No. 12-658

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER LEE PRICE,

Petitioner,

v.

KIM T. THOMAS, Commissioner of the Alabama Department of Corrections,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED
(Rephrased)

1. Should this Court decline to review Price's splitless and meritless claim that the Eleventh Circuit applied erroneous standards of review in denying relief on his penalty-phase ineffective assistance of counsel claims?

2. Should this Court decline to review Price's meritless claim that the Eleventh Circuit improperly invoked, *sua sponte*, a pleading defect in denying relief on his penalty-phase ineffective assistance of counsel claims?

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In 1991, Christopher Lee Price murdered William "Bill" Lynn during the course of a robbery in Fayette County, Alabama. Price was convicted of capital murder and sentenced to death for that offense. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Price's conviction and death sentence. *Price v. State*, 725 So. 2d 1003 (Ala. Crim. App. 1997), *aff'd*, 725 So. 2d 1063 (Ala. 1998). This Court denied Price's petition for writ of certiorari. *Price v. Alabama*, 526 U.S. 1133, 119 S. Ct. 1809 (1999).

Price subsequently filed a petition for post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The state circuit court entered an order summarily denying and dismissing Price's petition. Pet. App. E. The Alabama Court of Criminal Appeals affirmed the circuit court's ruling in an unpublished opinion. Pet. App. D. The Alabama Supreme Court denied Price's petition for writ of certiorari.

After the Alabama Court of Criminal Appeals affirmed the circuit court's judgment, Price filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Alabama. District Court Judge L. Scott Coogler entered a memorandum opinion and final judgment denying and dismissing with prejudice Price's third amended habeas petition. Pet. App. B. The Eleventh Circuit affirmed the judgment of the district court. Pet. App. A.

STATEMENT OF JURISDICTION

The statement of jurisdiction that is contained on page 1 of Price's petition for writ of certiorari is correct. But, Price has not articulated any basis for this Court to invoke its discretionary jurisdiction under Supreme Court Rule 10.

STATEMENT OF THE CASE

A. The Proceedings Below

More than 20 years ago, Price was indicted by the Grand Jury of Fayette County, Alabama for the capital offense of murdering Bill Lynn during the course of a robbery in the first degree, in violation of section 13A-5-40(a)(2) of the Code of Alabama. (Vol. 1, Tab #R-1, p. 202.)[1] About a year later, a Fayette County jury found Price guilty of the capital murder of Mr. Lynn. *Id.* at 199, 213. That same day, the jurors, following the presentation of evidence, closing arguments, and instructions from the trial court, recommended to the judge by a vote of ten to two that Price should be sentenced to death. *Id.* at 200, 213. After a separate sentencing hearing, the court followed the jury's recommendation and sentenced Price to death. *Id.* at 219.

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[1] This citation format, with volume and tab numbers, refers to the state court record. The state court record and the index of that record (i.e., the habeas corpus checklist) were filed in the district court on November 1, 2006. Doc. 19.

On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Price's conviction and sentence. *Price v. State*, 725 So. 2d 1003 (Ala. Crim. App. 1997), *aff'd*, 725 So. 2d 1063 (Ala. 1998). This Court denied Price's petition for writ of certiorari. *Price v. Alabama*, 526 U.S. 1133, 119 S. Ct. 1809 (1999).

Price then, through counsel, filed his Rule 32 petition for post-conviction relief in the state Circuit Court. (Vol. 11, Tab #R-39, pp. 3-39.) The State moved the circuit court to dismiss the claims in his petition that failed to comply with the specificity and full factual pleading requirements of Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure, failed to state a valid claim for relief or present a material issue of fact or law, under Rule 32.7(d) of the Alabama Rules of Criminal Procedure, or were procedurally barred from review, under Rule 32.2(a) of the Alabama Rules of Criminal Procedure. (Vol. 11, Tab #R-41, pp. 81-87.)

The court granted the State's motion and dismissed those claims. (Vol. 11, Tab #R-42, pp. 88-89.) With regard to several of the claims in his petition that were dismissed because they failed to comply with Rule 32's specific pleading requirements, the court informed Price that he had 21 days "to supply the information necessary to comply with Rule 32's full-factual pleading requirements and to have these particular paragraphs reinstated into the petition." *Id.* at 88.

Price then amended three paragraphs in his petition. (Vol. 11, Tab #R-43, pp. 97-103.) The State

again moved the circuit court to dismiss Price's petition. (Vol. 11, Tab #R-44, pp. 193-200; Vol. 12, Tab #R-44, pp. 201-246.) The court granted the motion. (Vol. 12, pp. 250-299.) Price moved the court to reconsider its order of dismissal because it had overlooked his amendment. (Vol. 11, pp. 184-187.) In response, the court entered a revised final order in which it summarily dismissed and denied his petition and his amendment thereto. Pet. App. E.

The Alabama Court of Criminal Appeals affirmed the circuit court's judgment. Pet. App. D. The Alabama Supreme Court denied Price's petition for writ of certiorari.

Price also filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Alabama. After briefing, District Court Judge L. Scott Coogler entered a memorandum opinion and final judgment denying and dismissing with prejudice Price's third amended habeas petition. Pet. App. B.

After Judge Coogler denied Price's motion for a certificate of appealability, the Eleventh Circuit granted Price's motion for a certificate of appealability as to the following issues: "Claim A (ineffective assistance of counsel at the penalty phase), Claim B (ineffective assistance in litigating the change of venue motion), Claim C (failure to grant a change of venue), Claim H (future dangerousness), and as to whether the district court erred in denying Appellant's request for an evidentiary hearing."

The Eleventh Circuit affirmed the judgment of the district court. Price filed a petition for rehearing and rehearing *en banc* in which he argued, among other things, that the court had overlooked his "future dangerousness" claim. The Eleventh Circuit panel granted in part and denied in part his petition for rehearing. On that same day, the court vacated its prior decision, entered a substituted opinion in which it included a fuller discussion of Price's "future dangerousness claim," and again affirmed the district court's judgment. Pet. App. A.

Price filed a second petition for rehearing and rehearing *en banc*. The Eleventh Circuit denied that petition.

B. Statement of the Facts

The robbery-murder in this case, accomplished with a sword and a dagger, was as brutal as they come. There is no doubt that Price committed it and is worthy of the death penalty.

Price committed the murder at the home of Bill and Bessie Lynn on the evening of December 22, 1991. After attending church where Mr. Lynn served as a minister, they returned to their residence. (Vol. 4, pp. 413-414.) When they arrived, Mrs. Lynn went upstairs to watch a Christmas program on television. *Id.* at 415. Mr. Lynn remained downstairs and began assembling Christmas presents for their grandchildren. *Id.*

At approximately 9:30 p.m., the electricity in their home suddenly went off. *Id.* Mr. Lynn went upstairs to find out whether his wife knew what had

happened to their electricity, but she indicated to him that she did not know why their electricity went off. *Id.* When they realized that their neighbor's house still had electricity, Mr. Lynn suggested to his wife that they should call and report the power outage. *Id.* But, Mr. Lynn then observed that the security light on a pole outside of their house was still on, so he decided to walk outside and check the fuse box. *Id.* at 416.

After her husband went downstairs, Mrs. Lynn heard some noises outside, so she went to look out her bathroom window. *Id.* at 416-417. When she looked out the window, she saw a man standing in a karate-like position in her yard and noticed that he had what appeared to be a sword in his right hand. *Id.* at 416. She further observed that his arms were raised and that he was holding the weapon in a striking position. *Id.* Shortly thereafter, she heard her husband call out to her, asking her several times to call the police. *Id.* at 419.

Realizing that her husband was in danger, Mrs. Lynn went to the telephone to call the police, but when she twice picked up the receiver and did not hear a dial tone, she correctly concluded that their phone line had been cut. *Id.* She then went downstairs to retrieve a candle from their dining room and the pistol that they kept next to their bank deposit bag in a kitchen drawer. *Id.* at 419-420.

Armed with the pistol, Mrs. Lynn walked out the front door of her home, whereupon she encountered a man wearing a ski mask. *Id.* at 421. As soon as she saw that man, she was struck twice on the head by

another man who was standing to her left. *Id.* at 421, 428, 432. Mrs. Lynn raised her hands to defend herself, but she was struck again, suffering a deep cut to her thumb. *Id.* at 421. The blows to her head caused her to fall forward, but she was able to stand back up, point the pistol up in the air, and fire a shot. *Id.* After firing the pistol, Mrs. Lynn went around to the front of their van and called out her husband's name. *Id.* In a weak voice, Mr. Lynn told her that he had been stabbed and knew that he was dying. *Id.* She went to him and gave him the pistol, but he informed her that there were no more bullets in the weapon and that they should give the intruders "anything they want." *Id.* at 421-422.

Mrs. Lynn told her husband that she would leave and get assistance, and she then climbed into the driver's side of the van. *Id.* at 422. As she was struggling to get the keys into the ignition, the two men appeared on either side of the van and ordered her to get out of the vehicle. *Id.* As soon as she exited the van, one of the intruders began to beat her with an object, and the other man demanded money. *Id.* The beating continued as the intruders forced her back into her house. *Id.* at 423. She testified that both men were wearing dark clothing and that both of them wore gloves and had their heads covered. *Id.* at 430.

After she and the intruders entered her home, the men continued to demand money, so she retrieved the bank deposit bag, which contained cash and checks, from the kitchen drawer. *Id.* at 423-424. At that point, the intruders demanded that she give

them all of her jewelry and ordered her to remove her rings. *Id.* at 424. Although Mrs. Lynn begged them to allow her to keep her wedding ring, they again ordered her to remove the ring and put it in the bag, so she complied with that demand. *Id.* The intruders then looked around the house and around the outside of the house, and they eventually left the residence through the backdoor after instructing Mrs. Lynn to remain in the kitchen. *Id.* at 424-425.

As soon as the intruders left, Mrs. Lynn went outside to check on her husband. *Id.* at 426. She told him that she would go for help, and he asked her to hurry. *Id.* Mrs. Lynn ran to her father's house and called the rescue squad. *Id.* at 426-427. Mr. and Mrs. Lynn promptly were transported to the hospital where Mr. Lynn died at approximately eighteen or nineteen minutes after 10:00 p.m. that evening. *Id.* at 476-477.

In following the jury's recommendation that Price be sentenced to death, the trial court found the existence of two aggravating circumstances and concluded that they outweighed the statutory and non-statutory mitigating circumstances. (Vol. 1, pp. 213-219.) The court found the existence of the following aggravating circumstances: (1) the defendant committed the crime while he was engaged or was an accomplice in the commission of a robbery; and, (2) the capital offense was especially heinous, atrocious, or cruel as compared to other capital offenses. *Id.* at 214. The trial court stated the following in support of the latter finding:

> At the trial of this case a sword and dagger were introduced into evidence as being the instruments that were used in the killing. There were a total of thirty-eight (38) cuts, lacerations and stab wounds. Some of the stab wounds were a depth of three (3) or four (4) inches. Other wounds to the body and head indicated that the victim was repeatedly struck in a hacking or chopping motion. One of his arms was almost severed and his head was lined with numerous wounds three (3) to four (4) inches in length. His scalp was detached from the skull of his head in places. The victim died a slow, lingering and painful death probably from the loss of blood. He was still alive when an ambulance attendant got to him probably thirty (30) minutes to an hour after the initial attack began.

Id. at 215. In affirming Price's sentence, the Court of Criminal Appeals held that, "[c]onsidering the evidence of the circumstances surrounding the victim's murder, it is clear that it was unnecessarily torturous, pitiless, conscienceless, extremely wicked, and shockingly evil." *Price*, 725 So. 2d at 1062.

Price was apprehended at a friend's house in Chattanooga, Tennessee. (Vol. 1, p. 212.) After his arrest, Price gave a lengthy statement to law enforcement officers in Chattanooga in which he confessed to participating in the crime. *Id.* at 212-

213. In addition, Price told his friend that he had "murdered someone in Alabama." *Id.* at 213.

REASONS FOR DENYING THE PETITION

Price's petition fails to meet this Court's requirement that there be "compelling reasons" for granting certiorari. Sup. Ct. R. 10. The facts of his case implicate no split, and he has not shown that any of the traditional grounds for granting certiorari review set out in Rule 10 exist. Price, for instance, cannot establish that the Eleventh Circuit's decision below conflicts with the decisions of other courts of appeal, *see*, Sup. Ct. R. 10(a), or that this case presents a novel and important question of federal law, *see*, Sup. Ct. R. 10(c). For the reasons set forth below, his petition for writ of certiorari should be denied.

I. THIS COURT SHOULD DECLINE TO REVIEW PRICE'S CLAIM THAT THE ELEVENTH CIRCUIT APPLIED ERRONEOUS STANDARDS OF REVIEW.

Price's tortuous first question presented is not tethered to any single, unified legal theory, and it is unworthy of review. At different points, he contends that the Eleventh Circuit's resolution of two of his ineffective-assistance claims created two unrelated circuit splits, that the Eleventh Circuit applied the wrong standards of review in addressing those claims, and that the Eleventh Circuit erred in failing

to conduct a cumulative review of counsel's alleged errors. Price is mistaken on all counts.

A. The Eleventh Circuit's Resolution Of Price's Claims Did Not Create A Circuit Split.

In an attempt to support his argument that the Eleventh Circuit's decision below created a split among the circuits, Price cites three unrelated decisions – *Winston v. Pearson*, 683 F.3d 489 (4th Cir. 2012), *Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009) (*en banc*), and *Miles v. Martel*, 696 F.3d 889 (9th Cir. 2012)[2] – and alleges that the outcome of his case would have been different if the Eleventh Circuit had applied the standards from those cases. But those decisions are easily distinguishable from Price's case, and this case implicates no split arising from them. None of those decisions addresses the circumstances presented here.

1. *Fourth Circuit*. The Fourth Circuit decision was one in which, unlike the circumstances presented here, the federal court concluded that the petitioner's allegations, on their face, were meritorious, and thus that the state court should have developed the record further. In *Winston*, 683

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[2] On the same day that Price filed his cert petition, the Ninth Circuit withdrew its opinion in *Miles* and, upon joint motion of the parties, ordered that the petitioner be released from custody. *Miles v. Martel*, No. 10-15633, 2012 WL 5896794, at *1 (9th Cir. Nov. 21, 2012). Thus, any relevance that *Miles* may have had to Price's case is now gone.

F.3d at 492, the petitioner filed a state habeas petition in which he raised a claim alleging that trial counsel were ineffective for failing to present evidence showing that he is mentally retarded. The Virginia Supreme Court, in denying relief, rejected the petitioner's requests for discovery and an evidentiary hearing as to that and his other claims. The Fourth Circuit concluded that the Virginia Supreme Court's refusal to grant the petitioner discovery and a hearing on that claim was unreasonable and that the petitioner, therefore, was unable to create a record on that issue in state court through no fault of his own. *Id.* at 496-497, 501. For that reason, the Fourth Circuit held that the state court failed to adjudicate the petitioner's claim on the merits and concluded that the claim accordingly was subject to *de novo* review.[3]

The Fourth Circuit, in so ruling, "reiterated that 'the requirements that petitioners exhaust their state remedies and diligently develop the record in state court are exacting burdens.'" *Id.* at 497 (quotation omitted). Indeed, the court, in emphasizing the limited scope of its ruling, noted "that [the fact] that a petitioner requested an evidentiary hearing from the state court, without

[3] On October 17, 2012, the State of Virginia filed a cert petition challenging, among other rulings, the Fourth Circuit's holding that the Virginia Supreme Court failed to adjudicate the habeas petitioner's IAC claim on the merits. The petition was distributed for the conference of January 18, 2013, but it remains pending before this Court.

more, might not always suffice to satisfy AEDPA's diligence requirement." *Id.*

2. *Tenth Circuit.* Likewise, the Tenth Circuit decision was one in which the federal court, unlike the circumstances here, could conclude that the petitioner had pleaded a facially meritorious claim and thus that the state court failed to adequately develop the record. In *Wilson*, 577 F.3d at 1286, the Tenth Circuit consolidated two cases to determine whether the state appellate court's rulings on the petitioners' IAC claims were entitled to deference under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *See* 28 U.S.C. § 2254(d). In each case, the petitioner followed Oklahoma's law, which provides that a defendant, on direct appeal, can move the Oklahoma Court of Criminal Appeals to remand his case for an evidentiary hearing on claims alleging that his counsel were ineffective for failing to investigate or present certain evidence if he submits specific allegations and non-record evidence that show "'by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence[.]'" *Id.* at 1286-1287 (quotation omitted). But, in both cases, the state court denied the petitioners' respective motions, and in so ruling, the court relied solely on the trial record and disregarded the allegations and non-record evidence that they proffered in support of their claims. *Id.* at 1288-1289.

In a divided decision, the Tenth Circuit held that AEDPA's deferential standard of review did not

apply to the petitioners' ineffective assistance of counsel claims because the state court decided those claims without considering the petitioners' allegations and non-record evidence in support thereof and without applying *Strickland v. Washington*, 466 U.S. 668, (1984), in denying relief on those claims. *Id.* at 1287-1287. In the case of Petitioner Wilson, the state court did not even "quote, summarize, or analyze the substance of the non-record evidence[]" that he offered in support of his motion for an evidentiary hearing. *Id.* at 1288. Because the state court failed to apply *Strickland* in reviewing the petitioners' motions for an evidentiary hearing – and, indeed, altogether ignored the allegations contained therein – the court held that those rulings did not constitute an "adjudication on the merits" and, therefore, were not entitled to AEDPA's deferential review. *Id.* at 1291-1292.

Significantly, the Tenth Circuit distinguished the state appellate court's rulings in *Wilson* with its rulings in cases in which the state court "first analyzes the proffered non-record evidence against the *Strickland* standard, concludes that even if admitted the evidence would not entitle the petitioner to habeas relief, and then denies the motion for an evidentiary hearing." *Id.* at 1292. The court emphasized that decisions in those types of cases *do* constitute an "adjudication on the merits," and, thus, are entitled to AEDPA deference because the state court applied *Strickland* in analyzing the allegations and non-record evidence that the petitioner offered in support of his motion for an evidentiary hearing. *Id.*

3. *Eleventh Circuit*. Meanwhile, the Eleventh Circuit decision that Price claims creates a split – *Borden v. Allen*, 646 F.3d 785 (11th Cir. 2011) – is hardly "a stark contrast" to the cited Fourth and Tenth Circuit decisions. *Borden* simply held that in light of Alabama's rule requiring specificity in pleading in postconviction petitions, the state court will be deemed to have issued an "adjudication on the merits" for AEDPA purposes when it concludes that the petitioner did not allege sufficient facts to give rise to a meritorious constitutional claim. *Id.* at 814 ("A review of the Alabama Court of Criminal Appeals's disposition of the ineffective assistance claims at issue here indicates that the court ruled on the merits of those claims – that is, in determining that Borden failed to plead his claims with the specificity required by Rule 32.6(b), the court considered the underlying substance of his claims."). And the Eleventh Circuit held that it will determine whether a petitioner has established that the state court's decision is manifestly unreasonable based on the allegations the petitioner set forth in his state-court petition. *Id.* at 816-817 ("We therefore ... examine the reasonableness of the Court of Criminal Appeals's adjudication of Borden's claims based upon the allegations contained in his Amended Petition."). That rule is fully consistent with the approach taken by the Fourth and Tenth Circuits. Price does not persuasively explain how this decision somehow creates a split.

4. Likewise, the Eleventh Circuit's decision in the case at hand looks nothing like *Winston* and *Wilson*. Unlike in those cases, the state courts here applied

Strickland in analyzing Price's penalty-phase ineffective assistance of counsel claims. They concluded that discovery and evidentiary development was unnecessary because Price had not alleged sufficient facts to establish a colorable constitutional claim.

In this regard, a few details about the proceedings before the state court may be instructive. On May 23, 2000, Price filed his Rule 32 petition. (Vol. 11, Tab #R-39, pp. 3-39.) On June 26, 2000, the State filed its answer, arguing that most of his claims should be dismissed because they failed to comply with Rule 32's specific pleading requirements. *Id.* at Tab #R-40, pp. 41-80. Price did not respond to the State's answer, and his case remained dormant until the State moved the circuit court to dismiss most of the claims in his petition on December 8, 2000. *Id.* at Tab #41, pp. 81-87.

On December 11, 2000, the state circuit court granted the State's motion and dismissed those claims. *Id.* at Tab #R-42, pp. 88-89. But the state court gave Price another opportunity to plead viable claims. With regard to several of the claims that were dismissed because they failed to comply with Rule 32's specific-pleading requirements, the circuit court gave Price 21 days "to supply the information necessary to comply with Rule 32's full-factual pleading requirements and to have these particular paragraphs reinstated into the petition." *Id.* at 88. Price responded to the court's order by filing an amendment to his petition that spanned just three pages in length. *Id.* at Tab #R-43, pp. 97-103. The

state court then concluded that even with those additional allegations, Price had not pleaded enough facts to give rise to a meritorious ineffective-assistance claim.

In so doing, it is not as if the state court precluded Price from developing the record altogether. As the district court found, the court "granted discovery pertaining to his physical and mental health from various corrections facilities, as requested by Price's counsel." Pet. App. B at 81a. The state court issued four orders granting Price's discovery requests as to the Fayette County Sheriff's Department, the Alabama Board of Pardons and Paroles, the Department of Corrections, and several other state agencies on March 1, 2001. (Vol. 11, pp. 123-131, 145-150.) The circuit court did not dismiss Price's petition until April 1, 2002 (Vol. 12, pp. 304-364; Vol. 24, Tab #R-62), so he had more than a year to pursue and obtain discovery from those agencies and then file a second amendment to his petition that included information from those agencies to support his penalty-phase ineffective assistance of counsel claims. But Price failed to do so.

As the district court aptly observed, "[s]ince none of these medical records, or even a factual allegation that could be purportedly supported by the records, has appeared in the record or been made by Price, the court can only assume the records revealed no additional mitigating mental health evidence beneficial to Price." Pet. App. B at 81a. Thus, Price stood silent and failed to prosecute his case between the time that he filed his motions for discovery and

the time that the court dismissed his Rule 32 petition, and he, thereby, "failed to develop" the factual predicate underlying his claims in state court. *See* 28 U.S.C. § 2254(e)(2).

Moreover, in denying relief on the two claims that are now before this Court, the state circuit court and the Alabama Court of Criminal Appeals thoroughly reviewed the allegations that Price raised in his Rule 32 petition and amendment thereto and properly applied *Strickland* in holding that, even assuming those allegations are true, Price would not be entitled to relief. Pet. App. D at 312a-321a, 334a-338a; Pet. App. E. at 355a-364a. For that reason, the state courts' denial of those claims constituted an adjudication on the merits. *See Frazier v. Bouchard*, 661 F.3d 519, 525 (11th Cir. 2011), *cert denied*, 133 S. Ct. 410 (2012) ("[T]he determination that adjudications under Rules 32.6(b) and 32.7(b) of the Alabama Rules of Criminal Procedure are on the merits comports with this Court's precedent."); *Borden v. Allen*, 646 F.3d 785, 814 (11th Cir. 2011), *cert denied*, 132 S. Ct. 1910 (2012) ("A review of the Alabama Court of Criminal Appeals's disposition of the ineffective assistance claims at issue here indicates that the court ruled on the merits of those claims – that is, in determining that Borden failed to plead his claims with the specificity required by Rule 32.6(b), the court considered the underlying substance of his claims."); *Powell v. Allen*, 602 F.3d 1263, 1273 (11th Cir. 2010), *cert denied*, 131 S. Ct. 1002 (2011).

This case thus looks nothing like the Fourth and Tenth Circuit decisions that Price claims are on the other side of the "split." Indeed, it is utterly unclear why Price's citation to the Eleventh Circuit's decision in *Borden* is relevant at all.

B. Price's Claim That The Eleventh Circuit Erred In Limiting Its Review To Allegations He Raised In State Court Is Without Merit.

Despite the lack of connection between this case and the cases from other circuits cited in Price's petition, Price tries to gin up an argument for certiorari by criticizing the precise manner that the Eleventh Circuit rejected his ineffective-assistance claims. Namely, Price says that because the Eleventh Circuit reviewed the prejudice prong of *one* aspect of his prejudice claim *de novo* – namely, the claim arising from counsel's decision on the mental-health expert, on which the state court had not expressly ruled on the prejudice issue – the Eleventh Circuit should have reviewed the state court's *entire* prejudice ruling *de novo*, even though the state court had expressly found no prejudice as to the other complained acts of deficient performance. There is no lower-court split on Price's novel theory that AEDPA review works this way. The theory is contrary to a common-sense understanding of the sound administration of federal habeas claims, and particularly ineffective-assistance claims. And it is irrelevant on the facts of this case, given that the Eleventh Circuit appears to have considered the

prejudice issue *de novo*, across the board, in any event.

As a threshold matter, it is critical to disaggregate, at the outset, two issues that Price erroneously conflates in his petition, particularly when he cites the decisions of the Fourth and Tenth Circuits for the proposition that this case has given rise to a "split."

The first issue concerns the *record* that a federal habeas court must consider in addressing a petitioner's claim. If a state inmate's claim was adjudicated on the merits in state court, then federal habeas review of that claim is limited to the record that was before the state court. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). In reaching that result, this Court held that "[s]tate-court decisions are measured against this Court's precedent as of 'the time the state court renders its decision.'" *Id.* at 1399 (quotation omitted). Indeed, "[i]t would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court." *Id.* Eleventh Circuit law is consistent with this proposition, for it "examine[s] the reasonableness of" a state court's adjudication of habeas claims "based upon the allegations contained in" the state-court petition. *Borden*, 646 F.3d at 816-817; *accord Powell*, 602 F.3d at 1273.

This first issue here appears to be largely a red herring. Price is not alleging in his petition that there was some additional evidence, not before the state court, that he wished to put before the federal

court. Here, the state circuit court and the state appellate court thoroughly reviewed the allegations that Price raised in his Rule 32 petition and amendment thereto in support of the claims that are before this Court and properly applied *Strickland* in holding that, even assuming those allegations are true, Price would not be entitled to relief. Pet. App. D at 312a-321a, 334a-338a; Pet. App. E. at 355a-364a. The Eleventh Circuit properly limited its review of those claims to the state court record, and Price does not appear to be claiming otherwise.

Instead, Price appears to be arguing a second, distinct point: he is saying that the Eleventh Circuit applied the wrong *standard of review* in assessing his claim of *Strickland* prejudice. He argues that because the state court did not rule on the prejudice issue as to the mental-health-expert claim, AEDPA deference could not properly be applied to the state court's determination that counsel's other allegedly deficient acts were not prejudicial. As explained below, this theory is not a basis for certiorari.

1. The Eleventh Circuit Correctly Denied Relief On Price's Claim That His Trial Counsel Failed To Retain An Independent Mental Health Expert To Evaluate Him.

There is no merit to Price's argument that the Eleventh Circuit erred in denying relief on his claim that his trial counsel were ineffective for failing to retain an independent metal health expert to evaluate him.

In denying relief on this claim, the state circuit court held that Price's counsel made a reasonable decision not to retain such an expert. Pet. App. E at 358a-364. The state appellate court adopted the circuit court's reasoning in affirming that ruling. Pet. App. D at 334a-338a. Because the state courts resolved that claim on the deficient performance prong of the two-part *Strickland* analysis, they did not address the separate question of prejudice.

In reviewing that claim, the Eleventh Circuit concluded that it need not address whether Price's counsel were deficient for failing to retain a mental health expert because the court found that it was easier to dispose of the claim under *Strickland's* prejudice prong. Pet. App. A. at 15a. And, in conducting that analysis, the lower court correctly recognized that it was required to review Price's claim *de novo* because the state courts did not address prejudice and, instead, disposed of the claim under *Strickland's* deficient-performance prong. In holding that Price's claim is meritless, the lower court reasoned:

> We, however, cannot say that had these allegations been before the jury that there is a reasonable probability that the outcome of Price's sentencing would have been different. Although the state appellate court did not consider whether Price was prejudiced by his counsel's failure to retain a mental health expert, we cannot say, even if reviewing this claim without

> AEDPA's added deference, [FN8. *See Rompilla v. Beard,* 545 U.S. 374, 390, 125 S. Ct. 2456, 162 L.Ed.2d 360 (2005) (holding that when state court addresses only deficient performance element of two-part *Strickland* analysis, federal court review of prejudice element is de novo).] that the failure prejudiced Price. On *Strickland's* prejudice prong, Price has offered no more than a conclusory assertion that a mental-health expert could have testified to a connection between the abuse Price suffered as a child and his subsequent actions. *See e.g. Powell v. Allen,* 602 F.3d 1263, 1275 (11th Cir. 2010) (finding no prejudice where petitioner failed to allege the existence of an expert report, or what, specifically that expert's report would reveal about the petitioner's mental status).

Pet. App. A at 15a-16a. Thus, as the lower court found, even if his counsel were deficient for failing to retain a mental health expert to evaluate him – which Respondent certainly denies – Price cannot satisfy his burden of proving prejudice under *Strickland* with regard to that claim.

Moreover, in sentencing Price to death, the trial court found the existence of two aggravating circumstances: (1) the defendant committed the crime while he was engaged or was an accomplice in the commission of a robbery; and, (2) the capital

offense was especially heinous, atrocious, or cruel as compared to other capital offenses. (Vol. 1, p. 214.) In support of the latter finding, the court stated:

> At the trial of this case a sword and dagger were introduced into evidence as being the instruments that were used in the killing. There were a total of thirty-eight (38) cuts, lacerations and stab wounds. Some of the stab wounds were a depth of three (3) or four (4) inches. Other wounds to the body and head indicated that the victim was repeatedly struck in a hacking or chopping motion. One of his arms was almost severed and his head was lined with numerous wounds three (3) to four (4) inches in length. His scalp was detached from the skull of his head in places. The victim died a slow, lingering and painful death probably from the loss of blood. He was still alive when an ambulance attendant got to him probably thirty (30) minutes to an hour after the initial attack began.

Id. at 215. *See also Price*, 725 So. 2d at 1062 ("Considering the evidence of the circumstances surrounding the victim's murder, it is clear that it was unnecessarily torturous, pitiless, conscienceless, extremely wicked, and shockingly evil.").

In light of the brutal nature of his crime and the specific findings of the court that sentenced him to death, the Eleventh Circuit was right to find no

reasonable probability that expert testimony regarding his alleged mental health problems would have altered the balance of the aggravating and mitigating circumstances that led to the imposition of the death sentence. The Eleventh Circuit, therefore, was correct in holding that the allegations that Price raised in support of that claim in state court, even assuming that they are true, are insufficient to show that he suffered prejudice.

2. The Eleventh Circuit Correctly Denied Relief On Price's Claim That His Trial Counsel Failed To Adequately Interview His Relatives, Friends, And School Teachers.

On the other hand, the Eleventh Circuit applied AEDPA deference in reviewing Price's claim that his trial counsel were ineffective for failing to adequately interview his relatives, friends, and school teachers. But the language that the court employed in analyzing that claim indicates that the court *also* reviewed it *de novo* and found that, even under that more favorable standard of review to Price, he is not entitled to habeas relief. The lower court correctly adjudicated that claim.

In affirming the state circuit court's denial of that claim, the Alabama Court of Criminal Appeals reasoned that, "'[c]onsidering all the evidence introduced during the guilt and penalty phases of the trial, we cannot see how the evidence that the appellant argues should have been elicited at the penalty phase would have had any impact on his sentence. It certainly would not have changed the

outcome, and it did not render the sentencing fundamentally unfair or unreliable.'" Pet. App. D at 314a-315a (quotation omitted). Thus, the appellate court agreed with the circuit court that, even assuming the allegations that Price raised in support of that claim in his Rule 32 petition and amendment thereto are true, he cannot satisfy his burden of proving prejudice under *Strickland*. *Id.*

Before addressing his claims, the Eleventh Circuit identified the "applicable standards of review" that apply to Price's claims. Pet. App. A at 3a-5a. With the exception of his IAC claim arising from counsel's decision on the mental-health expert, the lower court expressly stated that AEDPA's deferential standard of review applies to his claims. *Id.* For that reason, the court applied AEDPA deference in correctly concluding that the state appellate court's holding that Price cannot satisfy his burden of proving prejudice with regard to his claim that his counsel failed to adequately interview his relatives, friends, and teachers was not contrary to or an unreasonable application of clearly established Supreme Court precedent. *Id.* at 14a ("We need not address whether Price's trial counsel was deficient in failing to conduct an investigation of Price's background for mitigation evidence because we cannot say that the state appellate court's application of *Strickland's* prejudice standard was unreasonable.").

But the language that the lower court employed in addressing that claim reveals that the court also reviewed it *de novo*. In particular, the court

reasoned as follows in affirming the district court's denial of that claim:

> As to the allegations regarding the evidence that his friends, family members and school records would have revealed, we also find them to be too general and conclusory to be able [to] say that there is a reasonable probability that this evidence would have changed the outcome of Price's sentencing. Although he alleges that his family members would have testified to more specific instances of abuse than did his mother, he does not give any indication of their nature or number such that we could say a jury that learned about these instances would have recommended a life sentence. Likewise, we cannot say that a jury would have rendered a different sentence had it heard from Price's friends and family of their love for him and that he was a good kid where Price's mother already testified to essentially these same facts at Price's sentencing hearing.

Pet. App. A at 16a. Thus, the lower court's language suggests a holding that, even under *de novo* review, Price is not entitled to habeas relief. And, because the court's adjudication of his claim is correct, Price's petition for writ of certiorari should be denied.

C. This Court Should Decline To Review Price's Cumulative-Effect Claim.

To the extent that Price is arguing that the Eleventh Circuit erred in failing to conduct a cumulative analysis of his counsel's alleged errors, this Court should deny certiorari.

1. Certiorari Should Be Denied Because Price's Claim Was Not Properly Raised In The Lower Court.

After the Eleventh Circuit affirmed the district court's judgment denying and dismissing his third amended habeas petition, Price filed a petition for rehearing and rehearing *en banc*, but he did not include his argument that the lower court erred in failing to conduct a cumulative analysis of his counsel's alleged errors in that petition. The Eleventh Circuit panel that heard his appeal granted in part and denied in part his petition for rehearing, vacated its prior decision, entered a substituted opinion in which it included a fuller discussion of one of his claims, and again affirmed the district court's judgment. Pet. App. A. Price then filed a second petition for rehearing and rehearing *en banc*, but yet again, he failed to argue that the lower court erred in failing to conduct a cumulative analysis of his counsel's alleged errors. The court denied that petition.

Thus, Price had two opportunities to present that question to the lower court, but he failed to do so. This Court has long held that it will not consider questions that were not properly presented to or

ruled on by the lower courts except in extraordinary circumstances. *See*, *e.g.*, *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). This case presents no reason to deviate from that rule. Because Price's claim was not preserved below, it should not be considered by this Court.

2. Certiorari Should Be Denied Because Price Is Not Entitled To Relief On This Claim.

As the Eleventh Circuit has recognized, this Court has not addressed the applicability of the cumulative-error doctrine to ineffective assistance of counsel claims. *See Forrest v. Florida Dept. of Corrections*, 2009 WL 2568185, at *5, 342 Fed.Appx. 560, 564 (11th Cir. 2009). For that reason, this case would be a poor vehicle to consider the question because it arises under AEDPA. To be entitled to relief under AEDPA, Price must not only persuade this Court that the cumulative-error doctrine is correct but also that this Court had clearly established the rule at the time of his state post-conviction proceeding. *See* 28 U.S.C. § 2254(d) (1). Because this Court has not yet addressed the applicability of that doctrine in this area, Price cannot make such a showing.

Moreover, even assuming, *arguendo*, that such a doctrine applies in the context of ineffective assistance of counsel claims, no court has found that Price's counsel were deficient in any respect. Indeed, the Alabama Court of Criminal Appeals stated the following in rejecting Price's claim that the cumulative effect of his counsel's alleged errors

warranted relief: "Here, because there was no showing of counsel's ineffectiveness, there is no showing that [the] cumulative effect of the alleged errors was reversible error." Pet. App. D at 339a.

Similarly, the Eleventh Circuit acknowledged that Price raised a claim alleging that the cumulative effect of his counsel's alleged errors warranted habeas relief. Pet. App. A at 12a-13a. Although the court did not expressly reject that claim, it implicitly did so when it found, in the language that suggested *de novo* review across the board, that Price had not established ineffective assistance of counsel at all. *Id.* at 11a-16a. On the mental-health issue, the Eleventh Circuit held that it could not "say, even if reviewing this claim without AEDPA's added deference, that the failure prejudiced Price." Pet. App. A at 15a-16a (footnote omitted). Likewise, the Eleventh Circuit held that it could not "say that there is a reasonable probability that" the friends, family, and teachers "evidence would have changed the outcome of Price's sentencing." *Id.* at 16a. Given these statements and the Eleventh Circuit's recognition that Price had made a cumulative-prejudice argument, the Eleventh Circuit's opinion can only be understood as rejecting the argument. And that rejection was correct. As noted above, this case involved a brutal murder, and Price has made no showing that the proffered additional mitigating evidence, which the Eleventh Circuit showed to be extraordinarily weak, would have made a difference.

For the foregoing reasons, this Court should deny certiorari review of Price's cumulative-effect claim.

II. THIS COURT SHOULD DECLINE TO REVIEW PRICE'S MERITLESS CLAIM THAT THE ELEVENTH CIRCUIT IMPROPERLY INVOKED, *SUA SPONTE*, A PLEADING DEFECT IN DENYING RELIEF ON HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

Price's second question presented is even more unworthy of certiorari review. In that portion of his petition, Price contends that the Eleventh Circuit *sua sponte* applied the pleading requirements from Rule 2(c) of the Rules Governing Section 2254 Cases in denying relief on his IAC claims. But the lower court did no such thing.

Instead, the court twice expressly stated that it limited its review of Price's ineffective assistance of counsel claims to the allegations that he raised in support of those claims in his *state-court Rule 32 petition*. *See* Pet. App. A at 13a ("Because the state court resolved this claim on a motion to dismiss, without taking evidence, we review the merits of this claim based on the record before the state appellate court, which in this case consists of the allegations in Price's Rule 32 petition."); Pet. App. A. at 17a, n.9 ("While we recognize that Price was not required to allege facts in his petition that would have been equivalent to the type of proof that one would expect in an evidentiary hearing, because our review of the state court's resolution of his *Strickland* claim is limited to the record before the state court, *see*

Pinholster, 131 S. Ct. at 1398, we are bound to review the merits of his claim given the allegations in his Rule 32 Petition, because the state court ruled on his claim without the benefit of an evidentiary hearing."). And the court never mentioned Rule 2(c) of the Rules Governing Section 2254 Cases or addressed Price's claims, as they were pleaded in his habeas petition, in its decision.

Thus, the Eleventh Circuit correctly applied this Court's binding precedent in limiting its review of Price's claims to the allegations that he raised in state court. *Pinholster*, 131 S. Ct. at 1398. *See also Borden*, 646 F.3d at 816-817; *Powell*, 602 F.3d at 1273. Because his argument to the contrary is premised on a profound misreading of the lower court's decision, this Court should deny certiorari on the second question presented.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari.

Respectfully submitted,

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