No. 08-9156

In the
Supreme Court of the United States

HOLLY WOOD,
Petitioner,
v.
RICHARD ALLEN, Commissioner,
Alabama Department of Corrections, *et al.*,
Respondents.

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

BRIEF OF RESPONDENTS

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(CAPITAL CASE)

QUESTIONS PRESENTED

At defense counsel's request, Dr. Karl Kirkland conducted a pre-trial mental health evaluation of Petitioner Holly Wood. In his report, Dr. Kirkland noted that, while Wood was "functioning in the borderline range of intellect," he suffered from no "mental disorder" that prevented him from remembering or understanding the criminality of his alleged offense: fatally shooting his ex-girlfriend. Dr. Kirkland's report also contained details of Wood's 18 other arrests, including Wood's admission that he shot a previous ex-girlfriend in a similar manner, for a similar reason.

Wood's trial team did not seek another mental health evaluation. Nor did they present any such evidence to the penalty phase jury. Wood claims this was ineffective assistance of counsel. The questions presented are:

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

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

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents agree with Wood's assessment of the relevant Constitutional and statutory provisions in this case, with one caveat. Pet. 2-3. Because the second question presented requires the Court to address the effect of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") on the statutory presumption of correctness granted to state courts' factual findings, Respondents present both the pre-AEDPA (former § 2254(d)) and post-AEDPA (§ 2254(e)) presumption of correctness statutes in the Appendix. *See infra* at 2a-4a. To assist the Court with the first question presented, we also replicate AEDPA's bar to relief, 28 U.S.C. § 2254(d), in the Appendix. *See infra* at 1a.

INTRODUCTION

Holly Wood believed that his ex-girlfriend was dating another man, so he snuck into her home and shot her in the head while she slept.

Five months before Wood's capital murder trial, his trial team received the results of Wood's pre-trial competency evaluation ("the Kirkland Report"). The Kirkland Report revealed that Wood possessed "an IQ in the borderline range of intellect" and read at a "3rd grade level." J.A. 327, 330. The report concluded, however, that Wood's "thinking was goal directed and logical" and his subaverage intellect did not "detract from his ability to appreciate the

criminality" of his conduct. J.A. 330. The report also revealed that Wood had been arrested on 18 previous occasions, had "problems with anger and impulse control," and admitted to shooting his previous ex-girlfriend "after seeing her with another man." J.A. 326-27. Counsel did not seek another evaluation. Instead, they moved to suppress "all psychiatric and psychological evidence" during the guilt and penalty phases. Trial Record Vol. 8 at 375-77.

In his state post-conviction petition, Wood claimed that, after reading the Kirkland Report, reasonable counsel would have investigated and presented mitigating "evidence of Mr. Wood's mental retardation and mental disability." J.A. 235-39. Six state judges unanimously concluded that, as a matter of historical fact, Wood's trial team "determined that nothing in that report merited further investigation" and that "counsel decided that calling Dr. Kirkland to testify was not in Wood's best interest." BIO App. 51. Based on this factual determination, the state courts ruled that counsel acted reasonably under *Strickland v. Washington*, 466 U.S. 668 (1984).

This Court limited certiorari review to two questions, both directed at the factual determination that trial counsel made a "strategic decision" not to continue their pursuit of mental health evidence and not to present such evidence to Wood's penalty-phase jury. Pet. i.; s*ee* 28 U.S.C. § 2254(d)(2). But in his § 2254(d)(2) argument, Wood pays scant attention to the factual conclusion outlined in the question presented. *See* Blue Br. 35-51. Instead, Wood rebuts the antithetical notion that "counsel conducted *further* investigation into Wood's mental deficiencies

that were raised in the Kirkland Report" (Blue Br. 44, emphasis added)—a notion that Wood twice acknowledges was not the state courts' factual conclusion. *See* Blue Br. 32, 35.

Presumably for that reason, Wood demotes his § 2254(d)(2) argument to secondary status, in favor of a § 2254(d)(1) claim that the state courts unreasonably applied *Strickland* by ruling that counsel reasonably halted their mental health investigation. But that issue is not fairly included in the questions presented. Pet. i. Nor does it have merit for a simple reason: Pursuing a mental-deficiency-based mitigation defense would have opened the door to the devastating rebuttal evidence contained in the Kirkland Report, especially Wood's shooting assault of his previous ex-girlfriend. That is precisely what occurred during Wood's post-conviction proceedings. The court of appeals' decision should be affirmed.

STATEMENT OF THE CASE

I. WOOD'S VOLATILE RELATIONSHIPS

Wood challenges his death sentence for fatally shooting his ex-girlfriend, Ruby Gosha. But Wood's story begins nine years earlier, with the non-fatal shooting of his previous ex-girlfriend, Barbara Siler.

A. The Assault of Barbara Siler and The McClaren Report

Barbara Siler ended her "abusive" relationship with Wood after one argument in which the Sheriff was summoned. J.A. 478-80. Ms. Siler's mother instructed Wood never to return to the Siler home.

J.A. 480. But he did. One night, Wood sent a friend to the Silers' door to coax Barbara outside. J.A. 480-81. When she refused, Wood shot Barbara Siler through a window. J.A. 481. She survived.

In January 1985, Wood pleaded guilty to assaulting Ms. Siler, and he was sentenced to 15 years imprisonment. J.A. 21-22. Five years later, Wood was paroled. Trial Tr. Vol. 8 at 417. While on parole, Wood was arrested for escaping a police officer during a traffic stop. J.A. 393-401.

Pending his escape trial, Wood was examined for competency by Dr. Michael D'Errico. J.A. 579-82. In his final report ("the McClaren Report"), Dr. D'Errico opined that Wood functioned "in the borderline range of general intelligence."[1] J.A. 580-81. Dr. D'Errico also noted, however, that (1) Wood's memory was "fully intact;" (2) his "structure of thought was normal;" and, (3) Wood admitted that he knew "escap[ing] from law enforcement [was] against the law." J.A. 580-81. In summary, Dr. D'Errico determined that Wood's "mental status appear[ed] essentially normal except for the possibility that he function[ed] within the level of borderline intelligence." J.A. 582.

Wood's escape charge was *nol prossed*, and in June 1993, he was again released on parole to live with Ruby Gosha, his new girlfriend and the mother of his child. J.A. 325; Trial Tr. Vol. 6 at 1046.

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[1] Dr. Harry McClaren's name appears on the letterhead of Dr. D'Errico's report. J.A. 579. The parties and lower courts have therefore referred to Dr. D'Errico's findings as the "McClaren Report."

B. The Murder of Ruby Gosha

Wood's relationship with Ms. Gosha soured, and Wood became "very angry" when he discovered that Ms. Gosha was dating another man named "Amp." J.A. 50. Wood tried to stab Ms. Gosha in the heart through an open car window. Trial Tr. Vol. 3 at 420-22, 504. While Ms. Gosha successfully fought off Wood's first attempt on her life, she lost the use of two fingers when her wrist was slit during the struggle. *Id.* at 420.

Wood's second attempt was successful. On the afternoon of September 1, 1993, Wood and his cousin Calvin Salter traveled to the Gosha home. *Id.* at 414, 455-58. An argument ensued, and like Barbara Siler's mother, Ruby Gosha's mother informed Wood "that she wanted him there no more." *Id.* 420, 457. As he left, Wood told Ruby Gosha, "I will get you some day." *Id.* at 420. Later that night, he did.

As Wood and Salter drove around that evening, they spotted Amp's car. *Id.* at 487. Wood asked Salter to follow Amp, and he told Salter that "if he caught [her], Ruby Lois, and Amp together, he was going to kill her." *Id.* at 488. Salter complied, and at Wood's direction, he stopped near the Gosha residence. *Id.* at 488-90. Wood concealed a shotgun in his clothing and walked toward the house alone. *Id.* at 490-94. Wood snuck into the house through an open back door, placed the shotgun to the head of a sleeping Ruby Gosha, and pulled the trigger. *Id.* at 433, 440-41, 494-95. Ms. Gosha died from the blast.

As Wood and Salter sped away, Wood confessed that he had murdered Ms. Gosha and that "he

[knew] the police was coming." *Id.* at 496. So, as Salter drove, Wood tossed shotgun shells out the window, *Id.* at 495-96, and he buried the murder weapon in the woods behind his father's house. *Id.* at 499. During the getaway, Wood bragged, "I shot that bitch in the head, and blowed her brains out, and all she did was wiggle." *Id.* at 495.

II. WOOD'S TRIAL AND THE KIRKLAND REPORT

Wood was charged with the capital offense of intentional murder during a burglary. Ala. Code § 13A-5-40(4). He was appointed a team of three attorneys. Lead counsel, Cary Dozier, had practiced law for more than 20 years, including time as an Assistant Attorney General, a chief deputy District Attorney, and a clerk for a judge on the Alabama Court of Criminal Appeals. J.A. 138. Dozier had prosecuted "probably over a hundred" criminal trials and represented "probably over a thousand" criminal defendants, including two or three capital murderers. J.A. 144. Frank Ralph had practiced law for more than 30 years and had previously defended 50 felony trials. J.A. 189-90. Kenneth Trotter was a recent graduate of Vanderbilt Law School, and Wood's case was his first jury trial. J.A. 259-60. Dozier also hired a private investigator to assist the team. J.A. 151-52.

Dozier requested that Wood be evaluated for mental competency seven months before trial. Trial Record, Vol. 7 at 216-218. As Dozier later testified, one reason for the evaluation was to "get a lead on some possible mitigating evidence." J.A. 150. The request was granted, and Wood was evaluated by Dr. Karl Kirkland. J.A. 323.

As part of his evaluation, Dr. Kirkland reviewed Wood's Department of Corrections file, which contained a recent mental evaluation of Wood ("the Kilby Evaluation"). J.A. 325-27. Like the McClaren Report, the Kilby Evaluation concluded that Wood's IQ was in the "borderline range of intellectual functioning" and that Wood read at a third-grade level. J.A. 327. Dr. Kirkland concurred, finding that Wood "is at least functioning in the borderline range of intellect" and "is still reading on a less than third grade level." J.A. 329-30. Dr. Kirkland went on to explain that "[t]here was not a mental order present that would detract from [Wood's] ability to appreciate the criminality" of shooting Ruby Gosha. J.A. 330. To the contrary, Wood exhibited "a normal thought process," a "concrete reasoning ability," and "[h]is thinking was goal directed and logical." J.A. 327-28.

Wood made several admissions to Dr. Kirkland. Wood admitted that he suffered from "poor anger control" and "felt injurious to others in the past." J.A. 327-28. He admitted shooting Barbara Siler "after seeing her with another man." J.A. 326. He acknowledged that he had never suffered from head injuries or diseases. J.A. 326. He professed to be sober on the day of Ruby Gosha's murder. J.A. 326, 330. Furthermore, Dr. Kirkland's report listed Wood's 18 arrests, including arrests for harassment, disorderly conduct, and theft of property (three times). J.A. 326-27.

Dr. Kirkland completed his report on May 13, 1994. J.A. 323. Trotter's post-trial fee declaration shows that he spoke with Dr. Kirkland three days prior. J.A. 319. Dozier and Ralph's fee declarations

show that both men reviewed a psychological report on May 24, 1994. J.A. 313-15.

Wood's trial team did not seek another mental evaluation. Instead, two months before trial, they filed a motion to "suppress all psychiatric and psychological evidence" and to require the State to proffer "all witnesses and exhibits" it "intend[ed] to employ" in the penalty phase. Trial Record Vol. 8 at 375-77. As Trotter explained at a pre-trial hearing, based on "the report that was done at Taylor Harden [*i.e.* the Kirkland Report]," Wood sought to prevent any "psychological evidence or argument" that he was "prone to violent behavior" from being introduced to the jury in either the guilt or penalty phases. Trial Tr. Vol. 1 at 72-73.

After a four-day trial, Wood was convicted of capital murder. J.A. 8.

III. THE DUAL PENALTY PHASE

In Alabama, capital sentencing is bifurcated. Immediately after conviction, a penalty phase trial is held before the same jury, which issues a non-binding "advisory verdict." Ala. Code § 13A-5-46. After the jury renders its recommendation, the presiding judge orders a "pre-sentence investigation report." Ala. Code § 13A-5-47(b). Once the report is finalized, the judge hears final arguments and imposes the sentence based upon evidence presented at trial, at the sentencing hearing, and in the presentence investigation report. Ala. Code §§ 13A-5-47(c-e).

Here, the State proved three aggravating circumstances. First, the jury's guilt phase verdict established that Wood murdered Ms. Gosha during a burglary. Ala. Code § 13A-5-49(4). Second, the State proved that Wood was "under sentence of imprisonment" (serving parole) at the time of the murder. Ala. Code § 13A-5-49(1). Third, the State offered a certified copy of Wood's conviction for assaulting Barbara Siler, a "prior crime of violence." Ala. Code § 13A-5-49(2). The State attempted to call Ms. Siler to provide details of the shooting, but Trotter and Ralph successfully prevented her testimony. J.A. 23-24.

Before presenting Wood's mitigation case, Trotter informed the trial court that "we don't intend to introduce [the Kirkland] report today to the jury." J.A. 12. Based on Dr. Kirkland's finding of "a history of antisocial behavior and problems with anger control," however, Trotter requested "that there be further evaluation done of the defendant, although that won't be admissible to this jury prior to the judge rendering his final verdict." J.A. 12. The court stated that it would "consider that after we finish [the jury phase] today." J.A. 12.

Trotter presented a two-fold mitigation case to the jury. Trotter argued that Wood killed Ms. Gosha in a drunken fit of jealously—not with premeditated malice:

> This wasn't a cold-blooded murder, someone without any alcohol or anything in their system, someone with any other factors. . . .

> [Wood's] reasoning could have been clouded by the different emotions and the alcohol that he was having. The more he drank and the more he thought about Lois. Lois rejecting him. Lois with Amp, not seeing his baby again. It began to work up inside him, festering up inside him, and that's what brought him to do what you have found that he did.

J.A. 69-72. To support the jealousy element, Trotter elicited testimony that Wood heard that Ms. Gosha was dating Amp. J.A. 50. To support the intoxication element, Trotter called a parole board employee to testify that Wood's arrest report listed him as "perceived to have been drinking" at the time of his arrest. J.A. 59.

Trotter also called three members of Wood's family—his father and two sisters—to establish that Wood was beloved and respected, despite his early life being riddled by "one tragedy after another one." J.A. 34. Some examples of the mitigating evidence elicited by Trotter include:

- Wood's father never lived with Wood or his six siblings because his father was married to another woman, J.A. 29;
- Wood's mother died when he was 10 years old, J.A. 29;
- Wood's lone brother was killed in an automobile accident the next year, J.A. 33;

- After his mother's death, Wood and his siblings lived in a house occupied by 16 people, J.A. 29;

- The siblings were eventually evicted and forced to live alone under the care of Wood's 15-year-old sister, J.A. 30-31;

- Wood quit school at age 15 to secure employment to provide for his siblings, J.A. 33-35; and,

- Wood's family looked up to him as a leader and as a loving son and brother, J.A. 26-27, 35-36, 52.

The jury recommended death by a 10-2 vote. J.A. 84.

Counsel did not seek another mental health evaluation before final sentencing. However, Wood's presentence investigation report referred to both the Kirkland and McClaren Reports, and Trotter ensured that both reports were made part of the sentencing record.[2] J.A. 85-86. Using these reports, Trotter argued to the sentencing court that "Holly cannot use abstraction skills much beyond the average range of intellect, and that he is at most functioning in the borderline range of intellectual functioning . . . [and that] would mitigate any aggravating circumstances in this case." J.A. 88.

A week later, the trial court sentenced Wood to death. J.A. 91-108. In its sentencing order, the court

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[2] Under Alabama law, the sentencing judge considers the "[e]vidence submitted in connection with" the presentence report in his weighing process. Ala. Code § 13A-5-47(d).

outlined its consideration of Wood's borderline intellectual functioning as a mitigating circumstance:

> The forensic evaluation report, which was considered by the Court but not presented to the jury during the penalty phase, shows that the defendant is functioning in the borderline range of intellect. The report also indicates that the defendant does not have a mental disorder present that would detract from his ability to appreciate the criminality of his behavior with regard to this specific alleged instant offense.

J.A. 104. After taking "into consideration all of the matters that [were] properly before the Court," the court was "convinced beyond a reasonable doubt that the aggravating circumstances . . . far outweigh[ed] the mitigating circumstances." J.A. 108.

Both the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Wood's conviction and sentence on direct appeal. J.A. 109, 125. This Court denied certiorari review. J.A. 1.

IV. STATE POST-CONVICTION PROCEEDINGS

Wood next filed a post-conviction ("Rule 32") petition in the state circuit court. Relevant here, Wood claimed that his trial team rendered ineffective assistance by "failing to develop evidence of Mr. Wood's mental retardation and mental disability" after viewing the Kirkland Report. J.A. 235-39.

Wood was granted two evidentiary hearings, the first of which began six years after his trial.[3] J.A. 1-3. Dozier testified that while Trotter was responsible for presenting the mitigation case (J.A. 139), "all three" team members investigated and prepared motions for the penalty phase. J.A. 139-40, 166. According to Dozier, "[w]e went over the motions with Mr. Trotter, of course, psychological evaluations and things we felt were necessary for the penalty phase." J.A. 140. When asked if he spoke to "any potential witnesses in mitigation," Dozier replied, "I don't recall. I know we had a lot of correspondence with psychologist [*sic*] and so forth. It's been so long." J.A. 140. While Dozier could not specifically recall reading or making the decision whether to use the Kirkland Report due to the six-year time gap (J.A. 168, 171), he was "sure" the team read it before trial. J.A. 174.

Ralph testified that Trotter had spoken to members of Wood's family in preparation for the penalty phase. J.A. 199. Ralph also spoke to Wood's family members, although he could not remember which ones. J.A. 198-200. Regarding the Kirkland Report, Ralph "remember[ed] seeing" it and believed "counsel and [he] sat down and went over [it] and

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[3] This Court released *Atkins v. Virginia*, 536 U.S. 304 (2002), during the appeal from the initial rejection of Wood's Rule 32 petition. Accordingly, the state appellate court remanded Wood's case for a second hearing to determine (1) whether Wood "[was] mentally retarded" and (2) whether counsel "rendered ineffective assistance because they did not develop and present evidence that [Wood was] mentally retarded." J.A. 388-89. Because this appeal involves the resolution of the latter remanded claim, Respondents focus on the state courts' opinions after the remand.

reviewed it." J.A. 210. Both Ralph and Dozier's fee declarations show that each attorney reviewed a psychological report on May 24, 1994, 11 days after Dr. Kirkland completed his report. J.A. 313, 315, 323.

Trotter testified that the senior attorneys "made the decisions and told [him] what to do" (J.A. 279), and that Dozier, who was lead counsel, made the decision not to proceed beyond the Kirkland Report:

> 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. And so at that point, he determined that we didn't need any further evaluators and no further were called.

J.A. 283. Trotter testified that this decision was made "sometime prior to the penalty phase, prior to October of '94" and that "it would have been around the time that we had received Mr. Kirkland's report and sometime thereafter."[4] J.A. 283. While Trotter suggested that another evaluation be conducted between the jury recommendation and judge sentencing phases (J.A. 12, 343-46), he "relied upon Mr. Dozier's opinion of the psychiatry evaluation and upon the opinion of the psychiatric evaluator as to Mr. Wood's mental condition." J.A. 288.

Trotter testified that he "did a lot of the background research and material for the penalty phase." J.A. 279. He talked "to a lot of [Wood's]

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[4] Wood's trial began on October, 17, 1994. J.A. 1.

family members . . . trying to get information about Holly's upbringing, his background, his childhood, what it had been like growing up in Holly's home, characteristics about Holly, anything we could use to humanize Holly." J.A. 277-78. Trotter also called Wood's school seeking "background information about what kind of student he was, what kind of person he'd been at the school." J.A. 267. When school officials "wouldn't talk to [counsel] about the case," Trotter subpoenaed Wood's school records. J.A. 268. But "they didn't respond to the subpoena" either.[5] J.A. 268.

Wood's school teachers testified at the Rule 32 hearing that Wood possessed an IQ in the "low to mid 60's" (J.A. 403, 413) and was placed in "special education" classes. J.A. 402, 413. According to his teachers, Wood was an "average" special education student who was sometimes "lazy," but never failed his classes. J.A. 409-11, 418.

Three psychiatric experts (one for Wood and two for Respondents) testified concerning Wood's alleged mental retardation. Like the three evaluators before them, each post-conviction expert determined that Wood possessed subaverage intellectual functioning (*Atkins'* first requirement) based on grade-school-level academic skills and full-scale IQ scores ranging from 59 to 73.[6] J.A. 441, 449-50, 491-92, 507, 540.

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[5] Wood takes Trotter to task for failing to obtain his school records. Blue Br. 13, 49-50. Yet, Wood's post-conviction counsel and expert similarly failed to secure and present the records. J.A. 451; Pet. App. 25a.

[6] Under Alabama law, a petitioner must establish three elements to be deemed mentally retarded under *Atkins*: (1) "subaverage general intellectual functioning," (2) sufficient

The experts disagreed, however, on Wood's adaptive functioning (*Atkins'* second requirement). The following is a sample of Wood's adaptive skills the experts considered:

- Wood held down numerous jobs between the ages of 15 and 33 (when he murdered Ruby Gosha), including driving a delivery route, operating a forklift, panning, skimming, and stacking lead, and working at a pulp mill and funeral home. J.A. 422, 476-77, 497-98, 539;

- Wood consistently navigated his delivery route and the route to visit family and a girlfriend in Florida. J.A. 465, 475, 498-99;

- Wood was "extremely good with his money" (J.A. 531), as demonstrated by his ability to pay bills, rent hotel rooms, and purchase and maintain automobiles. J.A. 35, 476-78, 512, 531;

- From an early age, Wood was a "very sharp" dresser (J.A. 514), who prided himself on a "neat," "clean" appearance. J.A. 409, 419, 501; and,

- Wood possessed adequate verbal and written communication skills (J.A. 510), including the ability to write personal letters in cursive handwriting. J.A. 481-82.

"impairments in adaptive behavior," and (3) the manifestation of these deficiencies before the age of 18. *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002).

Based on these adaptive abilities, among others, Respondents' experts determined that Wood is not mentally retarded.[7] J.A. 506-07, 540.

The Rule 32 court agreed. Based on Wood's adaptive abilities, the court ruled that Wood is not mentally retarded. BIO App. 14-31. The court also rejected Wood's claim that counsel performed deficiently for failing to further investigate his "mental retardation and mental disabilities" after reading the Kirkland Report:

> On this record, Wood has failed to establish deficient performance with respect to this claim. His counsel thoroughly reviewed Dr. Kirkland's report and determined that nothing in that report merited further investigation. Based on their investigation and the detailed information that they had in their possession, Wood's counsel made a reasonable judgment that another mental evaluation was not necessary. . . . This Court finds that reasonable counsel could have decided against seeking another mental health evaluation, in order to prepare other, more promising, defenses for trial.
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> Moreover, it appears that Wood's trial counsel decided that calling Dr. Kirkland to testify was not in Wood's best interest. . . .

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[7] The state court rejected Wood's expert's testimony concerning adaptive functioning because it was based upon "highly questionable, if not entirely inaccurate, information." BIO App. 14-15, 18. The court below noted, "Wood has not claimed (and could not show in any event) any error in the Rule 32 court's exclusion of [his expert's] testimony." Pet. App. 14a, n.7.

> Because their decision was based on a thorough review of Dr. Kirkland's report, the failure of Wood's counsel to create a mental retardation issue at his capital murder trial is understandable and reasonable.

BIO App. 51-53. As for *Strickland's* prejudice element, the Rule 32 court found "no reasonable probability that the presentation of evidence concerning Wood's alleged mental retardation" would have altered either the trial court's "finding that the three aggravating circumstances 'far outweigh' the mitigating circumstances" or the jury's advisory verdict. BIO App. 55.

Adopting the Rule 32 court's final order, the Alabama Court of Criminal Appeals affirmed.[8] J.A. 593-94. The Alabama Supreme Court declined certiorari review. J.A. 4.

V. FEDERAL HABEAS PROCEEDINGS

Pursuant to 28 U.S.C. § 2254, Wood filed a habeas petition with the United States District Court for the Middle District of Alabama. J.A. 4. Wood again claimed that he was "mentally retarded" and that his trial team "was ineffective for failing to investigate and present evidence of [his] mental retardation and mental disability" after reading the Kirkland Report. J.A. 611, 621. The district court declined Wood's request for an evidentiary hearing. Pet. App. 103a-109a. The district court likewise

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[8]Because the appellate court adopted the Rule 32 court's order, Respondents refer to the collective decisions of the state courts as the "state courts' decision."

rejected Wood's claim that he is mentally retarded. Pet. App. 118a-123a.

The court granted habeas relief, however, on Wood's ineffective assistance claim. Pet. App. 140a-151a. The court held that Wood's counsel performed deficiently by failing to present evidence of Wood's "borderline range of intellectual functioning" to the penalty phase jury. Pet. App. 148a. Finding that Trotter (personally) neither made "a strategic decision not to pursue or present evidence of mental retardation," nor a "strategic decision not to let the jury at the penalty phase know about [Wood's] mental condition" (Pet. App. 146a-147a), the district court determined that the state court's contrary legal conclusion was based on "an unreasonable determination of the facts." Pet. App. 147a. As for prejudice, the district court held that evidence of Wood's "intellectual functioning, even if it had not been enough to establish that he was mentally retarded," might have affected the jury's advisory verdict. Pet. App. 151a.

A unanimous panel of the Court of Appeals for the Eleventh Circuit rejected Wood's claim that he is mentally retarded. Pet. App. 7a-14a, 73a. Divided, the court of appeals reversed the district court's grant of relief on Wood's ineffective assistance of counsel claim. Pet. App. 14a-72a.

With regard to § 2254(d)(2), the court held that "Wood has wholly failed to show the state courts made an unreasonable determination of the facts." Pet. App. 49a-50a. In support of the state courts' factual findings that counsel chose not to further investigate and present evidence contained in the

Kirkland Report, the court of appeals cited, among other things, (1) Trotter's Rule 32 testimony that "Dozier reviewed Dr. Kirkland's report and decided nothing merited going further" and (2) Trotter "expressly [telling] the trial judge, on the record and on behalf of the trial team, that Dr. Kirkland had evaluated Wood and counsel did not intend to introduce Dr. Kirkland's report to the jury." Pet. App. 49a.

The court of appeals rejected the district court's finding of deficient performance. The court held that a reasonable attorney could have chosen to stop investigating Wood's mental health issues after reading the Kirkland Report. Pet. App. 58a-59a. The court noted that Wood's trial team could have reasonably chosen not to present mental health evidence to the jury because the Kirkland Report "contained information harmful to Wood." Pet. App. 52a. Addressing counsels' inability to recall certain details six years later, the court held that counsel is presumed to act reasonably when the record is silent as to why they reached a particular strategic decision. Pet. App. 50a-55a.

The court of appeals additionally held that Wood could not establish prejudice. Pet. App. 61a-72a. The court opined that confronting the advisory jury with evidence of Wood's impaired intellectual functioning would have actually "tipped the scales even more toward a death sentence" because the jury would have learned, among other things, (1) that Wood had been arrested on 18 previous occasions; (2) that Wood admitted to Dr. Kirkland that he was not drunk at the time of the murder; (3) the reason why Wood actually quit school; and, (4) the details of

Wood's similar attempt to murder Barbara Siler. *Id.* at 64a-68a.

SUMMARY OF THE ARGUMENT

The state courts' determination of the facts is both presumed and actually correct.

1. By its plain language, § 2254(e)(1)'s presumption of correctness for state court factual findings "shall" apply, and the petitioner "shall" have the burden of rebutting it, in every "proceeding instituted by an application for a writ of habeas corpus," not just those where a petitioner introduces new evidence. Wood's theory that § 2254(d)(2) requires a pre-presumption review of the state court record is a veiled attempt to resurrect 28 U.S.C. § 2254(d)(8) (1994 ed.), which Congress buried with AEDPA. Wood's theory also emasculates the presumption in the 90% of habeas proceedings that do not feature evidentiary hearings, a result clearly at odds with Congress' intent to increase deference to state courts.

Sections 2254(e)(1) and 2254(d)(2) work hand-in-hand to govern review of a state court's determination of the facts. The following three-step approach gives effect to the plain language and Congressional intent for both provisions:

> *Step 1*: When pleading a § 2254(d)(2) claim, the habeas petitioner cites the state court's relevant findings of fact and the portions of the state record that allegedly prove that those findings were erroneous.

> *Step 2:* Applying § 2254(e)(1), the district court determines whether the cited portions of the state record provide "clear and convincing evidence" that rebuts the presumption that the state court's determination of the facts is correct.
>
> *Step 3:* If the presumption survives, the petitioner's § 2254(d)(2) claim fails because a correct determination of the facts is a reasonable determination of the facts. If the presumption is rebutted, the petitioner clears § 2254(d)(2)'s bar to relief if he can also show that (1) the state court's legal conclusion was "based on" the erroneous factual determination and (2) the state court's determination of the facts was not only erroneous, but also objectively "unreasonable."

2. The state courts based their legal conclusion on a reasonable determination of the facts. The courts rejected Wood's *Strickland* claim based on the following factual conclusion: After reviewing the Kirkland Report, Wood's trial team "determined that nothing in that report merited further investigation" and "decided that calling Dr. Kirkland to testify was not in Wood's best interest." BIO App. 51-53. The courts' determination of the facts is backed by (1) Trotter's Rule 32 testimony that Dozier decided to end the mental health investigation with the Kirkland Report; (2) Trotter's pre-sentencing letters that confirm Dozier decided not to seek further evaluations; (3) Trotter's pre-trial motion to prevent any psychological evidence from being admitted in the guilt or penalty phases; and (4) Trotter's penalty-phase statement to the trial court that "we don't

intend to introduce that report today to the jury." J.A. 12.

With one exception, Wood cites record evidence to rebut the notion that counsel *further* investigated Wood's mental health issues after reviewing the Kirkland Report. Blue Br. 35-37, 43-51. But this endeavor is worthless under § 2254(d)(2) because the state court based its legal conclusion on a finding that counsel decided *against* further investigation, a fact that Wood twice acknowledges in his brief. Blue Br. 32, 35. In fact, counsel's decision to end their mental health investigation with the Kirkland Report is the foundation of Wood's § 2254(d)(1) argument that counsel acted unreasonably. Blue Br. 24-34.

The only evidence that Wood cites to rebut the determination that counsel chose to halt their mental health investigation with the Kirkland Report is counsel's inability to remember the details of their decisions six years later. Wood's reliance on faulty memories fails because it conflicts with *Strickland's* presumption of reasonableness when faced with a silent record. Accordingly, Wood fails to rebut § 2254(e)(1)'s presumption of correctness. Because the state courts' determination of the facts is both presumed and demonstrably correct, it cannot be deemed objectively unreasonable under § 2254(d)(2).

3. The Court should not consider Wood's claim that the state court unreasonably applied *Strickland*. 28 U.SC. § 2254(d)(1). That claim is outside the limited questions presented.

It is also meritless. Prior to the state courts' decision, this Court held on three occasions that counsel reasonably halted a particular line of penalty-phase investigation because counsel had "reason to believe" that further investigation would prove either "fruitless" or "harmful" to his client's case. *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *see also Burger v. Kemp*, 483 U.S. 776 (1987); *Darden v. Wainwright*, 477 U.S. 168 (1986). After reading the Kirkland Report, Wood's trial team had reason to believe both. Counsel had reason to believe that continuing to investigate Wood's borderline intellectual functioning was "fruitless" because the Kirkland Report (1) stated that Wood's subaverage intellect did not prevent Wood from understanding the criminality of shooting Ruby Gosha, (2) stated that Wood possessed "concrete reasoning ability" and "goal directed and logical" thought, and (3) contained two virtually identical conclusions regarding Wood's intellectual functioning (obviating the need for a third opinion). J.A. 327-28. The Kirkland Report also contained several pieces of "harmful" information, such as (1) Wood's 18 prior arrests, (2) his admission to anger-control issues, and (3) his admission to shooting his previous ex-girlfriend, Barbara Siler, after seeing her with another man.

These issues are similar to the ones faced by counsel in *Strickland*, *Burger*, and *Darden*, and the Court held in each of those cases that counsel acted reasonably when they chose not to further pursue or present similar lines of mitigation defense. The state courts cannot have unreasonably applied *Strickland* when, faced with a similar set of facts, they reached

the same conclusion as this Court in *Strickland* and two other cases. 28 U.S.C. § 2254(d)(1).

4. Wood cannot establish prejudice for two reasons. First, Alabama is a judge-sentencing state, and Wood's post-conviction evidence of subaverage intellect would not have affected the trial court's weighing analysis. At trial, the court considered Wood's borderline intellectual functioning from three sources: the McClaren Report, the Kirkland Report, and the Kilby Evaluation. After considering this evidence, the court determined that the aggravating circumstances "far outweigh[ed]" the mitigating circumstances. J.A. 108. Presenting similar evidence from new sources would not have altered the trial court's weighing calculus in Wood's favor.

Second, presenting evidence of Wood's mental deficiencies to the advisory jury would have further tipped its sentencing scale in favor of death. At best, Wood's subaverage intellect would have added a feather's weight in mitigation after the jury learned that Wood's low IQ in no way affected his ability to think logically or to know right from wrong. Then, any mitigating weight would have been overwhelmed by the State's rebuttal evidence, including (1) Wood's admitted anger control issues; (2) Wood's acknowledgment that he was sober when he murdered Ruby Gosha; and (3) Wood's admission that he shot Barbara Siler for the same reason he murdered Ruby Gosha—both women had the audacity to date another man.

ARGUMENT

Wood's post-conviction presentation proved that investigating and presenting "evidence of Mr. Wood's mental retardation and mental disability" to a jury was a fool's errand. J.A. 235-39 (Wood's Rule 32 petition); J.A. 621-23 (Wood's § 2254 habeas petition). Wood is not mentally retarded. Nor does his subaverage intellect furnish mitigating weight. And whatever consideration a juror might have given Wood's subaverage intellect would have been eviscerated after Barbara Siler revealed Wood's date-me-or-die attitude toward his ex-girlfriends in rebuttal. J.A. 473-82.

This outcome would not have surprised trial counsel or anyone who read the Kirkland Report. The Kirkland Report not only revealed Wood's low IQ and grade-school-level academic skills (J.A. 327), it also identified the reasons why a juror would give this evidence little to no mitigating weight: Wood possessed "concrete reasoning ability" (J.A. 327-28); his thinking was "goal directed and logical," (J.A. 327); and he could "appreciate the criminality of [his] behavior" (J.A. 330). This supposition proved correct. Wood's sentencing judge gave no weight to Wood's borderline intellectual functioning because it did not "detract from his ability to appreciate the criminality" of shooting Ruby Gosha. J.A. 104. When post-conviction counsel tried to expand on the Kirkland Report, they failed to present any evidence that Wood's subaverage intellect affected his judgment, and 10 out of 10 judges agreed that Wood is not mentally retarded.

The Kirkland Report also forecast the State's rebuttal strategy: hammer home Wood's criminal history and anger-control issues, especially the fact that Wood shot Barbara Siler because—like Ruby Gosha—she "had the audacity to date another man."[9] Pet. App. 67a. Again, this supposition proved correct. At trial, the prosecutor attempted to elicit Barbara Siler's testimony, only to be repelled by Wood's trial team. J.A. 23-24. But when post-conviction counsel employed a mental-deficiency-based strategy at the Rule 32 hearing, they opened the door for Barbara Siler's story (J.A. 473-82) and the details of Wood's arrest for criminal impersonation and escape from police. J.A. 393-401.

That the Kirkland Report foretold the negative results of a mental-deficiency-based strategy drives the resolution of Wood's § 2254(d) claims in favor of the state courts' decision. As for Wood's § 2254(d)(2) claim, it sheds light on the reasons why, as a matter of historical fact, Wood's trial team halted their mental health investigation and fought to suppress all psychological evidence. *See infra* at 37-47.

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[9] By statute, Ala. Code § 13A-5-45(g), "the State is allowed to rebut any evidence the [defendant] offers as a mitigating circumstance." *George v. State*, 717 So. 2d 849, 852 (Ala. Crim. App. 1997) (holding that evidence that defendant fled the state is admissible to rebut mitigating evidence of "extreme mental or emotional disturbance); *see also Ex parte Smith*, No. 1010267, 2003 WL 1145475 (Ala. 2003) (citing evidence of defendant's "interstate illegal drug enterprise" to rebut mental retardation); *Smith v. State*, __ So. 2d __, 2007 WL 2459291 (Ala. Crim. App. Aug. 31, 2007) (ruling that evidence of defendant's "arrest[] for carrying a concealed weapon and for contributing to the delinquency of a minor" was admissible to rebut claim of mental retardation).

Regarding § 2254(d)(1), it shows why Wood's team acted reasonably under *Strickland*. *See infra* at 47-54. Furthermore, the negative ramifications of Wood's post-conviction strategy defeat Wood's prejudice argument. *See infra* at 55-63.

To set the table for these merits arguments, Respondents begin by explaining how the Court should reach its § 2254(d)(2) conclusion procedurally under AEDPA. To do so, we answer the questions left open in *Rice v. Collins*, 546 U.S. 333, 339 (2006): (1) Does § 2254(e)(1)'s presumption of correctness for state court factual findings apply when the district court's review is confined to the state court record and, if it does, (2) how does § 2254(e)(1) interact with § 2254(d)(2)?

I. SECTION 2254(e)(1)'S PRESUMPTION OF CORRECTNESS APPLIES IN ALL § 2254 HABEAS ACTIONS.

Under AEDPA, the presumption of correctness for state court factual findings is unconditional. 28 U.S.C. § 2254(e)(1). It "shall" apply in every § 2254 habeas proceeding, *id.*, including those involving a review of the state court record under §2254(d)(2). The Court has agreed on multiple occasions:

- *Wiggins v. Smith*, 539 U.S. 510, 528 (2003): "The state court's assumption that the records documented instances of this abuse has been shown to be incorrect by 'clear and convincing evidence,' 28 U.S.C. § 2254(e)(1), and reflects 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' § 2254(d)(2)."

- *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005): "Under [AEDPA], Miller-El may obtain relief only by showing the Texas conclusion to be 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' 28 U.S.C. § 2254(d)(2). Thus we presume the Texas court's factual findings to be sound unless Miller-El rebuts the 'presumption of correctness by clear and convincing evidence.' § 2254(e)(1)."

- *Schriro v. Landrigan*, 550 U.S. 465, 473-74 (2007): "Under AEDPA, Congress prohibited federal courts from granting habeas relief unless . . . the relevant state-court decision 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' § 2254(d)(2). . . . AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.' § 2254(e)(1)."

Wood disagrees. Relying on the Ninth Circuit's opinion in *Taylor v. Maddox*, 366 F.3d 922 (9th Cir. 2004), he argues that § 2254(e)(1) only applies when a petitioner attacks the state courts' factual findings "based in part on evidence extrinsic to the state court record." Blue Br. 38-39. According to Wood, "[t]he additional requirements of § 2254(e)(1) do not apply" when a habeas petitioner "seeks relief based entirely on the state court record." Blue Br. 38. Wood's interpretation of § 2254(e)(1) not only contradicts this Court's prior pronouncements, it ignores the plain language, history, and intent of AEDPA.

A. UNDER ITS PLAIN LANGUAGE, § 2254(e)(1) APPLIES IN ALL § 2254 HABEAS PROCEEDINGS.

The debate whether § 2254(e)(1)'s presumption applies to all proceedings initiated under § 2254(d) ends with its very first sentence:

> *In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court*, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1) (emphasis added). In no uncertain terms, Congress stated that the presumption "shall" apply, and the petitioner "shall" have the burden of rebutting it, in all proceedings "instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment," not just those proceedings featuring extrinsic evidence. *Id.*

Had Congress intended to limit the presumption to cases involving extrinsic evidence, it would have said so. But Congress did not. Congress stated that the presumption applies in *all* proceedings in which a § 2254 habeas petition is filed, and that should be the end of the matter. *See Zuni Public School Dist. No. 89 v. Department of Educ.,* 550 U.S. 81, 93 (2007) ("[I]f the intent of Congress is clear and

unambiguously expressed by the statutory language at issue, that would be the end of our analysis.").

B. AEDPA Eliminated Pre-Presumption Review Of The State Court Record.

Section 2254(e)(1)'s history provides further proof that Congress intended the presumption to apply immediately upon the filing of a § 2254 petition. Congress did not create § 2254(e)(1) from whole cloth in 1996. For 30 years, the federal habeas statute included a pre-presumption review of the state court record much like Wood's reading of current § 2254(e)(1). *See* 28 U.S.C. § 2254(d)(8) (1994 ed.). But Congress abolished that threshold review with AEDPA.

1. Before AEDPA, the statutory presumption of correctness lay in 28 U.S.C. § 2254(d) (1994 ed.). Respondents reproduce the defunct statute, in its entirety, in the Appendix. *See infra* at 2a-3a. Former § 2254(d) applied a three-step approach to the presumption. *See generally* Wright, Miller, Cooper, and Amar, *Federal Practice and Procedure*, Jurisdiction 3d § 4265.1 at 339-51. First, the State had the burden of establishing three prerequisites: (1) the relevant issue was determined by a state court with competent jurisdiction; (2) the state court conducted a hearing on the merits; and, (3) the factual findings were reduced to writing. *Id.* at 339-40.

If these prerequisites were met, the second step allowed a petitioner to avoid the presumption in one of eight enumerated ways. *Id.* at 340-47. The eighth, former § 2254(d)(8), allowed the petitioner to

avoid the presumption if the state court's "factual determination [was] not fairly supported by the record." Thus, under § 2254(d)(8), the district court could review the state court's factual findings against the state court record before applying the presumption of correctness. *See, e.g.*, *Wainwright v. Goode*, 464 U.S. 78, 84-85 (1983) (applying former § 2254(d)(8)'s "fairly supported by the record" standard); *Marshall v. Lonberger*, 459 U.S. 422, 430-38 (1983) (same).

If the petitioner failed to meet one of the eight circumstances listed in § 2254(d), then, and only then, the presumption of correctness attached. Wright & Miller, *supra* § 4265.1 at 348. At that point (step three), a petitioner could overcome the presumption "in an evidentiary hearing in the proceeding in the Federal Court" by "establish[ing] by convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. § 2254(d) (1994 ed.).

Wood's theory of a threshold, pre-presumption review of the state court record resembles habeas law from 1966 to 1996; specifically, former § 2254(d)(8). But Wood's case is not governed by the 1966 habeas statute. It is governed by AEDPA.

2. With AEDPA, the presumption statute was "relettered as § 2254(e)(1), but drastically changed in substance." Wright & Miller, *supra* § 4265.2 at 354. Congress modified or extracted three significant sections from former § 2254(d). First, Congress removed the three prerequisites for the State to claim the presumption. Second, Congress erased the eight avenues to avoid the presumption, including

former § 2254(d)(8)'s pre-presumption review of the state court record. Third, Congress changed the petitioner's rebuttal burden from "convincing evidence" to "clear and convincing evidence," while also removing the introductory clause that indicated the burden must be rebutted "in an evidentiary hearing in the proceeding in the Federal court."

These changes were not merely cosmetic. Congress manifested its intent to strengthen the deference afforded to state court decisions throughout AEDPA. *See, e.g.*, 28 U.S.C. §§ 2244(b) (tightening restrictions on successive petitions); 2244(d) (creating a one-year statute of limitation); 2254(b) (strengthening "exhaustion" defenses); 2254(d) (erecting deferential bars to habeas relief); 2254(e)(2) (minimizing evidentiary hearings). With § 2254(e)(1), Congress strengthened the statutory presumption of correctness for state court factual findings by eliminating the strings attached.

3. Wood wants to keep the strings. The notion that "the presumption of correctness and the clear-and-convincing standard of proof only come into play once the state court's fact-findings survive any intrinsic challenge," *Taylor*, 366 F.3d at 1000, is a veiled attempt to resurrect former § 2254(d)(8). But treating § 2254(d)(2) as the re-incarnation of former § 2254(d)(8) not only defies AEDPA's plain language and Congressional intent, it could render § 2254(e)(1) meaningless in 90% of § 2254 habeas proceedings.

Wood argues that § 2254(e)(1) does not apply "where a habeas petitioner seeks relief based entirely on the state record." Blue Br. 38. A recent study of post-AEDPA habeas proceedings suggests that,

nationwide, 90.5% of capital cases and 99.6% of non-capital § 2254 cases proceed without an evidentiary hearing. Nancy J. King, *et. al*, *Final Technical Report: Habeas Litigation in U.S. District Courts*, 35-36, 64 (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf. So, under Wood's theory, § 2254(e)(1) would apply in less than 10% of habeas proceedings.

Not only is this outcome wrong, it emasculates the presumption in the wrong set of cases. According to Wood, § 2254(e)(1) would not apply in cases in which federal evidentiary hearings are foreclosed, a result that generally occurs because the petitioner received a full and fair hearing in the state court. The presumption would apply when evidentiary hearings are conducted, which generally occurs because the state court did not hear all of the facts (due to no fault of the petitioner). *See* 28 U.S.C. § 2254(e)(2). Thus, under Wood's theory, deference is bestowed upon state court factual findings that were based on less than all of the facts, and deference is withheld when the state courts heard everything.

The Court has already rejected one theory that emasculated § 2254(e)(1)'s presumption in a large number of habeas proceedings. *See Woodford v. Garceau*, 538 U.S. 202, 207-08 (2003) (rejecting the Ninth Circuit's view that a habeas proceeding is initiated "with the filing of a request for the appointment of counsel or a motion for a stay"). The Court should rule likewise here.

C. SECTIONS 2254(d)(2) AND 2254(e)(1) WORK TOGETHER IN A PRINCIPLED MANNER.

Every circuit save one agrees with Respondents: § 2254(e)(1) applies in habeas proceedings involving a review of the state court record. *See* Brian R. Means, *Federal Habeas Manual*: *A Guide to Federal Habeas Corpus Litigation* § 3:83 (2009) (collecting the circuits' decisions on the issue).[10] The quandary has been *how* to apply both § 2254(e)(1) and § 2254(d)(2) in the same proceeding. *See id.*

Two steps of logic suggest that §2254(e)(1) applies first and §2254(d)(2) second. First, state courts' factual findings are presumed correct until proved otherwise. 28 U.S.C. § 2254(e)(1). Second, a correct factual determination is necessarily a reasonable factual determination. Applying these principles, a petitioner cannot prove that a state court's decision was "based on an unreasonable determination of the facts" under § 2254(d)(2) until he first destroys the presumption that the court's "determination of the facts" are correct under § 2254(e)(1).

With this in mind, Respondents offer a step-by-step guide to reviewing claims in which the

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[10] The minority circuit, the Ninth, has been somewhat inconsistent on its position. *Compare Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004) (holding that § 2254(e)(1) does not apply when reviewing the state court record) *with Williams v. Warden*, 422 F.3d 1006, 1009 (9th Cir. 2005) (applying § 2254(e)(1)'s presumption of correctness to a state court factual determination regarding the meaning of jury verdict forms).

petitioner relies solely on the state court record to attack the state court's determination of the facts.[11]

> *Step 1 (Pleading):* A petition is filed, bathing the state court's factual findings in a presumption of correctness. The petitioner claims that he can overcome § 2254(d)(2)'s bar to relief and identifies (1) the state court's factual findings that formed the basis of its legal conclusion and (2) the record citations that prove the state court erred.
>
> *Step 2 (§ 2254(e)(1)):* The district court determines whether the cited portions of the state record prove, by "clear and convincing evidence," that the state court's factual findings are erroneous.
>
> *Step 3 (§ 2254(d)(2)):* If the presumption survives Step 2, then the petitioner cannot overcome § 2254(d)(2)'s bar to relief because a correct determination of the facts constitutes a reasonable determination of the facts. If the presumption is rebutted, however, the petitioner can overcome § 2254(d)(2)'s bar if he can also show that (1) the state court's legal decision was "based on" the erroneous factual determinations and (2) the state court's

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[11] Because it is not presented here, Respondents do not address the question left open in *Holland v. Jackson*, 542 U.S. 649, 652 (2004): How do § 2254(d)'s bars apply when a petitioner presents evidence in federal court that was not considered by the state courts?

> determination of the facts was not only erroneous, but also objectively unreasonable.[12]

Unlike Wood's theory, this proposed application gives effect to the plain language of §§ 2254(d)(2) and 2254(e)(1). It also mirrors the Court's treatment of the distinct provisions in *Wiggins* when the Court determined that a habeas petitioner had overcome § 2254(d)(2)'s bar to relief. 539 U.S. at 528. Below, we put our proposal into practice.

II. WOOD CANNOT OVERCOME § 2254(d)(2)'S BAR TO HABEAS RELIEF.

To clear § 2254(d)(2)'s bar, a petitioner must show that the state court's legal decision "was *based on* an unreasonable determination of the facts." (Emphasis added.) Because Wood violates the "based on" requirement by attacking one line of the state courts' recitation of testimony, instead of its ultimate determination of the facts, *see infra* at 40-44, we begin by detailing the state courts' decision.

Under *Strickland's* deficient performance element, the state courts concluded that, after reading the Kirkland Report, Wood's trial team reasonably chose not to investigate further Wood's

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[12] In rare cases, Respondents believe that a state court's finding of fact can be proved erroneous by clear and convincing evidence under § 2254(e)(1), yet still be objectively reasonable under § 2254(d)(2). *See generally Lockyear v. Andrade*, 538 U.S. 63, 75 (2003) ("The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness."). But further discussion of the issue is unnecessary in this case because Wood failed to rebut the presumption of correctness by "clear and convincing evidence" in Step 2. *See infra* at 37-47.

mental health and not to "create a mental retardation issue" in the penalty phase. BIO App. 51-53. This legal conclusion was based on the following determination of the facts:

> [Wood's] counsel thoroughly reviewed Dr. Kirkland's report and determined that nothing in that report merited further investigation. Based on their investigation and the detailed information that they had in their possession, Wood's counsel made a reasonable judgment that another mental evaluation was not necessary. . . .
>
> Moreover, it appears that Wood's trial counsel decided that calling Dr. Kirkland to testify was not in Wood's best interest.

BIO App. 51-52. Before we explain Wood's error, Respondents show that the state court record, and the inferences arising from the facts therein, strongly support the presumption that the state courts' determination of the facts is correct. *See Parke v. Railey*, 506 U.S. 20, 35 (1992) (stating that the state courts' findings of historical fact, and the "inferences properly drawn from such facts," are statutorily presumed correct); *Lonberger*, 459 U.S. at 431-32 (same).

A. THE STATE COURTS CORRECTLY DETERMINED THE FACTS.

Wood does not challenge the finding that counsel "reviewed Dr. Kirkland's Report." BIO App. 51. Nor can he. Both Dozier and Ralph testified that they did. J.A. 174, 210. Both men's fee declarations

show that each reviewed a psychological report 11 days after the Kirkland Report was finished. J.A. 323. Furthermore, Trotter testified at the Rule 32 hearing that Dozier reviewed the report (J.A. 283), and Trotter recited findings from the report to the trial court before the penalty phase. J.A. 12.

That counsel (specifically lead counsel, Dozier) determined "nothing in that report merited further investigation" (BIO App. 51), is backed by Trotter's Rule 32 testimony:

> 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. And so at that point, he determined that we didn't need any further evaluators and no further were called.

J.A. 283. Trotter's recollection is backed by a statement in his November 1994 letters to senior counsel: "We have not had any independent psychological evaluations done since [Dozier] said it would not be needed." J.A. 343, 345.

That Wood's trial team consciously chose not to present Dr. Kirkland, or any mental health evidence contained in his report, to the jury is proved by two facts. First, counsel filed a pre-trial motion to "suppress all psychiatric and psychological evidence" in the guilt and penalty phases. Trial Record Vol. 8 at 375-77. As Trotter explained before trial, counsel sought to prevent the jury from hearing any "psychological evidence or argument" that Wood was "prone to violent behavior." Trial Tr. Vol. 1 at 72-73.

Trotter was likely referring to the finding that Wood had "problems with anger and impulse control;" Wood's admission to Dr. Kirkland that he "has felt injurious toward others in the past;" and, Wood's admission to shooting Barbara Siler out of jealousy. J.A. 327-28. Second, referring to the Kirkland Report, Trotter told the court immediately before the penalty phase, "we don't intend to introduce that report today to the jury." J.A. 12. "Inten[t]" springs from a conscious decision; in this case, the decision not to present the Kirkland Report to the jury.

Reasonable inferences from the record establish why counsel likely made these decisions. Counsel likely determined that Wood's below-average IQ and reading skills would not have moved the jury because, as Dr. Kirkland explained in his report, (1) Wood possessed no mental deficiencies that prevented him knowing that shooting Ruby Gosha was wrong; (2) Wood possessed "concrete reasoning ability;" and, (3) Wood's "thinking was goal directed and logical." J.A. 327-28. Furthermore, the cost of any benefit was steep. Had the report been introduced, the jury would have learned of Wood's 18 prior arrests. J.A. 326-27. The jury would have learned that Wood suffered from impulse and anger control issues. J.A. 327-28. Finally, the jury would have learned that Wood admitted to shooting Barbara Siler for the same reason he shot Ruby Gosha: Both women "had the audacity to date another man." Pet. App. 67a.

B. WOOD REBUTS A STRAW MAN.

Wood's § 2254(d)(2) argument fails largely because, with one exception explained *infra* at 44-46,

Wood attempts to rebut a factual conclusion the state courts never reached.

1. Wood initially gets it right. In his "Statement of the Case," Wood correctly identifies the state courts' decision: "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.'" Blue Br. 17. Then, as his primary argument, Wood claims that he clears § 2254(d)(1)'s bar because the state courts unreasonably applied *Strickland* when they concluded that counsel reasonably halted their mental health investigation with the Kirkland Report. Blue Br. 24-34. Wood's position then turns. Wood claims that he clears § 2254(d)(2)'s bar because the state courts unreasonably determined, as a matter of historical fact, that counsel *continued* investigating Wood's mental health issues after reading the Kirkland Report. Blue Br. 35-51.

Petitioner's about-face is predicated on the following exchange from Dozier's Rule 32 testimony:

> Q: Did that [Kirkland] report provide anything for you at all?
> A: I think it indicated that Holly Wood had some problems at a younger age or something like that. I just don't recall all this. I think there was some childhood problems, something in the report.
> Q: So anything in the report, would you have pursued that in the penalty phase?
> A: Oh, we did. We did.

J.A. 150. During its recitation of counsel's testimonies, the Rule 32 court characterized Dozier's answer thusly: "[h]e affirmed that they diligently pursued the information that was contained within Dr. Kirkland's report."[13] BIO App. 48.

Twice, Wood correctly recognizes that this statement was the Rule 32 court's "characterization of Dozier's testimony," and that it should not be "misconstrued as the state court's conclusion." Blue Br. 32, 35. Yet, Wood makes that mistake by labeling the court's characterization of Dozier's testimony as its "ultimate fact determination" (Blue Br. 36) and then making it the foundation of his § 2254(d)(2) claim: "[T]he 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." *Id.*; *see also* Blue Br. 43-44 ("the ultimate determination that Wood's trial team adequately investigated the crucial evidence revealed in the Kirkland Report is an objectively unreasonable determination of the facts"), 48-49 ("the state court determination that counsel further investigated those matters based on such evidence [*i.e.* interviewing family members and collecting "general background information"] is unreasonable and is rebutted by clear and convincing evidence").

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[13] This recitation occurs three pages before the court declares its ultimate factual and legal findings. *Compare* BIO App. 44-50 (recitation of Dr. Kirkland's findings and counsel's post-conviction testimonies) *with* 51-53 (ultimate findings).

But, as previously outlined, the state courts' factual conclusion was that "counsel thoroughly reviewed Dr. Kirkland's report and determined that nothing in that report merited further investigation." BIO App 51. And, again, Wood embraces the courts' factual conclusion as the linchpin of his § 2254(d)(1) claim: "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 [revealed in the Kirkland Report]." Blue Br. 32.

Wood therefore argues in vain. Because the state courts' characterization of Dozier's answer did not form the factual basis of the courts' legal conclusion, it is worthless under § 2254(d)(2).

Wood's mistake turns his argument in Respondents' favor. To prove that counsel halted their mental health investigation with the Kirkland Report, Wood relies upon Trotter's suggestions that another mental health evaluation be performed; first in statements to the trial court before the penalty phase (J.A. 12) and then in letters to senior counsel after the jury rendered its advisory verdict (J.A. 343, 345). Blue Br. 44-45. But, as we outlined in the previous section, these pieces of evidence prove the correctness of the state courts' factual determination. Trotter's statement to the trial court that "we don't intend to introduce that report today to the jury" (J.A. 12) bolsters the factual finding that counsel decided that "calling Dr. Kirkland to testify was not in Wood's best interest." BIO App. 51-52. Trotter's statement to the court that "no further investigation has been done, psychologically, of those points [raised in the Kirkland Report]" (J.A. 12), supports

the factual finding that counsel "determined that nothing in that report merited further investigation." BIO App. 51. The same finding of fact is bolstered by Trotter's letters to senior counsel, which state, "We have not had any independent psychological evaluations done since [Dozier] said it would not be needed." J.A. 343, 345.

At best, Wood's cited evidence suggests that, while Trotter "relied upon Mr. Dozier's opinion of the psychiatry evaluation" (J.A. 288), Trotter disagreed with Dozier's decision to not to seek another mental health evaluation. But that is not the issue. Under §§ 2254(e)(1) and 2254(d)(2)—and the first question presented (Pet. i.)—the issue is whether the state courts rightly determined, as a matter of historical fact, that the decision to forgo further investigation was made. On that issue, Wood's primary evidence supports the presumption of correctness.[14]

2. Consciously or not, while chastising the court of appeals' decision, Wood momentarily veers into a rebuttal of the factual determination that counsel chose to halt their mental health investigation with the Kirkland Report. Blue Br. 46-47.[15] Wood notes that (1) "Dozier could not recall making the supposed

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[14] Both of Trotter's calls for a post-jury mental evaluation were based on evidence that Wood suffered from "antisocial behavior" and "anger control" issues, not borderline intellectual functioning. J.A. 12, 343, 345. Trotter fought to prevent the jury from discovering and considering the same anger control issues. Trial Record Vol. 1 at 72-73; Vol. 8 at 375-77. Thus, Trotter's calls for a post-jury evaluation cannot be construed as Trotter's opinion that Wood's borderline intellectual functioning warranted further investigation or presentation to the jury.

[15] Wood resumes his attack on the state courts' recitation of Dozier's testimony on page 48.

decision attributed to him [by Trotter]," and (2) "Trotter, who had no relevant experience, did not recall considering Wood's borderline mental retardation at all." Blue Br. 46-47 (*citing* J.A. 168, 171, 288). But these memory lapses do not prove that counsel failed to take certain actions; they prove that counsel are human.

By the time they testified at the Rule 32 hearing, six years had passed since trial for Dozier and Ralph, seven years for Trotter. J.A. 1-2. Among them, Wood's three attorneys testified that they could not "recall" or "remember" specific details about the trial more than 100 times. J.A. 137-212, 255-311. These memory lapses reached far beyond the Kirkland Report. For example, Dozier forgot Trotter's first name, but he obviously has one (Kenneth). J.A. 138-39. Similarly, Dozier could not recall whether the murder weapon had been forensically tested (J.A. 156), but it clearly was. J.A. 114-15. And, relevant here, Dozier could not recall making the decision to forgo another mental health evaluation (J.A. 171), but we know that he did because Trotter said so in his November 1994 letters (J.A. 343, 345), and during his testimony at the August 2001 evidentiary hearing. J.A. 283.

Strickland accounts for silent records by bestowing a presumption of reasonableness upon counsel that "the defendant must overcome." *See Strickland*, 466 U.S. at 689. The Court should reject Wood's call to turn the presumption on its head. Post-conviction delay is already a capital prisoner's best friend. As charted *infra* at 5a, Alabama's death row inmates have stretched the length of time between trial and their Rule 32 evidentiary hearings

up to 16 years with petitions ranging from 50 to 370 pages. If the Court holds that delay-induced amnesia constitutes "clear and convincing evidence" that an action was not taken, it will incentivize even greater delays in capital habeas proceedings—a result diametrically opposed to "AEDPA's acknowledged purpose of reducing delays in the execution of state and federal criminal sentences." *Landrigan*, 550 U.S. at 475.

C. Because It Is Presumed Correct, The State Courts' Factual Determination Is Objectively Reasonable.

Because Wood fails to rebut § 2254(e)(1)'s presumption of correctness with clear and convincing evidence, his § 2254(d)(2) argument is easily dispatched. The state courts' determination of the facts is presumed correct, so it cannot be objectively unreasonable. As a result, Wood cannot clear § 2254(d)(2)'s bar to relief.

The same result occurs even if § 2254(e)(1)'s presumption has no application here. Under § 2254(d)(2), disagreement with the state courts' factual determination is not enough. A petitioner must show "that the trial court had no permissible alternative but to" reach the opposite conclusion. *Rice*, 546 U.S. at 341-42. Wood cannot meet this standard. Even if it is debatable, it is at the very least "permissible," and thus objectively reasonable, to factually conclude that, after reviewing the Kirkland Report, counsel "determined that nothing in that report merit further investigation" and that "calling Dr. Kirkland to testify was not in Wood's best interest." BIO 51-53. That determination is

permissible because it is based on (1) counsels' fee declarations, (2) their pre-trial motion to suppress all psychological evidence, (3) Trotter's pre-penalty phase statements to the trial court, (4) Trotter's subsequent letters to senior counsel, and (5) the attorneys' post-conviction testimonies.

III. WOOD CANNOT OVERCOME § 2254(d)(1)'S BAR TO HABEAS RELIEF.

Assuming that the state courts' factual findings are correct, Wood argues that he clears § 2254(d)(1)'s bar to relief because the state courts unreasonably applied *Strickland*'s deficient performance standard to those facts. Blue Br. 24-34. This argument is both meritless and outside the limited questions presented.

A. WOOD'S § 2254(d)(1) CLAIM IS NOT FAIRLY INCLUDED WITHIN THE LIMITED QUESTIONS PRESENTED.

Wood has pulled a bait-and-switch. At the cert-stage, Wood pitched this case as an opportunity to resolve the "conflict among the circuits regarding the interaction of Sections 2254(d)(2) and 2254(e)(1);" *i.e.* the question left unanswered in *Rice v. Collins*. Pet. 13; *see also* Pet. Reply 2 (same). He crafted two questions around his § 2254(d)(2) claim—the first addressing its merits, the second addressing § 2254(e)(1)'s application to his claim. Pet. i. The Court granted review, limited to those two questions. J.A. 635. But now that review has been granted, Wood relegates discussion of § 2254(d)(2) to in-the-alternative status, in favor of a distinct § 2254(d)(1) claim. Blue Br. 24-51.

Only questions "fairly included" within those set out in the petition "will be considered by the Court." Rule 14.1(a), Rules of the Supreme Court of the United States. As the Court noted in *Rice*, "[t]he question whether a state court errs in determining the facts is a different question from whether it errs in applying the law." 546 U.S. at 342. Consequently, Wood's claim that the state courts unreasonably applied *Strickland* should not be considered under Rule 14.1(a) because it is a different question than the one upon which cert was granted: "Whether [the] state court's decision on post-conviction review is based on an unreasonable determination of the facts." Pet. i.

Granted, Wood discussed § 2254(d)(1) in the body of his petition. Pet. 22-25. But "the fact that [Wood] discussed this issue in the text of [his] petition for certiorari does not bring it before [the Court]. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993). Rule 14.1(a) levies the requirement that all distinct issues be spelled out in the questions presented, in part, so that "parties who feared an inability to prevail on the question presented would [not] be encouraged to fill their limited briefing space and argument time with discussion of issues other than the one on which certiorari was granted." *Yee v. Escondido*, 503 U.S. 519, 536 (1992). With Wood now demoting his § 2254(d)(2) claim to secondary status, and attacking a characterization of testimony rather than the factual conclusion outlined in the questions presented, *see infra* at 40-44, this appears to be one of those cases.

B. LIKE COUNSEL IN *STRICKLAND*, *DARDEN*, AND *BURGER*, WOOD'S COUNSEL REASONABLY HALTED THEIR MENTAL HEALTH INVESTIGATION.

Regardless, the state courts reasonably applied *Strickland* because, faced with a similar set of facts, they reached the same conclusion as this Court in three cases, including *Strickland* itself.

In *Strickland*, the Court stated that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 690-91. Wood evokes the latter scenario; that is, he claims that his trial team unreasonably halted its investigation into Wood's "mental deficiencies for purposes of mitigation" after reviewing the Kirkland Report. Blue Br. 24-25.

For the purpose of this appeal, Respondents adopt Wood's "red-light, green-light" analogy for judging the decision to halt an investigation. Blue Br. 27. Under *Strickland*, counsel has a duty to reasonably investigate a promising mitigation lead (*i.e.* "the green light") unless or until he encounters a "red light," at which point counsel may terminate his investigation without violating the Sixth Amendment. Blue Br. 27. The Court has defined the "red light" as a reason to believe that further investigation would either be "fruitless" or "harmful." *Strickland*, 466 U.S. at 691 (when counsel "has reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable"). Prior to

the state courts' decisions here, the Court held on three occasions that counsel reasonably halted an investigation after encountering one or both of these red-light indicators.

In *Strickland*, David Washington argued that his trial counsel performed deficiently in the penalty phase by failing, among other things, to "request a psychiatric report" and "to seek a presentence investigation report." 466 U.S. at 675. The Court held that counsel's decision not to embark down these investigative paths was reasonable because (1) "counsel could reasonably surmise from his conversations with [Washington] that character and psychological evidence would be of little help" and (2) Washington's post-conviction mitigating evidence would have been "harmful" if introduced at trial because it would have allowed the State to introduce Washington's "rap sheet" and psychological reports that rebutted Washington's "emotional disturbance" argument. *Id.* at 699-700.

In *Darden v. Wainwright*, 477 U.S. 168 (1986), Willie Darden's trial counsel "obtained a psychiatric report on [Darden], with an eye toward using it in mitigation during sentencing." *Id.* at 185. Counsel did not, however, introduce the report (or any other evidence) at sentencing. In holding that counsel reasonably "rejected use of the psychiatric testimony," the Court noted that the State could have countered with (1) its own psychiatric report that labeled Darden as a "sociopathic type personality" and (2) evidence of Darden's prior convictions, including an assault with the intent to commit rape. *Id.* at 186.

In *Burger v. Kemp*, 483 U.S. 776 (1987), Christopher Burger's attorney knew "some, but not all," of Burger's troubled childhood, and he knew that Burger possessed "an IQ of 82 and functioned at the level of a 12-year-old child." *Id.* at 779, 790-91. Counsel "determined that he need not undertake further investigation," however, and he did not present any mitigating evidence at trial. *Id.* at 795. Even though counsel "could well have made a more thorough investigation than he did," *id.* at 794, the Court deemed his decision not to present testimony from Darden or his psychologist reasonable because counsel feared that the jury would have learned from either man that Darden understood right from wrong and that he reveled in his crime. *Id.* at 791-92.

The Kirkland Report contained similar red-light indicators. Like counsel in *Strickland*, Wood's trial team knew after reading the Kirkland Report that Wood's subaverage intellect "would be of little help" in lessening Wood's moral culpability. *Strickland*, 466 U.S. at 699. The Kirkland Report indicated that Wood's "thinking was goal directed and logical" (J.A. 327) and that Wood's low intellectual functioning did not affect his ability to appreciate the criminality of shooting Ruby Gosha (J.A. 330)—just as Christopher Burger's low IQ did not prevent him from "understanding right from wrong." *Burger*, 483 U.S. at 791, n.9. Furthermore, because the Kirkland Report and the Kilby Evaluation reached the same conclusion regarding Wood's intellectual abilities (J.A. 327), counsel had reason to believe that further investigation into the subject would produce the same results; a supposition proved true when three psychologists and Wood's grade-school teachers presented "essentially identical" evidence at the Rule

32 hearing. Pet. App. 63a. Thus, counsel could have reasonably believed that further investigation would be "fruitless." *Strickland*, 466 U.S. at 691.

The Kirkland Report was also chock-full of "harmful" information. *Id.* Like counsel in *Strickland* and *Darden*, Wood's counsel faced the dilemma of hiding the 18 prior arrests listed in the Kirkland Report. J.A. 326-27. Even worse, the Kirkland Report revealed that Wood acknowledged his "injurious" feelings toward others, including an admission that he shot Barbara Siler "after seeing her with another man." J.A. 326. Deeming these problems as anything other than a "red light" would have resulted in a head-on collision with rebuttal testimony from Dr. Kirkland and Barbara Siler that "might be literally fatal" to Wood's mitigation case. *Burger*, 483 U.S. at 792.

To dispatch Wood's § 2254(d)(1) claim, the Court needs only to declare that the state courts' decision was objectively reasonable. *See Lockyear v. Andrade*, 538 U.S. 63, 70-71 (2003). When faced with similar facts, the state courts reached the same conclusion as this Court in *Strickland*, *Darden*, and *Burger*. Regardless of whether another jurist might rule differently, it cannot be objectively unreasonable to come down on the same side as this Court. Thus, Wood cannot clear § 2254(d)(1)'s bar to relief.

C. NEITHER *WILLIAMS* NOR *WIGGINS* CONTROLS THIS CASE.

Wood's reliance on the Court's subsequent decisions in *Williams v. Taylor*, 529 U.S. 326 (2000), and *Wiggins v. Smith*, 539 U.S. 510 (2003), is

misplaced because neither case presented the issue here: Whether counsel reasonably halted an investigation when faced with *Strickland's* red-light indicators ("fruitless" or "harmful"). Blue Br. 24-34.

In *Williams*, trial counsel unreasonably failed to investigate evidence of Terry William's childhood abuse and borderline mental retardation, evidence that was contained within Williams' juvenile and social services records. 529 U.S. at 370, 373. Counsel failed to uncover this mitigating evidence because they never obtained and reviewed Williams' records, wrongly believing that "state law barred access to such records." *Id.* at 395. Using Wood's "red light" analogy, *Williams* has no application here because the Court was not confronted with a situation in which counsel, after receiving a potential mitigation lead, misinterpreted a "green light" for a "red light." Instead, *Williams* addressed a situation in which counsel failed to reach the intersection.[16]

In *Wiggins*, trial counsel unreasonably failed to follow-up on evidence of Kevin Wiggins' troubled life history contained within his presentence investigation ("PSI") report and social service ("DSS") records. 539 U.S. at 523-28. The Court deemed counsel's failure unreasonable because counsel halted their investigation of Wiggins's life history with these records, despite (1) the records

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[16] Wood's reliance on *Rompilla v. Beard*, 545 U.S. 374 (2005), which post-dates the state courts' decisions in this case, is misplaced for a similar reason. Blue Br. 34. The Court held that Rompilla's attorneys acted unreasonably because they failed to timely secure, then fully review, Rompilla's prior conviction file, not because counsel read the file and failed to follow-up on a promising lead. *Id.* at 383-90.

mentioning Wiggins' "misery as a youth" and his "disgusting" life in foster care and (2) being offered funds to retain a "forensic social worker" to create a "social history report." *Id.* at 523-24.

Unlike *Williams, Wiggins* presented a situation in which counsel unreasonably stopped investigating after viewing a "green light" (*i.e.* the notations in Williams' PSI and DSS records). But *Wiggins* differs from this case, *Strickland*, *Darden*, and *Burger* in that Wiggins' "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 (distinguishing *Strickland*, *Darden*, and *Burger*). In other words, unlike Wood's counsel, Wiggins' attorneys acted unreasonably because they never faced a "red light" before halting their investigation.

Because neither *Williams* nor *Wiggins* presented the same factual situation faced by Wood's counsel, the state courts cannot be deemed objectively unreasonable for failing to match their holdings. At best, Wood can argue that some jurists would place this case on the *Williams*-*Wiggins* side of the fence, while others would join the state courts on the *Strickland*-*Darden*-*Burger* side. But if reasonable jurists can disagree on which decisions were most applicable, and thus which outcome should have been reached, Wood cannot prove that the state courts unreasonably applied "clearly established" precedent from this Court. 28 U.S.C. § 2254(d)(1).

IV. WOOD CANNOT PROVE PREJUDICE.

Even if Wood could clear one of § 2254(d)'s bars for *Strickland's* deficient performance element, he cannot prove *Strickland* prejudice. Before delving into the reasons, however, Respondents address the proper application of *Strickland's* prejudice standard to Alabama law.

A. *STRICKLAND* PREJUDICE'S ANALYSIS IS JUDGE-CENTRIC WHEN APPLIED TO ALABAMA LAW.

To prove penalty-phase prejudice, a capital petitioner must establish "a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Wood argues that, to meet this standard, he needs to establish a reasonable probability that just one of the 10 jurors who recommended a death sentence would have changed his vote had he known of Wood's low intellectual functioning. Blue Br. at 24 ("at least one more vote"), 53 ("at least one juror's calculus"), 55 ("at least one additional juror").

Wood's "one more juror" argument wrongly applies *Strickland* to Alabama law for two reasons. First, the trial court is the sentencer under Alabama law, and the jury's advisory verdict "is not binding upon the court." Ala. Code § 13A-5-47(e). The court must treat a life without parole ("LWOP") recommendation as a mitigating circumstance, *Ex parte Carroll*, 852 So.2d 833, 837 (Ala.2002), but the court is not required to give the recommendation any

amount of weight. *Harris v. Alabama*, 513 U.S. 504, 515 (1995). Second, Alabama juries cannot return an advisory penalty-phase verdict until 10 jurors vote for death or seven vote for LWOP. Ala. Code § 13A-5-46(f). The jury must continue deliberating until it reaches the required number of votes, or a mistrial is declared, and a new penalty-phase jury is empanelled. Ala. Code § 13A-5-46(g); *see also* J.A. 82-83 (trial court's jury instructions). Wood only received two LWOP votes; therefore, he needed to sway at least *five* more jurors to get a LWOP recommendation.[17] J.A. 84.

Because Alabama is a judge-sentencing state, *Strickland* prejudice is a judge-centric analysis. Wood can establish prejudice in one of two ways. First, Wood could establish a reasonable probability that the mitigating weight of his subaverage intellect would have successfully tilted the court's weighing calculus. Second, Wood could establish a reasonable probability that introducing evidence of his subaverage intellect to the advisory jury would have (1) persuaded at least five more jurors to recommend LWOP and (2) the added weight of a LWOP recommendation would have changed the outcome of the court's weighing analysis. He can do neither.

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[17] Wood seizes the "one juror" language from the Court's decision in *Wiggins*. 537 U.S. at 510. Unlike here, a single juror's vote mattered in *Wiggins* because Maryland law requires a unanimous jury vote to impose the death penalty. *Id.* (*citing Borchardt v. State,* 786 A.2d 631, 660 (Md. 2001)).

B. WOOD'S SENTENCER CONSIDERED EVIDENCE OF WOOD'S "BORDERLINE INTELLECTUAL FUNCTIONING" AT TRIAL.

The mitigating weight of Wood's subaverage intellect obviously would not have tilted the trial court's sentencing scales to LWOP because the trial court considered Wood's low intellectual functioning when sentencing Wood to death. In its weighing process, the trial court considered the McClaren Report and the Kirkland Report, which contained the results of the Kilby Evaluation. *See supra* at 11-12. From these reports, the trial court knew that (1) Wood functioned in the borderline range of intellectual functioning (J.A. 327, 329-30, 580-81); (2) Wood read at a third grade level (J.A. 327); and (3) Wood dropped out of school in tenth grade. J.A. 580. The trial court also witnessed Wood's intellectual abilities at trial. For example, at a pre-trial suppression hearing, Wood testified that, "I can read anything you put in front of me," Trial Tr. Vol. 1 at 168, and he proved it by reciting the arrest warrant he was shown 13 months earlier: "I read the names on there. Holly Wood intentionally caused the death by shooting Ruby Lois Gosha, with a firearm, a better description is [not] known to the affiant, 13-6A-2." *Id.* at 162.

In its final order, the trial court considered "that the defendant is functioning in the borderline range of intellect," but noted "the defendant does not have a mental disorder present that would detract from his ability to appreciate the criminality of his behavior with regard to this specific alleged instant offense." J.A. 104. The court then stated that it was "convinced beyond a reasonable doubt that the

aggravating circumstances . . . far outweigh[ed] the mitigating circumstances." J.A. 108. There is no probability, much less a reasonable one, that wrapping the same evidence in a new package would have changed the court's weighing calculus.

As a result, Wood's only path to prejudice is to establish a reasonable probability that introducing evidence of his subaverage intellect to the jury (1) would have swayed at least five more jurors to recommend LWOP and (2) the added weight of a LWOP recommendation would have changed the outcome of the trial court's weighing analysis. The Court need not speculate over the effect of a LWOP recommendation on the trial court, however, because Wood's evidence would have similarly failed with the advisory jury.

C. Presenting Evidence Of Wood's Low Intellectual Functioning To The Jury Would Have Further Tipped The Scales In Favor Of A Death Sentence.

The Kirkland Report is like a Trojan Horse. At first blush, it entices with the "inherently mitigating" evidence of Wood's borderline intellectual functioning. Blue Br. at 52. But had Wood's counsel wheeled it before the jury, its mitigating quality would have proved hollow; while its contents wrought havoc on Wood's penalty phase case.

1. Respondents agree that Wood's borderline intellectual functioning constitutes admissible, non-statutory mitigating evidence. But merely presenting such evidence does not assure a LWOP recommendation or sentence. *See, e.g.*, *Sale v. State*,

8 So. 3d 330, 350-51 (Ala. Crim. App. 2008) ("borderline intellectual function;" 12-0 death recommendation; death sentence); *Yeomans v. State*, 898 So. 2d 878, 901-02 (Ala. Crim. App., 2004) ("borderline range of intelligence;" 11-1 death recommendation; death sentence). To make any difference, a defendant must give the evidence mitigating weight by explaining why *his* intellectual deficiencies matter under the facts of *his* case. Wood offers the following explanation:

> 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 reaction of others.'

Blue Br. 53 (*quoting Atkins v. Virginia*, 536 U.S. 304, 318 (2002)). But these attributes do not apply to Wood, and the State would have called Dr. Kirkland, Barbara Siler, and others in rebuttal to prove it.[18] *See George v. State*, 717 So. 2d 849, 852 (Ala. Crim. App. 1997) ("the State is allowed to rebut any evidence the [defendant] offers as a mitigating circumstance").

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[18] The only exception is that Wood suffered from "problems with anger and impulse control." J.A. 327. Of course, after learning that Wood shot and/or stabbed two ex-girlfriends, it is doubtful that a jury would have deemed Wood's anger control issues mitigating.

As for Wood's ability to "engage in logical reasoning" (Blue Br. 53), Dr. Kirkland determined that Wood possessed a "concrete reasoning ability" and "[h]is thinking was goal directed and logical." J.A. 327-28. As for his "ability to understand and process information" (Blue Br. 53), Dr. Kirkland found that Wood exhibited "a normal thought process." J.A. 327. That Wood could process information and think logically is further proved by the various jobs he held from ages 15 to 33, including driving a forklift, driving a delivery route, panning and stacking lead, and working at a pulp mill. J.A. 422, 476-77, 497-98, 539. Furthermore, Wood was "extremely good with his money," including the ability to pay bills, rent hotel rooms, and purchase and maintain automobiles. J.A. 35, 476-78, 512, 531.

Wood ably communicates with others. J.A. 510. Not only did he converse with his attorneys, he wrote letters in cursive handwriting to Barbara Siler while in prison. J.A. 481-82. Wood proved that he "understand[s] the reaction of others." Blue Br. 53. Immediately after shooting Ruby Gosha, Wood told his cousin that "he [knew] the police was coming." Trial Tr. Vol. 3 at 496. Understanding why they were coming, Wood tossed shotgun shells out the window, and he buried the murder weapon before he was arrested. *Id*. at 495-96, 499.

Most importantly in a juror's eyes, Dr. Kirkland would have testified that Wood knew that shooting Ruby Gosha was wrong. J.A. 330. In fact, Wood acknowledged to Dr. D'Errico that to "escape from law enforcement is against the law." J.A. 581.

As we stated at the outset, arguing to a jury that Wood's "mental deficiencies" mitigated his "personal culpability" for murdering Ruby Gosha was a fool's errand. Blue Br. 53. At best, the jury might have assessed a feather's weight to such evidence. But that weight, and much more, would have been counterbalanced by the door this strategy opened.

2. Attempting to prove that Wood suffered from "mental retardation and mental disability" would have destroyed two lines of Trotter's penalty phase strategy. J.A. 235. First, Trotter argued that Wood quit school to provide for his siblings. J.A. 68. As the court of appeals noted, Wood's new strategy may have convinced the jury that Wood quit school to escape his special education classes, not to provide for his family. Pet. 67a-68a. Even worse, had trial counsel followed Wood's post-conviction course, the jury would have learned from Wood's sister Maeola that Wood's school career actually ended when Wood "got kicked out of school . . . because of the way he acted." R.32 Vol. 1, Sept. 18, 2000, Tr. 167.

Second, Trotter argued that Wood shot Ms. Gosha in a drunken fit of jealously, not with premeditated malice. J.A. 69-72. But Dr. Kirkland would have informed the jury that Wood professed that he did not drink alcohol on the day of the murder.[19] J.A. 326, 330.

Worst of all, arguing that Wood lacked the mental capacity to "engage in logical reasoning" or "to abstract from mistakes and learn from

[19]With the exception of relevancy, the Alabama Rules of Evidence, including the hearsay rules, do not apply during the penalty phase. Ala. Code § 13A-5-45(d).

experience" (Blue Br. 53, *quoting Atkins*, 536 U.S. at 318), would have opened the door to Wood's extensive criminal history, including his assault of Barbara Siler. *See, e.g.*, *Ferguson v. State*, 13 So. 3d 418, (Ala. Crim. App. 2008) (noting that Alabama's "appellate courts have looked to a myriad of factors in determining whether one is mentally retarded," including "being extensively involved in criminal activity"). Dr. Kirkland would have relayed Wood's confession that he shot Barbara Siler "after seeing her with another man." J.A. 326. Barbara Siler, who was waiting to testify at trial (J.A. 23), would have detailed the sordid story as she did at the Rule 32 hearing. J.A. 480-82. Finally, as the court of appeals aptly stated, the prosecutor would have driven the point home in closing: Wood learned from experience that "he needed to do more than merely shoot through a window—he had to sneak into the house and shoot [his ex-girlfriend] from point-blank range in her bed." Pet. App. 67a.

* * *

Attempting to negate Wood's "personal culpability" (Blue Br. 53) with evidence of mental retardation and mental deficiencies would have further tipped the jury's sentencing scales in favor of a death sentence. Consequently, Wood cannot establish a reasonable probability that (1) five jurors would have changed their death recommendations to LWOP, thereby (2) altering the trial court's conviction "beyond a reasonable doubt that the aggravating circumstances . . . far outweigh the mitigating circumstances." J.A. 108.

Nothing about Wood's subaverage intellect would have overcome Wood's date-me-or-die attitude toward women or his callous bravado concerning Ms. Gosha's murder: "I shot that bitch in the head, and blowed her brains out, and all she did was wiggle." Trial Tr. Vol. 3 at 495.

CONCLUSION

The Court should affirm the decision of the court of appeals.

Respectfully submitted,

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Appendix

28 U.S.C. § 2254(d)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (1994 ed.)[20]

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

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

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

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

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

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

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[20] Congress "amended" this statute, and "redesignated" it 28 U.S.C. § 2254(e), in 1996. *See* 28 U.S.C. § 2254, Amendments.

to appoint counsel to represent him in the State court proceeding;

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

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

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

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

28 U.S.C. § 2254(e)

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

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

(A) the claim relies on--

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

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

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

Sample of Alabama Rule 32 Proceedings[21]

Petitioner	Time Elapsed Between Trial & Rule 32 Hearing	Length of Rule 32 Petition
Wayne Holleman Travis	16 years and counting	70 pages
Anthony Ray Hinton	16 years	70 pages
Casey McWhorter	15 years	83 pages
Roy Edward Perkins	14 years	372 pages
Charles Stewart	13 years and counting	158 pages
Larry Smith	11 years	48 pages
William John Ziegler	8 Years and counting	297 pages

[21] The State requests this Court take judicial notice of the records in *Ziegler v. State*, CC-00-2891.60 (Mobile County); *Perkins v. State*, CC-92-478.60 (Tuscaloosa County); *Stewart v. State*, CC-90-630.60 (Talladega County); *Travis v. State*, CC-92-004.60 (Conecuh County); *Sockwell v. State*, CC-1988-1244.60 (Montgomery County); *Hinton v. State*, CR-04-0940, 2006 WL 1125605 (Ala. Crim. App. Apr. 28, 2006), *McWhorter v. State*, CC-93-077.60 (Marshall County); and *Smith v. State*, CC-95-200104.60 (Marshall County).