

No. 25-1410

In The
Supreme Court of the United States

JIMMY DAVIS, JR.,

Petitioner,

vs.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

After a week-long guilt-phase trial, on Friday, December 10, 1993 at 4:30 PM, the sentencing phase of Jimmy Davis, Jr.'s trial began. App. 375. Shortly thereafter, a jury began deliberating whether he should live or die. The jury and the judge lacked critical information about Davis because his trial counsel spent virtually no time preparing for Davis's penalty-phase trial and therefore failed to present evidence of the horrific child abuse Davis suffered or that Davis's prior conviction involved merely taking \$50 dollars and pizza from a delivery man without violence or a weapon. Instead, the jury and judge heard from Davis's own lawyer that the robbery "sounds real bad." App. 14. Yet, even without hearing this compelling mitigating evidence, Davis's jury initially split 7-5, with five jurors favoring life imprisonment over death. App. 14. After the trial judge instructed the jury to keep deliberating, the jury voted 11-1 for death. App. 14.

The first time the ACCA¹ considered this issue, it found the missing mitigation evidence "powerful" and stated that but for a perceived procedural bar, the court "would be compelled to grant relief and order a new sentencing hearing." App. 574, 579-80. The ACCA explained the reasons why, explicitly noting the initial jury split whereby "seven jurors voted for death and five for life," the trial court's instruction to the jury that it "cannot accept the numbers as they state them" and to keep deliberating, and the ensuing 11-1 vote for death, concluding, "Certainly, it is reasonable to conclude that

¹ Capitalized terms not defined herein have the meaning set forth in Davis's Petition.

the evidence of Davis's child abuse could very well have tipped the scales in the other direction." App. 332.

Nonetheless, after the ACCA's procedural-bar holding was reversed and remanded, the ACCA changed course and disregarded the jury's hesitation in assessing prejudice, rejecting its prior opinion without an explanation or even any mention of the initial 7-5 jury split, simply stating that "upon further research and review of the record we have reconsidered" and "now conclude that the circuit court did not abuse its discretion in denying Davis relief." App. 224. Davis continued to pursue relief, repeatedly highlighting the jury's initial 7-5 split and non-unanimous verdict, as set forth below.

Davis seeks certiorari on two questions: First, whether it is unreasonable for a court to disregard jury hesitation as part of *Strickland's* requirement to consider the totality of the circumstances in assessing prejudice; and second, whether the Eleventh Circuit's decision conflicts with *Rompilla v. Beard*, 545 U.S. 374 (2005) and *Williams v. Taylor*, 529 U.S. 362 (2000). As set forth below, Respondent's opposition does not accurately portray the record or the law and fails to respond to many of Davis's arguments, thereby conceding them.

ARGUMENT

I. Certiorari is Warranted on Davis’s First Question Presented.

A. The Jury’s Hesitation is Not a “Claim” Subject to Waiver or Failure to Exhaust, and Davis and the State and Federal Courts Did Address the Jury’s Hesitation In Any Event.

Respondent’s procedural default and waiver arguments collapse at the threshold, as jury hesitation is not a freestanding claim; it is *factual evidence* bearing on prejudice under *Strickland*. Davis did not need to – nor could he – raise the jury’s hesitation as a standalone legal claim. App. 179 (“[T]here was no requirement, nor would there have been any grounds, for Davis to raise a standalone claim based on the jury’s hesitation.”); Pet. 23 n.8. Because Section 2254’s exhaustion requirement “pertains to independent claims for habeas relief,” not *evidence*, procedural default simply has no place here. *Murray v. Carrier*, 477 U.S. 478, 484 (1986) (quotation omitted); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (holding once claim is properly presented, party “can make any argument in support of that claim”); *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 378–79 (1995) (same, even if petitioner previously disavowed argument in support of claim). Davis presented his *Strickland* claim, and he would not have been required to present a piece of factual evidence supporting one prong of that claim as its own standalone claim. Regardless, though, Davis did in fact repeatedly present the jury’s hesitation to both the state and federal courts below.

Davis relied upon the jury's 7-5 split and non-unanimous verdict in his federal habeas petition, amended petition, merits briefing, and at oral argument. *Davis v. Allen*, No. 1:07-cv-00518-CLS, ECF Nos. 1 ¶ 333, 33 ¶ 282, 52, p. 25-26 (N.D. Ala.); *Davis v. Comm'r, Ala. Dep't of Corr.*, No. 18-14671, ECF Nos. 18, p. 21-22; 35, p. 20; 36; 52-53; 86 at 17:55-18:24; 92; 97, p. 10, 13, 19, 23-25 (the concurrence in the denial of rehearing was simply wrong in asserting this was "raised for the first time in the dissenting opinion."). App. 172. In state court, Davis's Rule 32 petition, oral argument, and petition for rehearing each cited the jury's 7-5 split as evidence of *Strickland* prejudice. *Davis v. Alabama*, No. 93-534.60, Pet., ¶ 81 ("the jurors were divided on the capital punishment issue such that seven jurors were in favor of a sentence of death and five were against it"); Tr. 16:21-17:9 (arguing at Rule 32 hearing that the jury's hesitation shows prejudice: "The advocacy shortcomings, . . . was virtually decisive when we recall . . . the jury reported a seven to five deadlock on the Friday afternoon at the penalty stage of the hearing.") (Ala. Cir. Ct. 2002); *Davis v. Alabama*, No. CR-03-2086, App. for Reh'g, p. 4-5 ("The jury was divided 7-5 on the death penalty . . .") (Mar. 27, 2006). At every stage, Davis argued the jury's 7-5 split and hesitation to sentence him to death made it reasonably probable that the missed mitigation evidence would have tipped the balance toward life, as the initial ACCA opinion correctly stated.

Moreover, both the federal and state courts addressed the jury hesitation in ruling on Davis's *Strickland* claim, meaning review is proper. *United States v. Williams*, 504 U.S. 36, 41 (1992) (certiorari precluded "only when the question presented was not pressed or passed upon below" (citation modified)). There is no waiver when the issue was passed upon by lower

courts, even where, *unlike* here, the petitioner “expressly disavowed” the argument below. *Lebron*, 513 U.S. at 378–79. Here, the Eleventh Circuit majority gave jury hesitation a perfunctory review but failed to properly incorporate it into its *Strickland* prejudice evaluation. App. 56–57 n.25. Similarly, the ACCA addressed the jury’s split in its initial 2006 opinion—finding the evidence so powerful that, but for a perceived procedural bar, the court “would be compelled to grant relief and order a new sentencing hearing.” App. 574.

In fact, Respondent itself argues the Eleventh Circuit majority “considered” the jury’s hesitation, citing to the Eleventh Circuit panel majority’s footnoted, flawed, and perfunctory analysis. Opp. 14; *see* Section I.B. *infra*. Respondent cannot have it both ways, that the court below considered the issue and that the court below did not consider the issue so it is waived.

B. Remand Would Change the Outcome.

Respondent argues that even if this Court reversed, “the outcome would be the same” because the Eleventh Circuit panel majority held the jury’s hesitation did not sway its prejudice analysis. Opp. 17-18. Respondent is wrong to call the Eleventh Circuit panel majority’s cursory dismissal of the jury’s hesitation—waving it away in a footnote because of “the short length of deliberations”—a “holding.” App. 56-57 n.25. To be clear, the Eleventh Circuit panel majority’s decision does *not* state it considered the jury’s hesitation in finding the ACCA’s decision was not an unreasonable application of *Strickland*’s prejudice prong. This failure to consider jury hesitation as part of its *Strickland* evaluation was erroneous. Moreover, the panel majority’s perfunctory treatment of the issue was equally erroneous. There is

simply no reasonable basis to conclude the jury hesitation here does not alter the prejudice analysis. Indeed, as noted, when the first ACCA considered the jury's hesitation, it determined it would be "compelled to grant relief" absent a non-existent procedural bar. App. 574.

Thus, when considered (or when properly considered), the jury's hesitance to sentence Davis to death, even without the substantial mitigating evidence trial counsel failed to present, necessarily reveals the second ACCA's no-prejudice determination was unreasonable. *See Williams*, 529 U.S. at 406. If this Court agrees, then on remand the outcome of this case will change.

C. This Case Concerns an Important Question of Federal Law About Which the Circuit Courts Have Ruled Inconsistently, Including in AEDPA Cases.

This capital case presents an important and recurring federal question this Court should address: whether courts must consider a jury's hesitation in imposing a death sentence as part of the totality of circumstances that *Strickland* requires to be assessed in evaluating prejudice. Six federal circuits (the First, Second, Fourth, Sixth, Ninth, and Tenth) consider jury hesitation in evaluating *Strickland* prejudice, while three circuits (the Third, Seventh, and Eighth) do not, creating a split. Pet. 14–28.

Respondent insists this circuit split "does not exist" because the cited cases "turn on differences of fact and to a lesser extent, differences in the standards of review," as some of the cases were decided before AEDPA's

enactment. Opp. 24-26. But that *highlights*, rather than undermines, the circuit court split. As reflected in the below chart summarizing jury-hesitation cases cited in the Petition with cases applying AEDPA bolded, two of the three cases *discounting* juror hesitation are *non-AEDPA* cases – that is, those courts applied a less deferential, more lenient standard of review – and six cases *crediting* juror hesitation applied AEDPA’s more stringent standard of review:

<u>Credited Hesitation</u>	<u>Discounted Hesitation</u>
<i>Dugas v. Coplan</i> , 428 F.3d 317 (1st Cir. 2005)	<i>Wharton v. Superintendent Graterford SCI</i> , 95 F.4th 113 (3d Cir. 2024)
<i>Ouber v. Guarino</i>, 293 F.3d 19 (1st Cir. 2002)	<i>Allen v. Chandler</i>, 555 F.3d 596 (7th Cir. 2009)
<i>Mason v. Scully</i> , 16 F.3d 38 (2d Cir. 1994)	<i>Sanders v. Trickey</i> , 875 F.2d 205 (8th Cir. 1989)
<i>Cox v. Donnelly</i>, 387 F.3d 193 (2d Cir. 2004)	<i>White v. Plappert</i>, 131 F.4th 465 (6th Cir. 2025)
<i>Williams v. Stirling</i>, 914 F.3d 302 (4th Cir. 2019)	<i>Davis v. Comm’r, Ala. Dep’t of Corr.</i>, 120 F.4th 768 (11th Cir. 2024)
<i>Mason v. Mitchell</i>, 543 F.3d 766 (6th Cir. 2008)	
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<i>Vega v. Ryan</i>, 757 F.3d 960 (9th Cir. 2014)	
<i>Medina v. Barnes</i> , 71 F.3d 363 (10th Cir. 1995)	
<i>Carter v. Bowersox</i>, 265 F.3d 705 (8th Cir. 2001)	

This also undercuts Respondent’s argument that AEDPA bars any possible relief here. Respondent asserts that the ACCA could not have unreasonably applied a rule that this Court has not yet decided. Opp. 19-21. But Davis does not ask this Court to announce a new rule of constitutional law; he asks this Court to hold that the ACCA unreasonably applied an existing one, namely, *Strickland*’s mandate that courts consider the totality of the circumstances in assessing prejudice. 466 U.S. at 695. “General legal principles” – like *Strickland*’s totality-of-the-evidence holding – “can constitute clearly established law for purposes of AEDPA,” even if the legal principle lacks “precise contours,” as *Strickland* does. *Andrew v. White*, 604 U.S. 86, 94 (2025).

Respondent argues that Davis’s petition presents an insurmountable paradox: if the law governing jury hesitation under *Strickland* is not settled, then a state court’s resolution of the question cannot be an unreasonable application of clearly established law, so AEDPA bars relief. Opp. 20–22. Applying this reasoning, if a question is unsettled enough to merit this Court’s attention under Supreme Court Rule 10, it is too unsettled for AEDPA relief—and if the law is settled enough for AEDPA, this Court should not review because it would not satisfy Rule 10. This catch-22 would insulate

every state court habeas decision from this Court’s review. That cannot be the law, and the existence of this Court’s AEDPA decisions confirm it is not. *See, e.g., Williams*, 529 U.S. at 390 (despite AEDPA, granting certiorari and finding state court’s prejudice analysis was “contrary to” *Strickland*). The relevant law can be clearly established (*Strickland*’s prejudice rule) while the application of that rule to a recurring factual context (jury hesitation) remains unsettled and the subject of a circuit split.

Respondent also fails to address Davis’s arguments regarding constitutional significance of the jury in assessing whether the defendant should live or be put to death. Pet., 18-22. This Court’s decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), *Hurst v. Florida*, 577 U.S. 92 (2016), and *Ramos v. Louisiana*, 590 U.S. 83 (2020), underscore the primacy of the Sixth Amendment jury right and support that disregarding a jury’s reluctance to impose death improperly diminishes the jury’s essential role in capital sentencing. Respondent does not even mention *Hurst*, in which this Court ruled advisory juries are unconstitutional (*Hurst*, 577 U.S. at 94), while arguing that the jury was irrelevant here because “the trial court was the sentencer.” Opp. 8. Respondent’s argument not only flies in the face of *Hurst*, it ignores that the trial judge also heard none of the substantial mitigating evidence that should have been presented but was not.²

² Respondent does not contest that if two additional jurors besides the five initially in favor of life had voted for life, that would have been sufficient for a jury recommendation in favor of life, instead arguing that more than two would have had to

II. The Eleventh Circuit’s Decision Conflicts with *Rompilla* and *Williams*, Independently Warranting Certiorari Review.

Respondent’s Opposition does not – because it cannot – seriously refute that the Eleventh Circuit’s decision conflicts with *Rompilla* and *Williams*. Respondent characterizes this independent basis for review as “fact-bound error correction” with “no ‘compelling reasons’” for review. Opp. 26. But all Respondent does is try to play up the facts of Davis’s sole prior conviction and argue that *Rompilla* offers no guidance with respect to applying AEDPA, while ignoring the close parallels here to *Rompilla*, the missed child abuse evidence, and *Williams* altogether.

Davis’s Petition sets forth in detail the reasons why Judge Rosenbaum concluded below that what happened in *Rompilla* is “precisely what happened here,” how its facts “line up so perfectly” with the facts of this case including the missed evidence of child abuse, and how *Rompilla* “is so on point here that the Supreme Court could have been talking about Davis’s case.” Pet. 27-32. In its attempt to distinguish *Rompilla*, the ACCA incorrectly found *Rompilla* involved only one aggravating circumstance, when in fact there were three, more

change their vote from the final 11-1 vote. Opp. 8. Respondent agrees that if two jurors changed their vote even from the 11-1 vote then the jury’s conclusion would not have been for death, but argues with whether that could have resulted in a mistrial rather than a life sentence, which is irrelevant to the question presented.

aggravating than the two in this case, which brings this case well within the bounds of *Rompilla*. App. 660.

Respondent does not respond to any of that, thereby conceding it. Respondent instead argues that Davis’s sole prior offense was “more harrowing” than just taking pizzas without violence or a weapon. Opp. 28-30. But regardless of how Respondent tries to characterize the seriousness of the prior offense, that in no way takes this case outside the bounds of *Rompilla* – in *Rompilla*, the prior offense was a violent rape and assault in which *Rompilla* broke into the victim’s apartment, “slashed her left breast with a knife,” and held her “at knife-point while he raped her for over an hour.” 545 U.S. at 402.

Respondent’s only other argument is that *Rompilla* offers no guidance with respect to the unreasonable application of law under AEDPA, citing *Cullen v. Pinholster*, 563 U.S. 170 (2011). Opp. 27. Respondent appears to be arguing that because this Court made the observation in *Pinholster* that non-AEDPA cases offer “no guidance” with respect to applying AEDPA’s unreasonableness standard, no federal appellate court can ever again reverse a death sentence based on non-AEDPA Supreme Court precedent. But Respondent is seeking to impose on AEDPA’s “clearly established Federal law” clause a requirement that does not exist, that such law can consist *only* of Supreme Court cases that *themselves* apply AEDPA. That cannot be right. Otherwise, AEDPA would eviscerate the need for state courts to reasonably apply, or to not rule contrary to, *Rompilla*, *Strickland*, and every other non-AEDPA Supreme Court case. The State’s position is proven wrong by the dozens of post-*Pinholster* federal appellate court decisions reversing death sentence decisions as contrary to or an unreasonable application of

Rompilla, *Strickland*, and other non-AEDPA Supreme Court precedent, including multiple decisions of this Court. See, e.g., *Debruce v. Comm'r, Ala. Dep't. of Corr.*, 758 F.3d 1263, 1278 (11th Cir. 2014).

Finally, Respondent entirely ignores *Williams*. Under *Williams*, a state court's decision is contrary to this Court's precedent "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent." *Williams*, 529 U.S. at 406. That is precisely what happened here. *Rompilla* is indistinguishable from this case. The Eleventh Circuit majority decision's holding that the ACCA did not err in denying Davis's claim contradicts *Williams*' holding regarding what amounts to an unreasonable application of this Court's precedent. Respondent does not dispute this point and thus has conceded it. Sup. Ct. R. 15.2.

CONCLUSION

This case presents an opportunity for the Court to resolve a circuit split regarding consideration of jury hesitation in evaluating *Strickland* prejudice. The Eleventh Circuit panel majority erred in finding courts need not consider jury hesitation in evaluating prejudice. It erred again in suggesting, even considering the jury's hesitance to sentence Davis to death, the ACCA's no-prejudice determination was reasonable. The Court should grant Davis's Petition and reverse the Eleventh Circuit majority's decision.

Respectfully submitted this 21st day of September, 2026.

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