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

BRIEF FOR THE PETITIONER HOLLY WOOD

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a state court's decision on post-conviction review is based on an unreasonable determination of the facts when it concludes that, during the sentencing phase of a capital case, 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, while the court ignores evidence in the record before it that demonstrates otherwise?

2. Whether the rule followed by some circuits, including the majority in this case, abdicates the court's judicial review function under the Antiterrorism and Effective Death Penalty Act by failing to determine whether a state court decision was unreasonable in light of the entire state court record and instead focusing solely on whether there is clear and convincing evidence in that record to rebut certain subsidiary factual findings?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

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OPINIONS BELOW

The Eleventh Circuit's decision, which reversed the District Court's grant of habeas corpus relief, is reported at *Wood v. Allen*, 542 F.3d 1282 (11th Cir. 2008) and is reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1a. The District Court's decision is reported at *Wood v. Allen*, 465 F. Supp. 2d 1211 (M.D. Ala. 2006), and is repro-

duced at Pet. App. 99a. The decisions of the Alabama Court of Criminal Appeals and Alabama Supreme Court on direct appeal are reported at *Wood v. State*, 715 So. 2d 812 (Ala. Crim. App. 1996) and *Ex parte Wood*, 715 So. 2d 819 (Ala. 1998), *cert. denied,* 525 U.S. 1042 (1998) and reproduced in the Joint Appendix ("J.A.") at 109, 125. The decision of the Alabama Circuit Court denying Wood's state post-conviction petition is reproduced in the Respondents' Appendix to their brief in opposition to the Petition for Certiorari ("Resp. App.") at 1. The decisions of the Alabama Court of Criminal Appeals affirming the denial of Wood's state post-conviction petition are reported at *Wood v. State*, 891 So. 2d 398 (Ala. Crim. App. 2003), and are reproduced at J.A. 369, 589.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006). The Eleventh Circuit entered its judgment on September 16, 2008 (*see* Pet. App. 1a-98a), and denied Wood's timely petition for rehearing and rehearing *en banc* on November 12, 2008. *See* Pet. App. 153a. Justice Thomas granted Wood's application for a 30-day extension and, on March 12, 2009, Wood timely filed a petition for a writ of certiorari, which this Court granted on May 18, 2009. J.A. 635.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are provided in Petitioner's Petition for Writ of Certiorari at 2-3 (quoting U.S. CONST. amend. VI; U.S. CONST. amend. XIV, § 1; and 28 U.S.C. §§ 2254(d), (e)(1) (2006)).

STATEMENT OF THE CASE

Holly Wood, who has significant mental deficiencies, was convicted of capital murder after a jury found that he had killed his former girlfriend, Ruby Gosha, in the house where she was staying. Primary responsibility for the critical penalty phase of Wood's trial fell on a novice attorney who had been assigned that task by his two more experienced co-counsel. This attorney had been admitted to the bar only four or five months prior to his appointment as Wood's counsel, had no experience in capital cases, and no jury trial experience.

This division of labor resulted in a brief penalty phase presentation of mitigating evidence that the Alabama Supreme Court described as "meager" and "scant." J.A. 131. Wood's entire mitigation case, including opening and closing statements, consumed only 49 pages in the transcript. It consisted of pleas for mercy from Wood's family members, testimony about his upbringing from his sister, a police report that indicated he had been drinking at the time of his arrest, and a parole board report remarking that he needed "anger induced, acting out and reality therapy." Afterwards, the jury recommended by a 10 to 2 vote that Wood be sentenced to death and the trial judge accepted that recommendation.

Counsel's investigation for mitigating evidence was as meager as the penalty phase presentation it produced, consisting of little more than interviews with Wood's family members at the courthouse, and requests for school and government agency records on which counsel failed to follow through. Counsel's strategy for the penalty phase was not informed by any meaningful investigation into Wood's mental

deficiencies even though counsel obtained a competency evaluation five months prior to the trial which stated that Wood was functioning "at most, in the borderline range of intellectual functioning," a clear signal of potentially powerful mitigating evidence.

As the novice attorney told the trial judge on the morning of the penalty phase, since obtaining that report, counsel had done no further investigation of Wood's potential mental health problems even though those problems needed further assessment. As a result, counsel's decisions concerning the penalty phase were not informed by the facts that Wood had an IQ in the 60s, which is within the range of mental retardation, or that he was classified as "educable mentally retarded" in school and placed in special education classes held in the school's basement. The failure to investigate Wood's significant mental deficiencies was the result of inattention and neglect by his attorneys, who did not communicate or work effectively together on a mitigation strategy.

I. THE TRIAL

In September 1993, Wood was arrested in Troy, Alabama, and charged with the capital murder of his former girlfriend, who was also the mother of his son. (R. Vol. 7, 94-96, 114.) On February 3, 1994, the trial court appointed Cary Dozier, an experienced Troy attorney, to represent Wood. (R. Vol. 7, 122-23.) The court also appointed Kenneth Trotter, who had been a member of the bar for only four or five months, and leased office space from Dozier. J.A. 261. At the time Trotter was appointed, he had not tried any jury cases to verdict and had no experience in capital murder cases. J.A. 262. A court-appointed third counsel withdrew and was replaced by Frank Ralph,

another experienced Troy attorney. (R. Vol. 7, 198-99.)

Trotter was understandably "very nervous about this whole case." J.A. 178. As Ralph later testified, "you could just tell by talking to Ken that he—he had no courtroom experience," that he was "troubled with the aspect of having to be in the courtroom." J.A. 179. Nevertheless, at some time prior to trial, Dozier and Ralph gave Trotter responsibility for the penalty phase of the trial. J.A. 179, 198.

Prior to trial, Dozier moved for a forensic psychological evaluation of Wood. (R. Vol. 7, 216-18, 234.) The trial court granted the motion and appointed a psychologist, Dr. Karl Kirkland, to evaluate Wood's "competency to stand trial and mental state at the time of the offense." J.A. 92. Kirkland prepared a Report, dated May 13, 1994 ("Kirkland Report"), which was provided to counsel at that time. *See* J.A. 323-33. While it recommended that the court find Wood competent to stand trial, it also reported that Wood "is functioning, at most, in the borderline range of intellectual functioning," could read only on a third-grade level, and "could not use abstraction skills much beyond the low average range of intellect." J.A. 327-28. Notwithstanding this information regarding Wood's significant mental deficiencies, during the five months that elapsed between counsel's receipt of the Kirkland Report and trial, Wood's counsel took no steps to investigate or develop mitigating evidence on this subject.

Dozier and Ralph handled the guilt or innocence phase of the trial, which commenced on October 17, 1994 (*see, e.g.,* R. Vol. 2, Tr. 191-398; R. Vol. 3, Tr. 409-12; R. Vol. 3, Tr. 426-37; R. Vol. 5, Tr. 801-02; R. Vol. 5, Tr. 878-907, 911-22), but their efforts were

unsuccessful. In late afternoon, on October 20, 1994, the jury returned a verdict finding Wood guilty of capital murder. (*See* R. Vol. 5, Tr. 954-55.) The court directed the jury and the parties to return at 8:30 the following morning for the sentencing phase of the case. (*See* R. Vol. 5, Tr. 956.) Although Trotter knew, and would advise the court the following morning, that his client's mental impairments identified by Dr. Kirkland five months earlier had not been investigated and "need[ed] further assessment" (J.A. 12), neither he nor his co-counsel sought a continuance of the sentencing phase to conduct such investigation prior to the presentation of mitigating evidence to the jury.

The following morning in chambers, Trotter advised the court that the Kirkland Report, completed in May, had found that "the defendant may have psychological problems that need further assessment." J.A. 12. Admitting that "[n]o further investigation ha[d] been done" with regard to those "problems," Trotter asked that "prior to any final sentencing by the Court we would request that there be further psychological evaluation done of the defendant." J.A. 12. When Trotter offered that the requested psychological evaluation "won't be admissible to this jury," the trial court twice indicated that the request would be considered "after this jury has been released." J.A. 12. Neither Trotter nor the court ever raised this issue again.

The State's presentation during the penalty phase focused on three aggravating circumstances to support a death sentence. However, the state conceded it could not establish, as an aggravating circumstance, that the killing was "heinous, atrocious and cruel." J.A. 9. Indeed, the trial court specifically

found that there was no evidence "that comes to the level that is required by the case law explaining and defining that aggravating circumstance." J.A. 9-10. Trotter's opening statement, apart from a short statement accepting the jury's verdict and describing the role that mitigating circumstances can play, consisted of a single sentence. *See* J.A. 21. He presented the testimony of Wood's father and two of his sisters with whom Trotter had met at the courthouse to discuss possible mitigation evidence. *See* J.A. 26-54. Their testimony focused primarily upon pleas to spare his life. *See* J.A. 41-42, 52-53. In addition, one of Wood's sisters testified about his upbringing, including that he lost his mother and brother, that he was raised by a cousin in a house with 16 people and then by his older sister, and that he quit school to work and make money. *See* J.A. 29-37. In addition, Trotter introduced a police report that indicated that Wood had been drinking at the time of his arrest and a parole board report remarking that he needed "anger induced, acting out and reality therapy." J.A. 60. The State had the burden of disproving the existence of any proffered mitigating circumstance that was in dispute (J.A. 80), but offered no rebuttal to the evidence Trotter presented. (R. Vol. 6, Tr. 1047.)

During the charge conference after the close of evidence, Trotter offered two instructions related to mental or emotional disturbance. Although the court found that "there has been no evidence presented to this jury concerning emotional disturbance" (R. Vol. 6, Tr. 1050), it agreed to give the instructions. In his closing statement, however, Trotter did not refer to or present argument concerning the court's instruction that mental or emotional disturbance constitutes relevant mitigation evidence. Trotter argued that

Wood had been drinking on the day of the crime and had been motivated by jealousy and anger resulting from his belief that his former girlfriend was involved in a relationship with another man and that "[h]is reasoning could have been clouded by the different emotions and the alcohol that he was having." J.A. 71.

By the statutory minimum vote of 10 to 2 (*see* J.A. 84), the jury recommended that Wood be sentenced to death. *See* ALA. CODE § 13A-5-46 (1994). Immediately following the jury recommendation, the judge dismissed the jury and scheduled a sentencing hearing for December 2, 1994. *See* J.A. 84. On October 26, 1994, Ralph wrote Trotter, with a copy to Dozier, directing Trotter to be prepared to make "arguments concerning the existence of aggravating and mitigating circumstances [at the December 2 hearing] . . . since you handled that phase of this case in chief." J.A. 342.

Four weeks later, and nine days before the final sentencing hearing, Trotter responded to Ralph and Dozier asking for their help in preparing for the sentencing hearing, and recommending that they "request an independent psychological evaluation—even if that means asking for a postponement of the sentencing hearing." J.A. 343-46. According to Trotter, his co-counsel rejected his recommendation because "they didn't think the Judge would grant a continuance." J.A. 285. Trotter dropped the matter.

At the sentencing hearing on December 2, 1994, "[n]o further evidence or testimony was offered other than the presentence report ordered to be prepared by the probation and parole office; and [the Kirkland Report] was offered by the defendant; and argument was made by both parties." (R. Vol. 6, Tr. 1114.)

Dozier argued that Wood acted "out of rage, heat of passion or whatever" and had been drinking that day. J.A. 87. Trotter added that "evidence of a difficult family history" and "[a]lso 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.

One week later, on December 9, 1994, the trial court found that the State had proven three aggravating circumstances and that there were no mitigating circumstances. *See* J.A. 106-07. The court accepted the jury's recommendation and sentenced Wood to death by electrocution. *See* J.A. 96. Wood's conviction and sentence were affirmed on direct appeal. *See* J.A. 109, 125.

II. STATE COURT POST-CONVICTION PROCEEDINGS

On November 30, 1999, Wood filed a petition for post-conviction review under Alabama Rule of Criminal Procedure 32. (R. Vol. 18, 48-213.)[1] Among other claims, Wood sought relief on the ground that his counsel had rendered ineffective assistance at the penalty phase of his trial by failing to investigate and present evidence of his mental impairments, in violation of his Sixth and Fourteenth Amendment rights. The state post-conviction court held evidentiary hear-

[1] Wood filed a Second Amended Petition, which is the subject of this appeal, on July 2, 2001. *See* J.A. 212-54.

ings on Wood's claims on September 18, 2000, August 22, 2001, and August 4, 2003.[2]

A. Trial Counsel's Division Of Labor

Each of Wood's trial counsel testified that Trotter was assigned to handle the penalty phase of the trial. According to Dozier, he and Ralph "just basically designated Trotter to do the sentencing aspect" of the trial and Trotter "handled the aggravating circumstances and mitigating circumstances as far as the sentencing process went." J.A. 139. Ralph confirmed that he and Dozier "told Ken Trotter to handle [the penalty phase] early on; that that was going to be his responsibility." J.A. 198.

Dozier did not recall much regarding the preparation for and conduct of the penalty phase of Wood's trial. When asked to describe counsel's general strategy at the penalty phase, Dozier testified: "Only thing I remember was something about his childhood, and I don't recall what it was all about.

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[2] On November 27, 2001, after the first two days of evidentiary hearings and after precluding testimony from Wood's independent psychologist, the state court issued an order denying Wood's claims in their entirety. *See* Pet. App. 154a-226a. The order was adopted verbatim from an order proposed by the Alabama Attorney General's Office. *See* Pet. App. 226a. On April 25, 2003, the Alabama Court of Criminal Appeals remanded the case to the state post-conviction court "with instructions that the court conduct an evidentiary hearing on and make specific, written findings of fact as to the appellant's contentions that he is mentally retarded and that his trial attorneys rendered ineffective assistance because they did not develop and present evidence that he is mentally retarded." J.A. 389. Subsequently, on August 4, 2003, the state court held an additional evidentiary hearing.

I mean, that's been a long time ago." J.A. 167.[3] Although Dozier claimed that he and Ralph participated in the preparation for the penalty phase, he could not recall speaking to any potential penalty phase witnesses. *See* J.A. 140. According to Dozier, "[w]e went over the motions with Mr. Trotter . . . psychological evaluations and things we felt were necessary at the sentencing stage." J.A. 140. Ralph also testified that he had little involvement in preparing for the penalty phase other than deciding that "Ken Trotter would handle it." J.A. 198. According to Ralph, he spoke with Wood's father and one or two of his sisters during and after the guilt or innocence phase of the trial. *See* J.A. 205.

Consistent with his co-counsel's testimony, Trotter testified that he was initially assigned to assist Dozier and Ralph who were to be "the principal spokespersons for Holly in the courtroom." J.A. 270-71. But "shortly before the trial, a decision was made, not by me, that I would represent Mr. Wood during the penalty phase in the courtroom." J.A. 271. His co-counsel told him, "Ken, you're going to have to handle this part of the trial," so Dozier and Ralph "could focus on the first phase of the litigation." J.A. 271. As a result, Trotter "did a lot of the background research and material for the penalty phase." J.A. 279. For a period of time, Trotter felt "stressed" and

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[3] In contrast, Dozier was clear about the strategy at the guilt or innocence phase for which he was responsible, which was to establish that the State could not prove that there was sufficient evidence to show that Wood committed a burglary, in which case, under Alabama law, "[t]here would be no capital murder." J.A. 153; *see also* J.A. 205 (Ralph testifying extensively about their strategy to undermine the State's burglary case).

like he was carrying a "large burden" because he "was having to do a lot of work independently, more so than I thought when I initially accepted the appointment from Judge Barr." J.A. 290-91. In August 1994, Trotter described his predicament in a letter to Kevin Doyle of the Southern Poverty Law Center: "I have been stressed out over this case and don't have anyone with whom to discuss the case, including the two other attorneys." J.A. 350.

B. Trial Counsel's Mitigation Investigation

Trotter's mitigation investigation consisted principally of interviews with Wood's family at the courthouse. With respect to the Kirkland Report's indication that Wood was functioning, at most, in the borderline range of intellectual functioning, Trotter testified that "I don't recall considering that. I don't recall anything about that actually." J.A. 288. According to Trotter, after counsel received the Kirkland Report, "there may have been a discussion about whether we should do anything further and . . . Mr. Dozier had indicated that he had looked at the report and that he didn't think anything in the report really merited—that there was nothing in the report that merited going further." J.A. 283.

Dozier testified that he did not specifically recall reading the Kirkland Report before the trial, meeting with Dr. Kirkland, or speaking with him. J.A. 174.[4] Nor did he recall considering using Dr. Kirkland's report at the penalty phase or

[4] Dozier's fee declaration indicates that he reviewed the Kirkland Report for one hour on May 24. *See* J.A. 313. There are no other references to the Kirkland Report or to any other investigation of Wood's mental impairments on Dozier's fee declaration.

"mak[ing] a determination not to present evidence based on anything that [he] read in Kirkland's report." J.A. 168, 171. Dozier testified that counsel would have presented information regarding "mental health problems" to the jury if any were available and would have presented useful information in the Kirkland Report to the jury. J.A. 169. But counsel did "[n]o further investigation" (J.A. 12) of the "mental health problems" referred to in that Report.

In late June, Trotter issued a subpoena to Luverne High School for Wood's school records. *See* J.A. 339. Trotter also had two very brief telephone calls with individuals at Luverne High School (*see* J.A. 267-68, 320), but did not seek to enforce the subpoena and never obtained any of Wood's school records. *See* J.A. 267. Nor did he make any effort to identify any of Wood's special education teachers or to contact them directly. Trotter did not remember whether he asked Wood for this information. *See* J.A. 268.

In September 1994, Trotter moved for production of documents regarding Wood from the Alabama Department of Corrections, the Alabama Department of Pardons and Paroles and the Alabama Department of Human Resources (R. Vol. 8, 456-61), but did not take steps to see that those records were produced before trial. Less than three weeks before the trial commenced, Trotter wrote Ralph: "I still haven't seen any material from the judge regarding the records we requested. . . . Is there anything we can do about this?" J.A. 341.

Wood's counsel retained a private investigator, R.C. "Pete" Taylor, but Taylor played no role in investigating the mental impairments identified in the Kirkland Report. Taylor took his directions from

Dozier, not Trotter who was only responsible for the penalty phase. *See* J.A. 263-64. Taylor testified that Dozier instructed him to "arrange to see the evidence that the Troy Police Department had" and that they "agreed on people to be interviewed." (R. Vol. 17, Aug. 22, 2001 Tr. 88.) Taylor's contemporaneous notes of his interviews and invoices reflecting his activities indicate that he investigated the circumstances surrounding the crime—not any potential mitigation evidence. *See* J.A. 351-68.

In addition, counsel met with Wood in February 1994, prior to the time that Trotter was assigned responsibility for the penalty phase. *See* J.A. 312, 319. Trotter did not recall what he discussed with Wood. *See* J.A. 303, 306. As a general matter, Trotter testified that "Mr. Wood was more or less a passive participant in the process." J.A. 288. Counsel "would try to get information from him, but . . . it was difficult in the circumstances." J.A. 288.

Trotter met with Wood's family members at the courthouse and "that is how [he] identified the witnesses that we used at the penalty phase." J.A. 277. Trotter did not recall when he met with Wood's family and whether there was more than one such meeting at the courthouse. *See* J.A. 277. But two of Wood's sisters, including Johnnie Pearl Wood who was a witness at the penalty phase proceeding, testified that they did not meet with Trotter (or Wood's other lawyers) at the courthouse until after Wood had been convicted. *See* (R. Vol. 17, Aug. 22, 2001 Tr. 121.)

Trotter tried to get information from Wood's family "about Holly's upbringing, his background, his childhood, what it had been like growing up in Holly's home, characteristics about Holly, anything that we

could use to humanize Holly to make him seem more real to the jury. . . ." J.A. 278. Based on those discussions, Trotter developed the penalty phase presentation which the Alabama Supreme Court described as "meager" and "scant." J.A. 131.

Trotter "objected at a couple of points to handling the penalty phase of the trial." J.A. 271. He did not "think that we were actually prepared to move forward with the penalty phase of the trial when we moved forward with the penalty phase." J.A. 271. But "after consultation with Mr. Dozier and Mr. Ralph that their concerns about that were alleviated" and "at their direction, I went ahead and proceeded." J.A. 271.

With regard to the penalty phase presentation, Ralph testified that "I don't think that Mr. Trotter—and it's no disrespect to Mr. Trotter—brought out enough of Mr. Wood's background through enough witnesses of the type of upbringing that he had" and that "there were more circumstances in his background that were potentially mitigating that were not explored. . . ." J.A. 184-85. Notwithstanding that view, Ralph did nothing to supplement Trotter's presentation and then assigned him to handle the final sentencing proceeding before the trial court. *See* J.A. 342.

C. Evidence Of Wood's Significant Mental Deficiencies

Wood's former teachers testified that, based on assessments of his intellectual and adaptive functioning, he was placed in special education classes and classified as "educable mentally retarded." J.A. 402-03, 408. His teachers recalled that his IQ was in the low to mid 60s. *See* J.A. 403. The special education

classes were held in the basement of the school, where basic life skills, such as cooking, were taught. *See* J.A. 407; (R. Vol. 16, Sept. 18, 2000 Tr. 131; R. Vol. 17, Sept. 18, 2000 Tr. 211-13.) The teachers explained that special education classes were structured environments where students worked at their own ability levels on assignments that were specifically tailored to them (*see* J.A. 404), and that the special education students like Wood typically only received a first grade to sixth grade level education, notwithstanding their classification as seventh, eighth, or ninth grade students. (*See* R. Vol. 17, Sept. 18, 2000 Tr. 215.) Most special education students worked at a first, second or third grade level, and fourth, fifth and sixth grade levels were considered "extremely high." J.A. 415. His teachers testified that Wood was an "average" special education student who functioned in the "middle to low" range. J.A. 403, 414.

Wood's former teachers each testified that neither Wood's trial counsel nor his investigator contacted them in 1994, and that, if they had been contacted, they would have cooperated and agreed to testify at Wood's trial in 1994. *See* J.A. 406, 416-17; (R. Vol. 16, Sept. 18, 2000 Tr. 128, 148; R. Vol. 17, Sept. 18, 2000 Tr. 215).

Two of Wood's sisters, Johnnie Pearl Wood and Maeola Wood, confirmed that he had been in special education classes. Maeola Wood was also placed in special education classes and received a third grade education even though she completed school and received a high school diploma. (*See* R. Vol. 16, Sept. 18, 2000 Tr. 181.) They testified that special education classes were held underground and that Holly Wood was referred to as a "retard" or "mole hole" by

other students. (*See* R. Vol. 16, Sept. 18, 2000 Tr. 168.) Maeola Wood also testified that she had been diagnosed as mentally retarded. (*See* R. Vol. 16, Sept. 18, 2000 Tr. 195-96.)

Wood's expert psychologist, Dr. Karen Salekin, and the State's experts, Dr. Harry McClaren and Dr. Greg Prichard, all agreed that "Wood's IQ falls within the range of mentally retarded," (J.A. 447, 491, 508, 541) and that his "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.[5] Based on her assessment, Dr. Salekin concluded that Wood suffers from mild mental retardation. *See* J.A. 450. Although the State's experts reached a different conclusion about whether Wood is mentally retarded, both of them found that he has significant deficits in intellectual functioning and significant deficits in one area of adaptive functioning. *See* J.A. 507-08, 530, 541.

D. The State Court Decision

The state court denied Wood's ineffective assistance claim on September 24, 2003. The court found that Wood had "failed to establish deficient performance," concluding that "counsel thoroughly reviewed Dr. Kirkland's report and determined that nothing in that report merited further investigation," and "could have decided against seeking another mental health evaluation, in order to prepare other, more promising, defenses for trial." Resp. App. 51. In addition, the state court concluded that there is

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[5] Each of the psychologists assessed Wood's functioning in the context of the clinical definitions of mental retardation referred to by this Court in *Atkins v. Virginia*, 536 U.S. 304, 308 n.3 (2002).

"no reasonable probability" that the presentation of evidence concerning Wood's mental deficiencies "would have changed the jury's ten to two recommendation of a death sentence or this Court's finding that the aggravating circumstances outweighed the mitigating circumstances" in light of the "brutal[]" nature of the crime. Resp. App. 55-56. The state court also concluded that its "finding that Wood is not mentally retarded further supports the conclusion that there is no reasonable probability that the presentation of evidence concerning his alleged mental retardation would have affected the outcome of this case." Resp. App. 56.

On January 6, 2004, the Alabama Court of Criminal Appeals affirmed and adopted the state court's findings. *See* J.A. 589. The Alabama Supreme Court denied Wood's petition for a writ of certiorari. *See* J.A. 4.

III. FEDERAL COURT HABEAS CORPUS PROCEEDINGS

On May 26, 2004, Wood filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Alabama asserting, *inter alia*, that he received ineffective assistance of counsel during the penalty phase of his trial. *See* J.A. 4. Specifically, Wood asserted that trial counsel failed to investigate and present mitigation evidence of his substantial mental deficiencies. *See* J.A. 621-23.

By order dated November 20, 2006, the District Court (Albritton, J.) granted Wood's habeas petition on that ground, after finding "nothing in the record to even remotely support a finding that counsel made a strategic decision not to let the jury at the penalty stage know about Wood's mental condition." Pet.

App. 147a. The District Court held that "clear and convincing record evidence indicates that Trotter, who did not have the requisite years of experience, was left to conduct the mitigating evidence investigation on his own with little assistance from the attorneys who had the requisite experience, and did not make a strategic decision not to pursue or present evidence of mental retardation." Pet. App. 146a. The District Court concluded that "[a] finding by the state courts that a strategic decision was made not to investigate or introduce to the sentencing jury evidence of mental retardation is an unreasonable determination of the facts in light of the clear and convincing evidence presented in the record." Pet. App. 147a.

The District Court further found that "there is a reasonable probability that evidence of Wood's intellectual functioning, even if it had not been enough to establish that he was mentally retarded and had merely demonstrated that he was on the borderline of mental retardation, would have established a non-statutory mitigating circumstance" and that "[c]ounsel's failure to investigate and present any evidence of intellectual functioning, therefore, is sufficient to undermine confidence in the application of the death sentence." Pet. App. 151a.

Accordingly, the District Court ordered the State "to either (1) vacate Holly Wood's sentence and resentence him to life without possibility of parole, or (2) conduct a new sentencing hearing for Holly Wood that is consistent with the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984)." Pet. App. 152a.

On appeal, a divided panel of the Eleventh Circuit reversed. *See* Pet. App. 1a-98a. Describing the appeals court's obligation under the Antiter-

rorism and Effective Death Penalty Act of 1996 ("AEDPA") as "examining whether there is evidence to support the state courts' findings" (Pet. App. 50a n.23), Judge Hull, writing for the majority, determined that 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." Pet. App. 50a. Based on those determinations, the majority held that Wood had "failed to show the state courts made an unreasonable determination of the facts" because "[a]t a minimum, Wood has not presented evidence, much less clear and convincing evidence, that counsel did not make such decisions about [the Kirkland Report] and a mental health defense." Pet. App. 50a n.23. The majority also held that Wood had failed to establish prejudice. *See* Pet. App. 61a-71a.

The Eleventh Circuit dissent noted that the majority's "conclusion ignores specific and direct evidence of ineffectiveness of counsel in favor of nothing but pure speculation that the failure to investigate and present mitigating evidence was a 'strategic decision.'" Pet. App. 73a. The dissent also found that "[a] fair reading of the entire record compels the conclusion that Wood's lawyers, in fact, did not adequately prepare for the penalty phase and their direct testimony concedes as much." Pet. App. 74a. As for prejudice, the dissent stated that "evidence of Wood's mental deficiencies was essential to mitigation" and, given the statutory minimum death penalty vote of 10 to 2, "there is a reasonable probability that the outcome of Wood's penalty phase would have been different had Wood's lawyers rendered effective assistance of counsel." Pet. App. 90a, 92a.

This Court granted Wood's petition for a writ of certiorari to the Eleventh Circuit on May 18, 2009. *See* J.A. 635.

SUMMARY OF THE ARGUMENT

"In a long line of cases . . . this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684 (1984) (citations omitted). Wood was denied the effective assistance of counsel at the critical penalty phase of his capital trial where "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

In particular, counsel failed "to make [a] reasonable investigation[]" of Wood's mental deficiencies or to "make a reasonable decision" that made such an "investigation[] unnecessary." *Id.* at 691. As Trotter told the trial judge when the penalty phase began, in the five months after counsel received the Kirkland Report, "no further investigation" had been done of the "psychological problems" identified in that Report, even though those problems "need[ed] further assessment." J.A. 12. Nor had counsel learned anything during that five-month period that indicated that further investigation was unnecessary on the grounds that it "would have been counterproductive" or "fruitless." *Wiggins v. Smith*, 539 U.S. 510, 525 (2003). Accordingly, it was "impossible" for counsel to make "a fully informed decision" regarding whether and how to use the important information concerning Wood's mental deficiencies at the penalty phase of Wood's trial. *Id*. at 527-28.

The Eleventh Circuit's judgment reversing the District Court's grant of habeas relief on Wood's ineffective assistance claim should be reversed for three alternative and independent reasons. First, even accepting the facts found by the state court, trial counsel were ineffective because they terminated their investigation into Wood's mental deficiencies in the face of facts that any reasonable defense lawyer would have understood required follow-up, not abandonment, of a promising avenue of mental health mitigation that was Wood's best chance for a sentence less than death. The state court's contrary decision involved an unreasonable application of clearly established federal law as reflected by this Court's decisions in *Strickland* and *Wiggins*.

Second, the state court decision was also based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2) in light of the totality of the evidence presented in the state court proceeding. *See Miller-El v. Dretke*, 545 U.S. 231, 265 (2005) ("*Miller-El II*"). The state court decision denying Wood's ineffective assistance claim (which was taken verbatim from the State's proposed order) does not even address the "record of the actual sentencing proceeding," which "underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526. Counsel failed to pursue a reasonable investigation into Wood's mental deficiencies due to the delegation of the sentencing phase to an inexperienced attorney, the lack of clear lines of supervision of Trotter, and the disorganization and lack of communication among counsel, which allowed critical functions to slip through the cracks. To the extent

that the state court found otherwise, its decision was objectively unreasonable.

In reaching its conclusion, the state court focused on isolated evidence that counsel did some investigation preceding the penalty phase by interviewing Wood's family and making feeble and unsuccessful attempts to obtain Wood's school records and records from state agencies. But the fact that counsel "had *some* information with respect to petitioner's background" fails to establish that "they were in a position to make a tactical choice not to present" evidence of Wood's mental deficiencies. *Id*. at 527 (emphasis in original).

In reversing the District Court's grant of habeas relief on Wood's ineffective assistance claim, the Eleventh Circuit majority misapplied AEDPA by "merg[ing] the independent requirements of §§ 2254(d)(2) and (e)(1)." *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) ("*Miller-El I*"). Those two sections have distinct purposes consistent with the plain language and structure of the statute. The Eleventh Circuit majority lost sight of its duty to assess the *reasonableness* of the state court decision in light of the *entirety of the state court record* as (d)(2) requires, and improperly imposed on Wood an additional burden reserved under (e)(1) for measuring the *correctness* of *individual findings of fact* in certain cases.

Third, even if (e)(1) were construed to apply to individual or subsidiary findings of fact in cases where there is no evidence outside the state court record, the individual fact findings made by the state court here are rebutted by clear and convincing evidence, thus entitling Wood to relief.

Finally, the deficient performance of Wood's counsel prejudiced him. Wood's jury was deprived of the opportunity to give "full consideration of evidence that mitigates against the death penalty," which "is essential if the jury is to give a 'reasoned *moral* response to the defendant's background, character and crime.'" *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (emphasis in original). The Alabama Supreme Court found that Wood's counsel overall "presented little evidence of mitigating circumstances." J.A. 131. The jury never heard the powerful mitigating evidence of Wood's mental deficiencies, including that Wood has an IQ in the range of mental retardation, possesses reading, spelling and mathematics skills at an elementary-grade level, and was classified as "educable mentally retarded" and placed in special education classes. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000). Had this evidence been presented to the jury, it very likely would have resulted in at least one more vote for a sentence of life without parole.

ARGUMENT

I. THE STATE COURT DECISION INVOLVED AN UNREASONABLE APPLICATION OF *STRICKLAND* BECAUSE COUNSEL FAILED TO MAKE A REASONABLE INVESTIGATION OF WOOD'S MENTAL DEFICIENCIES PRIOR TO HIS CAPITAL TRIAL

Wood's counsel failed to conduct a reasonable investigation into Wood's substantial mental deficiencies for purposes of mitigation even though they were alerted to those deficiencies in the Kirkland Report five months prior to trial. Under clearly established federal law, counsel's failure to pursue and investigate the leads in the Kirkland Report, as any rea-

sonably competent defense lawyer would have done, amounted to constitutionally ineffective assistance.

It is clearly established federal law that, in a capital trial, "counsel has a duty to make reasonable investigations [into potential mitigation evidence] or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91. In *Williams* and *Wiggins*, this Court held that habeas petitioners were entitled to relief under AEDPA because their counsel failed to conduct a reasonable investigation of potential mitigation evidence in support of supposed tactical decisions regarding capital sentencing proceedings. The state court decisions denying Wood's ineffective assistance claim do not even cite *Williams* or *Wiggins*.[6]

A. Under This Court's Clearly Established Precedents, Decisions Not To Present Mitigation Evidence After Less Than Complete Investigation Are Reasonable Only To The Extent That Reasonable Professional Judgments Support The Limitation On Investigation

To satisfy the Sixth Amendment guarantee, counsel must comport with "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688. Beginning with *Strickland*, this Court repeatedly has held that this duty is not met where counsel's decisions regarding the presentation of mitigation

[6] *Wiggins* was decided after the state court's initial decision denying Wood's ineffective assistance claim, but prior to that court's subsequent decision after remand for further proceedings from the Alabama Court of Criminal Appeals.

evidence are not informed by reasonable investigations:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Id. at 690-91.

Thus, in *Williams*, this Court held that trial counsel were constitutionally ineffective, thereby entitling a habeas petitioner to relief under AEDPA, where among other things "[c]ounsel failed to introduce available evidence that Williams was 'borderline mentally retarded'" because counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background" prior to the sentencing proceeding of his capital trial. *Williams*, 529 U.S. at 396; *see also id.* at 415 (O'Connor, J., concurring) (counsel failed "to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances").

In *Wiggins*, the Court reaffirmed the clearly established law that trial counsel's decisions regarding the presentation of mitigation evidence must be informed by reasonable investigations of potential mitigation evidence. The Court rejected counsel's "attempt to justify their limited investigation as reflecting a tactical judgment not to present mitigating

evidence at sentencing and to pursue an alternate strategy instead" because "counsel were not in a position to make a reasonable strategic choice" as "the investigation supporting their choice was unreasonable." *Wiggins*, 539 U.S. at 521, 536. As the Court explained, trial counsel's investigation was unreasonable because they "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 524.

The Court held that "any reasonably competent attorney would have realized that pursuing the[] leads [in public records] was necessary to mak[e] an informed choice among possible defenses . . . . Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless . . . ." *Id.* at 525. In other words, the limited information available to counsel operated as a "green light" to indicate the availability of potential mitigating evidence and to require counsel to investigate further unless and until they discovered additional information that operated as a "red light" to indicate that further investigation would be counterproductive or fruitless.

Applying AEDPA, this Court held that the state court's "assumption that the investigation was adequate . . . reflected an unreasonable application of *Strickland*" because "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28. The Court further held that the state court's "deference to counsel's strategic decision not 'to present every conceiva-

ble mitigation defense,' despite the fact that counsel based this alleged choice on what we have made clear was an unreasonable investigation, was also objectively unreasonable." *Id.* at 528 (citation omitted).

Strickland and *Wiggins* establish that once counsel are in possession of information that would lead a reasonable attorney to investigate further, it is unreasonable for counsel to halt their investigation unless and until further investigation yields additional information supporting a decision to do so.

B. The Kirkland Report Constituted A "Green Light" That Would Have Led Any Reasonably Competent Defense Attorney To Investigate Further

"In assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 688, 689). An objective review of counsel's performance measured against the norms prevailing in Alabama, as seen from their "perspective at the time," plainly demonstrates that their "investigation" of Wood's mental disabilities was unreasonable.

Investigations "into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins*, 539 U.S. at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)). In particular, "experienced capital defense

attorneys categorically reject the idea that the utility of evidence relating to the defendant's background or mental health can be determined before an investigation." Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 341-42 (1993); *see* Ala. Capital Representation Resource Ctr., *Alabama Capital Defense Trial Manual* (2d ed. 1992) at 27-28 ("Extensive pretrial investigation is absolutely critical in a capital case. . . . Counsel can never gather too many details concerning the facts and circumstances of each case"). Wood's counsel's performance fell far short of these norms, which prevailed in Alabama at the time of his trial.

The Kirkland Report revealed that Wood had significant mental impairments, including that he was "functioning, at most, in the borderline range of intellectual functioning." J.A. 328. In addition, the Report stated that Wood previously had been found to be "reading on a 3rd grade level" and was "still reading on less than a 3rd grade level" (J.A. 327), and that Wood "could not use abstraction skills much beyond the low average range of intellect." J.A. 328.

The information contained in the Kirkland Report would have put a reasonable defense lawyer on notice of Wood's significant mental impairments. Even ignoring Dr. Kirkland's cautionary "at most" formulation, evidence of borderline mental retardation is plainly mitigating. *See Williams,* 529 U.S. at 396 (counsel unreasonably failed to introduce evidence that Williams was "borderline mentally retarded"); *Tennard v. Dretke*, 542 U.S. 274, 287-88 (2004) ("impaired intellectual functioning [evidenced by an IQ score of 67] is inherently mitigating" and obviously evidence that "might serve as a 'basis for a

sentence less than death'"). Such evidence "is exactly the sort of evidence that garners the most sympathy from jurors." *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004); *see* John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 1035, 1051 (2008) ("data suggests that evidence of borderline mental retardation or other forms of cognitive impairments are important in many cases even though the mental retardation threshold is not satisfied"); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1539 (1998) (same). Indeed, at the sentencing hearing before the trial judge, Trotter briefly referred to the Kirkland Report as mitigating evidence "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." J.A. 88. In doing so, Trotter acknowledged (feebly and belatedly) the importance of mitigation evidence regarding Wood's mental impairments.[7]

Any reasonable defense attorney would have regarded the Kirkland Report as the beginning, and not the end, of an inquiry into Wood's mental impairments. That Report was prepared to assist the *court* in determining Wood's "competency to stand trial and

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[7] Under Alabama law at the time of Wood's capital trial, the jury issued an advisory verdict on sentencing, which the trial court could override. *See* ALA. CODE §§ 13A-5-46, 13A-5-47 (1994). But "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).

mental state at the time of the offense" (J.A. 323), and did not purport to fully evaluate Wood's intellectual functioning.[8] Nor did the finding of competency negate the potential for significant mental health mitigation evidence. "Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial." *Atkins*, 536 U.S. at 318. It follows that "[o]ne 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).

"In assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins,* 539 U.S. at 527. The Kirkland Report constituted a "green light" based on which "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Wiggins*, 539 U.S. at 525; *see Jells v. Mitchell*, 538 F.3d 478, 496 (6th Cir. 2008) ("counsel's awareness of Jells's unstable home environment and academic difficulties should have alerted them that further investigation by a mitigation specialist might [have] proved fruitful").[9]

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[8] In his Report, Dr. Kirkland referenced a separate November 1992 evaluation (*see* J.A. 327), which was not appended to that Report or provided to Wood before the penalty phase.

[9] Thus, the Eleventh Circuit misapplied *Wiggins* when it attempted to distinguish it on the grounds that Wood's counsel "investigated and knew about his borderline intellectual functioning *before* deciding not to present mental health evidence to the jury" and that "the post-conviction evidence was consistent with Dr. Kirkland's report and the other evidence already in

Indeed, Dozier testified that evidence of "mental health problems" would have been "relevant to the penalty phase" and counsel would "have presented [such evidence] at the penalty phase." J.A. 169. But in the five-month period between obtaining the Kirkland Report and trial, counsel took no steps to investigate the mental health problems revealed by that Report as Trotter told the court on the morning of the sentencing hearing. *See* J.A. 12.

The state court recited that Dozier "affirmed that they [counsel] diligently pursued the information that was contained within the Kirkland report." Resp. App. 48. Even if that statement were misconstrued as the state court's conclusion, rather than a characterization of Dozier's testimony, it amounts to a legal conclusion about counsel's conduct with no supporting factual basis. The only source of information, which the state court identified, that counsel obtained concerning Wood's mental deficiencies is the Kirkland Report itself. The state court did not make *any* findings of historical fact that counsel took any action, went anywhere, or spoke to anyone in an effort to follow up on that information.[10]

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counsel's possession." Pet. App. 58a n.28 (emphasis in original). The same was true in *Wiggins* where counsel "had *some* information with respect to petitioner's background" prior to the penalty phase. *Wiggins,* 539 U.S. at 527 (emphasis in original). But that did not mean that "they were in a position to make a tactical choice not to present a mitigation defense" because "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy." *Id.*

[10] Dozier had no specific recollection of reading the Kirkland Report prior to the trial, or meeting with or speaking to Dr. Kirkland. *See* J.A. 174. The only statement Dozier made about the Report is that "I think it indicated that Holly Wood had

On the contrary, the record reveals that consistent with Trotter's statement that "[n]o further investigation" of the Kirkland Report had been done (J.A. 12), counsel did not retain an independent psychologist to evaluate Wood for mitigation purposes, nor contact Wood's special education teachers or speak with his family concerning his experiences in special education, nor make any other effort to investigate further the information concerning Wood's mental disabilities in the Kirkland Report.[11] Moreover, counsel did not learn anything after obtaining the Kirkland Report that supported any decision to limit their investigation. As in *Wiggins*, merely reading the Kirkland Report and deciding not to follow up on the information contained in it was not a sufficient investigation because "counsel chose to abandon their investigation at an unreasonable juncture." *Wiggins*, 539 U.S. at 527.

While counsel are not required to run down blind alleys where "more promising" avenues lie open to inquiry (Resp. App. 51), there was never a "red light" that justified counsel's failure to pursue the mitigation issues raised by the Kirkland Report.[12] To the

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childhood problems at a younger age or something like that," but admitted that "I just don't recall all this" (J.A. 150), and later stated that "I don't think [Dr. Kirkland] discovered any childhood problems." J.A. 173. Thus, at best, Dozier's testimony amounts to speculation about information unrelated to Wood's mental deficiencies.

[11] Counsel's fee applications indicate that Dozier and Ralph reviewed the Kirkland Report on May 24 and that Trotter spoke to Dr. Kirkland for 30 minutes on May 10. *See* J.A. 313, 315, 319. Beyond that, there is no indication that counsel made any meaningful attempt to investigate Wood's mental condition.

[12] Counsel's failure to pursue these issues cannot be excused by the truism in every case that "counsel does not enjoy

extent that Wood's counsel made a conscious decision not to present evidence of Wood's mental impairments as mitigation (*see* Resp. App. 51), that decision was made without reasonable investigation, "making a fully informed decision with respect to sentencing strategy impossible." *Wiggins*, 539 U.S. at 527-28.

Indeed, Wood's counsel's performance fell far short of that which this Court held was ineffective in *Rompilla v. Beard*, 545 U.S. 374 (2005). In *Rompilla*, counsel's failure to "enquire further" occurred only after counsel had expended substantial effort "to find mitigating evidence by other means," including extensive interviews with family members and employing the services of *three* mental health experts who reported to counsel that they had found "nothing that could be used as mitigation evidence." *Id.* at 388-92; *Commonwealth v. Rompilla*, 721 A.2d 786, 790 (Pa. 1998). In contrast, Wood's counsel failed to conduct any meaningful investigation specifically of Wood's mental deficiencies, and as Trotter belatedly told the trial court, the Kirkland Report did not present a blind alley, but rather raised issues that "need further assessment." J.A. 12.

Accordingly, the state court's decision denying Wood's ineffective assistance claim involved an unreasonable application of *Strickland*, *Williams* and *Wiggins*.

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the benefit of unlimited time and resources." Resp. App. 51 (citation omitted). In light of counsel's "meager" mitigation presentation (J.A. 131 n.1) and the meager investigation that produced it, counsel's failure to pursue important information concerning Wood's mental disabilities as potential mitigation cannot be explained by any cost/benefit analysis regarding limitations on their time and resources.

II. THE STATE COURT DECISION WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT

Even if the state court's statement that Dozier affirmed that counsel "diligently pursued the information that was contained within Dr. Kirkland's report" (Resp. App. 48) were misconstrued as the state court's conclusion, rather than its characterization of Dozier's testimony, and also as an ultimate finding of fact, rather than a legal conclusion concerning counsel's conduct, the state court decision was based on an unreasonable determination of the facts in light of the entire state court record, much of which the state court simply ignored.

Under section 2254(d)(2), habeas relief is warranted where the federal court determines that a state court decision is "objectively unreasonable in light of the evidence presented in the state court proceeding." *Miller-El I*, 537 U.S. at 340 (*citing* § 2254(d)(2) and *Williams*, 529 U.S. at 399 (O'Connor, J., concurring)). That assessment "turns on a consideration of the totality of the 'evidence presented in the state court proceeding.'" *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004), *cert. denied*, 544 U.S. 1063 (2005).

This Court has held that the "objectively unreasonable" standard in section 2254(d)(2) imposes a highly deferential standard for federal court review of state court habeas decisions. *See Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007); *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). But the standard is not beyond reach and is met when the reviewing court concludes from examining all the evidence that

the determination of the facts falls outside the broad range of reasonable decision-making and that a different outcome is compelled. In *Miller-El II*, 545 U.S. at 265, involving claims of jury discrimination, this Court held that a petitioner was entitled to relief under section 2254(d)(2) where "[i]t is true . . . that at some points the significance of Miller-El's evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination."

As discussed below, the state court's decision that trial counsel conducted a diligent investigation of Wood's mental deficiencies raised in the Kirkland Report is objectively unreasonable based on the totality of the evidence in the state court record. A reasonable fact finder would be compelled to have ruled differently than the state court did. In Part II.A., we show that the Eleventh Circuit erred in making this determination because it applied the wrong test, requiring that the showing of unreasonableness be made by clear and convincing evidence, which reflects an improper merging of (d)(2) and (e)(1). In Part II.B, we show that had the Eleventh Circuit applied the correct test, it would have been compelled to find that the ultimate fact determination was unreasonable in light of the entire state court record. This is true for two separate but interrelated reasons. First, the facts, when viewed as a whole, are "too powerful" to lead to any other conclusion. Second, even if (e)(1)'s clear and convincing requirement is applied to the state court's subsidiary fact findings, there is clear and convincing evidence that those subsidiary fact findings are incorrect and cannot support the ultimate finding that Wood's trial counsel conducted a diligent investigation. Therefore, even if (e)(1)

applies to a case in which the evidence is limited to the state court record—contrary to the most sensible reading of the statute—Wood is still entitled to relief based on the facts in this case.

A. The Eleventh Circuit Used The Wrong Standard For Assessing The Reasonableness Of State Court Decisions Under Section 2254(d)(2), Which Is Distinct From, And Operates Independently Of, Section 2254(e)(1)

Two distinct sections of AEDPA govern the deference that a federal habeas court must give to state court factual determinations. Under 28 U.S.C. § 2254(d)(2), a federal court may grant a writ of habeas corpus where the state court's adjudication of the claim "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." Under 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct" by a federal court and "the applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

This Court has stated that sections 2254(d)(2) and (e)(1) are independent and should not be conflated as the Eleventh Circuit majority did in this case and as that court has done in other cases:[13]

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[13] *See LaMarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 942 (11th Cir. 2009) ("[T]he state courts made factual findings . . . and LaMarca has not refuted these findings by clear and convincing evidence. Thus, LaMarca has not demonstrated the state courts' decisions were 'based on an unreasonable determination of the facts.'") (citations omitted); *Freeman v. Attorney*

"AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence." *Miller-El I*, 537 U.S. at 341. In short, section 2254(d)(2) supplies a standard of review requiring a federal court to assess the reasonableness of the state court's "determination of the facts" in light of all the evidence presented in the state court record, whereas section 2254(e)(1) supplies a burden of proof for rebutting any specific state court "determination of a factual issue." It is thus "incorrect for the Court of Appeals, when looking at the merits, to merge the independent requirements of §§ 2254(d)(2) and (e)(1)." *Id*. at 341.

Consistent with the Court's holding in *Miller-El I*, where a habeas petitioner seeks relief "based entirely on the state record," a federal court reviews the state court's fact findings for their reasonableness under 2254(d)(2). *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004), *cert. denied*, 543 U.S. 1038 (2004). The additional requirements of 2254(e)(1) do not apply in that situation, because the "challenge . . . is governed by the deference implicit in the 'unreasonable determination' standard of section 2254(d)(2)." *Id.* at 1000. If, however, a habeas petitioner challenges state court factual findings

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General, 536 F.3d 1225, 1234 (11th Cir. 2008) (affirming denial of habeas relief where the petitioner "has not demonstrated by clear and convincing evidence that the findings of the state court were unreasonable in light of the evidence presented during the post-conviction evidentiary hearing"), *cert. denied*, 129 S. Ct. 921 (2009); *Gilliam v. Sec'y for the Dep't of Corr.*, 480 F.3d 1027, 1032 (11th Cir. 2007) ("for a writ to issue because the state court made an 'unreasonable determination of the facts,' the petitioner must rebut 'the presumption of correctness by clear and convincing evidence'") (alteration omitted) (citation omitted), *cert. denied*, 128 S. Ct. 1697 (2008).

based in part on evidence that is extrinsic to the state court record, 2254(e)(1)'s requirements "come into play once the state court's fact-findings survive any intrinsic challenge" under 2254(d)(2). *Id*. In other words, those findings are presumed correct unless rebutted by clear and convincing evidence *that was not part of the state court record* (and was appropriately introduced in the federal habeas proceedings under 2254(e)(2)). *See id*.; *see also Lambert*, 387 F.3d at 235 ("the language of § 2254(d)(2) and § 2254(e)(1) implies an important distinction: § 2254(d)(2)'s reasonableness determination turns on a *consideration of the totality of the 'evidence presented in the state-court proceeding*,' while § 2254(e)(1) contemplates a challenge to the state court's individual factual determinations, including a challenge based wholly or in part on evidence outside the state trial record") (emphasis added);[14] 1 Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure* § 20.2c (5th ed. 2005) (courts should consider first whether a state court's fact findings are reasonable under § 2254(d)(2), and if they are, only then should they apply § 2254(e)(1)'s presumption of correctness).

Although sections (d)(2) and (e)(1) are related to the extent that they both refer to a state court's factual findings, the plain language and structure of

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[14] In *Lambert*, the Third Circuit noted that some courts have concluded that application of (d)(2) should precede application of (e)(1), while others have found that application of (e)(1) should precede (d)(2). *Id.* at 236 n.19. The Third Circuit "adopt[ed] no rigid approach to habeas review," concluding that a federal court might apply those provisions in either order. *Id.* In either event, the Third Circuit made plain that "before the writ can be granted, petitioner must show an unreasonable determination—under (d)(2)—in *light of the entire record in the original state court trial*." *Id.* (emphasis added).

the statute demonstrate that they should not be imposed on top of each other as the Eleventh Circuit majority did in this case. Indeed, Congress' placement of these provisions in separate sections clearly demonstrates that they operate independently because courts must "give effect, if possible, to every clause and word of a statute." *Williams*, 529 U.S. at 404 (citations omitted); *see also Lambert*, 387 F.3d at 235 ("We . . . read § 2254(d)(2) and § 2254(e)(1) together as addressing two somewhat different inquiries" because "it is a cardinal rule of statutory interpretation that we must 'give effect, if possible, to every clause and word of a statute'") (citation omitted); *Taylor*, 366 F.3d at 999 ("We interpret these provisions sensibly, faithful to their text and consistent with the maxim that we must construe statutory language so as to avoid contradiction or redundancy"). As this Court stated in *FDA v. Brown & Williamson Tobacco Corp.*:

> It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole."

529 U.S. 120, 133 (2000) (citations omitted).[15]

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[15] If Congress had intended the clear and convincing evidence burden of (e)(1) to apply to the unreasonableness standard in (d)(2) it would have added that provision to subsection (d) instead of placing it in subsection (e) with the rules governing federal court evidentiary hearings.

Overlaying the burden of proof supplied in section (e)(1) on the standard of review supplied by section (d)(2) would render the statute "incoherent." *See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 625-26 (1993). Congress did not enact such an incoherent statute. Rather, the statute refers in distinct sections to the different functions performed by a federal court in a federal habeas proceeding "in language appropriate to each." *Id*. at 624. It supplies a standard of review in section (d)(2) when the federal court acts as a reviewing court of state court factual determinations, and a burden of proof for rebutting state court factual findings when the federal court acts as an independent fact finder.

Moreover, the plain language of the provisions confirm that they operate independently to supply different standards for the two different capacities in which federal courts may act in federal habeas proceedings. The plain language of section (e)(1) specifies that a state court determination of a factual issue is "presumed to be *correct*" and that a federal habeas petitioner must rebut that "presumption of *correctness*" by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (emphasis added). In stark contrast, section (d)(2) requires the federal court to assess whether the state court decision was based on an "*unreasonable*" determination of the facts—not whether the facts are *correct*. 28 U.S.C. § 2254(d)(2). If Congress had intended the (e)(1) clear and convincing burden of proof to govern the (d)(2) standard of review for reasonableness, it would have written (e)(1) in terms of rebutting a presumption of reasonableness, rather than rebutting a presumption of correctness.

Furthermore, if rebutting individual state court fact findings under (e)(1) were a prerequisite to the grant of relief under (d)(2), state courts would have a perverse incentive to engage in little or no fact finding to insulate their decisions from any meaningful review. If the state court does not make fact findings, then none can be rebutted by clear and convincing evidence. And, if rebuttal of state court fact findings by clear and convincing evidence is a prerequisite to a finding that the state court decision was an unreasonable determination of the facts, then no such finding could follow where the state court engages in little or no fact finding. Surely, Congress did not intend that "far reaching and seemingly perverse" result. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998). Instead, as set forth above, the standard of review found in (d)(2) and the burden of proof found in (e)(1) are separate provisions that fit together comfortably.

Contrary to Congressional intent as reflected by the language and structure of the statute, the Eleventh Circuit majority erroneously merged the clear and convincing evidence burden of proof set forth in section (e)(1) with the unreasonableness standard of review set forth in section (d)(2), by finding that Wood failed to show that the state court made an unreasonable determination of the facts because he failed "[a]t a minimum" to present "clear and convincing evidence" against that determination. Pet. App. 50a n.23. In other words, the Eleventh Circuit majority effectively superimposed section 2254(e)(1) on section 2254(d)(2) and required Wood to establish an unreasonable determination of the facts by clear and convincing evidence as a prerequisite to relief under section 2254(d)(2). That improper application of the burden expressed in (e)(1) for rebutting *individual*

factual findings in certain circumstances caused the Eleventh Circuit majority to lose sight of the totality of the state court record and of its statutory duty to make an *overall reasonableness determination* in light of that record. In doing so, the Eleventh Circuit majority imposed "too demanding a standard" on Wood that Congress did not intend, and disregarded this Court's teaching that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." *Miller-El I*, 537 U.S. at 340-41.

B. If The Eleventh Circuit Had Applied The Correct Standard, It Would Have Been Compelled To Find That The State Court's Ultimate Decision That Counsel Adequately Investigated The Information Concerning Wood's Mental Impairments In The Kirkland Report Was Objectively Unreasonable

Applying the proper standard under section 2254(d)(2), the state court determination was an objectively unreasonable determination of the facts in light of the totality of the state court record. This is true whether the evidence (including the evidence on which the state court did not make fact findings) is viewed as a whole, as it should be under section 2254(d)(2), or whether the subsidiary fact findings the state court *did* make are evaluated under (e)(1)'s "clear and convincing" requirement.[16] Either way, as the analysis below demonstrates, the ultimate determination that Wood's trial team adequately investi-

[16] To rebut a factual finding by "clear and convincing evidence," it must be "highly probable" that the finding was erroneous. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

gated the crucial evidence revealed in the Kirkland Report is an objectively unreasonable determination of the facts.[17]

The Alabama Supreme Court, after describing counsel's penalty phase presentation variously as "meager," "scant," and consisting of "little evidence," "conclude[d] that neither the jury nor the trial judge acted unreasonably by finding that no mitigating circumstances existed in Wood's case." J.A. 131. Counsel's "meager" presentation was the product of an equally meager investigation, which did not include any further investigation of Wood's significant mental impairments revealed in the Kirkland Report.

The totality of the state court record shows that, in concluding otherwise, the state court failed to consider contemporaneous evidence of *what actually happened* leading up to and during the penalty phase. The state court's failure to consider this evidence renders unreasonable the state court's determination that counsel conducted further investigation into Wood's mental deficiencies that were raised in the Kirkland Report.

Trotter's statement on the morning of the penalty phase—that counsel had done no "further inves-

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[17] Although *Miller-El I* makes clear (537 U.S. at 341) that it is never appropriate to impose (e)(1)'s clear and convincing requirement *on top of* the petitioner's burden of showing objective unreasonableness under (d)(2), some courts have expressed their lack of confidence in subsidiary state court fact findings by noting that there was clear and convincing evidence that such findings were incorrect. Although this use of (e)(1) in a case where the facts are limited to the state court record is contrary to what we believe is the proper relationship between (d)(2) and (e)(1), we address it here to show that even under this approach, Wood is entitled to relief.

tigation" of the "psychological problems" identified in that Report (J.A. 12)—belies any finding that counsel conducted such an investigation. The state court's conclusion is further undercut by the undisputed fact that, after the penalty phase before the jury, but before sentencing by the trial court, Trotter wrote to his co-counsel reiterating that "we should request an independent psychological evaluation—even if that means asking for a postponement of the sentencing hearing [before the judge]." J.A. 343, 345. This contemporaneous documentary evidence further demonstrates that Trotter realized he had not done a reasonable investigation of potential mental health mitigation, rendering any decision with respect to the presentation of such evidence unreasonable. Moreover, the failure to follow through and request an independent psychological evaluation at that late date also was unreasonable because it was not based on a weighing of the pros and cons for Wood. Rather, it was based solely on Dozier's and Ralph's belief "that the judge would never grant a continuance." J.A. 285.[18]

As in *Wiggins*, the "record of the actual sentencing proceedings underscores the unreasonableness of

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[18] Counsel made no meaningful effort to obtain the independent psychological examination that Trotter belatedly concluded was necessary to a reasonable investigation of Wood's mental disabilities. As the trial court noted, counsel lodged no objection to proceeding with the penalty phase on the morning following the guilty verdict. J.A. 98. Moreover, in the six weeks between the jury's sentencing recommendation and the sentencing hearing before the trial court, counsel never followed through on the trial judge's statement that he would consider Wood's request for an independent psychological evaluation after the jury had rendered its penalty verdict and been released. J.A. 285.

counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526. When viewed in light of that record, "the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." *Id.* at 526-27. Here the state court decision does not even acknowledge the evidence of what counsel actually said and did during the penalty phase, much less analyze it in any meaningful way. *See, e.g., Guidry v. Dretke*, 397 F.3d 306, 326-27 (5th Cir. 2005) ("The state trial court's omission, without explanation, of findings on evidence crucial to Guidry's habeas claim, where the witnesses are apparently credible, brought into question whether, under subpart (d)(2), its 'decision . . . was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding'"); *Taylor*, 366 F.3d at 1008 ("Failure to consider key aspects of the record" resulted in a decision that was based on "an 'unreasonable determination of the facts'" in light of the state court record).

The Eleventh Circuit majority attributed the state court's determinations that Wood's counsel "made a reasonable judgment that another mental health evaluation was not necessary" and "could have decided against seeking another mental health evaluation, in order to prepare other, more promising defenses for trial" (Resp. App. 51) and other aspects of the mitigation investigation solely to Dozier, whom both courts labeled as "experienced" counsel. Pet. App. 50a, 58a. But Dozier could only speculate about what he "would have" done with respect to events *six*

years prior to his testimony because he had no specific recollection about what trial counsel did or why at the penalty phase, and had "no files" from Wood's case that might shed light on those issues. J.A. 146. Dozier could not recall making the supposed decision attributed to him:

> Q. Did you ever consider using Dr. Kirkland's report, the evaluation that we discussed, at the penalty phase?
>
> A. I don't recall. I'm sure I might have presented it at the sentencing phase. It's part of the court record, so I'm sure it was introduced somewhere.
>
> * * *
>
> Q. Did you, in fact, make a determination not to present evidence based on anything you read in Kirkland's report?
>
> A. I don't recall.

J.A. 168, 171. Dozier's testimony, which is riddled with "I don't recall," provides no basis for the state court's factual determinations.

Moreover, Dozier testified that he and Ralph "basically designated Trotter to do the sentencing aspect" of the trial. J.A. 139. According to Trotter, that decision was made by Dozier and Ralph "[s]hortly before the trial." J.A. 270. Trotter, who had no relevant experience, did not recall considering Wood's borderline mental retardation at all. J.A. 288. Trotter could not recall to what extent or when he might have talked with Dozier and Ralph about the penalty phase presentation "if I spoke to anybody about it." J.A. 277. In an August 1994 letter to an attorney at the Southern Poverty Law Center,

Trotter complained that he did not "have anyone with whom to discuss the case, including the two other attorneys." J.A. 350. This problem was the result of a mitigation effort that was disorganized, lax, and inept. As a result, it is highly probable that counsel's actions did not result from a strategic decision informed by a reasonable investigation of Wood's mental deficiencies, but rather from inattention and neglect.

In addition, the state court's determinations that counsel "testified that they would have used anything in Dr. Kirkland's report that was helpful to them" and "would have presented any information in their possession about Wood's mental health" (Resp. App. 48) are simply irrelevant. What matters is what counsel actually did or did not do, not what they hypothetically *would* have done. The Kirkland Report plainly contained "helpful" mitigation concerning "Wood's mental health." Counsel not only failed to use that information, they also did nothing to investigate it and develop independent sources of evidence about the mental impairments which Dr. Kirkland identified.[19]

In an attempt to buttress counsel's mitigation investigation, the state court and Eleventh Circuit majority noted other activities in which counsel engaged. Pet. App. 39a-40a, 56a-57a. But those activities amounted to little more than interviews with Wood's family members and other attempts to collect general background information on which counsel failed to follow through and which were unsuccessful, as discussed in further detail below. None of that

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[19] Dozier testified that this type of information would be relevant at the penalty phase. J.A. 169

evidence bears on any supposed investigation of Wood's mental impairments revealed by the Kirkland Report, and the state court determination that counsel further investigated those matters based on such evidence is unreasonable and is rebutted by clear and convincing evidence.

The state court found that "Trotter met with Wood's family." Pet. App. 201a. According to Trotter, he met with Wood's family at the courthouse and "that is how [he] identified the witnesses that we used at the penalty phase." J.A. 277. At the Rule 32 hearing, two of Wood's sisters testified that they did not meet Trotter at the courthouse until after Wood had been convicted. (R. Vol. 16, Sept. 18, 2000 Tr. 171; R. Vol. 17, Aug. 22, 2001 Tr. 121.) In any event, none of Wood's family members testified at trial concerning his mental impairments.

Although the state court found that "trial counsel used the services of a private investigator, who prepared reports for use in preparing Wood's defense" (Pet. App. 201a; *see* Pet. App. 56a-57a), it did not find that the investigator was ever asked to develop any information about Wood's mental functioning or that he took any steps to do so. On the contrary, the investigator's contemporaneous notes of his witness interviews, which he confirmed represented the total substance of the interviews, show that he focused solely on guilt/innocence issues—not on potential mitigation evidence. J.A. 361-68.

The state court also found that "[c]ounsel . . . attempted to get information from Wood's schools" and "contacted individuals at Luverne High School" (Pet. App. 201a; *see* Pet. App. 57a), but this "attempt[ ]" was feeble and ineffective. The record shows that, after issuing a subpoena to Luverne High School,

Trotter placed two very brief phone calls to the school, which he reported as consuming between 15 and 20 minutes in total. J.A. 267, 320. But he failed to enforce the subpoena, obtained no school records, and made no effort to contact any of Wood's teachers. J.A. 267.

Similarly, the state court found that "counsel sought information from the Alabama Department of Pardons and Paroles, the Alabama Department of Corrections, and the Department of Human Resources." Pet. App. 201a-02a; *see* Pet. App. 57a. But because counsel neglected to enforce the trial court's discovery order, they obtained no records until the morning of the penalty phase hearing before the jury, when they obtained records from the State Board of Pardons and Paroles. However, the documents did not arrive until after the proceedings had begun (J.A. 13-14), thereby precluding any realistic chance of making any significant use of or conducting further investigations based on information in the documents.

The state court also characterized the record as "silent" on the issue of why trial counsel did not call Dr. Kirkland as a witness. Resp. App. 52. Based on that characterization, the state court indulged a presumption that Wood's trial counsel made a reasonable professional judgment "that calling Dr. Kirkland to testify was not in Wood's best interest." Resp. App. 52. But whether trial counsel made a decision not to call Dr. Kirkland as a witness is beside the point. As set forth above, the Kirkland Report was prepared for the specific purpose of advising the court and the parties whether Wood was competent to stand trial or presented issues warranting a special plea based on his mental state at the time of the crime. It did not contain the type or

amount of information that an investigation of potential mitigation evidence would have produced. Obtaining the Kirkland Report did not excuse counsel from pursuing their obligation to investigate Wood's mental impairments for penalty phase purposes. The potential mitigation evidence referred to in the Report was available from other sources, through whom it could have been presented to the jury.

In sum, as the Eleventh Circuit dissent concluded, the "only reasonable reading of the record" is that trial counsel "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.

III. COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED WOOD

It is well-established that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (citation omitted). In making that inquiry, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek v. Texas*, 428 U.S. 262, 276 (1976); *see also Gregg v. Georgia*, 428 U.S. 153, 204 (1976) ("We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision"). "[I]t is only when the jury is given a vehicle for expressing its reasoned moral response to

that evidence in rendering its sentencing decision, that we can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence." *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (internal quotations omitted).

Wood's trial counsel did not present a complete picture to the sentencing jury, which resulted in an unreliable sentencing determination. Trial counsel failed to present and the jury did not consider the "inherently mitigating" evidence of Wood's significant mental impairments (*Tennard*, 542 U.S. at 287-88), which "is exactly the sort of evidence that garners the most sympathy from jurors." *Smith*, 379 F.3d at 942. The jury never heard the undisputed testimony of three independent psychologists, including two retained by the State, that Wood has an IQ in the 60s, which constitutes significant deficits in intellectual functioning within the definition of mental retardation. Nor did the jury hear the undisputed testimony that Wood's reading, spelling and arithmetic abilities are at elementary school levels, which is "an area that he functions in the mentally retarded range." J.A. 507; *see also* J.A. 443 (on the Wide Range Achievement Test, Wood had "a reading score of sixth grade and a third grade math and a third grade spelling" score). The jury also did not consider the testimony of Wood's special education teachers about his placement in special education classes and his classification as "educable mentally retarded." J.A. 403, 413, 419. Most students functioned at first through third grade levels and Wood functioned in the "middle to low" range of the special education students. J.A. 403, 414.

Evidence of Wood's mental deficiencies was critical information necessary for the jury's consideration of whether death was an appropriate punishment. Indeed, in light of his borderline mental retardation, Wood shares many of the characteristics exhibited by mentally retarded individuals that led this Court to conclude that their "deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." *Atkins*, 536 U.S. at 318. There is a reasonable probability that evidence of Wood's mental impairments would have changed at least one juror's calculus of his moral culpability because of Wood's "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id*. at 318.[20]

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[20] The statement Wood made to the court in this case just before his death sentence was formally imposed shows the diminished mental capacity of someone who spent his youth in special education classes held in the school's basement:

> THE COURT: Mr. Wood, do you wish to say anything at this time?
>
> DEFENDANT WOOD: Yeah, I want to say, if I had committed the offense on Salter's testimony as far as what he done told, they believed from what Salter have told them on the statement, all these statements what he made against me. Three statements saying that I killed the Gosha girl—How can they say I killed her? What do they have to say that I killed her? Salter done told all kind of lies, testimony, different things, people in the street. How can they say that I killed her? He done made all kind of lies. He got on the witness stand and said his testimony, all that statement he made wasn't true. He perjured right there on the witness stand from the testimony.

J.A. 89.

As in *Williams*, "the reality that [Wood] was borderline mentally retarded, might well have influenced the jury's appraisal of his moral culpability." *Williams*, 529 U.S. at 398 (citations and internal quotations omitted).

But the jury never learned anything about Holly Wood's mental deficits before voting 10 to 2 for the death sentence. Instead they heard personal pleas for mercy from two of his siblings, evidence that "during his childhood his family had experienced difficult times" and that Wood had been drinking at the time of his arrest, and a parole board report remarking that he needed "anger induced, acting out and reality therapy." J.A. 131. In light of that meager presentation, the Alabama Supreme Court "conclude[d] that neither the jury nor the trial judge acted unreasonably by finding that no mitigating circumstances existed in Wood's case." *Id*. Trotter's brief and uninspired presentation[21] did not give the jury a vehicle through which to express its "reasoned *moral* response" and to make a reliable determination that death was the appropriate sentence for Wood in light of all the relevant information bearing on that issue. *Penry v. Johnson*, 532 U.S. at 788 (emphasis in original).

Wood's jury recommended a death sentence by a vote of 10 to 2, which was the minimum required for such a recommendation under Alabama law. ALA. CODE § 13A-5-46. Had trial counsel's presentation been supplemented with the powerful evidence of

[21] Trotter realized the limits of the mitigation evidence he presented and even acknowledged in his closing statement to the jury that "it may not be enough for you" when "you are weighing these mitigating factors, and these aggravating factors." J.A. 68.

Wood's significant mental impairments, there is a reasonable probability that at least one additional juror would have "struck a different balance" and concluded that the mitigating evidence outweighed the aggravating evidence. *Wiggins*, 539 U.S. at 537. Evidence of mental impairments "is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

The state court's contrary decision is an unreasonable determination of the facts based on the state court record and an unreasonable application of clearly established federal law. The state court found that the evidence would not have altered the trial court's determination "that the three aggravating circumstances 'far outweigh' the mitigating circumstances" or the jury's death penalty recommendation in light of the "brutal[]" nature of the crime. Resp. App. 55. But the State conceded and the trial court expressly found that there was no evidence that could establish the distinct aggravating circumstance that the crime was "heinous, atrocious and cruel." J.A. 9, 106. Thus, the crime was not so heinous as to foreclose the jury from returning a verdict of life in prison had they been presented with the available evidence of Wood's mental impairments.

Indeed, in *Williams*, the prosecution presented evidence that following the murder of the victim, the defendant "savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to

having strong urges to choke other inmates and to break a fellow prisoner's jaw." *Williams v. Taylor,* 163 F.3d 860, 868 (4th Cir. 1998), *rev'd*, 529 U.S. 362 (2000). This Court nevertheless found that the defendant was prejudiced by his counsel's failure to uncover powerful mitigation evidence, including that he was "borderline mentally retarded." *Williams*, 529 U.S. at 396; *accord Rompilla*, 545 U.S. at 393 (finding prejudice where counsel failed to present mitigating evidence of the defendant's abusive childhood and mental health issues in a case where defendant had repeatedly stabbed the victim and set him on fire).

The state court also relied on its "finding that Wood is not mentally retarded" as "further support[] [for] the conclusion that there is no reasonable probability that the presentation of evidence concerning his alleged mental retardation would have affected the outcome of the case." Resp. App. 56. That also constitutes an unreasonable application of clearly established federal law, including *Williams*, which makes plain that borderline mental retardation is powerful mitigation evidence and the failure to investigate and present such evidence is prejudicial. *See Williams*, 529 U.S. at 396-98.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the United States Court of Appeals for the Eleventh Circuit, and grant the petition for a writ of habeas corpus.

Respectfully submitted,

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