

**CAPITAL CASE
No. 08-9156**

IN THE
Supreme Court of the United States

HOLLY WOOD,

Petitioner,

v.

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections,
TROY KING, the Attorney General of Alabama,
and GRANTT CULLIVER, Warden,

Respondents.

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

**REPLY BRIEF FOR THE PETITIONER
HOLLY WOOD**

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I. THE STATE COURT DECISION WAS AN UNREASONABLE DETERMINATION OF THE FACTS

The Alabama Court of Criminal Appeals recognized (J.A. 387) and Respondents concede (Red Br. 58) what any reasonably competent defense counsel would have realized after reading the Kirkland Report: that Wood’s borderline intellectual functioning was potential mitigation evidence. The fact questions pertinent to Wood’s ineffective assistance claim center on two issues: (1) Did Wood’s trial counsel undertake any meaningful investigation into this potentially significant mitigation evidence; and (2) if not, did Wood’s counsel make an informed strategic decision not to pursue Wood’s mental deficiencies as mitigation? Pet. App. 56a. Although Respondents persuaded the Eleventh Circuit majority that Wood’s counsel had conducted an adequate post-Kirkland Report mitigation investigation and that state court findings on that issue were “amply supported by the record” (Pet. App. 56a-57a), they now maintain that the state court made no such finding (Red Br. 3, 41, 42), and implicitly concede that any such finding would have been unreasonable.¹

¹ The Eleventh Circuit majority cited numerous historical facts found by the state court that supposedly supported the state court’s determination that “counsel investigated a potential mental health defense, but decided against presenting it.” Pet. App. 56a-57a, 201a; Blue Br. 43-51.

Respondents previously told this Court that “Dozier testified that [counsel] followed up on the information that was

(Continued on following page)

Respondents seek to cover their retreat by characterizing the issue of counsel's patently inadequate mitigation investigation as a "straw man." Red Br. 40-46.

Even putting aside the fact that Respondents' current contention is legally insufficient to support the state court decision (*see* Point II, *infra*), any finding that counsel decided to terminate investigation of mental health mitigation after reading the Kirkland Report was objectively unreasonable in light of the evidence in the state court record. That record plainly shows that counsel were interested in mental health evidence after the Kirkland Report, although their efforts to obtain such evidence were pitifully deficient.

A. The State Court Determination That Counsel Chose To Halt Their Mental Health Mitigation Investigation With The Kirkland Report Was Unreasonable

Respondents no longer maintain that Wood's counsel conducted any meaningful investigation of the mental health mitigation leads in the Kirkland

contained in Dr. Kirkland's report" and cited "evidence in the record" that supposedly "support[ed] the state courts' finding that [counsel] conducted a thorough penalty phase investigation." Brief of Respondents in Opposition to the Petition for Writ of Certiorari 10, 21. Respondents – not Wood – have made an "about-face." Red Br. 41.

Report. Instead, Respondents now contend that the state court's "legal conclusion was based on" (Red Br. 38) its finding that "counsel thoroughly reviewed Dr. Kirkland's report and determined that nothing in that report merited further investigation." Resp. App. 51. According to Respondents, this finding amounts to a "determination that counsel chose to halt their mental health investigation with the Kirkland Report." Red Br. 23.² Even assuming, contrary to law, that such a finding alone could establish that Wood received constitutionally adequate representation, that finding was an unreasonable determination of the facts because it is contradicted by abundant evidence in the state court record, which the state court and the Eleventh Circuit majority ignored.

² Respondents, like the Eleventh Circuit majority, also focus on the state court's finding that "Wood's trial counsel decided that calling Dr. Kirkland to testify was not in Wood's best interest." Red Br. 38, 46; Resp. App. 51; Pet. App. 50a-55a. That issue is a red herring. Wood has never argued that his trial counsel should have called Dr. Kirkland as a witness or introduced his Report into evidence. Rather, Wood has consistently argued that his counsel were ineffective for failing to investigate and develop evidence of his mental deficiencies independent of the Kirkland Report.

1. The Kirkland Report Was Prepared For The Guilt Phase And Dozier's Decision That It Did Not Merit "Going Further" Was Limited To The Purpose For Which It Was Prepared

In attempting to justify the state court decision, Respondents, like the state court and Eleventh Circuit majority, ignore the limited purposes for which the Kirkland Report was prepared. Dozier, who was in charge of the guilt or innocence phase of the trial (J.A. 271), filed a Petition for Insanity Evaluation, Competency Evaluation and Treatment to determine whether Wood was competent to stand trial and whether he had an insanity defense to guilt. (R. Vol. 7, 216-18.)³ The court thereupon ordered Wood to be examined to evaluate "his ability to understand the nature and object of the proceedings pending against him and his ability to reasonably assist his attorneys in his defense," and "his mental condition at the time of the alleged offense – specifically, whether any mental disease or defect existed at the time of the alleged offense which would have rendered the Defendant substantially lacking in his ability to either appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."

³ See ALA. R. CRIM. P. 11.1 (1994) (stating standard for determining when defendant is incompetent to stand trial); ALA. CODE § 13A-3-1(a) (1994) (stating standard for defense to guilt based on defendant's mental disease or defect at time of crime).

(R. Vol. 7, 235-36.) The court-ordered examiner, Dr. Kirkland, therefore, limited the scope of his evaluation to assessing Wood's "competency to stand trial and mental state at the time of the alleged offense." J.A. 324. Dr. Kirkland concluded that Wood "is capable, at this time, of assisting his attorney in his defense and fully participating in the process of a trial," and that "[t]here was not a mental disorder present that would detract from his ability to appreciate the criminality of [his] behavior with regard to this specific alleged instant offense." J.A. 329, 330.

The Kirkland Report hampered any defense to guilt based on Wood's mental state at the time of the offense, and that is the only context in which Dozier could have determined that nothing in the Kirkland Report "merited going further," *e.g.*, that there was no need for another psychological evaluation to assess Wood's competency or mental state at the time of the offense. J.A. 283, 343, 345. That Wood's counsel may have decided not to pursue an insanity defense does not show that they also decided not to pursue evidence of Wood's mental deficiencies as mitigation. To the contrary, Dozier testified that evidence of "mental health problems" would have been presented at the penalty phase if counsel had been aware of it. J.A. 169. But there is no need to rely on Dozier's recollection of events because his conduct and that of his co-counsel, after receipt of the Kirkland Report,

plainly demonstrate they had not made a decision to halt any investigation for mental health mitigation.

2. Counsel Sought Mental Health Mitigation After They Reviewed The Kirkland Report

Respondents contend that a defense motion to suppress psychological evidence, argument and speculation supports the state court finding that Wood's trial counsel decided to forego any investigation into Wood's mental status. Red Br. 39. But Respondents have mischaracterized that motion, ignoring both its limited nature and another motion filed at the same time that *sought* psychological evaluations of Wood for mitigation purposes. The record shows that, on four distinct occasions after Wood's counsel received the Kirkland Report, Wood's counsel expressed their desire to obtain mental health mitigation evidence. The state court decision does not address this evidence, much less attempt to reconcile it with any finding that counsel decided to halt their mental health mitigation investigation with the Kirkland Report.

First, on September 2, 1994, more than three months after Dozier supposedly decided to drop any inquiry into mental health mitigation, Dozier argued a motion to discover prior "psychological evaluations" of Wood to help develop mitigation evidence. (R. Vol. 1, Tr. 80.) Concurrently, Trotter sought "psychological or other observations" from the Alabama Department

of Human Resources. (R. Vol. 1, Tr. 80.) Although the court granted their motion, counsel did nothing to ensure timely receipt of the information. J.A. 341.⁴ Had counsel dropped any inquiry into mental health mitigation after reviewing the Kirkland Report, there would have been no reason to seek such “psychological” evidence.

Second, immediately before the penalty phase began, Trotter requested that “there be further psychological evaluation done of the defendant.” J.A. 12. Respondents wrongly contend that Trotter’s statement “supports the factual finding that counsel ‘determined that nothing in the [Kirkland] report merited further investigation.’” Red Br. 43-44.⁵ Trotter plainly stated the opposite – the psychological problems identified in the Report “need[ed] further

⁴ Counsel did not raise the issue again until the morning of the penalty phase hearing when Trotter told the court that “[w]e have[] never received those reports . . .” J.A. 13. The judge replied that “[n]o one has brought notice to me that those records have not been filed,” that he had given counsel “full access to them,” and had “entered the order . . . some twenty-one days ago.” J.A. 15.

⁵ Respondents also rebut a straw man when they argue that Trotter’s statements show that Wood’s counsel decided not to present the Kirkland Report to the jury (Red Br. 40) or call Dr. Kirkland to testify (Red Br. 43). *See* note 2 *supra*. Trotter’s statement concerning what “won’t be admissible to this jury” plainly refers to the requested “further psychological evaluation,” not the Kirkland Report. J.A. 12.

assessment,” which is precisely why he requested another psychological evaluation. J.A. 12.⁶

Nor can Trotter’s request be explained as a mere dissent from “Dozier’s decision . . . not to seek another mental health evaluation.” Red Br. 44. Dozier stood silently next to Trotter in the courtroom. There is no basis to reasonably conclude that Trotter’s statements reflected a disagreement among counsel. Rather, the record plainly shows that Wood’s counsel realized belatedly that the Kirkland Report, although prepared for a different purpose, contained valuable leads regarding mental health mitigation that they had failed to investigate and develop.

Third, after the penalty phase, Trotter wrote to his co-counsel to recommend that they “request an independent psychological evaluation – even if that means asking for a postponement of the sentencing hearing.” J.A. 343-46. Dozier and Ralph did not reject that recommendation on the basis of any supposed prior “strategic” decision to forego mental health mitigation. Rather, they rejected it only because “they

⁶ Respondents also contend that Trotter’s request was “based on evidence that Wood suffered from ‘antisocial behavior’ and ‘anger control’ issues, not borderline intellectual functioning.” Red Br. 44 n.14. This purported distinction is meaningless, because the type of significant mental deficiencies Wood has are closely related to issues involving anger control and antisocial behavior. See Kenneth L. Appelbaum, M.D. & Paul S. Appelbaum, M.D., *Criminal-Justice Related Competencies in Defendants with Mental Retardation*, 22 J. PSYCHIATRY 483, 489 (1994).

didn't think [t]he Judge would grant a continuance.” J.A. 285.

Fourth, at the sentencing hearing, Trotter argued that “the fact that, as reported in the [Kirkland Report], that Holly cannot use abstraction skills much beyond the low average range of intellect, and that he is at most functioning in the borderline range of intellectual functioning . . . would mitigate any aggravating circumstances in this case, and would require that the proper sentence for [this] case be life in prison without parole and not death.” J.A. 88. There would have been no reason for Trotter to make that argument if counsel had determined six months earlier that such information would not be useful mitigation.

The motion to “suppress psychological evidence,” which was filed prior to these events, does not support a finding that Wood’s counsel had decided to drop the issue of Wood’s mental status as a mitigating factor. The motion seeks to “suppress psychological evidence, argument or speculation *against [Wood].*” (R. Vol. 8, 375 (emphasis added).) That motion did not seek to limit Wood’s ability to present mental health mitigation evidence. To the contrary, on the same day that Wood’s counsel argued the motion to suppress (R. Vol. 1, Tr. 73), they also argued their motion to discover prior “psychological” evaluations of Wood for use in the penalty phase. (R. Vol. 1, Tr. 80.)

The motion to suppress was expressly directed at “prosecutorial argument” “beyond the reach of cross-examination” in the form of “psychological predictions of behavior []or moral judgments expressed in psychobabble” with “the state blindly foraging for some character flaw making the alleged crime explicable.” (R. Vol. 8, 376.)⁷ When Trotter conceded that counsel had no indication the State had such evidence, the court denied the motion. (R. Vol. 1, Tr. 74.)

In sum, the state court record cannot reasonably be characterized as silent (Red Br. 45) regarding whether counsel made a decision to halt their investigation for mental health mitigation with the Kirkland Report. As the Eleventh Circuit dissent stated, the only “reasonable reading of this record” is that Trotter “realized too late what any reasonably prepared attorney would have known: that evidence of Wood’s mental impairments could have served as mitigating evidence and deserved investigation so that it could properly be presented before sentencing.” Pet. App. 85a-86a.

⁷ Respondents’ contention that through the motion to suppress “Trotter fought to prevent the jury from discovering and considering . . . anger control issues” (Red Br. 44 n.14) is insupportable. Trotter affirmatively submitted evidence that Wood “[n]eeds anger induced, acting out and reality therapy.” J.A. 60-61.

B. Respondents' Proposed Three-Step Procedure For Applying Sections 2254(d)(2) And 2254(e)(1) Is Inconsistent With The Language, Structure And History Of AEDPA

Respondents also retreat from the Eleventh Circuit majority's application of sections 2254(d)(2) and (e)(1). The Eleventh Circuit majority improperly super-imposed section 2254(e)(1) on section 2254(d)(2) and required Wood to establish that the state court fact-finding was unreasonable by clear and convincing evidence in violation of this Court's contrary direction in *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). Blue Br. 37-43. Respondents offer a three-step proposal for applying sections 2254(d)(2) and (e)(1) (Red Br. 36) that is not supported by any authority, including the Eleventh Circuit majority in this case, or even by their supporting *amici*. See CJLF Br. 10 n.3, 11.

1. Respondents' Proposal Is Inconsistent With The Language And Structure Of AEDPA

Respondents' proposal fails to account for the fact that sections 2254(d)(2) and (e)(1) impose independent requirements found in distinct sections of that statute. *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004), *cert. denied*, 544 U.S. 1063 (2005). Had Congress intended the burden of proof in 2254(e)(1) to be a prerequisite for application of the standard of review in 2254(d)(2) as Respondents contend (Red Br.

36), it would have provided for that paradigm in plain language in a single section of the statute.

Respondents' contention that the plain language of section 2254(e)(1) shows that it applies to all habeas proceedings regardless of whether any evidence is submitted outside the state court record also fails. Red Br. 30. Section 2254(e) is a distinct section that provides rules for when federal courts can take evidence outside the state court record and the burden of proof governing fact-finding based, in part, on that evidence. The language and structure of the statute indicate that section 2254(e) does not apply in this case.⁸

Moreover, Respondents' approach renders section 2254(d)(2) superfluous. According to Respondents, if, after applying section 2254(e)(1), the "presumption survives, the petitioner's § 2254(d)(2) claim fails because a correct determination of the facts is a reasonable determination of the facts." Red Br. 22, 36. Conversely, as another court improperly merging sections 2254(d)(2) and (e)(1) has found, if the presumption in 2254(e)(1) does not survive because it is rebutted by clear and convincing evidence, the factual determination is "therefore objectively unreasonable." *Ward v. Sterne*, 334 F.3d 696, 704 (7th Cir. 2003) (citation omitted). Thus, under Respondents' approach,

⁸ That section 2254(e)(1) will apply only in a subset (perhaps 10%) of habeas proceedings (Red Br. 33) hardly renders it insubstantial.

section 2254(e)(1) would be sufficient to decide every case involving a challenge to state court fact determinations, leaving no independent role for section 2254(d)(2). See *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004) (rejecting “reading [that] would render part of the statute entirely superfluous”).⁹

Equally without merit is Respondents’ contention that this Court has “agreed” that section 2254(e)(1) applies in cases “involving a review of the state court record under § 2254(d)(2).” Red Br. 28 (citing *Wiggins v. Smith*, 539 U.S. 510, 528 (2003); *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (“*Miller-El II*”); *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007)). None of those cases presented the question of the interaction of sections 2254(d)(2) and (e)(1), turned on that question, or even required the Court to engage in any analysis of that issue. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998). Indeed, when the issue was presented in *Rice v. Collins*, 546 U.S. 333, 339 (2006), which was decided after *Wiggins* and *Miller-El II*, this Court stated that “[w]e need not address that question.” As Respondents acknowledge, in *Rice*, this Court “left open” the question on this appeal. Red Br. 28.

⁹ Respondents’ formulation also is belied by the plain language of the statute because Respondents incorporate concepts such as “erred” and “correct” into section 2254(d)(2), which does not speak in those terms. See *Williams v. Taylor*, 529 U.S. 362, 411 (2000).

2. A Comparison With Prior Law Shows That Current Sections 2254(d)(2) And 2254(e)(1) Operate Independently

Respondents also misread AEDPA's history. Red Br. 31-34. Prior to AEDPA, the "power of inquiry on federal habeas corpus [was] plenary," including "the power to receive evidence and try the facts anew." *Townsend v. Sain*, 372 U.S. 293, 312 (1963); *see also Wright v. West*, 505 U.S. 277, 289 (1992). In some circumstances, federal courts were mandated to hold evidentiary hearings. *Townsend*, 372 U.S. at 312-13. "In all other cases where the material facts [were] in dispute . . . [federal courts had] the power, constrained only by [their] sound discretion, to receive evidence bearing upon the applicant's constitutional claim." *Id.* at 318. Former section 2254(d) provided the burden of proof for federal court fact-finding, requiring, with certain exceptions, that petitioners "establish by convincing evidence that the factual determination by the State court was erroneous." Red Br. 3a.

AEDPA limited the circumstances in which federal courts can receive evidence to supplement the state court record. *See* 28 U.S.C. § 2254(e)(2). AEDPA also limited the circumstances in which federal courts would engage in independent fact-finding by adding a new provision, section 2254(d)(2), which bars relief unless petitioner can show that the state court decision was based on an unreasonable determination of the facts in light of the state court record or has

satisfied the standards for supplementing the state court record in federal court.

Contrary to Respondents' contention (Red Br. 31), AEDPA did not eliminate any "pre-presumption review of the state court record." Rather, AEDPA: (i) placed that review in a distinct section of the statute (section 2254(d)(2)); (ii) strengthened the standard of review by requiring federal courts to determine whether the state court decision was based on an objectively unreasonable determination of the facts (rather than whether the state court decision was fairly supported by the record); and (iii) barred federal courts from granting relief absent such a determination assuming there is no basis to supplement the state court record.¹⁰

In doing so, Congress enacted a distinct section governing review of state court fact-finding (2254(d)(2)) and de-linked it from the burden of proof governing federal fact-finding (2254(e)(1)), which no longer serves any purpose in cases where the state court record is not supplemented. If, after review under section 2254(d)(2), the federal court concludes that the state court decision was based on an unreasonable determination of the facts in light of the state court record, then there is no basis to apply any

¹⁰ In arguing that "deference is withheld" unless section 2254(e)(1) applies to cases involving only the state court record (Red Br. 34), Respondents ignore the deference afforded by Congress to state court decisions in sections 2254(d)(1) and (2).

presumption of correctness to the underlying fact-finding. If the federal court does not conclude that the state court decision was based on an unreasonable determination of the facts and the state court record was complete, then relief is barred and the presumption does not come into play. If the federal court does not determine that the state court decision was based on an unreasonable determination of the facts, but the state court record was incomplete through no fault of the petitioner, then the federal court must presume that the facts found by the state court are correct unless rebutted by clear and convincing evidence introduced in the federal court. That is the only sensible reading of the statute consistent with its language, structure and history.

II. THE STATE COURT DECISION INVOLVED AN UNREASONABLE APPLICATION OF *STRICKLAND*

It is clearly established federal law that “[e]ven assuming [counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.” *Wiggins v. Smith*, 539 U.S. 510, 527 (2003); accord *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984) (“strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments

support the limitations on investigations”). As the Eleventh Circuit majority acknowledged: “Here, the issue becomes: Did counsel, before deciding not to present evidence of Wood’s borderline intellectual functioning, make ‘reasonable investigations’ or ‘a reasonable decision that ma[de] particular investigation unnecessary?” Pet. App. 56a.

A. Any Reasonably Competent Attorney Would Not Have Concluded That The Kirkland Report Constituted A “Red Light” Justifying A Halt To Investigation Of Wood’s Mental Deficiencies

The Kirkland Report contained information regarding Wood’s significant mental deficiencies (J.A. 387), which Respondents concede would have constituted mitigation evidence. Red Br. 58. Wood’s significant mental deficiencies are “inherently mitigating” (*Tennard v. Dretke*, 542 U.S. 274, 287-88 (2004)) and “exactly the sort of evidence that garners the most sympathy from jurors.” *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004). As shown in Point I.A, *supra*, Wood’s counsel did not regard the Kirkland Report as a “red light.” But if they had done so, their performance would have been deficient under *Wiggins*. Any reasonably competent attorney would not have terminated an investigation into Wood’s mental deficiencies for potential use in mitigation after reading the Kirkland Report.

This Court has long recognized the “vitally important” role of counsel in conducting a “thoroughgoing investigation” prior to a capital trial. *Powell v. Alabama*, 287 U.S. 45, 57 (1932). Wood’s counsel had “a duty to make reasonable investigations [for mitigating evidence] or to make a reasonable decision that [made] particular investigations unnecessary.” *Strickland*, 466 U.S. at 691; *accord Williams v. Taylor*, 529 U.S. 362, 396 (2000) (counsel “did not fulfill their obligation to conduct a thorough investigation of the defendant’s background” prior to the penalty phase).

The state court opined that “reasonable counsel could have decided against seeking another mental health evaluation, in order to prepare other, more promising, defenses for trial.” Resp. App. 51. But regardless of what “reasonable counsel” hypothetically “could have decided” based on a different set of facts, the state court record plainly demonstrates that Wood’s counsel did not decide to forego mental health investigation *in favor of more promising* evidence because they were not in a position to make such a determination. In May 1994 when Dozier supposedly made that decision, Wood’s counsel were not aware of any “more promising” evidence, because they had not conducted any penalty phase investigation. Nor did counsel ever develop more promising mitigation evidence. The Alabama Supreme Court determined that “neither the jury nor the trial judge acted unreasonably by finding that no mitigating circumstances

existed in Wood's case" based on Trotter's "meager" penalty phase presentation. J.A. 131 n.1.¹¹

Considering that the Kirkland Report contained leads for potential mental health mitigation and that Wood's counsel were not pursuing "other, more promising" lines of investigation, any reasonably competent defense attorney would not have halted their investigation for mental health mitigation with the Kirkland Report. That the Kirkland Report found Wood ineligible for an insanity or incompetency defense is immaterial. "One can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider." *Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991).¹² Indeed, the ALABAMA CAPITAL DEFENSE TRIAL MANUAL, which each of Wood's counsel consulted and relied on (J.A. 145, 178, 320), reiterated that "serious mental illness that would not rise to the level of mental

¹¹ Their failure to investigate and develop evidence for the penalty phase is evident from the three lawyers' time records, which on their face demonstrate that up until a month before trial when the entries stopped, they did almost nothing in this area. See J.A. 311-22.

¹² See generally Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J. L. & SOC. CHANGE 237, 261 (2007-08) ("developing mitigating evidence is quite different" from evaluating competency or insanity).

incompetency or insanity may yet help explain the client's behavior" at the penalty phase.¹³

Following Respondents' argument that the Kirkland Report constituted a "red light" to its logical conclusion would lead counsel to halt their mental health mitigation investigation in those cases in which they are most important. A capital case will never proceed to sentencing if the defendant is found incompetent to stand trial or not guilty by reason of insanity. Evaluations such as the Kirkland Report are obtained where, as here, counsel, such as Dozier, believes that the defendant may be "suffering problems related to some mental illness or personality disorder." (R. Vol. 7, 216.) If counsel treat a finding that their client's perceived mental illness or personality disorder does not render the client incompetent or establish an affirmative defense to guilt as a red light signaling a halt to any investigation for mental health mitigation, then such mitigation evidence would never be pursued in precisely those

¹³ ALABAMA CAPITAL REPRESENTATION RESOURCE CENTER, ALABAMA CAPITAL DEFENSE TRIAL MANUAL 539 (2d ed. 1992). That Manual also advised counsel to "approach [the sentencing phase of a capital trial] as a major trial, not an afterthought" because "[i]t may very well be the only trial at which your client has a chance to prevail." *Id.* at 537. It further cautioned that "[t]he process of investigation is extremely time consuming: It cannot be done in the last few weeks before trial." *Id.* at 538; *see also id.* at 56-81 (questionnaire to collect information for penalty phase "with a special emphasis on potential mental health claims").

cases in which counsel has reason to believe that inherently mitigating evidence might be available.

Nor would competent counsel have decided to terminate further inquiry into Wood's mental function merely because the Kirkland Report contained some information adverse to Wood. The supposedly harmful information in the Kirkland Report would not have been admissible through testimony from Dr. Kirkland or submission of his Report. As the trial court correctly told counsel (R. Vol. 1, Tr. 73), the results of a court-ordered competency evaluation would "not be admissible as evidence in a trial for the offense charged" (ALA. R. CRIM. P. 11.2(b)(1) (1994)) and the results of a court-ordered evaluation of a defendant's mental state at the time of the offense would have been "admissible only if the defendant pleads 'not guilty by reason of mental defect or disease.'" ALA. R. CRIM. P. 11.2(b)(2) Author's Comments § 11.2 (Hugh Maddox Commentary, Michie Co. 2d ed. 1994).

The Alabama Rules reflect the principle that court-ordered psychological evaluations cannot be used against a defendant consistent with the Fifth Amendment except in rebuttal for a purpose that has been disclosed to the defendant and his counsel prior to the evaluation. See *Estelle v. Smith*, 451 U.S. 454, 464-65 (1981); *Buchanan v. Kentucky*, 483 U.S. 402, 421-24 (1987); *Ex parte Wilson*, 571 So.2d 1251, 1258 (Ala. 1990). Prior to his evaluation, Dr. Kirkland notified Wood that "*none of the information [he obtained] would be used against him concerning the*

charge itself.” J.A. 324 (emphasis added). Neither Wood nor his counsel were ever told that the Kirkland Report or Dr. Kirkland’s testimony might be used against Wood beyond the limited purpose of the Report.

Furthermore, the supposedly harmful information in the Kirkland Report, which related to Wood’s competency and mental state at the time of the offense, would not have been admissible – through any source – to rebut mitigation evidence, because it is irrelevant to Wood’s significant mental deficiencies. “Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial.” *Atkins v. Virginia*, 536 U.S. 304, 318 (2002). Notably, Respondents did not call Dr. Kirkland to testify at the Rule 32 hearing in rebuttal to Wood’s evidence of his significant mental deficiencies. Instead, Respondents called two other psychologists, neither of whom testified about, or relied on, Wood’s ability to understand right from wrong, his criminal history or any related issues.

None of the cases cited by Respondents supports their contention that the Kirkland Report constituted a “red light” justifying a supposed decision to halt investigation of Wood’s mental deficiencies. None even involves counsel’s failure to pursue such evidence. In each case, counsel had information that directly contradicted the potential mitigation evidence that

the petitioner later claimed on post-conviction review should have been presented.

In *Strickland*, “[t]rial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help.” *Strickland*, 466 U.S. at 699. Moreover, the psychiatric examinations presented in the post-conviction proceedings “would have directly contradicted respondent’s claim that the mitigating circumstance of extreme emotional disturbance applied to his case.” *Id.* at 700.

In *Burger v. Kemp*, 483 U.S. 776, 790-91 (1987), the psychologist whom counsel employed to examine his client prior to trial “indicated that he would not be able to provide helpful testimony.” *Burger v. Kemp*, 753 F.2d 930, 935 n.4 (11th Cir. 1985). Wood’s counsel never retained a defense psychologist to assist them with developing mitigation evidence – as opposed to a court-appointed psychologist to assess competency and insanity defenses – and had no reason to believe that such a psychologist would have been unable to provide helpful testimony about Wood’s mental deficiencies.¹⁴

In *Darden v. Wainwright*, 477 U.S. 168, 184-85 (1986), counsel obtained a “psychiatric report on

¹⁴ See *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (criminal defendant has right of “access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense”).

petitioner, with an eye toward using it in mitigation during sentencing.” The psychiatrist indicated “that petitioner ‘very well could have committed the crime; that he was, as I recall his [the psychiatrist’s] term, sociopathic type personality,’” which would have directly contradicted “testimony that petitioner was incapable of committing the crimes.” *Id.* at 186.

In contrast, nothing in the Kirkland Report directly contradicted evidence of Wood’s significant mental deficiencies. In failing to pursue the “green light” in the Kirkland Report regarding Wood’s mental deficiencies, Wood’s counsel “chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.” *Wiggins*, 539 U.S. at 527-28.

B. Wood’s Argument That The Eleventh Circuit Majority Misapplied Section 2254(d)(1) Is Properly Before This Court

Respondents contend that Wood’s section 2254(d)(1) argument is not fairly included within the question presented. Red Br. 47-48. To the contrary, the first question asks whether it was an unreasonable determination of the facts to conclude that “the failure of a novice attorney with no criminal law experience to pursue or present evidence of defendant’s severely impaired mental functioning was a strategic decision.” Pet. i. That question cannot be decided without considering the relevant facts in the context of the

applicable legal principles in *Strickland*, *Williams* and *Wiggins* for determining what constitutes a “strategic decision.” For that reason, Wood argued that the Eleventh Circuit erred in its application of section 2254(d)(1) (Pet. 22-27; Red Br. 48) in a subpoint to the first point in his Petition for Certiorari, which challenged the court of appeals’ treatment of his ineffective assistance claim. Pet. 13-27. The first question presented fairly includes all the arguments in support of that first point, including Wood’s section 2254(d)(1) argument. See SUP. CT. RULE 14.1(a) (“[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein”).

This “Court repeatedly has stated that when resolution of a question of law is a predicate to intelligent resolution of the question on which we granted certiorari, it can be regarded as fairly comprised within it.” EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 457 (9th ed. 2007) (internal quotation marks omitted). Wood’s section 2254(d)(1) argument is, at the very least, a predicate to intelligent resolution of Wood’s section 2254(d)(2) argument. See *City of Sherill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214 n.8 (2005); *Eddings v. Okla.*, 455 U.S. 104, 113 n.9 (1982).

The cases on which Respondents rely are inapposite. In *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 34 (1993), this Court concluded that the single question presented challenging the substance of the court of appeals’ judgment

did not fairly include the court of appeals' denial of petitioner's motion to intervene. Wood plainly was a party below with standing to raise the questions presented in this Court.

In *Yee v. Escondido*, 503 U.S. 519, 536 (1992), the Court held that the question presented was limited to a physical taking (as distinct from a regulatory taking) issue because physical taking "was the only ground of decision in two previous Court of Appeals cases, *departure from which was said by the question presented to be the issue in the appeal.*" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 380-81 (1995) (emphasis by Court). The Eleventh Circuit addressed Wood's arguments under both sections 2254(d)(1) and (2). Pet. App. 49a, 53a-61a.

III. RESPONDENTS DO NOT ADDRESS THE REASONABLENESS OF THE STATE COURT'S DECISION REGARDING PREJUDICE

As Wood previously demonstrated, the state court's determination that Wood was not prejudiced by his counsel's deficient performance because of the nature of the crime and the state court's finding that Wood is not mentally retarded was based on: (1) an unreasonable application of *Williams* and other well-settled precedent of this Court; and (2) an unreasonable determination of the facts in light of the state court record. *See* Blue Br. 51-56. Respondents do not and cannot make any attempt to justify the state

court's prejudice determination based on the state court's analysis. Instead, Respondents offer their own analysis unrelated to the state court's prejudice analysis. As a result, Respondents' analysis is not entitled to any deference under AEDPA. *Wiggins*, 539 U.S. at 529.

Respondents contend that capital sentencing in Alabama is "judge-centric" (Red Br. 56) and that the "mitigating weight of Wood's subaverage intellect obviously would not have tilted the trial court's sentencing scales to LWOP because the trial court considered Wood's low intellectual functioning when sentencing Wood to death." Red Br. 57. Respondents' argument ignores the central role that the jury plays under this Court's death penalty jurisprudence and Alabama law: "the role of the advisory jury is so essential that a failure to present mitigating evidence to the jury cannot easily be cured at the judicial sentencing stage." *Brownlee v. Haley*, 306 F.3d 1043, 1075 (11th Cir. 2002). The court's sentencing decision absent a fully-informed jury recommendation has little meaning.

Moreover, the trial court itself was not fully informed. Because Wood's counsel had not developed the evidence, all Trotter was able to do at the sentencing hearing was read a few isolated phrases (absent any explanation or context) from the Kirkland Report (J.A. 88) which, because it was prepared for another purpose, was, according to Respondents, "chock-full of 'harmful' information." Red Br. 52. The judge had another reason not to take

Trotter's short presentation seriously: On the morning of the sentencing trial, the judge had agreed twice to consider, after the jury was released, Trotter's "request that there be further psychological evaluation done of the defendant." J.A. 12. But Trotter never followed up that request and the judge reasonably concluded he had nothing to offer.

Because Wood's counsel failed to investigate his significant mental deficiencies, neither the sentencing jury nor judge knew that: (1) Wood's IQ is between 59 and 64, which means he ranks in the lowest 1 percent of the total population (which Respondents' expert acknowledged "falls within the range of mentally retarded") (J.A. 403, 447, 491, 508, 541, 573; *Atkins*, 536 U.S. at 342 n.5; DAVID WECHSLER, WECHSLER ADULT INTELLIGENCE SCALE – THIRD EDITION ADMINISTRATION AND SCORING MANUAL 24 (Harcourt Brace & Co. 1997)); (2) Wood's functional academics "are very low, like second to fourth grade level," which is "an area that he functions in the mentally retarded range" (J.A. 507-08, 530); (3) Wood was classified as "educable mentally retarded," placed in special education classes held in the school's basement, and called a "retard" by other students (J.A. 402-03, 407-08; (R. Vol. 16, Sept. 18, 2000 Tr. 168, 188)); (4) as a special education student, Wood only functioned between the first and third grade levels (J.A. 414-15); and (5) even in the view of Respondents' psychologist, Wood met all but one criterion needed "to justify a diagnosis of mental retardation" (J.A. 506-09). Thus, there is no basis for Respondents' contention that the evidence

that was presented at the post-conviction hearing was “essentially identical” to the information in the Kirkland Report. Red Br. 51. Even according to Respondents’ experts, if Wood had significant deficits in only one additional area of adaptive functioning, he would have been diagnosed as mentally retarded, which since 2002 would constitute a categorical bar to his execution.

Respondents’ remaining prejudice arguments proceed from the false premise of what would have happened if Wood’s counsel had “wheeled the [Kirkland Report] before the jury.” Red Br. 58. Wood has never claimed that the Kirkland Report should have been presented to the sentencing jury. In any event, Respondents’ version of what would have happened if Wood’s counsel had presented evidence of his significant mental deficiencies to the sentencing jury bears little resemblance to what actually happened during the post-conviction proceedings.

Respondents contend that evidence of Wood’s mental deficiencies would have been rebutted by calling Dr. Kirkland and Barbara Siler. Red Br. 59. In fact, Respondents did *not* call Dr. Kirkland as a witness at the post-conviction hearing. The psychologists who did testify on behalf of Respondents did *not* address Wood’s ability to appreciate the criminality of his conduct, to distinguish right from wrong, or any other allegedly harmful information in the Kirkland Report. Red Br. 60. Although that information may have been relevant to assessing Wood’s competency and affirmative defense based on insanity, it had no bearing on Wood’s significant mental deficiencies.

Respondents are also incorrect that presenting evidence of Wood's significant mental deficiencies "would have opened the door to Wood's extensive criminal history." Red Br. 62. This Court's precedents indicate that a penalty phase defense that relies on evidence of good character may open the door to evidence of bad acts. *See, e.g., Strickland*, 466 U.S. at 700. But Wood's significant mental deficiencies do not implicate his character. Indeed, counsel's penalty phase presentation consisting of testimonials from family members that Wood was a "good boy" (J.A. 26) and a "loving boy" (J.A. 35) ran a far greater risk of opening the door to Wood's criminal history.

Respondents' psychologists did not recite Wood's criminal past or ascribe any significance to it in relationship to Wood's significant mental deficiencies. To the extent this history was discussed at all, it supported Wood's contention that his significant mental deficiencies affected him in ways that mitigated that history. For example, the only relevant testimony regarding Wood's encounter with a police officer during a traffic stop that resulted in his being charged with "escape" was that it showed that Wood's judgment "was quite impaired" and that he does not "understand[] the consequences of his own behavior at times." J.A. 466-67.¹⁵

¹⁵ According to the police officer, after she stopped Wood for speeding, he presented a false identification and then fled barefoot into the woods, leaving behind his sneakers and his vehicle. J.A. 394-96. The next day, Wood voluntarily appeared at
(Continued on following page)

As for Barbara Siler's potential as a rebuttal witness, the jury already knew about Wood's assault. In his opening argument, the prosecutor, without objection from Wood's counsel, told the jury that Wood was on parole from a conviction "of assault in the first-degree for shooting another young woman with a shotgun, and nearly killing her, was sentenced to fifteen years in the penitentiary, after serving a little over six years of that sentence was paroled and was a parolee at the time that he killed Ms. Gosha." J.A. 19. The court also instructed the jury on the elements of first-degree assault. J.A. 76. Siler's testimony regarding the circumstances of that assault, even if admitted,¹⁶ would have added little to what the jury already knew.

In any event, to the extent that the details of Wood's prior felony conviction became known to the jury, evidence of his significant mental deficiencies would have given the jury some context in which to

the police station to ask for his car. He was arrested, although he insisted that the police "had the wrong man." J.A. 397, 399-400.

¹⁶ Wood's presentation of his significant mental deficiencies would not have altered the trial court's conclusion that evidence regarding the circumstances surrounding the assault was inadmissible. The State was able to establish an aggravating circumstance through introduction of the underlying judgment of conviction. The circumstances of the assault also did not rebut evidence of Wood's significant mental deficiencies. When Respondents asked Dr. Prichard about it, he said that there "was likely some planning involved in that behavior" with no explanation that it played any role in his evaluation. J.A. 530.

assess it. Presented as Respondents' brief presents it, Wood's assault against Barbara Siler offers one picture. Presented in the context of an adequate diagnosis and explanation of Wood's severe mental impairments, that offense has a different meaning and would likely persuade a jury or a judge that the appropriate response to Wood's crimes was a sentence of life imprisonment without parole – the sole alternative to a death sentence under Alabama law. In *Williams v. Taylor*, the Virginia Supreme Court, the Fourth Circuit, and the State all emphasized Williams' horrendous criminal record (which included brutal assaults on the elderly, arson and many robberies). See *Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998), *rev'd*, 529 U.S. 362 (2000). But this Court understood the mitigating force of the life-history and borderline mental retardation evidence neglected by Williams' lawyers, which would have put his criminal record into true perspective. *Williams*, 529 U.S. at 398.

Furthermore, to the extent that Siler's potential testimony had any possible relevance to Wood's mental capacity, that testimony likely would have supported his position that his intellectual deficiencies translated into deficiencies in other areas. Respondents' psychologist, Dr. Prichard, testified after interviewing Siler that her questionnaire responses showed that Wood had adaptive functioning "deficits in the area[s] of communications and socialization." J.A. 534-36.

Finally, Respondents argue that offering evidence of Wood's significant mental deficiencies would have

been inconsistent with evidence concerning Wood's reasons for leaving school and with Trotter's argument that "Wood shot Ms. Gosha in a drunken fit of jealousy, not with premeditated malice." Red Br. 9. Even putting aside that Dr. Kirkland's testimony on the issue of Wood's alcohol consumption would have been inadmissible, Trotter's arguments on these grounds were so inconsequential that the trial court did not even address them in its sentencing order. J.A. 97-108.

Had Wood's counsel conducted an adequate investigation, the jury would have heard the "inherently mitigating" evidence of Wood's "significantly impaired intellectual functioning," which "is obviously evidence that might serve as a basis for a sentence less than death." *Tennard*, 542 U.S. at 288 (internal quotation marks omitted). Without that critical information, the jury lacked a "vehicle for expressing its reasoned moral response . . . in rendering its sentencing decision" and there is no basis to conclude that the jury "made a reliable determination that death [was] the appropriate sentence." *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (internal quotation marks omitted).



CONCLUSION

For the reasons stated above and in Wood's opening brief, this Court should reverse the judgment of the court of appeals, and grant the petition for a writ of habeas corpus.

Respectfully submitted,

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