

No. 08-9156

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IN THE  
**Supreme Court of the United States**

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HOLLY WOOD,  
*Petitioner,*  
*us.*

RICHARD ALLEN, Commissioner,  
Alabama Department of Corrections, *et al.*,  
*Respondents.*

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

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**BRIEF *AMICUS CURIAE* OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF RESPONDENTS**

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## **QUESTIONS PRESENTED**

1. Under 28 U. S. C. § 2254(d)(2), did the Alabama state courts base their rejection of Wood's ineffective assistance claim upon an unreasonable factual determination that Wood's trial counsel consciously chose to end their mental health investigation with the Kirkland Report and not to present any evidence contained within the report to the penalty phase jury?

2. Did the Court of Appeals err by applying 28 U. S. C. § 2254(e)(1)'s presumption of correctness to the state court's factual findings when Wood's § 2254(d)(2) claim was based solely on the state court record?

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IN THE  
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HOLLY WOOD,  
*Petitioner,*

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Alabama Department of Corrections, *et al.*,  
*Respondents.*

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**BRIEF *AMICUS CURIAE* OF THE  
CRIMINAL JUSTICE LEGAL FOUNDATION  
IN SUPPORT OF RESPONDENTS**

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**INTEREST OF *AMICUS CURIAE***

The Criminal Justice Legal Foundation (CJLF)<sup>1</sup> is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In this case, the petitioner seeks to water down the protections for reasonable state court judgments enacted by Congress in the Antiterrorism and Effective Death Penalty Act of 1996. Such a weakening of this important law would be contrary to the interests CJLF was formed to protect.

### **SUMMARY OF FACTS AND CASE**

The facts and history of the cases are described in detail in the Brief for Respondents at pages 3-21. We summarize them here to frame the issues discussed in this brief. Sixteen years ago Holly Wood crept into his former girlfriend's bedroom as she slept and shot Ruby Gosha in the head with a 12-gauge shotgun. See *Wood v. State*, 715 So. 2d 812, 813-814 (Ala. Crim. App. 1996). He told his cousin, who was waiting outside in his truck, "I shot that bitch in the head, and [blew] her brains out and all she did was wiggle." *Id.*, at 815.

Wood previously shot another former girlfriend, Barbara Siler, through the window of her home. *Wood v. Allen (Wood III)*, 542 F. 3d 1281, 1284, 1295-1296 (CA11 2008). He was on parole for that violent felony when he murdered Ruby. *Ibid.*

Wood was assigned three attorneys to handle his defense. *Wood III*, 542 F. 3d, at 1289. Two of his attorneys, Carey Dozier and Frank Ralph, were experienced capital defense attorneys. J. A. 143; *Wood III, supra*, at 1289, 1291. The third attorney, Kenneth Trotter, had recently been admitted to the bar. *Id.*, at 1292.

The jury unanimously convicted Wood of capital murder during a first-degree burglary. *Id.*, at 1284.

Part of the defense preparation was review of a psychological report prepared by Dr. Karl Kirkland.

App. to Brief for Respondents in Opposition to the Petition for Writ of Certiorari (“Resp. App.”) 50. Dozier had initially reviewed Dr. Kirkland’s report and decided nothing in it required further inquiry. *Ibid.*; see also *Wood III*, 542 F. 3d, at 1293-1294. When Trotter asked if a second report was necessary, Dozier again examined Dr. Kirkland’s report and concluded that “nothing in that report merited further investigation.” Resp. App. 51.

During the penalty phase, the State sought to call Barbara Siler, the victim of Wood’s prior assault conviction. *Wood III*, 542 F. 3d, at 1295. Trotter successfully objected to her testimony as unduly prejudicial. *Ibid.* Trotter also called Wood’s father and sisters as mitigating witnesses. J. A. 25, 27-53. They testified Wood was a good son, good brother, and Wood was “a leader” who took care of his siblings. J. A. 26, 33-35, 38. Finally, Trotter called the Pardons and Paroles clerk to establish that Wood was drinking at the time of arrest. *Wood III, supra*, at 1296. Trotter asked the jury to treat Wood’s alcohol consumption as a mitigating factor. *Id.*, at 1297. The jury recommended a sentence of death by a vote of 10 to 2. *Ibid.*

Defense counsel chose not to disclose Dr. Kirkland’s report to the jury. *Wood III*, 542 F. 3d, at 1295. The report was not disclosed because it contained harmful evidence that Wood “felt injurious toward others in the past,” *id.*, at 1290, and refuted his claim that he had not been drinking the day of the murder. See *id.*, at 1305.

The trial judge held a sentencing hearing one month later and reviewed Dr. Kirkland’s psychological evaluation. *Wood III*, 542 F. 3d, at 1297-1298. The judge imposed a death sentence, noting that “[t]he defendant asked the Court to consider an outpatient forensic evaluation report that was submitted by Karl Kirkland.” J. A. 92. That report

“shows that the defendant is functioning in the borderline range of intellect. The report also indicates that the defendant does not have a mental disorder present that would detract from his ability to appreciate the criminality of his behavior with regard to this specific alleged offense. The report also indicates that the defendant was ‘quite willing to discuss the lack of drugs or alcohol on the day of the offense.’ ” J. A. 92-93.

The trial judge found three aggravating factors and no mitigating factors. *Wood III*, 542 F. 3d, at 1298.

Wood’s sentence was affirmed on direct appeal, and Wood filed a petition for state postconviction review. *Wood III*, 542 F. 3d, at 1299. Three evidentiary hearings were held between 2000 and 2003. *Ibid.* Wood’s family, teachers, his former girlfriend, and several psychiatrists all testified. *Id.*, at 1285-1288, 1289-1294. Based on Wood’s evidence, the state postconviction court found Wood was not mentally retarded “because Wood clearly has failed to establish that he has significant or substantial deficits in his adaptive functioning.” Resp. App. 14; see also *Wood III*, *supra*, at 1286, n. 3. It also determined that Wood’s counsel was not ineffective. Resp. App. 36.

Wood then filed a petition for relief under 28 U. S. C. § 2254. *Wood III*, 542 F. 3d, at 1285. The district court agreed that Wood was not mentally retarded but found counsel ineffective at the penalty phase because they had failed to produce evidence of Wood’s “borderline range of intellectual functioning.” *Wood v. Allen*, 465 F. Supp. 2d 1211, 1243 (M.D. Ala. 2006). The Eleventh Circuit affirmed the district court’s *Atkins* and *Batson* holdings, but reversed the ineffective assistance of counsel holding. *Wood III*, 542 F. 3d, at 1314.

This Court granted certiorari on May 18, 2009. *Wood v. Allen*, 129 S. Ct. 2389, 173 L. Ed. 2d 1291 (2009).

### SUMMARY OF ARGUMENT

The habeas reforms of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) were the product of a compromise intended to preserve habeas corpus as a remedy for clearly wrong state court decisions while eliminating the use of the writ as another appeal to second-guess the state courts on debatable questions. As a part of this compromise, Congress enacted 28 U. S. C. § 2254(d) as an independent ground for rejecting a collateral attack on a final state judgment. This subsection is independent of other requirements for habeas relief, including § 2254(e)(1). Both provisions should be applied according to their terms, neither excluding the other.

To expedite processing of habeas cases, Congress's main goal is enacting AEDPA, § 2254(d) should be applied first, based solely on the state court record, to dispose of any claims barred by this subsection. For any claims that survive this initial review, either because one of the two numbered exceptions applies or because there is no state court decision on the merits to invoke subsection (d), § 2254(e)(1) attaches a presumption of correctness to any relevant state court findings. The findings to which § 2254(e)(1) applies may have been made in deciding the claim before the federal habeas court or some other issue in the case.

In cases where there is no additional evidence produced in federal court, the “unreasonable determination” standard of § 2254(d)(2) and the “clear and convincing” standard of § 2254(e)(1) are essentially equivalent and will typically point to the same result.

The Court of Appeals in this case correctly applied the § 2254(d)(2) standard. Its passing reference to “clear and convincing” was merely imprecise phrasing, not important to the opinion.

The present case illustrates how the unlimited mitigation rule of *Lockett v. Ohio*, combined with *Rompilla v. Beard*’s expansion of the duty to investigate mitigation, provides unlimited ammunition to attack the adequacy of the defense in every capital case. Trial counsel for Wood made a reasonable decision regarding the scope of their investigation, considering the limited resources available. If the Court addresses the merits of part I of Petitioner’s Brief, it should disavow any implication in *Rompilla* that counsel cannot focus their investigation in this manner.

*Amicus* NACDL contends that a decision should receive less deference and greater scrutiny when the trial judge adopts findings prepared by the prevailing party. This contention is flatly contradicted by the very precedent of this Court that they cite, *Anderson v. Bessemer City*.

## ARGUMENT

### **I. Section 2254(d) creates an independent condition on habeas relief, not a substitute for any other condition.**

Much of the complexity in the law of habeas corpus arises from the need to strike a “careful balance,” between “protect[ing] the State’s sovereign interest in punishing offenders and its good faith attempts to honor constitutional rights, . . . while ensuring that the extraordinary remedy of habeas corpus is available to those whom society has grievously wronged.” *Calderon v. Coleman*, 525 U. S. 141, 146 (1998) (*per curiam*)

(citations and internal quotation marks omitted). The push and pull of those competing considerations through various court decisions and legislative enactments has caused the remedy to wander a wavering line. Congress enacted AEDPA because it believed the balance had tilted too far in the petitioners' favor, see 141 Cong. Rec. 15062, col. 2 (1995) (statement of Sen. Hatch), but it did not wish to abolish federal habeas for state prisoners altogether. Hammered-out compromises are more complex than single-minded, sweeping pronouncements, but solution of the puzzle is aided by keeping in mind what Congress wanted to change and what it wanted to keep.

The nature of the compromise can be seen in the amendments proposed by Senators Kyl and Biden as AEDPA was being debated. Senator Kyl proposed language similar to the District of Columbia statute in *Swain v. Pressley*, 430 U. S. 372 (1977). That amendment would have largely eliminated federal habeas review for state prisoners. See 141 Cong. Rec. 15045, cols. 2-3 (1995). Senator Biden would have deleted the "deference" standard to "allow[] the current practice of independent review by the court." 141 Cong. Rec. 15058, col. 1 (1995). The Senate rejected both amendments, and adopted "a carefully crafted compromise" with AEDPA's current standard. 141 Cong. Rec. 15064, col. 1 (1995) (statement of Sen. Specter). The compromise standard was intended to allow federal courts to correct *clearly* wrong state court decisions while forbidding the use of habeas corpus to second-guess state judgments on debatable questions, which was the effect of the *de novo* standard of review. See *id.*, at 15062, col. 3 (statement of Sen. Hatch).

To accomplish this goal, Congress decided to keep federal habeas review of state decisions but erect some new hurdles for petitioner to clear, raise the height of

some existing ones, and leave other existing hurdles in place. Foremost among the new hurdles is § 2254(d). That subsection bars habeas corpus relief for any claim adjudicated on the merits in a state court proceeding unless the lower court’s adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law” or “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.” § 2254(d)(1)-(2). Although often referred to as a “deference” standard, this subsection actually creates a modified rule of *res judicata*. See Scheidegger, Habeas Corpus and the Legislative Power, 98 Colum. L. Rev. 888, 931-932 (1998); Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell v. Kelly*, No. 07-1223, pp. 9-13 (“CJLF *Bell* Brief”).<sup>2</sup>

At the same time, Congress raised the bar of the hurdle in former subdivision (d). Prior to AEDPA’s revisions, the habeas corpus statute “bore an obvious resemblance to the list of guidelines in *Townsend v. Sain*, [372 U. S. 293 (1963).]” 17B C. Wright, A. Miller, E. Cooper, & V. Amar, *Federal Practice and Procedure* § 4265.1, p. 319 (3d ed. 2007). Six of the itemized hurdles to habeas relief addressed situations where a federal evidentiary hearing was mandatory. *Id.*, at 321. In six of the eight situations, a habeas petitioner was almost assured a second appeal in federal court. Congress sought to reduce the delay this created, see Effective Death Penalty Act of 1995, H. Rep. No. 104-23, 104th Cong., 1st Sess., 9 (1995), and fashioned AEDPA to implement its goal to limit habeas review.

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2. All prior CJLF briefs cited in this brief are available at <http://www.cjlf.org/briefs/briefmain.html>.

141 Cong. Rec. 15095, col. 2 (1995) (statement of Sen. Dole).

Section 2254(e)(1) is the replacement for subdivision (d) of the pre-AEDPA habeas statute. The revision increased the strength of former § 2254(d)'s presumption of correctness for state court findings of fact, eliminating the list of exceptions in favor of a single, simple requirement to present clear and convincing evidence rebutting the presumption. A ~~strikeout~~/*italics* version of § 2254, showing the changes, is attached as an appendix to this brief. Congress intended the burden to be high. The burden was necessary because the pre-trial 1996 “habeas system ha[d] robbed the State criminal justice system of any sense of finality and [was] prolong[ing] the pain and agony faced by families of murder victims.” 141 Cong. Rec. 14533, col. 2 (1995) (statement of Sen. Thurmond). Tightening the standards was necessary “to restore public confidence and ensure accountability to America’s criminal justice system.” *Ibid.*

The new hurdle erected by § 2254(d) does not replace any old ones. For example, after AEDPA, some commentators claimed that § 2254(d)(1) had displaced the retroactivity doctrine of *Teague v. Lane*, 489 U. S. 288 (1989). See, e.g., Yackle, A Primer on The New Habeas Corpus Statute, 44 Buff. L. Rev. 381, 385 (1996). That was not correct. *Horn v. Banks*, 536 U. S. 266, 272 (2002) (*per curiam*), clarified that “the AEDPA and *Teague* inquiries are distinct.” While it is generally true that a state court’s rejection of a rule that is “new” for *Teague* purposes is also protected by the § 2254(d)(1) standard, this is not always the case, and both requirements continue to have independent force. See *ibid.* Similarly, § 2254(d)(2) is not mutually exclusive with any of the other conditions on habeas relief. As Respondents correctly note, new § 2254(d) does not

incorporate any of the limitations on the presumption of correctness repealed from former § 2254(d), now § 2254(e)(1). See Brief for Respondents 33.<sup>3</sup>

AEDPA provided three key limits on relitigation: § 2244(b)'s gate against successive petitions; § 2254(d)'s limit on relitigation of state court determinations of the merits; and § 2254(e)(1)'s requirement that in a federal hearing petitioner rebut the presumption the state court factual determinations were correct. All three provisions make it more difficult to use a habeas petition to “do over” a prior determination. None of the provisions is a nullity, and none is a substitute for another. Each applies to a specific stage of review, and the petitioner must clear all before he may obtain relief.

## **II. Section 2254(e)(1) applies to every case that survives § 2254(d).**

Petitioner and a supporting *amicus* rely on *Taylor v. Maddox*, 366 F. 3d 992 (CA9 2004), for the proposition that § 2254(d)(2) and § 2254(e)(1) are independent and that only one or the other applies when a particular factual finding is reviewed on federal habeas. See Brief for Petitioner 38-39; Brief for American Civil Liberties Union, *et al.* (“ACLU Brief”) 6-7. They are correct on the first point but mistaken on the second. Their claim that this either/or interpretation is necessary to avoid rendering either subsection superfluous is also mistaken.

*Amicus* ACLU contends, “Section 2254(d)(2) deals with cases (like this one) in which no additional evi-

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3. CJLF disagrees with Respondents regarding the order in which a habeas court should normally apply these subsections, but we agree on the more important point of when they apply.

dence is introduced in federal court . . . .” ACLU Brief 7. That is close but not quite right. The section by its terms requires the federal habeas court to judge the reasonableness of the state court’s factual findings “in light of the evidence presented in the State court proceeding,” *i.e.*, solely on the state court record. Section 2254(d)(2) applies to every claim decided on the merits by the state court. Any additional evidence presented to the federal court is irrelevant to the question § 2254(d) directs the federal court to decide.

In our brief in *McDaniel v. Brown*, No. 08-559, at pages 8-19 (“CJLF *Brown* Brief”), we explain why the determination under § 2254(d)(1) should also be decided on the state court record. If the petitioner has not qualified for an exception under clause (1) or (2), then the language at the top of § 2254(d) forbids a grant of habeas relief on that claim. See 141 Cong. Rec. 15058, cols. 1-2 (1995) (statement of Sen. Biden). There is no need to ask whether the petitioner can meet the “clear and convincing” standard of § 2254(e)(1) because that question is moot. The habeas court must “decline to examine further into the merits because they have already been decided against the petitioner” by the state court. See CJLF *Brown* Brief 8-9 (quoting *Darr v. Burford*, 339 U. S. 200, 215 (1950)). Denial of a claim under subdivision (d) not only makes an evidentiary hearing unnecessary, it also makes discovery unnecessary. An issue that can and must be decided solely on the state court record can be decided promptly after the filing of the petition and response. Disposing of the bulk of claims this way, thereby winnowing the case to the very few issues where new factual determinations in federal court are necessary and proper, will implement the purpose of Congress to expedite habeas review of capital cases. See *Williams v. Taylor*, 529 U. S. 362, 404 (2000); CJLF *Bell* Brief 5.

*Amicus* ACLU contends at page 8,

“If the state court’s decision on the merits was *not* based on an unreasonable determination of the facts, the state decision is entitled to deference on the existing state court record, barring any independent error of law. Section 2254(e)(1) then comes into play and directs the federal court to presume that the facts the state court reasonably determined are correct.”

It is important to be clear here. In this scenario, “Section 2254(e)(1) . . . comes into play” only *if* petitioner has succeeded establishing the exception under § 2254(d)(1). If neither the (d)(1) nor the (d)(2) exception applies, § 2254(e)(1) does not “come into play” *because the case is over*, at least as to this claim.

Only when and if § 2254(d)’s hurdle is cleared or avoided does a federal court need to apply § 2254(e)(1) to a “determination of a factual issue.” This is not limited to factual determinations made in the course of deciding the same claim that petitioner makes in federal court. Although the exhaustion and procedural default rules generally require the petitioner to make the claim to state courts in order to receive a federal determination on the merits, that requirement is not airtight. A claim that is procedurally defaulted in state court may still be considered by a federal habeas court if the court finds the state ground inadequate, see *Lee v. Kemna*, 534 U. S. 362, 375 (2002), or not independent, *Park v. California*, 202 F. 3d 1146, 1151 (CA9 2000), *cert. denied*, 531 U. S. 918 (2000), if the petitioner meets the “cause and prejudice” test, see *Strickler v. Greene*, 527 U. S. 263, 289 (1999), or in extremely rare cases if there has been a miscarriage of justice. See

*House v. Bell*, 547 U. S. 518 (2006).<sup>4</sup> In these cases, § 2254(d) would not apply because there has been no state court decision on the merits.

However, a state court may have made factual findings that are relevant to the defaulted federal habeas claim while deciding another claim. For example, if a California judge makes a finding under *People v. Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), that a prosecutor's race-neutral explanation for a peremptory challenge is genuine, that fact may dispose of a claim under *Batson v. Kentucky*, 476 U. S. 79 (1986). Section 2254(d) would not apply to the federal *Batson* claim if it was not timely made in state court and, therefore, not decided on the merits. In such a case, the state court's finding of facts must be presumed correct under § 2254(e)(1) unless rebutted by clear and convincing evidence.

Subdivision (e) can also come into play when a petitioner succeeds in establishing one of subdivision (d)'s exceptions but does not simultaneously establish he is entitled to relief. *Woodford v. Visciotti*, 537 U. S. 19 (2002) (*per curiam*), provides an example. In that case, the Ninth Circuit concluded that the California Supreme Court had applied the wrong standard for judging an ineffective assistance of counsel claim. See *id.*, at 21-22. The Ninth Circuit was mistaken, and this Court reversed, *id.*, at 27, but we can hypothesize a case where the state court really did apply the wrong standard. In such a case, § 2254(d)'s bar would be lifted, but the petitioner would still have to establish that he is entitled to relief on the merits. Any facts found by the

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4. Adequacy of state grounds is presently before this Court in *Beard v. Kindler*, No. 08-992. Independence of state grounds is presently before the Court in *Sullivan v. Florida*, No. 08-7621.

state court must be rebutted by the petitioner with clear and convincing evidence.

In summary, § 2254(d)(2) and § 2254(e)(1) must be applied according to their terms, with neither precluding the other. When the state court findings of fact are found to be reasonable under § 2254(d)(2) *and* no other basis for avoiding the bar of § 2254(d) applies, then § 2254(e)(1) becomes inapplicable only in the sense that it is unnecessary. There should be no evidentiary hearing because the claim is precluded by the prior decision and there is nothing further to decide. See CJLF *Bell* Brief 24. In other cases, where § 2254(d) does not bar relief, the habeas court decides whether a hearing is needed and applies § 2254(e)(1) to any facts decided by the state court, regardless of whether those facts were found in the course of deciding the claim now before the federal court or in the course of deciding some other issue. Thus, each provision has independent operation, and neither is superfluous.

**III. In cases with no federal evidentiary hearing, including this one, the (d)(2) and (e)(1) inquiries typically point to the same result.**

Petitioner Wood and *amicus* ACLU correctly point out that there has been confusion in federal courts as to the relationship between § 2254(d)(2) and (e)(1). Brief for Petitioner 37; ACLU Brief 5. The confusion is easy to remedy, but not in the manner proposed by Petitioner and the ACLU.

The focus of petitioner's and *amicus*'s ire regarding § 2254(e)(1) appears to be footnote 23 of the Court of Appeals' opinion. This footnote is worth quoting in the context of its accompanying text:

“For several reasons, Wood has not established that the state courts’ decision was contrary to, or an unreasonable application of, established Supreme Court precedent or based on an unreasonable determination of the facts. First, the Rule 32 evidence amply supports the state courts’ fact findings.<sup>22</sup> Very experienced counsel Dozier and Ralph had Dr. Kirkland’s report revealing Wood’s mental deficiencies but did not give it to the jury or have Trotter give it to the jury. Dozier was the primary contact with Dr. Kirkland and had a lot of correspondence with him, and even Trotter specifically testified that Dozier had reviewed Dr. Kirkland’s report. While Dozier had no files left and could not recall the details of Dr. Kirkland’s report six years later, he was sure they would have used anything useful in the report. Moreover, at the start of the penalty phase, Dozier and Ralph were present in court when Trotter expressly told the trial judge, on the record and on behalf of the trial team, that Dr. Kirkland had evaluated Wood and counsel did not intend to introduce Dr. Kirkland’s report to the jury. Trotter testified that Dozier reviewed Dr. Kirkland’s report and decided nothing merited going further. And Dozier and Ralph, as experienced counsel, were present in court during the entire penalty phase. The evidence amply supports the state courts’ fact findings that experienced counsel (1) decided calling Dr. Kirkland would not be in Wood’s best interest, and (2) decided against presenting mental health evidence. Wood has wholly failed to show the state courts made an unreasonable determination of the facts.<sup>23</sup>

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<sup>22</sup>. Whether counsel made a decision “regarding what evidence to put forth at sentencing is a ques-

tion of fact.” *Jackson v. Herring*, 42 F. 3d 1350, 1366 (11th Cir. 1995); see also *Gaskin v. Sec’y, Dep’t of Corr.*, 494 F. 3d 997, 1003 (11th Cir. 2007).

“23. At a minimum, Wood has not presented evidence, much less clear and convincing evidence, that counsel did not make such decisions about Dr. Kirkland’s report and a mental health defense. See *Bolender v. Singletary*, 16 F. 3d 1547, 1558 & n.12 (11th Cir. 1994) (holding that “state court findings of historical facts made in the course of evaluating an ineffectiveness claim,” such as the state court’s finding that defense counsel was aware of defendant’s general background, were entitled to presumption of correctness). Our colleague’s separate opinion basically conducts de novo review and cherry picks certain statements to support its conclusions, rather than examining whether there is evidence to support the state courts’ findings. The main difference between the opinions is that the majority applies the required AEDPA deference but the separate opinion does not.” *Wood v. Allen*, 542 F. 3d 1281, 1303-1304 (CA11 2008).

The main text paragraph is clearly applying § 2254(d) and deciding that neither exception to that subsection’s general bar on relitigation applies, employing the correct standard for subsection (d)(2), “unreasonable determination of the facts.” The only implied reference to § 2254(e)(1) is the entirely superfluous phrase “much less clear and convincing evidence” in the footnote. In context, there is no doubt that the “clear and convincing” language is not essential or even important to the decision. This is not reversible error but merely less-than-perfect opinion drafting. “[T]his Court reviews judgments, not opinions.” *Chevron U. S. A., Inc. v. Natural Resources Defense Council*,

*Inc.*, 467 U. S. 837, 842 (1984).<sup>5</sup> The premise of Petitioner’s second question presented is that the Court of Appeals majority “focus[ed] solely on whether there is clear and convincing evidence . . . .” Brief for Petitioner i. That premise is false.

As *amicus* ACLU acknowledges, the Court of Appeals in this case is in good company with its passing reference to “clear and convincing evidence” in a case governed by § 2254(d)(2). See ACLU Brief 11 (citing *Miller-El v. Dretke*, 545 U. S. 231, 266 (2005); *Wiggins v. Smith*, 539 U. S. 510, 528 (2003)). The reason, quite simply, is that these two verbal formulations are essentially equivalent in the context of a habeas case with no additional evidence. Cf. *Strickland v. Washington*, 466 U. S. 668, 696 (1984) (“minor differences in the lower courts’ precise formulations of the performance standard are insignificant”).

When a state court’s finding of fact is clearly and convincingly rebutted by evidence that was before that court, then the finding is unreasonable. Conversely, if the finding was reasonable, then the evidence petitioner placed before that court did not rebut it clearly and convincingly. See *Miller-El*, 545 U. S., at 266.

The Court of Appeals could have and probably should have stopped with the conclusion that the state court reasonably found the facts and reasonably applied them using the correct standard. Cf. *Rice v. Collins*, 546 U. S. 333, 339, 342 (2006). The incidental refer-

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5. *Amicus* ACLU also contends that on page 1305 the Court of Appeals “confus[ed] things still further” by referring to a presumption that trial counsel’s decision was reasonable. ACLU Brief 16. That presumption is taken directly from the landmark precedent on the rule of law at issue in this case. See *Strickland v. Washington*, 466 U. S. 668, 689 (1984). It has nothing to do with AEDPA, and the Court of Appeals correctly identified the source. See 542 F. 3d, at 1305.

ence to clear and convincing evidence had no effect on the decision and is certainly not a basis for reversal.

**IV. This case illustrates how the *Lockett* rule, in conjunction with *Strickland* as distorted by *Rompilla*, provides unlimited ammunition to attack every capital trial defense.**

As the first major point of his brief on the merits, Petitioner makes a 28 U. S. C. § 2254(d)(1) attack on the state court decision, contending that it was an unreasonable application of *Strickland v. Washington*, 466 U. S. 668 (1984). See Brief for Petitioner 24-34. Respondents correctly note that this argument is not fairly included in the questions presented and is without merit. See Brief for Respondents 47.

*Amicus* CJLF will only add a brief note to point out that the fact that this claim can be made at all under the circumstances of this case illustrates how far the law has drifted from the deferential standard of *Strickland*. In that case, this Court warned,

“The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. *Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel’s unsuccessful defense.* Counsel’s performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.” *Strickland*, 466 U. S., at 690 (emphasis added).

That is exactly what has happened in capital cases. Ineffective assistance in the penalty phase is alleged in virtually every case. The “anything goes in mitigation” rule of *Lockett v. Ohio*, 438 U. S. 586 (1978), creates an easy target. With the defendant’s entire life deemed relevant, postconviction counsel can *always* find something that trial counsel supposedly should have investigated or supposedly should have presented. The result is to ratchet up the cost and extend the delay in capital cases to the point that legislatures must seriously consider abandoning justice in the very worst murder cases because it is unaffordable, unachievable, or both. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in Support of the Certiorari Petition in *Schriro v. Styers*, No. 08-1350, pp. 13-18.

The problem was significantly aggravated by this Court’s decision in *Rompilla v. Beard*, 545 U. S. 374 (2005). That decision was a “distortion of *Strickland*.” *Id.*, at 397 (Kennedy, J., dissenting). It gave too much weight to the ABA Standards for Criminal Justice, *id.*, at 400, and failed to give defense counsel the proper leeway in the allocation of their limited resources. See *id.*, at 401. If this Court does decide to address the merits of this issue, it would do well to prune back the “duty to investigate” implications of *Rompilla*, if not overrule that case altogether.

The evidence in the state collateral review in this case demonstrates that trial counsel’s decision not to investigate further down the mental defense road was not only reasonable, it was correct. Counsel reasonably decided that the diagnosis of borderline intellectual functioning (*not* retardation) would not be helpful to their client and indeed went so far as to move to exclude psychological evidence. See Brief for Respondents 2. The additional evidence that Petitioner now contends counsel should have discovered is not, on the

whole, mitigating. His placement in special education, Brief for Petitioner 15-17, adds little that is not apparent from the diagnosis. The contradictory testimony of two of Wood's sisters, *Wood v. Allen*, 542 F. 3d 1281, 1299 (CA11 2008), adds little to the picture that one of them presented at trial. See *id.*, at 1296-1297.

Most importantly, the mitigating value of Wood's mental status was severely undermined, if not completely destroyed, by the testimony of his former girlfriend and his former boss. These two people, who knew Wood very well, did not consider him impaired at all. See *id.*, at 1288. Whatever his deficiencies on artificial psychological tests or in the academic realm, when it came to the real world Wood was capable of functioning at a level that people around him regarded as normal. He was capable of normal functioning, that is, when he chose to behave normally. When he chose aberrant behavior, such as attempting to murder former girlfriends on three separate occasions, he was capable of that, too.

Counsel in this case made a reasonable decision not to further investigate mental mitigation when their initial expert evaluation indicated little of mitigating value. In this case, the decision can be seen to be correct even in hindsight, although that is not required. See *Strickland*, 466 U. S., at 689. The Sixth Amendment guarantees reasonably effective counsel. It does not guarantee unlimited resources. The state should not be required to write a blank check for capital defense to conduct a "no stone unturned" investigation. Reasonably effective assistance means making decisions within the constraints of limited resources. If this Court does address the merits of Petitioner's § 2254(d)(1) argument, it should disavow any contrary implications of *Rompilla*.

**V. A state court decision does not lose its entitlement to deference merely because the trial court adopts proposed findings prepared by the prevailing party.**

*Amicus* National Association of Criminal Defense Lawyers has submitted a brief contending that state court findings of fact should be entitled to less deference under 28 U. S. C. § 2254(d)(2) when the trial court adopted proposed findings submitted by the prevailing party, the prosecution. Respondents apparently considers this argument to be so obviously meritless as to not require a response, but we will add just a few words.

*Amicus* NACDL, at pages 4 and 19 of its brief, quotes dicta from *Anderson v. Bessemer City*, 470 U. S. 564, 572 (1985), criticizing the practice, but omits the holding of the case that immediately follows these dicta: “Nonetheless, our previous discussions of the subject suggest that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.”

In a case governed by Federal Rule of Civil Procedure 52(a), the same standard of review on appeal, “clearly erroneous,” applies regardless of whether the judge adopted a party’s proposed findings. That is also how it should be in a case governed by 28 U. S. C. § 2254(d)(2). Given the history and purpose of AEDPA, it is inconceivable that Congress intended that state court findings of fact challenged in federal court would receive less deference than a federal trial court’s findings challenged on direct appeal. The main point was to make federal habeas review more restricted than an appeal, not broader. See 141 Cong. Rec. 15062, col. 3 (1995) (statement of Sen. Hatch).

The question of whether the word “unreasonable” in § 2254(d)(2) can refer to an unreasonable procedure

as well as a determination that is unreasonable on the merits remains open, pending a case that actually presents it. A claim of that type was made before this Court last term, but the factual premise of the claim was false. See Tr. of Oral Arg. in *Bell v. Kelly*, No. 07-1223, pp. 4-5. The issue is also not presented in this case. The practice of adopting findings submitted by a party may warrant criticism, but *Anderson* conclusively negates the proposition that it is so inherently unfair as to warrant a departure from the usual standard of review.

### CONCLUSION

The decision of the Court of Appeals for the Eleventh Circuit should be affirmed.

September, 2009

Respectfully submitted,

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## **APPENDIX**

(Intentionally left blank)

**§ 2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS [Amended.]**

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) 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 unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; ; or ~~that~~

(B)(i) there is ~~either~~ an absence of available State corrective process; or ~~the existence of~~

(ii) circumstances *exist that* rendering such process ineffective to protect the rights of the *applicant prisoner*.

(2) *An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.*

(3) *A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.*

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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 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.*

~~(d)(e)(1) In a any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue; made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence. , unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—~~

~~(1) that the merits of the factual dispute were not resolved in the State court hearing;~~

~~(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;~~

~~(3) that the material facts were not adequately developed at the State court hearing;~~

~~(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;~~

~~(5) that the applicant was an indigent and the State court, in deprivation of his constitutional~~

~~right, failed to appoint counsel to represent him in the State court proceeding;~~

~~(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or~~

~~(7) that the applicant was otherwise denied due process of law in the State court proceeding;~~

~~(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:~~

~~And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.~~

*(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—*

*(A) the claim relies on—*

*(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or*

*(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and*

*(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.*

~~(e)~~(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

~~(f)~~(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

*(h) Except as provided in section 408 of the Controlled Substances Act,<sup>5</sup> in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.*

*(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.*

(June 25, 1948, ch. 646, 62 Stat. 967; Nov. 2, 1966, Pub. L. 89-711, § 2, 80 Stat. 1105; Apr. 24, 1996, Pub. L. 104-132, § 104.)

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5. 21 U.S.C. § 848.