In the Supreme Court of the United States

RICHARD F. ALLEN,
Comm. of Alabama Dept. of Corrections, *et. al.*,
Petitioners,

v.

JAMES CHARLES LAWHORN,
Respondent.

On Petition for a Writ of Certiorari to The Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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(Capital Case)

QUESTION PRESENTED

In *Bell v. Cone*, 535 U.S. 685 (2002), trial counsel waived penalty-phase closing argument to prevent the State's rebuttal. Applying *Strickland v. Washington*, 466 U.S. 66 (1984), the Court held that (a) neither deficient performance nor prejudice could be presumed and (b) trial counsel acted reasonably.

James Lawhorn's counsel unsuccessfully attempted the same waiver strategy, resulting in two penalty-phase closing arguments for the State and none for Lawhorn. Lawhorn was then sentenced to death after state courts found that the aggravating circumstances of murder for hire and the murder was especially "heinous, atrocious, or cruel" outweighed Lawhorn's mitigating circumstances. The state courts rejected a finding of *Strickland* prejudice, holding that the addition of a closing argument would not have altered Lawhorn's sentence. The Court of Appeals for the Eleventh Circuit disagreed and granted habeas relief without applying 28 U.S.C. §2254(d)(1)'s "unreasonable application" clause. Instead, in a single sentence, the court of appeals stated that the state court's decision was "contrary to" clearly established precedent of this Court, without identifying the conflicting precedent. The question presented is:

> Under 28 U.S.C. §2254(d)(1), is a state court's determination that trial counsel's waiver of a penalty-phase closing argument did not prejudice the defendant "contrary to" clearly established precedent of this Court?

LIST OF PARTIES

Petitioners are Richard F. Allen, the Commissioner of the Alabama Department of Corrections, and Troy King, the Attorney General of Alabama. Herein, Petitioners are collectively referred to as "the State."

Respondent is James Charles Lawhorn, a prisoner at Holman Correctional Facility.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Respondent James Lawhorn was paid $50 to ambush and murder William Berry. He did, firing a .25-caliber handgun repeatedly "as the victim lay entangled in the underbrush and unable to talk, but gurgling." App. 140a. As described by the Alabama Court of Criminal Appeals, "the victim's last minutes were obviously filled with terror, fear, and knowledge that his death was imminent," and "[a]ll of this was accomplished by [Lawhorn] with complete indifference—complete indifference to Berry's pain and terror and complete indifference to the value of human life, which he found to be worth $50." *Id.* The question presented is whether the same state court was objectively unreasonable in determining that a penalty-phase closing argument from Lawhorn's attorney would not have overcome the weight of this aggravating evidence. *See* 28 U.S.C. §2254(d)(1).

Lawhorn was convicted of capital murder. In the penalty-phase, Lawhorn's counsel gave an opening statement and then presented evidence of Lawhorn's childhood and pleas for mercy from Lawhorn and his mother. Counsel then waived closing argument to prevent the State's veteran prosecutor from presenting rebuttal argument—the same strategy this Court deemed reasonable in *Bell v. Cone*, 535 U.S. 685 (2002), with one distinction: In *Bell*, the strategy was successful; here, it was not. In other words, two prosecutors were allowed to argue in this case; only one argued in *Bell*. The trial court subsequently sentenced Lawhorn to death after

determining that two aggravating circumstances—*i.e.* (1) intentional murder for pecuniary gain and (2) the "heinous, atrocious, or cruel" nature of the murder—outweighed Lawhorn's childhood background, which the court did not find mitigating.

Like this Court in *Bell*, the Alabama state courts rejected Lawhorn's deficient performance argument, deeming counsel's waiver of closing argument a reasonable strategic decision under the circumstances. The state courts also held that, even if counsel's decision was unreasonable, Lawhorn was not prejudiced because, "in this situation with these particular facts, closing argument by defense counsel would have had little impact." App. 213a.

On habeas review, the Court of Appeals for the Eleventh Circuit reached the opposite conclusion under both *Strickland* elements. While the State believes that the court of appeals failed to properly apply AEDPA's deference to *Strickland's* deficient performance standard—especially in light of this Court's finding of reasonableness in *Bell*—we limit the question presented to the court's prejudice analysis because the court erred in three ways:

1. The court's *de novo* prejudice analysis is erroneous. Merely adding a closing argument would not have tipped the sentencing scales in Lawhorn's favor;
2. After finding prejudice under *de novo* review, the court failed to apply §2254(d)(1)'s "unreasonable application" requirement to the state court's prejudice analysis; and,
3. In a single sentence, the court of appeals stated that the state court's decision was "contrary to" this Court's precedent, without

> identifying the conflicting precedent. The court could not have been referring to *Strickland* or *Bell*, as the state court reached the same conclusion this Court reached in both cases: rejection of the petitioner's IAC claim.

Based on these errors, we ask the Court to repeat the course it took last term in *Smith v. Spisak*, 130 S.Ct. 676, 687 (2010): Grant review and reverse an erroneous ruling that trial counsel's penalty-phase closing argument prejudiced the defendant. In light of the Court's recent decision in *Magwood v. Patterson*, No. 09-158, 2010 WL 2518374 (June 24, 2010), the failure to do so could lead to the relitigation of Lawhorn's entire case during a second trip from (re)sentencing, to direct appeal, to state post-conviction review, to federal habeas review—a trip that has taken 21 years the first time around.

OPINIONS BELOW

Because this case involves AEDPA, the State reproduces the relevant federal and state court opinions.

- *Federal Courts*: The opinion of the court of appeals is reported at 519 F.3d 1272. App. 1a-50a. The opinion of the district court, including the magistrate's report and recommendation, is reported at 323 F.Supp.2d 1158. App. 51a-196a.

- *State Courts*: The opinion of the Alabama Court of Criminal Appeals is reported at 756 So.2d

971. App. 198a-214a (relevant portions).[1] The trial court's order denying post-conviction relief is not reported. App. 215a-219a (relevant portions).

STATEMENT OF JURISDICTION

The court of appeals' judgment was entered on March 11, 2008. The court denied the States' petition for rehearing *en banc* on March 29, 2010, App. 210a, and for a panel rehearing on March 31, 2010. App. 197a. This petition is timely because it is filed within 90 days of the court's order refusing rehearing. *See* Sup. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

2. The Antiterrorism and Death Penalty Act of 1996 ("AEDPA") provides in relevant part: "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

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[1] To conserve resources, the State has omitted the lengthy portions of the state court opinions that address issues not related to the question presented. If merits briefing is ordered, the State will include the entire opinions in the Joint Appendix.

Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

Again, the State limits the question presented thusly: Was it objectively unreasonable for an Alabama court to conclude that, under *Strickland's* prejudice element, the addition of a penalty-phase closing argument would not have tipped Lawhorn's sentencing scales from death to life without parole? *See* 28 U.S.C. §2254(d)(1). To demonstrate why (1) Lawhorn failed to establish a reasonable probability that adding a closing argument would have tipped the sentencing calculus in his favor or, (2) at the very least, it was not objectively unreasonable for the state courts to reach that conclusion, we begin by detailing Lawhorn's crime, which served as the basis for both of his aggravating circumstances.

A. The Murder of William Berry

On the morning of March 31, 1988, Officer Kenneth Brasher watched James Lawhorn chase William Berry into his vehicle at a gas station. App. 2a. Later that afternoon, Maxine Walker, Berry's girlfriend and Lawhorn's aunt, offered to pay Lawhorn and his brother Mac $50 each to murder Berry. Trial Tr. 412.[2] The brothers agreed.

At a spot where she and Berry would "go parking," Maxine left the Lawhorns hiding in the woods, armed with a .25-caliber pistol and .12-gauge

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[2] The trial transcript is located in Document 17, Tabs 5-25 of the record.

shotgun. *Id.* at 414. Thirty minutes later, she returned with Mr. Berry. Maxine got out of her truck to "use the bathroom" in the woods and asked Mr. Berry to follow. *Id.* at 415. (Rightfully) fearing an ambush, William Berry ran. The Lawhorns jumped into the bed of Maxine's truck, and they chased Mr. Berry up the road. Upon catching Mr. Berry, Maxine "slammed on [the] brakes," and Mac rose from the truck bed and shot Mr. Berry with the shotgun. *Id.* at 418. Mr. Berry "hit the ground, then he jumped back up, and he started running again." *Id.* So, Mac shot him again. Mr. Berry fell a second time, arose a second time, and made for the woods. Mac shot a third time and missed, but Mr. Berry again fell to the ground because "his leg [became] tangled in a vine." *Id.* at 419-20. Lawhorn got out of the truck and stood over Mr. Berry. Unable to flee or speak, Mr. Berry was making "gurgling noises." *Id.* Lawhorn removed the .25-caliber pistol from his pocket and shot Mr. Berry four times—once each in the face and neck and twice in the chest. *Id.* 220-24, 419-20.

The group then fled the scene. Shortly thereafter, Lawhorn returned with another man to recover the spent shells before returning home to clean and dispose of the guns. *Id.* at 422-24. The next morning, Maxine drove Lawhorn to the bank. As promised, she gave Lawhorn $50 for "getting rid of" Berry. *Id.* at 429.

B. Trial and Direct Appeal

1. *The Trial*: Lawhorn was charged with murder for hire, a capital offense under Ala. Code §13A-5-40(a)(7). Lawhorn's lead counsel, Hank Fannin, had 24 years of experience, including 150-200 felony

trials and two capital murder trials. App. 207a; R.32. Tr. 62-63.[3] The lead prosecutor, District Attorney Robert Rumsey, was well-known for his "powerful and effective" closing arguments. App. 211a. Based largely on his detailed confession, Lawhorn was convicted of capital murder during the guilt-phase.[4]

D.A. Rumsey and Fannin each presented opening statements in the penalty-phase. Fannin outlined the mitigating circumstances that he intended to prove to the jury: Lawhorn (1) had "no significant history of . . . violent acts," (2) acted "under extreme duress or under the substantial domination" of Maxine Walker, and (3) was relatively young in age; plus "any aspect of [Lawhorn's] character or record" from "the time the Defendant was a child up until present time." Trial Tr. 498-500. Fannin concluded by stating, "I believe you'll hear sufficient evidence on the behalf of the Defendant that you'll come back with a recommendation of life without parole, and that's what we're asking you to do." *Id.* at 501.

D.A. Rumsey rested the State's penalty-phase case on its guilt-phase evidence, which proved the aggravating circumstances of murder for hire and that the murder was especially "heinous, atrocious, or cruel." Ala. Code §§ 13A-5-49(6), -49(8).

Fannin presented five witnesses in mitigation. Rhonda Peters, who became Lawhorn's counselor after he was charged with theft at age 17, testified

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[3] The Rule 32 transcript is located at Document 17, Tab 43 in the record.

[4] While not all introduced at Lawhorn's trial, all three participants in Mr. Berry's murder confessed their involvement. R.32. Tr. 126.

that Lawhorn was "polite" and "cooperative" and that he felt rejected by his biological father and did not have a good relationship with his stepfather. Trial Tr. 503-06. Lawhorn's junior high principal testified that Lawhorn was "very quiet" and possessed "very few disciplinary records." *Id.* at 514-16. Lawhorn's sister explained that Lawhorn's biological father divorced Lawhorn's mother when Lawhorn was three years old, and that Lawhorn went through three stepfathers before trying to reconcile with his biological father. *Id.* at 519-23. She also testified that Lawhorn was a hard worker and treated his nieces well. *Id.* at 527-28. Lawhorn's mother testified that her sister, Maxine Walker, was a "domineering type person." *Id.* at 542. Finally, both Lawhorn and his mother pleaded for the jury's mercy. *Id.* at 544-45. Specifically, Lawhorn asked the jury to "please have mercy on me." *Id.* at 545. Lawhorn admitted, "I was lead and I was wrong. I should not have did it." *Id.*

Through cross-examination and a rebuttal witness, D.A. Rumsey countered Lawhorn's mitigating evidence. Challenging Lawhorn's pristine past, D.A. Rumsey introduced evidence that Lawhorn had prior convictions for theft, burglary, and possession of burglary tools. *Id.* at 576. Regarding Lawhorn's home life, Lawhorn's principal testified that Lawhorn "did not give an appearance of being an underprivileged child in any way" and that "his mother was hard working and provided for him." *Id.* at 516. Furthermore, Lawhorn's mother testified that Lawhorn's stepfathers had not mistreated Lawhorn as a child. *Id.* at 538-41. And Lawhorn's sister acknowledged that, despite growing up in the same environment as her brother, she had never

been convicted of a felony. *Id.* at 532. Finally, D.A. Rumsey got Lawhorn to admit on cross-examination that, as he looked over Mr. Berry, he "didn't care whether [Berry] died or not." *Id.* at 572.

Instead of D.A. Rumsey, an assistant district attorney gave the State's first closing argument. *Id.* at 578-84. When he concluded, Fannin declared, "The Defendant waives closing argument in this phase of the trial, Your Honor. We object to the State making any further arguments." *Id.* at 584. D.A. Rumsey immediately objected, claiming, "we still have the right to argue. There is an Alabama Supreme Court case on it." *Id.* After the attorneys argued back-and-forth, the court indicated to D.A. Rumsey that he could proceed with an argument "[i]f you're sure about it." *Id.* at 585. Fannin preserved his objection for appeal, *id.*, and D.A. Rusmey argued to the jury. The jury recommended death by an 11-1 vote. App. 198a.

2. *The Sentence*: In Alabama, the trial judge is the ultimate sentencer in a capital case, and the court determines the sentence by weighing the aggravating circumstances against the mitigating circumstances. Ala. Code §13A-5-47(e). While it must be considered, the jury's recommendation "is not binding on the court." *Id.*

Two months after the jury recommended death, the Honorable William C. Sullivan conducted a final sentencing hearing. *See* Ala. Code § 13A-5-47(a-c) (requiring a separate sentencing hearing after the completion of a presentence investigation report). Judge Sullivan found that the State proved two aggravating circumstances: (1) murder for hire and (2) the murder was especially heinous, atrocious, or

cruel. Clerk's Trial Record 68. He determined that Lawhorn had failed to prove any statutory mitigating circumstances, specifically rejecting Lawhorn's contention that Lawhorn acted under extreme duress or under substantial domination or that Lawhorn's age (22) was mitigating. *Id.* at 70-71. Naming each of Lawhorn's penalty-phase witnesses, Judge Sullivan "considered all of the relevant factors or lack of same set out therein which the Defendant offered as a basis for a sentence of life without parole instead of death, and all other relevant mitigating circumstances." *Id.* at 71. Finding that the aggravating circumstances outweighed the mitigating circumstances, and "that there is only one logical conclusion as to the Defendant's punishment," the court sentenced Lawhorn to death. *Id.* at 68-69.

3. *Direct Appeal*: On appeal, the Alabama Court of Criminal Appeals rejected Lawhorn's argument that Fannin's waiver prevented D.A. Rumsey from presenting a closing argument. *See Lawhorn v. State*, 581 So. 2d 1159, 1173 (Ala. Crim. App. 1990). While Alabama's *Proposed* Rules of Criminal Procedure contemporaneously stated that "[i]f the defendant declines to make argument, the district attorney shall not make further argument," Rule 19.1(a)(8), *Alabama Rules of Criminal Procedure, Advisory Committee Draft* (June 1, 1977), the rule did not officially take effect until January 1, 1991—approximately one year after Lawhorn's trial. *See* Ala. R. Crim. P. 19.1(i). Accordingly, the appellate court affirmed the trial court's decision to allow a split argument under Alabama's common law. *Lawhorn*, 581 So. 2d at 1173 (citing *Powell v. State*, 141 So. 201, 209 (1932) and *Sheppard v. State*, 55 So. 514, 515 (1911)).

The court then affirmed the correctness of Lawhorn's sentence. *Id.* at 1178-79; *see* Ala. Code §13A-5-53 (requiring the appellate courts to independently "review the propriety of the death sentence"). The court noted that "we, too, have not found any non-statutory mitigating circumstances in appellant's family background, in his proclaimed weakness to Walker's alleged domination, or in his lack of discipline problems in his younger years." *Lawhorn*, 581 So. 2d at 1178. Accordingly, the court stated that "our independent weighing of the aggravating circumstances and no mitigating circumstances indicates that death is the proper sentence." *Id.*

The Supreme Court of Alabama affirmed. *Ex parte Lawhorn*, 581 So. 2d 1179 (Ala. 1991). Regarding Lawhorn's sentence, the court held that "[o]ur scrutiny of that evidence of mitigating circumstances [*i.e.* the testimony of Lawhorn's five witnesses] reveals nothing that outweighs the two statutory aggravating circumstances proven at trial—that the capital offense was committed for pecuniary gain and that the offense was especially heinous, atrocious, or cruel compared to other capital offenses." *Id.* at 1180.

C. State Post-Conviction Proceedings

1. *State Circuit Court*: Lawhorn filed a post-conviction, "Rule 32" petition in May 1993. Among numerous claims, Lawhorn argued that Fannin provided ineffective assistance of counsel ("IAC") when he waived the penalty-phase closing argument. The circuit court—*i.e.* the same Judge Sullivan who presided over Lawhorn's trial—granted Lawhorn an evidentiary hearing in October 1995.

At the hearing, Fannin testified that he waived the penalty-phase closing argument "to cut Mr. Rumsey off at the pass." R32. Tr. 50. Fannin stated that "part of the strategy [was] to keep him from inflaming the minds of the jury," because, Fannin believed that "[i]f the defendant does not argue, Rumsey doesn't have a chance to get up and point at him and call him a cold blooded murderer and back shooter." *Id.* Regarding the legal basis of his strategy, Fannin testified that "we understood that to be the rules of evidence [sic] in Alabama." *Id.* at 51.

The court rejected Lawhorn's claim on the merits under both *Strickland* elements. The court found that Fannin's strategy was reasonable under the circumstances because "[t]his court has watched district attorney Rumsey on many occasions during closing argument[;] [h]e is powerful and effective during closing argument." App. 216a.

Regarding *Strickland* prejudice, the court held that "Lawhorn failed to establish at the Rule 32 hearing a reasonable probability that, but for trial counsel's failure to make a closing argument during the penalty phase of trial that he would have received a sentence other than death." App. 218a. The court offered two primary bases for its opinion. First, the court found that "closing argument on this mitigation was not necessary" because Lawhorn "did not present a complicated case in mitigation that needed to be explained to the jury." App. 217a. Second, "this was a horrible crime and the jury would not have been swayed by a closing argument considering the facts of this case." App. 217a. Reciting the evidence, the court found that "this is not a case where the jury would have accepted a plea

for mercy or would have found any mitigating evidence that outweighed the aggravating circumstances presented." App. 218a.

2. *State Appellate Courts*: The Alabama Court of Criminal Appeals affirmed. App. 210a-214a. Regarding the IAC claim, the appellate court first quoted Judge Sullivan's decision. App. 210a-212a. Then, citing its own precedent in which another defense attorney made a similar waiver decision, the court held that Fannin's strategy was not unreasonable under *Strickland*. App. 212a-213a (citing *Floyd v. State*, 571 So. 2d 1221 (Ala. Crim. App. 1989)).

The court then rejected Lawhorn's prejudice argument on the merits. App. 213a-214a. The court found that, "in this situation with these particular facts, closing argument by defense counsel would have had little impact." App. 213a. The court rejected as "unpersuasive" "Lawhorn's suggestion that closing argument could have articulated the mitigating circumstance—substantial domination." *Id.* In fact, the court stated that, "[i]n view of the overwhelming evidence against Lawhorn, it is conceivable that such argument by trial counsel would have merely redirected the jury's attention to the egregious nature of this crime, having a detrimental effect." *Id.*

The Supreme Court of Alabama and this Court denied certiorari review. Doc. 17, Tab 59 (state supreme court); *Lawhorn v. Alabama*, 756 So. 2d 971 (2000).

D. Federal Court Proceedings

1. *The District Court*: Pursuant to 28 U.S.C. §2254, Lawhorn filed a habeas petition in the district

court for the Northern District of Alabama in January 2001. Following a magistrate's report and recommendation, the district court (Clemon, C.J.) granted habeas relief on two grounds.

First, the district court granted guilt-phase relief by finding that Lawhorn "was subjected to an unconstitutional delay in securing a judicial determination of probable cause for his warrantless arrest," App. 78a, a violation of the Fourth Amendment as interpreted by this Court in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). *See also* App. 90a-104a (magistrate's ruling on the *Riverside* claim).

Second, the district court granted penalty-phase relief by finding that Fannin provided IAC when he waived penalty-phase closing argument. App. 78a. The district court did not independently address the IAC claim; instead, it deferred to the magistrate judge's report and recommendation. App. 77a. Regarding prejudice, the magistrate judge held that the state court unreasonably applied *Strickland* because "[t]rial counsel's failure to make a closing argument has rendered the jury's recommendation unreliable," and under Eleventh Circuit precedent, '[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." App. 190a. (quoting *Brownlee v. Haley*, 306 F.3d 1043, 1069 (11th Cir. 2002)).

2. *The Circuit Court of Appeals*: A three-judge panel of the court of appeals (Birch, Barkett, and Wilson, J.) reversed the district court's grant of guilt-phase relief for a *Riverside* violation. App. 26a-37a.

The panel affirmed, however, the grant of penalty-phase relief. App. 38a-50a.

Distinguishing this Court's opinion in *Bell v. Cone*, 535 U.S. 685 (2002), the court found deficient performance through a combination of (1) "Fannin's decision to waive closing argument" and (2) Fannin's "complete misunderstanding of a clear rule of law" (*i.e.* believing that, at the time of Lawhorn's trial, Alabama law blocked the State's rebuttal closing argument if the defendant waived closing argument). App. 45a. The court failed, however, to cite §2254(d)(1) or hold that the state court's deficient performance decision was "contrary to or an unreasonable application of" *Strickland* or *Bell*. App. 41a-46a.

The court also found prejudice. According to the court, "Fannin needed only to convince two other jurors to alter the outcome of the proceedings." App. 48a. The court stated that Fannin could have used closing argument to (1) "refresh[ ] the jury's memory of the evidence of substantial domination presented during the guilt phase" and (2) "argue[ ] for the mitigation of Lawhorn's age at the time of the offense and his troubled family background." App. 47a-48a. The court held that "there is a reasonable probability that, but for his unprofessional error, the result of the sentencing hearing would have been different." App. 49a. And, like its deficient performance analysis, the court failed to cite §2254(d)(1) or hold that the state court's deficient performance decision was "contrary to or an unreasonable application of" *Strickland* or *Bell*. App. 46a-49.

The opinion's lone application of §2254(d) to Lawhorn's IAC claim came in the court's

"Conclusion" paragraph: "We do find that Lawhorn has demonstrated that the state court decision finding that his counsel's waiver of closing argument during the penalty phase was 'contrary to' clearly established federal law." App. 49a. The court did not, however, identify which case from this Court the state court's decision was "contrary to," nor did it conduct any further analysis of the point. *Id.* Instead, the court's opinion ended in the next sentence. App. 49a-50a.

Both parties sought rehearing and rehearing *en banc*. The *en banc* court denied both parties' motions on March 29, 2010 and the panel followed suit on March 31, 2010. App. 197a, 220a-21a.

REASONS FOR GRANTING THE WRIT

AEDPA serves two interrelated purposes: (1) To enhance federal deference for state court decisions and (2) to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). In Part I, we outline how the court of appeals failed to apply AEDPA's deference to the state court's prejudice analysis. *See* 28 U.S.C. §2254(d)(1). This error alone warrants review and reversal.

But what elevates this case beyond necessary error-correction is the fulfillment of AEDPA's second purpose: the prevention of unwarranted delays in the execution of a capital sentence. If the Court denies review, thereby granting Lawhorn habeas relief for resentencing, the decades-long cycle of capital review will begin anew: (re)sentencing, then direct appeal, then state post-conviction proceedings, then federal habeas review. And, in light of the Court's recent

decision in *Magwood v. Patterson*, No. 09-158, 2010 WL 2518374 (June 24, 2010), we legitimately fear that Lawhorn will relitigate his entire case, including successive and abusive guilt-phase and penalty-phase claims, along the way. *Magwood*, *supra*, slip op. at 10 (Kennedy, J. dissenting) ("the Court's holding today would allow a challenger in Magwood's position to raise any challenge to the guilt phase of the criminal judgment against him in his second application").

Whether the Court grants the petition to summarily reverse the court of appeals' decision, *see infra* Part III, or to order merits briefing, the Court should grant the State's petition to uphold AEDPA's twin purposes of deference and delay-avoidance, just as it has done 13 times in the past two Terms. *See infra* Part II(A).

I. The Court Of Appeals' Prejudice Analysis Conflicts With AEDPA and The Court's Precedent.

With respect to being prejudiced by trial counsel's penalty-phase performance, a capital petitioner must clear two hurdles before being entitled to federal habeas relief:

1. Under *Strickland*, the petitioner must show a "reasonable probability that, absent the errors, the sentencer—including the appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," *Strickland*, 466 U.S. at 695; and,
2. Under AEDPA, the petitioner must show that the state court's decision rejecting a prejudice

> finding was an "objectively unreasonable" application of *Strickland*, a "substantially higher threshold" than *Strickland's de novo* review. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

See also Woodford v. Visciotti, 537 U.S. 19 (2002) ("a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied *Strickland* incorrectly. [Citations omitted.] Rather, it is the habeas applicant's burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner.").

The court of appeals' opinion trips over the first hurdle and avoids the second; that is, (1) the court wrongly finds that, had Fannin given a closing argument, the balance of Lawhorn's aggravating and mitigating circumstances would have shifted to a sentence of life without parole, and (2) the court completely ignores §2254(d)(1)'s "unreasonable application" clause. The court then makes a third mistake: It invokes §2254(d)(1)'s "contrary to" clause to justify its opinion, even though the "contrary to" clause has no application in this case (nor does the court try to explain its application).[5]

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[5] The court of appeals actually makes a fourth mistake: Citing a combination of *United States v. Cronic*, 466 U.S. 648 (1984) and circuit caselaw, the court inferred—if not explicitly stated—that an "exception to the petitioner's [two-part] burden" under *Strickland* exists where counsel fails to give closing argument. App. 40a. In *Bell*, this Court expressly rejected the argument that ineffective assistance can be presumed when counsel waives closing argument. 535 U.S. at 692-97. The State does not treat this error as an independent basis for review only because the court ultimately applied *Strickland's*

To be clear, the court's final two mistakes—*i.e.* the failure to apply §2254(d)(1)'s "unreasonable application" clause and the erroneous invocation of the "contrary to" clause—are the errors that most clearly warrant review and reversal. But, for ease of review, the State addresses the errors in the order that they appear in the lower court's opinion.

A. The Court Of Appeals Erred In Its *De Novo* Review Of *Strickland's* Prejudice Element.

A closing argument before the advisory jury would have added no weight to Lawhorn's mitigating evidence, and adding zero mitigating weight to a heavily unbalanced sentencing scale would not have altered the trial court's sentence. Four errors led the court of appeals to reach the opposite, and erroneous, conclusion under *de novo* review.

1. *The court misapplied Strickland to Alabama law*: The court found a reasonable probability that Lawhorn's sentence would have changed because "Fannin needed only to convince two other jurors to alter the outcome of the proceedings." App. 48a. This statement is wrong on two fronts.

First, Alabama is a judge-sentencing State; thus, *Strickland* prejudice is a judge-centric analysis. Ala. Code §13A-5-47(e). Because the court is not bound by the jury's recommendation, *id.*, the ultimate prejudice inquiry in an Alabama-based capital case must always end with the probability that the

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two-part test despite its earlier pronouncement. App. 41a-49a. The State notes, however, that if the Court fails to grant review, the lower court's published opinion can (and almost certainly will) be cited for this erroneous proposition.

sentencing court would have altered its decision. That said, the jury's recommendation does play a role: The court must treat a life without parole ("LWOP") recommendation as a mitigating circumstance, *Ex parte Carroll*, 852 So.2d 833, 837 (Ala.2002), although the court is not required to assign the recommendation a particular amount of weight. *Harris v. Alabama*, 513 U.S. 504, 515 (1995). Thus, the defendant can establish jury-based prejudice under *Strickland*, but only if there is a reasonable probability that both (1) the jury would have recommended LWOP and (2) the added weight of the jury's LWOP recommendation would have tipped the trial court's sentencing scale in the defendant's favor.

Second, Lawhorn needed six additional votes, not two, to alter the advisory jury's death recommendation. Alabama law requires that at least 10 jurors vote for death or seven vote for LWOP before deliberations can end, or a mistrial is declared and another jury empanelled. Ala. Code §13A-5-46(g). Lawhorn only received one vote for LWOP; therefore, he needed at least six more votes to change the jury's recommendation.

As we show in the next three points, there is no reasonable probability that adding a penalty-phase closing argument to Lawhorn's defense would have altered the trial court's sentencing decision (or the jury's advisory verdict).

2. *The court overestimated the effect of a closing argument*: Under Alabama law, "[a]rgument of counsel is not evidence," *Ex parte Alabama Dept. of Mental Health and Mental Retardation*, 937 So.2d 1018, 1026 n.13 (Ala. 2006); thus, arguments add no

mitigating weight to the trial court's sentencing scale. *See also Boyde v. California*, 494 U.S. 370, 384 (1990) ("[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, *see* Tr. 3933, and are likely viewed as the statements of advocates."). Furthermore, even if arguments have mitigating weight, the trial court sentenced Lawhorn two months after Fannin would have given a closing argument to the advisory jury, allowing sufficient time for any mitigating weight from the argument to dissipate. Accordingly, there is no reasonable probability that a closing argument at the end of the penalty-phase would have altered the trial court's weighing analysis.

Even if the Court focuses its inquiry on the advisory jury's verdict, the outcome is the same. The court of appeals only enumerated two ways that closing argument would have benefitted Lawhorn in the jury's eyes: (1) "Refresh[ing] the jury's memory of the evidence of substantial domination presented during the guilt phase" and (2) "argu[ing] for the mitigation of Lawhorn's age at the time of the offense and his troubled family background." App. 47a-48a. But the jury did not need refreshing on these points. Fannin outlined each of them, and how they related to Lawhorn's mitigation case, in his opening statement a mere three hours before deliberations. Trial Tr. 490 (Penalty-phase begins at 4:05 p.m.), 498-500 (Fannin outlines the mitigating circumstances in his opening statement), 601 (jury's verdict read at 7:35 p.m.). Furthermore, shortly before it retired, the jury heard Lawhorn's family discuss Lawhorn's age and background, plus Maxine

Walker's domineering personality. *Id.* at 519-30 (Lawhorn's sister discussing Lawhorn's childhood), 542 (Lawhorn's mother discussing Maxine Walker). As the Court noted last Term in rejecting a finding of prejudice, closing arguments that "repeat[ ] the facts or connections that the [witnesses] had just described," thus causing the evidence to be "fresh in jurors' minds," do not make a "significant difference." *Smith v. Spisak*, 130 S.Ct. 676, 687 (2010).

3. *The court overestimated the impact of Lawhorn's mitigating evidence*: Maxine Walker did not exert "substantial domination" over Lawhorn as the court's opinion suggests. App. 47a. Lawhorn murdered Mr. Berry because he wanted $50, not because Maxine forced him to do so. In fact, during the penalty phase, Lawhorn testified that he "was lead" in Mr. Berry's murder. Trial Tr. 545.

As for Lawhorn's "troubled background," App. 48a, Lawhorn's principal testified that Lawhorn "did not give an appearance of being an underprivileged child in any way" and Lawhorn's "mother was hard working and provided for him." *Id.* at 516. Lawhorn's mother testified that Lawhorn's stepfathers had not mistreated Lawhorn as a child. *Id.* at 538-41. Lawhorn's sister acknowledged that, despite growing up in the same environment as her brother, she had never been convicted of a felony. *Id.* at 532. The only real "trouble" in Lawhorn's childhood was his prior convictions for theft, burglary, and possession of burglary tools. *Id.* at 576. Of course, these are aggravating factors that Fannin would have avoided in a closing argument.

In short, while they expressly considered all of Lawhorn's evidence in determining his sentence, *see*

Lawhorn, 581 So. 2d at 1180, the state courts rejected these factors as constituting a mitigating circumstance with good reason: The evidence was not particularly mitigating. *Lawhorn*, 581 So. 2d at 1178 ("we, too, have not found any non-statutory mitigating circumstances in appellant's family background, in his proclaimed weakness to Walker's alleged domination, or in his lack of discipline problems in his younger years"). Rehashing evidence with minimal mitigating weight in a closing argument does not create a reasonable probability of a different sentence.

4. *The court gave short shrift to the State's aggravating circumstances*: Coldly shooting someone for $50 is extremely aggravating. Standing over that person while he gasps for his last breaths before shooting him in the face, neck, and chest worsens matters. Then admitting to the jury that you "didn't care whether the victim died or not" just minutes before the jury renders its advisory verdict is particularly damning. Trial Tr. 572. These are just a few of the reasons the state appellate court described Lawhorn's crime as "outrageously wicked and shockingly evil." App. 140a. Nothing Fannin could have said in closing would have lessened the aggravated nature of Lawhorn's crime. *See Bobby v. Van Hook*, 130 S.Ct. 13, 20 (2009) (per curiam) (in rejecting of finding of prejudice, noting that the court of appeals "gave all this [aggravating] evidence short shrift, leading it to overstate further the effect additional mitigating evidence might have had").

* * *

As Justice Stevens aptly stated when rejecting a finding of prejudice, in some cases, "even the most

skillful of closing arguments—even one befitting Clarence Darrow—would not have created a reasonable probability of a different outcome." *Spisak*, *supra*, at 693 (Stevens, J. concurring). This is one of those cases, and the court of appeals erred in reaching a contrary decision under *de novo* review.

B. The Court Of Appeals Failed To Apply §2254(d)(1)'s "Unreasonable Application" Clause To The State Court's Application Of *Strickland's* Prejudice Element.

Regardless of whether the court of appeals correctly judged prejudice under *de novo* review, its greatest error—and the one that makes this petition most cert-worthy—is that the court stopped there. The court never mentioned, much less applied, §2254(d)(1)'s additional layer of deference during its prejudice analysis. App. 46a-49a.

As this Court recently affirmed in *Renico v. Lett*, 130 S.Ct. 1855 (2010), if there is no "plainly correct or incorrect" answer to the constitutional issue facing the state and federal courts, then the federal court cannot find that the state court was objectively unreasonable in reaching its decision, either way, under AEDPA. *Id.* at 1865. For the reasons stated above, we believe that the State court's rejection of prejudice was plainly correct. But, even taking the facts in the light most favorable to Lawhorn, the best Lawhorn can argue is that it is debatable whether prejudice resulted from Fannin's decision—or, using the Court's parlance, there is no "plainly correct or incorrect" answer to the prejudice question. In that circumstance, AEDPA required the court of appeals to deny habeas relief under §2254(d)(1), *see id.*, an

action the court failed to take because it ignored §2254(d)(1).

The failure to determine whether a state court's merits application of *Strickland's* prejudice element was "objectively unreasonable" is a clear violation of AEDPA. And, as we show in Parts II(A) and III, petitions to correct similar AEDPA violations have been frequently granted over the past two Terms, several even resulting in summary reversal.

C. The Court Of Appeals Tersely Concluded That The State Court's Decision Was "Contrary To" This Court's Precedent, Even Though The State Court Reached The Same Result As This Court In *Strickland* and *Bell.*

The court's lone nod to AEDPA's requisite deference comes in the court's "Conclusion" paragraph:

> We do find that Lawhorn has demonstrated that the state court decision finding that his counsel's waiver of closing argument during the penalty phase was "contrary to" clearly established federal law.

App. 49a. The court's terse conclusion fails to identify *which* case(s) from this Court the state court's decision is "contrary to," and the court fails to explain *why* the state court's decision is "contrary to" the unidentified case(s).

The court's cursory invocation of §2254(d)(1)'s "contrary to" clause is plainly wrong. "A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in our cases, or if it

decides a case differently than we have done on a set of materially indistinguishable facts." *Bell*, *supra*, at 694. Neither of these errors is present here.

First, the state court did not "appl[y] a rule different from the governing law set forth in [this Court's] cases." *Id.* The state court properly identified *Strickland's* two-part test as governing Lawhorn's ineffective assistance of counsel claim. App. 204a-214a.

Second, the state court did not "decide [this] case differently than we have done on a set of materially indistinguishable facts." *Bell*, *supra*, at 694. The court of appeals failed to name which case with "materially indistinguishable facts" that the state court's decision was "contrary to." The court could not have relied on *Strickland* or *Bell*—the two most cited, and appropriate, choices—because the state court reached the same conclusion as this Court did in *Strickland* and *Bell*: the rejection of habeas relief.

In *Strickland*, the Court was faced with the issue of whether trial counsel failed to present sufficient mitigating evidence, a different question than the one presented here. *Strickland*, *supra*, at 699-701. Regardless, the Court rejected a finding of prejudice because "[t]he evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge." *Id.* at 699.

In *Bell*, the Court was faced with a similar question based on similar facts as this case. But the Court rejected a finding of deficient performance, *Bell*, *supra*, at 698-702, and therefore did not reach *Strickland's* prejudice inquiry. *Id.*

In other words, neither of the cases most cited by the court of appeals can serve as the basis for the token invocation of §2254(d)(1)'s "contrary to" clause. And neither the court of appeals nor Lawhorn has cited any other case in which this Court found ineffective assistance of counsel based on materially indistinguishable facts.

In a nutshell, the court of appeals picked the wrong portion of §2254(d)(1) to justify its decision. *See Bell*, *supra*, at 694 ("[Section] 2254(d)(1)'s 'contrary to' and 'unreasonable application' clauses have independent meaning."). The court should have invoked the "unreasonable application" clause and answered the following question: Was the state court's merits determination that the addition of a closing argument would not have altered Lawhorn's sentence "objectively unreasonable" under *Strickland*? *See*, *e.g.*, *Spisak*, *supra*, at 687 ("We therefore cannot find the Ohio Supreme Court's decision rejecting Spisak's ineffective-assistance-of-counsel claim to be an 'unreasonable application' of the law 'clearly established' in Strickland."). But, again, the court of appeals failed to address the correct and mandatory question under AEDPA.

* * *

In summary, the court of appeals' decision conflicts with AEDPA in two ways. First, the court failed to conduct the proper inquiry: Was the state court's prejudice analysis an unreasonable application of *Strickland*? Second, the court's invocation of §2254(d)(1)'s "contrary to" clause in its conclusory paragraph was inappropriate under the facts of this case. And on top of its AEDPA errors,

the court wrongly found prejudice under *de novo* review. Review is warranted to correct these errors.

II. The Court Of Appeals' Misapplication Of AEDPA Presents A Compelling Issue Worthy Of The Court's Review.

A. The Court Granted 13 State-Filed Petitions To Correct Misapplications Of AEDPA During The Past Two Terms.

The Court's recent docket demonstrates that correcting a misapplication of AEDPA constitutes a "compelling reason" to grant review under Rule 10. By our count, the Court granted a State's petition to reverse and/or vacate the granting of federal habeas relief in 13 cases during the October 2008 and 2009 Terms alone. *See Berghuis v. Thompkins*, No. 08-1470, 2010 WL 2160784 (June 1, 2010); *Renico v. Lett*, 130 S.Ct. 1855 (2010); *Berghuis v. Smith*, 130 S.Ct. 1382 (2010); *Thaler v. Haynes*, 130 S.Ct. 1171 (2010) (per curiam); *Smith v. Spisak*, 130 S.Ct. 676 (2010); *McDaniel v. Brown*, 130 S.Ct. 665 (2010); *Wong v. Belmontes*, 130 S.Ct. 383 (2009) (per curiam); *Bobby v. Van Hook*, 130 S.Ct. 13 (2009) (per curiam); *Bobby v. Bies*, 129 S.Ct. 2145 (2009); *Knowles v. Mirzayance*, 129 S.Ct. 1411 (2009); *Waddington v. Sarausad*, 129 S.Ct. 823 (2009); *Hedgpeth v. Pulido*, 129 S.Ct. 530 (2008); *Wright v. Van Patten*, 552 U.S. 120 (2008). Like this case, five of the 13—*Van Hook*, *Belmontes*, *Spisak*, *Mirzayance*, and *Van Patten*—involved IAC claims. And in four of those five, the Court conducted a *Strickland* prejudice analysis: *Van Hook*, *Belmontes*, *Spisak*, *Mirzayance*.

B. Granting The Present Petition Is Necessary To Prevent An Unnecessary Second Trip Through The Decades-Long Appeals And Post-Conviction Process.

The Court's frequent grants of State-filed, AEDPA-based petitions fulfills of AEDPA's twin purposes: ensuring deference to state court opinions and preventing unnecessary delays in the execution of criminal sentences. In Part I, we explained why the Court should grant review to fulfill the former purpose (*i.e.* deference to state courts). Below, we explain why review is necessary to fulfill the latter.

"Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford*, 538 U.S. at 206. But a decades-long delay is precisely what awaits the State and its victim's family in this case should the Court fail to grant review.

Absent certiorari review, Lawhorn's case will reset to square one: the state trial court. For the reasons set forth in Part I, it is hard to fathom how the same state courts that (1) sentenced Lawhorn to death and (2) held that there was no reasonable probability that a closing argument would have changed their minds will now reach a different conclusion merely because counsel presents a closing argument. If they do not alter Lawhorn's sentence, the capital cycle will begin again: sentencing, then direct appeal, then state post-conviction review, then federal habeas. And as Round One taught us, it may take more than 20 years for Lawhorn's case to return to its present posture.

Experience has also taught us that there is no reason to believe that Round Two will be shorter

because Lawhorn returns solely for resentencing. As we demonstrated last Term in *Magwood v. Patterson*, *supra*, a capital petitioner can stretch the review process from five years in his first round of appeals (1981-1986) up to 24-plus years in his second, post-resentencing round of appeals (1986-Today). *Magwood*, *supra*, slip op. at 4-8. Billy Joe Magwood is not alone.

David Larry Nelson was granted penalty-phase relief by federal courts in 1993 based on a prosecutor's statement during penalty-phase closing arguments. *See Nelson v. Nagle*, 995 F.2d 1549 (11th Cir. 1993). Nelson stopped in this Court during his second trip through the system, with the Court holding that Nelson's challenge to the State's "cut-down" execution procedure was properly considered a §1983 civil rights challenge, not a successive §2254 habeas petition. *Nelson v. Campbell*, 541 U.S. 637 (2004). The Court remanded Nelson's case to the district court so that Nelson might be executed by his preferred method. But, as detailed in the States' amicus brief in *Hill v. McDonough*, 547 U.S. 573 (2006), Nelson reneged on his assurances to this Court that he would accept an alternative method of execution, and he raised another challenge in district court. *See* States' Amicus Br. 4-18, *McDonough*, *supra*, No. 05-8794. Never proceeding beyond district court again, Nelson died on death row on November 2, 2009, meaning that his post-resentencing round of appeals lasted 16 years without nearing conclusion.

Our point is not that Magwood or Nelson should have been denied habeas relief in Round One based upon the likelihood of delay in Round Two. Our point is that where capital cases are concerned, it is

vitally important for this Court to grant review to correct errors in AEDPA's application so that Congress' goal of avoiding delays in capital cases will be fulfilled.

The importance of correcting AEDPA errors in capital cases has intensified in light of the Court's recent decision in *Magwood*. Before *Magwood*, the lower federal courts unanimously limited post-resentencing habeas petitions to those issues novel to resentencing. *See Magwood*, *supra*, slip op. 5 (Kennedy, J. dissenting). The Court's opinion, however, seemingly opens the door to *all* claims in Round Two, including successive and abusive claims stemming from the original, unblemished guilt-phase trial. *Id.* at 10 (Kennedy, J. dissenting) ("the Court's holding today would allow a challenger in Magwood's position to raise any challenge to the guilt phase of the criminal judgment against him in his second application"). While the Court has left that question open for another day, *id.* at 21, the State must "deal with the dispiriting [and time-consuming] task of responding to previously rejected or otherwise abusive claims" until that day comes.[6] *Id.* at 18 (Kennedy, J. dissenting).

In short, as it has done in several other AEDPA cases recently, the Court should grant review to correct the lower court's plain error so that the State and its victims are not wrongly fated to witness the expansion of Lawhorn's proceedings from 21 to 42 (or more) years.

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[6] While *Magwood* only applies to federal habeas petitions, the States must also deal with the influx of otherwise successive and abusive claims in state courts as well because the claims must be exhausted in state courts before they can be raised in a federal habeas petition.

III. Summary Reversal Is Warranted.

Summary reversal is warranted to "correct a clear misapprehension" of federal law. *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam). Summary reversal is appropriate in this case because, as outlined in Part I, the failure to subject a state court's merits determination of an IAC claim to §2254(d)(1)'s "unreasonable application" clause, while erroneously invoking the "contrary to" clause, is a "clear misapprehension" of AEDPA. *Id.* Furthermore, summary reversal would allow the Court to prevent an injustice in this case while conserving the Court's scarce resources.

Summary reversal is, by no means, unprecedented to reverse a misapplication of AEDPA. Last Term, the Court summarily reversed three grants of federal habeas relief under AEDPA. *See Thaler v. Haynes*, 130 S.Ct. 1171 (2010) (per curiam); *Wong v. Belmontes*, 130 S.Ct. 383 (2009) (per curiam); *Bobby v. Van Hook*, 130 S.Ct. 13 (2009) (per curiam). In fact, just like this case, both *Van Hook* and *Belmontes* involved the reversal of a court of appeals' finding of *Strickland* prejudice in the penalty-phase of a capital murder trial. *See Belmontes*, 130 S.Ct. at 387-91 (holding that the court of appeals erred in finding *Strickland* prejudice for the failure to present additional mitigating evidence); *Van Hook*, *supra*, at 19-20 ("What is more, even if Van Hook's counsel performed deficiently by failing to dig deeper, he suffered no prejudice as a result").

Finally, if the Court decides that summary reversal is not appropriate here, we urge the Court to grant the State's petition and set this case for

merits briefing. A primary purpose of both AEDPA and *Strickland's* prejudice element is to prevent needless and time-consuming retrials when the alleged error had no effect on the outcome of the original trial. Nowhere is the fulfillment of this purpose more necessary than at the end of a federal habeas proceeding in a capital case because the Court's denial of certiorari review after a grant of habeas relief resets the clock on the decades-long process of state and federal court review of a death sentence.

CONCLUSION

The Court should grant the petition and either summarily reverse the judgment of the court of appeals or set this case for merits briefing and argument.

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