 78-80. Sigler, who is five years older than Davis, was raised by his grandparents, graduated from high school, and joined the Army, where he served until he was honorably discharged. *Id.* By contrast, Davis was raised by a single mother and never had a father in the home. *Id.* Sigler reminded the jury that Davis’s father died when Davis was only fifteen years old. *Id.* at 80-81.

Siegler and Davis saw each other every day when they were children, grew up together, and were “close friends” and “playing partners.” *Id.* at 79-81. After he joined the Army, Siegler kept in touch with Davis and saw him when he returned home to visit his grandparents. *Id.* at 81. Siegler observed “a noticeable difference” in Davis after Davis’s father died. *Id.* at 84. Davis’s “appearance” and “attitude towards things changed.” *Id.* “Around home, he wasn’t home very much. There were times when his mother had had problems with him. And which in the past it wasn’t like that.” *Id.*

Siegler agreed that Davis should be punished for his crime, but he asked the jury to recommend life without parole. *Id.* at 83. Asked why, Sigler explained, “I think that Jimmy wasn’t given the opportunities that a lot of people are given coming up. And who knows, maybe in prison he can learn to adjust, adapt, and get the proper counseling and things he needs.” *Id.* Siegler elaborated, “I think Jimmy was missing a lot as he was coming up. People to rely on, people to talk to, people who could understand him and try and help him out.” *Id.*

Annie M. Storey is a certified school psychometrist and school counselor. *Id.* at 90. Psychometrists are qualified to “administer[] intelligence and diagnostic educational tests.” *Id.* Storey has “three master’s degrees and one double-A certificate in the area of education, school psychometry, guidance and counseling.” *Id.* at 91. She has administered hundreds of tests over the years, and she’s testified in court about the results of her testing. *Id.* at 92-93.

Storey gave Davis the Wechsler Adult Intelligence Scale Revised (WAIS-R) and the Wide Range Achievement Test (WRAT) to assess his intellectual and academic functioning. *Id.* at 93-96. Davis had a verbal IQ of 82, a performance IQ of 70, and a full-scale IQ of 77 on the WAIS-R. *Id.* at 93. Storey told the jury that Davis’s full-scale IQ places “him at the sixth percentile, which means that 94 percent of the people in his age group would have scored higher than he did.” *Id.* at 94. “That,” she said, “means that he’s functioning right between where we would consider an individual who is mentally retarded and one who is low average.”

Id. In practical terms, he “would probably lag significantly behind his peers” on any test or task. *Id.* at 95.

The WRAT is a test of academic achievement in reading, writing, and arithmetic. *Id.* The average score is 100; Davis’s “scores ranged from 68 to 77,” which, Storey told the jury, “are very comparable to his full-scale IQ.” *Id.* “Academically, he’s functioning where an individual would be if they had completed the 5th grade.” *Id.*

Storey found that Davis “is borderline in intelligence.” *Id.* She testified that he “would probably experience a lot of difficulty performing any task that required a lot of intellectual performance. His fund of information is very limited.” *Id.* She told the jury that Davis “does not seem to be able to determine a lot about social intelligence, social type responses that he’s supposed to make in his environment. He’s easily distracted.” *Id.*

Storey also humanized Davis for the jury, recounting a personal moment they shared:

At the end of the test, just by way of context with him, some comments were alluded to, some pictures that I had on a bookshelf. And he identified one of my children as a person he had known. And I mentioned that my son had gone on to finish West Point and at that point, I could see some remorse in Jimmy. Sort of like, ... “if I could have done something else with my life, maybe it would have been a different route,” since he knew my son.

Id. at 96.

C. The jury's penalty-phase deliberations and verdict

Davis misrepresents the record, painting a picture of an exhausted and “significantly divided” jury, “forced” by the trial court to continue its penalty-phase deliberations late into the night. Pet. 7, 9-10. Here's what actually happened.

The jury began deliberating at 6:30 p.m. on December 10, 1993. ECF 37-1 at 135. At 7:10 p.m., the trial court announced that the jury had sent a note with this question: “Can you accept seven for death and five for life? If not, what procedure should we go by”? *Id.* The prosecution and defense counsel (Steve Giddens and Jonathan Adams) agreed that the court had to answer in the negative because Alabama law required at least ten votes for a recommendation of death and at least seven votes for a recommendation of life without parole. *Id.* at 135-36. Then, the attorneys noticed this:

ASSISTANT DA: The light came on again.

THE COURT: All right.

ADAMS: They may have answered the question for us, Judge.

Id. at 136. The trial court answered in writing on the jury's note: “No. There must be ten votes for a recommendation of death sentence. There must be at least seven votes for a recommendation of life without parole. Keep deliberating.” *Id.* at 137. The note was marked for identification, photocopied, and then returned to the jury. *Id.* At 7:30 p.m., the jury returned

its verdict, recommending by a vote of eleven to one that Davis be sentenced to death. *Id.* at 138.

Davis misunderstands Alabama's capital-sentencing statute. "If just two jurors would have struck a different balance or stuck to their votes against death," he says, then he "would have received a sentence of life imprisonment without the possibility of parole." Pet. 10, 25, 31. That is not true.

Alabama juries cannot return a penalty-phase verdict unless at least ten jurors vote for death or seven jurors vote for life without parole. Ala. Code § 13A-5-46(f). The jury must continue deliberating until it reaches the required number of votes; if the jurors cannot meet that requirement, a mistrial is declared, and a new penalty-phase jury is empaneled. *Id.* § 13A-5-46(g). That was the law at the time of Davis's trial in 1993, and it remains the law today.

Davis received one vote for life without parole. That means he needed to sway at least *six* more jurors, not just two, to secure a recommendation of life without parole. Any number less than six would have resulted in a penalty-phase mistrial and the empaneling of a new jury.

Further, at the time of Davis's trial in 1993, the trial court was the sentencer under Alabama law. So, the jury's verdict at the penalty phase of a capital trial was "not binding upon the court." Ala. Code § 13-A-5-47(e); *Scott v. State*, 163 So. 3d 389, 463 (Ala. Crim. App. 2012) ("Section 13A-5-47(e), Ala. Code 1975, grants the sentencing judge exclusive authority to fix the sentence for a capital murder-conviction.").

After the jury recommended by a vote of eleven to one that Davis be sentenced to death, the trial court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced Davis to death. *Davis v. State*, 718 So. 2d 1148, 1151 (Ala. Crim. App. 1995). His conviction and death sentence were affirmed on direct appeal. *Id.* at 1166, *aff'd*, 718 So. 2d 1166 (Ala. 1998), *cert. denied*, 525 U.S. 1179 (1999) (mem.).

D. Post-conviction proceedings

In January 2000, Davis filed a petition for postconviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, which he twice amended. Pet. App. 563. Following an evidentiary hearing on his claims of ineffective assistance of counsel, the state circuit court denied his petition. *Id.* at 221-22.

Although the State never argued that Davis's ineffectiveness claims were procedurally barred from postconviction review, the ACCA sua sponte found that his claims were barred and affirmed the circuit court's judgment on that ground. *Id.* at 570-74, 593. A bare majority of the court opined in dicta that Davis would be entitled to relief on his claim that trial counsel were ineffective for failing to investigate and present mitigation evidence, were that claim not barred from review. *Id.* at 574-83; *but see id.* at 594 (Baschab, J., concurring in the result) ("[T]his discussion and conclusion are inappropriate and are nothing more than unnecessary dicta.").

The Alabama Supreme Court (ASC) denied certiorari, but on rehearing *ex mero moto*, the ASC withdrew the certificate of judgment and granted certiorari to consider whether the ACCA erred in sua sponte holding that Davis's ineffectiveness claims were procedurally barred. *Id.* at 222-24. The ASC concluded that the ACCA erred in sua sponte holding that Davis's claims were procedurally barred, reversed, and remanded for that court to consider his ineffectiveness claims on the merits. *Ex parte Davis*, 9 So. 3d 537, 539 (Ala. 2007) (mem.).

The ACCA did as ordered and affirmed the circuit court's judgment. Pet. App. 595-664. Importantly, the ACCA made clear that its observations about Davis's penalty-phase ineffectiveness claims in its prior opinion were dicta:

Davis next argues that his attorneys were ineffective in the penalty phase of his capital trial. We stated in our previous opinion affirming the circuit court's denial of Davis's Rule 32 petition that if this issue had been properly before us, we would direct that a new sentencing hearing be conducted. However, upon further research and review of the record, we have reconsidered our comments in dicta in our previous opinion, and we now conclude that the circuit court did not abuse its discretion in denying Davis relief on his claims of ineffective-assistance-of-trial-counsel at the penalty phase.

Id. at 621. The ASC denied certiorari. *Ex parte Davis*, 9 So. 3d 571 (Ala. 2008).

Having exhausted his state-court remedies, Davis filed a 28 U.S.C. § 2254 petition in the Northern District of Alabama. The district court denied his habeas petition, Pet. App. 210-561, and by separate order, denied a certificate of appealability (COA) and dismissed his petition, *Davis v. Allen*, CV-07-S-518-E (N.D. Ala. May 26, 2016), ECF 51.

The Eleventh Circuit granted a COA on Davis's claims alleging that his trial counsel were ineffective for "(1) failing to investigate and present mitigating evidence of childhood abuse; and (2) failing to investigate and present mitigating evidence of the circumstances of his prior conviction for third-degree robbery." Pet. App. 2. Following briefing and oral argument, a divided panel affirmed. *Id.* at 1-165.

The panel majority resolved the case on prejudice, holding that "Davis failed to show that the state court's determination that he did not suffer prejudice was an unreasonable application of, or contrary to, federal law." *Id.* at 40. Judge Branch concurred; she also would have held that "the state court's determination that counsels' performance was not constitutionally deficient was not contrary to, or an unreasonable application of, clearly established federal law." *Id.* at 59. Judge Rosenbaum dissented. *Id.* at 100-59. She would have found that the state courts' purported failure "to consider at all in their prejudice analysis that, at one point, five members of the jury favored life without parole, ... and even at the verdict, the jury was not unanimous" was unreasonable. *Id.* at 156-57.

Davis filed a petition for rehearing en banc. ECF 97. The only question he presented for en banc

consideration was “whether the panel majority’s holding ... is contrary to *Rompilla*.” *Id.* The Eleventh Circuit ordered briefing, ECF 100, 106; Respondent filed his opposition, and Davis replied, ECF 104, 107.

The court of appeals denied Davis’s petition for rehearing en banc. Pet. App. 166-67. Judge Branch concurred in the denial of rehearing en banc, joined by Judge Grant. *Id.* at 168-73. Judge Rosenbaum dissented “[f]or the reasons [she] gave in [her] dissenting opinion.” *Id.* at 174. Judge Abudu dissented. *Id.* at 175-207. She would have held that *Strickland* “established a test for ineffective assistance claims that *requires* courts to look at the relevant decisionmaker’s on-the-record conduct at trial.” *Id.* at 176 (emphasis added); *id.* at 179, 196-97.³ “[T]he panel majority, she suggested, “created a new limit on clearly established law.” *Id.* at 186.

Responding to Judge Abudu’s dissent, Judge Branch reiterated what the panel majority held and what it did not hold:

My dissenting colleague misreads our panel decision and incorrectly asserts that our treatment of the jury’s initial hesitation in the context of our prejudice discussion “created a new limit on clearly established law.” To be clear,

³ Judge Abudu mistakenly thought the jury was the sentencer at Davis’s trial. Pet. App. 176 (“Here, that means the jury’s conduct as the decisionmaker is of critical importance and should not be cast aside.”). Again, the trial court was the sentencer under then-existing Alabama law, *see* Ala. Code § 13-A-5-47(e); *Scott*, 163 So. 3d 389, 463, so it is not accurate to describe the jury as “the decisionmaker.”

our majority panel opinion did not dispute that juror hesitation could be an indicator of prejudice or that the state court could have considered this information as part of a prejudice analysis. *See id.* at 797-98. Such hesitation is a valid factor—one of many—that a court may consider in assessing prejudice. Our majority decision merely rejected the dissent’s contention that the ACCA’s prejudice decision was an *unreasonable application of federal law* because it failed to *expressly* consider the jury’s initial hesitation in its prejudice analysis. *Id.* at 797. Our conclusion was a proper application of Supreme Court precedent and AEDPA.

Not only did Davis never make an argument about the state court’s failure to consider the initial juror hesitation as part of the prejudice analysis—it was instead raised for the first time in the dissenting opinion—but the Supreme Court has never held that a jury’s hesitation in reaching a verdict is necessarily a presumptive indicator of prejudice under *Strickland* or that such a factor must be considered or should weigh more heavily in the prejudice analysis.

Pet. App. 171-72 (Branch, J., concurring in the denial of rehearing en banc).

REASONS FOR DENYING THE PETITION

This Court should not grant certiorari on either of the questions presented. Davis has not shown that the panel majority misapplied *Strickland* or that the

decision below conflicts with this Court’s precedents or the decisions of other courts of appeals. The split he alleges does not exist, and even if it did, the panel majority held that any ruling would have no bearing on the outcome of his case. Nor has he shown that his case presents an important question of federal law. At bottom, Davis seeks only fact-bound error correction. Because he presents no “compelling reasons” for granting certiorari, Sup. Ct. R. 10, his petition should be denied.

I. This case is an exceptionally poor vehicle for addressing the first question presented.

Davis argues that this Court should grant certiorari to decide whether courts are required to consider the impact of a jury’s hesitation to impose the death penalty in assessing prejudice under *Strickland*. Pet. i, 5, 13-27. Even assuming that question warrants review, Davis’s case would be a terrible vehicle for addressing it. He did not raise this issue below, and neither the panel majority nor the district court ruled on it. However, the panel majority considered the jury’s purported hesitation in his case out of an abundance of caution and found that he’s not entitled to habeas relief. He failed to present this issue to the state courts, so it is unexhausted and defaulted. For any or all these reasons, his petition should be denied.

A. Davis did not raise this claim below.

This Court will not consider issues that were not raised below absent extraordinary circumstances. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46

(1992); *Rita v. United States*, 551 U.S. 338, 360 (2007) (“Rita did not make this argument below, and we shall not consider it.”); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (“Because this argument was not raised below, it is waived.”); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (“Ordinarily, this Court does not decide questions not raised or resolved in the lower courts.”). “The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.” *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring in the judgment).

“Davis never ma[de] an argument about the state court’s failure to consider the initial juror hesitation as part of the prejudice analysis—it was instead raised for the first time in the dissenting opinion.” Pet. App. 171-72 (Branch, J., concurring in the denial of rehearing en banc). He did not raise this argument in the district court. He did not raise it in his initial briefing in the Eleventh Circuit or at oral argument. ECF Nos. 35, 44, 86. He didn’t even raise it in his petition for rehearing en banc. ECF No. 97. Instead, Davis raises it for the first time now, parroting the panel dissent and Judge Abudu’s dissent from the denial of rehearing en banc. For that reason alone, his petition should be denied.

B. Davis’s claim is procedurally defaulted because he failed to exhaust it in state court.

Davis did not argue that the state courts should consider the jury’s purported hesitation in conducting the *Strickland* prejudice inquiry. He didn’t raise this claim in his initial briefing in the ACCA. Brief of Appellant, CR-03-2086 (Ala. Crim. App. Jan. 21, 2005); Reply Brief of Appellant, CR-03-2086 (Ala. Crim. App. Aug. 15, 2005). Nor did he raise this claim in his application for rehearing or his petition for writ of certiorari to the Alabama Supreme Court. Application for Rehearing and Supporting Brief, CR-03-2086 (Ala. Crim. App. Mar. 27, 2006); Petition for Writ of Certiorari, No. 1071293 (Ala. Aug. 26, 2008).

Federal habeas relief cannot be granted on a claim unless that claim was exhausted in state court. 28 U.S.C. § 2254(b)(1); *Medellin v. Dretke*, 544 U.S. 660, 666 (2005). “Exhaustion requires a state petitioner to ‘fairly present federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.’” *Raleigh v. Sec’y, Fla. Dep’t of Corr.*, 827 F.3d 938, 956 (11th Cir. 2016) (quoting *Duncan v. Henry*, 513 U.S. 364, 365 (1995)). A state petitioner “must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). “A claim is procedurally defaulted for purposes of federal habeas review ‘if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present [the claim] in order to

meet the exhaustion requirement would now find the claim procedurally barred.” *Raleigh*, 827 F.3d at 957 (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991)).

Davis failed to present this claim to the state courts. He cannot raise that claim in state court now because it would be procedurally barred on multiple grounds, including by Rule 32.2(b) (successive-petition bar) and Rule 32.2(c) (statute-of-limitations bar) of the Alabama Rules of Criminal Procedure. Because any state remedy is precluded by state procedural rules, his claim is unexhausted and procedurally defaulted from habeas review. For that reason, his petition should be denied.

C. The outcome of this case would not change even if the Court granted certiorari and reversed on the question presented.

Another vehicle problem for Davis’s first question presented is that it was not dispositive for the panel majority. The majority held that even if it were required to consider the jury’s purported hesitation, this fact would not make a difference to its prejudice determination, reasoning:

Davis’s case was not a case in which the jury seemed hopelessly deadlocked or in which deliberations dragged on for an extended period of time. The jury deliberated a total of one hour before returning its 11 to 1 advisory verdict in favor of the death penalty. The short length of deliberations undermines the dissent’s

contention that, in determining whether Davis was prejudiced, great weight or significance should be afforded to the fact that the jury sent a note initially asking whether the trial court could accept seven votes for death and five for life.

Pet. App. 56-57 n.25. Thus, this issue is not dispositive. Even if the Court reversed and held that juror hesitation must be considered, the outcome would be the same because the Eleventh Circuit already held that the alleged hesitation had no “great weight or significance.” *Id.*

This Court rarely, if ever, grants certiorari to review an issue that would be “better resolved in other litigation where ... it would be solely dispositive of the case.” *Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355, 370 (1971); accord *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) (“[When] this Court decides questions of public importance, it decides them in the context of meaningful litigation,” not in the “abstract[.]”). It is axiomatic that this Court exercises its certiorari power “to correct wrong judgments, not to revise opinions,” and “if the same judgment would be rendered by the [lower] court” regardless, then the Court’s “review could amount to nothing more than an advisory opinion.” *Cf. Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). This Court does not reach out to resolve even a “major difference among the Circuits” unless it would “affect the outcome in th[e] case” at hand. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 192 (1997).

For that additional reason, Davis’s petition should be denied.

D. The panel majority faithfully applied AEDPA and this Court’s precedents in holding that the ACCA’s decision that Davis failed to show prejudice was neither contrary to nor involved an unreasonable application of clearly established law.

Davis argues that the panel majority “declined to give any weight to jury hesitation in evaluating prejudice under *Strickland*.” Pet. 16. The majority’s decision on that front, he says, “stands in conflict with at least the First, Second, Fourth, Sixth, Ninth, and Tenth Circuits,” which have held that jury hesitation should be considered in assessing prejudice, *id.* at 14, but aligns the Eleventh Circuit with the Third, Seventh, and Eighth Circuits, which have declined to give weight to jury hesitation in the context of *Strickland* prejudice, *id.* at 16. Davis’s misunderstanding of the decision below and AEDPA is profound. His petition should be denied.

Federal habeas petitions filed by state inmates are governed by the provisions of 28 U.S.C. § 2254, as amended by AEDPA. *Harrington v. Richter*, 562 U.S. 86, 97-98 (2011). AEDPA provides that “a federal court may grant habeas relief on a claim ‘adjudicated on the merits’ in state court only if the decision ‘was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.’” *Waddington v. Sarausad*, 555 U.S. 179, 190 (2009) (quoting § 2254(d)(1)).

“Clearly established Federal law,” for purposes of section 2254(d)(1), “refers to the holdings, as opposed to the dicta, of this Court’s decisions as of the time of the relevant state-court decision.” *Williams*, 529 U.S. at 412; *McCarthy v. Hernandez*, 146 S. Ct. 1873, 1880 (2026) (“Only the holdings of this Court clearly establish federal law.”). Section 2254(d)(1) requires habeas petitioners to identify a “holding” of this Court that “definitively answered” the question raised by the petition. *White v. Woodall*, 572 U.S. 415, 423-24 (2014). “[I]t is not ‘an unreasonable application of clearly established Federal law’ for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.” *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

“[C]ircuit precedent may [not] be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.” *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013). “Nor may this or any federal court use an AEDPA case as an opportunity to pass on the wisdom of extending old precedents in new ways. AEDPA permits relief only when a state court acts contrary to or unreasonably applies this Court’s preexisting and clearly established rules.” *Brown v. Davenport*, 596 U.S. 118, 144 (2022).

A state-court decision is “contrary to” clearly established federal law if it “arrives at a conclusion opposite to that reached by this Court on a question of law” or “decides a case differently than this Court has on a set of materially indistinguishable facts.” *Williams*, 529 U.S. at 412-13. To meet the unreasonable-application standard, a habeas petitioner “must show far more

than that the state court’s decision was ‘merely wrong’ or ‘even clear error.’” *Shinn v. Kayer*, 592 U.S. 111, 118 (2020). Instead, the petitioner must demonstrate that “the state court’s decision is so obviously wrong that its error lies beyond any possibility for fair-minded disagreement.” *Id.* (quoting *Richter*, 562 U.S. at 103); *Klein v. Martin*, 607 U.S. 213, 220-21 (2026) (“The habeas claimant must instead establish that the state court ‘blunder[ed] so badly that every fair-minded jurist would disagree’ with the decision.”) (quoting *Mays v. Hines*, 592 U.S. 385, 392 (2021)).

Further, a state court’s decision is assessed as of “the time it was made.” *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). “[Section] 2254(d)(1) requires federal courts to focus on what a state court knew and did, and to measure state-court decisions against this Court’s precedents as of the time the state court renders its decision.” *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (citation omitted) (cleaned up). State-court decisions “cannot be held unreasonable only in light of later decided cases.” *Davenport*, 596 U.S. at 136.

Establishing that a state court’s application of *Strickland* was unreasonable under [section] 2254(d) is all the more difficult. The standards created by *Strickland* and [section] 2254(d) are both ‘highly deferential,’ and when the two apply in tandem, review is ‘doubly so.’” *Richter*, 562 U.S. at 105 (cleaned up). Davis brought penalty-phase ineffectiveness claims, so he must satisfy the additional, “highly demanding” *Strickland* standard. *Shinn*, 592 U.S. at 118.

To satisfy *Strickland*’s prejudice prong in the capital-sentencing context, a petitioner must do more than

“show that the errors had some conceivable effect on the outcome of the proceeding.” 466 U.S. at 693. “The question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death.” *Id.* at 695. “That requires a substantial, not just conceivable likelihood of a different result.” *Thornell v. Jones*, 602 U.S. 154, 163 (2024).

Importantly, “[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.” *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). “And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.” *Mirzayance*, 556 U.S. at 123. This is where “deference to the state court” is “near its apex.” *Sexton v. Beaudreaux*, 585 U.S. 961, 968 (2018).

Because his penalty-phase ineffectiveness claims were adjudicated on the merits in state court, Pet. App. 620-64, Davis had to satisfy the highly demanding standards of both *Strickland* and AEDPA. As a precondition to obtaining federal habeas relief, he had to show that the state court’s decision was contrary to, or involved an unreasonable application of, then-clearly established federal law as determined by the Supreme Court. § 2254(d)(1). To do that, he had to demonstrate that “the state court’s decision is so obviously wrong that its error lies beyond any possibility for fairminded disagreement.” *Shinn*, 592 U.S. at 111.

And of course, that was the question before the court of appeals. *See Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (“[T]he only question that matters under § 2254(d)(1) [is] whether a state court decision is contrary to, or involved an unreasonable application of, clearly established law.”). Because the panel dissent sua sponte found that jury hesitation plays a role in the assessment of *Strickland* prejudice, the panel majority looked for clearly established law on point but found none:

Our majority decision merely rejected the dissent’s contention that the ACCA’s prejudice decision was an *unreasonable application of federal law* because it failed to *expressly* consider the jury’s initial hesitation in its prejudice analysis. *Id.* at 797. Our conclusion was a proper application of Supreme Court precedent and AEDPA.

Not only did Davis never make an argument about the state court’s failure to consider the initial juror hesitation as part of the prejudice analysis—it was instead raised for the first time in the dissenting opinion—but the Supreme Court has never held that a jury’s hesitation in reaching a verdict is necessarily a presumptive indicator of prejudice under *Strickland* or that such a factor must be considered or should weigh more heavily in the prejudice analysis.

Pet. App. 171-72 (Branch, J., concurring in the denial of rehearing en banc).

Davis is wrong to say the panel majority “declined to give any weight to jury hesitation.” Pet. 16. A court reviewing Davis’s ineffectiveness claims *de novo* could have given weight to the jury’s purported hesitation, or not. But the standard of review below was not *de novo*. Instead, the question was whether the state court’s decision was contrary to, or involved an unreasonable application of, clearly established federal law. The panel majority answered that question correctly: No.

Returning to his asserted split, Davis simply cherry-picks one or two cases from each circuit, groups them into two long string citations, and calls it a day. Pet. 14-18. He does not engage in any legal analysis. And an immediate problem arises. Six of the cases in the first group and one case in the second were decided before AEDPA was enacted or involve the application of pre-AEDPA law.⁴ Because the courts of appeals “did not apply AEDPA deference to the question of prejudice in those cases[,] each of them lack the important ‘doubly deferential’ standard of *Strickland* and AEDPA.” *Pinholster*, 563 U.S. at 202. “Those cases therefore offer no guidance with respect to

⁴ *Dugas v. Coplan*, 428 F.3d 317, 327 (1st Cir. 2005) (“Since the state court never decided the question of prejudice, we review that issue *de novo*.”); *Mason v. Scully*, 16 F.3d 38 (2d Cir. 1994) (decided pre-AEDPA); *Powell v. Collins*, 332 F.3d 376, 388 (6th Cir. 2003) (applying pre-AEDPA law where habeas petition was filed in 1994); *Silva v. Woodford*, 279 F.3d 825, 831, 835 (9th Cir. 2002) (applying pre-AEDPA law); *Sanders v. Davis*, 23 F.4th 966, 980 (9th Cir. 2022) (applying pre-AEDPA law where habeas petition was filed before AEDPA’s effective date); *Medina v. Barnes*, 71 F.3d 363 (10th Cir. 1995) (decided pre-AEDPA); *Sanders v. Trickey*, 875 F.2d 205 (8th Cir. 1989) (decided pre-AEDPA).

whether a state court has *unreasonably* determined that prejudice is lacking.” *Id.*

Nor do the remaining cases in his string citations. For example, the panel majority correctly distinguished *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019), as follows:

[T]he Fourth Circuit’s decision in *Williams v. Stirling* is distinguishable because the mitigation evidence was more powerful than that here. There was evidence not only that the petitioner had a troubled childhood, but also that he suffered from fetal alcohol syndrome that impaired his judgment and his ability to control his impulses and to understand the consequences of his actions—and the Fourth Circuit believed the evidence of fetal alcohol syndrome would have been particularly compelling because it ‘could have provided the jury evidence of a neurological defect that caused [the petitioner’s] criminal behavior.’” 914 F.3d 302, 307-308, 318 (4th Cir. 2019). And the jury deliberations in *Williams* were clearly more deadlocked than here—the deliberations spanned over two days, the jury reported being deadlocked, the petitioner moved for a mistrial, and the trial court gave an *Allen* charge to the jury—whereas Davis’s jury deliberated for approximately an hour. *Id.* at 308 ... Davis’s case bears no resemblance to *Williams* either.

Pet. App. 56-57 n.25. Davis’s alleged split does not exist. The cases he cites turn on differences of fact and

to a lesser extent, differences in the standards of review.

Nor does Davis seriously challenge the panel majority's actual holding that the Supreme Court has not clearly established—and certainly had not clearly established at the time of the ACCA's decision in 2008—that courts must consider a jury's hesitation to impose a death sentence as part of *Strickland's* prejudice analysis. Pet. App. 55-58. In fact, Davis *admits* that the “Court has not yet directly considered whether and how a jury's hesitation to impose a death sentence impacts the analysis of whether a defendant's trial counsel's deficient performance prejudiced the defendant.” Pet. 18. That should be the end of the matter. His petition should be denied.

II. Certiorari should be denied on the second question presented.

Davis contends that the ACCA and the panel majority unreasonably applied *Rompilla*. Pet. i, 27-32. However, he does not allege, let alone demonstrate, a conflict among the courts of appeals, nor does he seriously argue that his case involves an important question of federal law. He seeks only fact-bound error correction instead. Because Davis presents no “compelling reasons” for granting certiorari, Sup. Ct. R. 10, his petition should be denied.

In *Rompilla*, trial counsel failed to review the readily available court file on the defendant's prior conviction for rape and assault even though they knew the prosecution not only intended to use the conviction to prove an aggravating circumstance but planned on

“introducing a transcript of the rape victim’s testimony given in that earlier trial.” 545 U.S. at 383. Because “[t]he prosecution was going to use the dramatic facts of a similar prior offense, ... *Rompilla*’s counsel had a duty to make all reasonable efforts to learn what they could about the offense.” *Id.* at 385. That failure, the Court held, “fell below the level of reasonable performance.” *Id.* at 383. And *Rompilla* was prejudiced because had counsel “looked in the file, ... they would have found a range of mitigation leads that no other source had opened up.” *Id.* at 390.

To begin, *Rompilla* examined the prejudice prong de novo because the state court resolved the petitioner’s claim on deficient performance without reaching prejudice. 545 U.S. at 390. Because this Court “did not apply AEDPA deference to the question of prejudice,” *Rompilla* “lack[s] the important ‘doubly deferential’ standard of *Strickland* and AEDPA.” *Pinholster*, 563 U.S. at 202. *Rompilla* “therefore offer[s] no guidance with respect to whether a state court has *unreasonably* determined that prejudice is lacking.” *Id.* For that reason alone, his petition should be denied.

Davis appears to argue that the ACCA’s prejudice determination was contrary to and involved an unreasonable application of *Rompilla* because the state court failed to appreciate that he was prejudiced by his counsel’s failure to investigate and present “the not-so-aggravating facts of his sole prior conviction.” Pet. 30. The jury, he says, should have learned that he had “a single non-violent prior conviction for participating in a group of young men taking pizzas and \$50 from a pizza delivery man without violence or a weapon.” *Id.*

This argument ignores salient facts about the robbery and proves far too much, for every crime accomplished through a successful *threat* of violence—from robbery to rape—could be similarly written off. Indeed, had Johnny Hazel kept a smile off his face and quickly opened the cash register, perhaps that robbery too would have been “nonviolent.” The theory that the jury just needed to hear more about Davis’s other robbery lacks merit and certainly does not warrant certiorari review.

First, the facts. Davis asserted in his petition for rehearing en banc that “his prior robbery conviction involved someone other than Davis saying ‘give it up’ without a weapon and with his hand in his pocket to a pizza delivery man, who handed over \$50 and six pizzas and who later said he did not feel threatened.” ECF 97 at 3. But it’s far from clear that the robbery victim “later said he did not feel threatened.” Davis cited not to any testimony from his robbery victim, but rather to the lawyer who represented Davis in that case. Davis’s lawyer testified that “according to the pizza man, there really was never a threat made to him.” ECF 37-3 at 7. But the jury and state courts could have easily discounted this testimony as “the most unreliable kind of multi-layered hearsay.” Pet. App. 129 (Rosenbaum, J., dissenting). After all, the victim of the robbery may have a much more vivid recollection of that night than Davis’s lawyer who purportedly spoke with the victim thereafter.

Second, Davis greatly overreads the hearsay, as the encounter between Davis, his three co-conspirators, and their victim was more harrowing than his least-violent-robbery-ever theory suggests. As Carlos

Hughley—one of the other criminals—recounted to police, he met Davis and two other men the night of the robbery and was told, “we fixing to get paid.” ECF 84-2 at 321. “We gonna rob the pizza man.” *Id.*

One of the men ordered pizzas for delivery to a nearby address, and they hid nearby waiting for their target. *Id.* at 324. “As the pizza man pulled up, Willie crosses the street and walks behind the pizza man. He goes to the house ... [T]he lady said you got the wrong address and at that time, he walked back to the car with the pizza in the hand. They charges.” *Id.* So, the victim was “walking back to the car with [his] back turned” when the aggressors “ran upon him and he turned around.” *Id.* at 325. One man hollered, “Where the money?” *Id.* Davis demanded the pizzas. *Id.* Another said, “Give it up.” *Id.* at 326. The victim acceded to the demands, handing over the pizzas he was carrying and his money bag. *Id.* at 325.

Given these facts, it is easy to imagine the *Strickland* claim that Davis might have brought had his counsel opted to force the prosecution to introduce facts of this robbery rather than stipulate to the fact of conviction. *See e.g., United States v. Dolbin*, 457 F. App’x 112, 115 (3d Cir. 2012) (“Dolbin argues that because his trial counsel did not move to ... stipulate to his prior convictions, the government was permitted to introduce evidence of his prior convictions, thereby ‘taint[ing] the jury’s view’ and ‘significantly prejudic[ing] him.’”).

Davis and three other men “ran up” on an unsuspecting deliveryman, surrounded him as he was about to enter his car, and demanded the money and goods

he was carrying. The interaction was “non-violent” only in the sense that the victim was not physically struck or killed, but that is true whenever credible threats of violence overpower a victim’s will. Davis might argue that a bank heist or sexual assault is “non-violent” so long as the violent threat against the victim is successful in overpowering her victim, but the ACCA was not unreasonable for discounting this theory.

Davis’s deliveryman robbery didn’t end in serious bodily harm or death for his victim. But it would’ve been easy for the State to show that the “nonviolent” ending had everything to do with the fact that Davis’s first victim didn’t make the same mistake as his second. When Davis robbed Direct Oil, Johnny Hazel smiled or “laughed at him and then [Davis] shot him,” later bragging that “[t]he second time felt even better than the first time.” Pet. App. 598. That ruthlessness helped make Davis’s crime highly aggravated. Hearing more details about how his first robbery was part of an escalating pattern of violence most likely would have made his case even more aggravated, not less. And certainly, the conclusion that more details about Davis’s crimes would not have made a difference at sentencing is not beyond any possibility for fair-minded disagreement. *Richter*, 562 U.S. at 103.

The panel majority faithfully applied this Court’s precedents and AEDPA deference in correctly denying habeas relief. His petition should be denied.

CONCLUSION

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

STEVE MARSHALL
Attorney General

Robert M. Overing
*Principal Deputy
Solicitor General*

/s/ Henry M. Johnson
Henry M. Johnson*
Assistant Attorney General

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
(334) 242-7300
Henry.Johnson@AlabamaAG.gov
*Counsel of Record

Counsel for Respondent