CAPITAL CASE

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

HOLLY WOOD, Petitioner,

v.

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

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a state court's decision on post-conviction review is based on an unreasonable determination of the facts when it concludes that, during the sentencing phase of a capital case, the failure of a novice attorney with no criminal law experience to pursue or present evidence of defendant's severely impaired mental functioning was a strategic decision, while the court ignores evidence in the record before it that demonstrates otherwise?

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

3. Whether a state court unreasonably applies *Atkins v. Virginia* when it bases its finding that a defendant does not have significant deficits in adaptive functioning and thus is not mentally retarded on an analysis of the defendant's relative strengths in adaptive functioning without considering the defendant's limitations, which is inconsistent with the accepted and established clinical definitions of mental retardation?

4. Whether a petitioner seeking habeas relief in federal court may rely on a comparative juror analysis to demonstrate a *Batson v. Kentucky* violation where that analysis is based on facts from the state trial court record, but was not presented to the state trial court?

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Petitioner Holly Wood respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, which reversed the District Court's grant of habeas corpus relief on ineffective assistance of counsel grounds and affirmed the District Court's denial of habeas corpus relief in all other respects in this case.

OPINIONS BELOW

The Eleventh Circuit's decision is reported at *Wood v. Allen*, 542 F.3d 1281 (11th Cir. 2008), and is attached as Appendix A. The District Court's decision is reported at *Wood v. Allen*, 465 F. Supp. 2d 1211 (M.D. Ala. 2006), and is attached as Appendix B. The decision of the Alabama Court of Criminal Appeals affirming the denial of Mr. Wood's state post-conviction petition is reported at *Wood v. State*, 891 So. 2d 398 (Ala. Crim. App. 2004). The decisions of

the Alabama Court of Criminal Appeals and Alabama Supreme Court on direct appeal are reported at *Wood v. State*, 715 So. 2d 812 (Ala. Crim. App. 1996), and *Ex parte Wood*, 715 So. 2d 819 (Ala. 1998), *cert. denied*, 525 U.S. 1042 (1998).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006). The Eleventh Circuit entered its judgment on September 16, 2008, and denied Mr. Wood's timely petition for rehearing and rehearing *en banc* on November 12, 2008. *See* Appendix C. On January 28, 2009, Justice Thomas granted Mr. Wood's timely application for a thirty-day extension to file this petition for a writ of certiorari up to and including March 12, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides, in pertinent part:

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

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

(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.

28 U.S.C. § 2254(d), (e)(1) (2006).

STATEMENT OF THE CASE

I. Mr. Wood's Trial

Petitioner Holly Wood is a black man with an IQ less than 70. He has been sentenced to death for a capital murder, after a trial at whose penalty phase he was represented by Kenneth Trotter, a recently-admitted lawyer who lacked any criminal law experience. (Vol. 17, Aug. 22, 2001 Tr. at 14-15.)[1] Mr. Wood was assigned two more experienced trial counsel, Cary Dozier and Frank Ralph, but they "basically designated" Trotter to "do the sentencing aspect." (Vol. 16, Sept. 18, 2000 Tr. at 15.) Despite Trotter's inexperience and the life-or-death consequences at stake, Trotter was left to "handle[] the aggravating circumstances and mitigating circumstances as far as the sentencing process went." (Vol. 16, Sept. 18, 2000 Tr. at 15.) In effect, Trotter was left to sink or swim.

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[1] At the time of Wood's trial, Alabama law required attorneys appointed in capital cases to have at least five years experience in criminal law. *See* ALA. CODE § 13A-5-54 (1994).

Trotter found himself increasingly isolated and working on his own. Shortly before the trial, he told the Southern Poverty Law Center that he did not "have anyone with whom to discuss the case, *including the two other attorneys*." (Vol. 18 at 31 (emphasis added).)

Not surprisingly, the investigation into mitigation evidence for use at the penalty phase was woefully inadequate. Ralph, who originally was supposed to handle the penalty phase, testified unequivocally that he did not participate in any investigation for the penalty phase. (Vol. 16, Sept. 18, 2000 Tr. at 73.) Mr. Wood's private investigator, Pete Taylor, did not even know the definition of mitigating circumstances. (Vol. 17 Aug. 23, 2001 Tr. at 93.) As a result of a competency evaluation that had been prepared at their request, trial counsel obtained an Outpatient Forensic Evaluation Report, dated May 13, 1994 ("Competency Report"), that concluded that Mr. Wood was competent to stand trial. (Vol. 7 at 244.) However, the Competency Report observed, among other things, that Mr. Wood had "an IQ in the borderline range of intellectual functioning," was "reading on a 3rd grade level," "is functioning, at most, in the borderline range of intellectual functioning" and "could not use abstraction skills much beyond the low average range of intellect." (Vol. 7 at 242-43.) Despite this clear evidence of mental impairments, neither Trotter nor either of his co-counsel pursued that evidence as a mitigating factor. (Vol. 17, Aug. 21, 2001 Tr. at 45, 51, 56-58, 61, 65.) Indeed, on the morning of the sentencing hearing before the jury, Trotter conceded that, even though trial counsel were on notice four months earlier, "[n]o further investigation has been done" into the issues of Mr. Wood's subaverage mental functioning that had been raised by the Competency Report. (Vol. 5 at 967.)

For example, counsel never spoke to Mr. Wood's teachers, who would have testified, among other things, that Mr. Wood was classified as "educable mentally retarded" and

was placed in special education classes. (Vol. 16, Sept. 18, 2000 Tr. at 128, 148; Vol. 17, Aug. 22, 2001 Tr. at 22; Vol. 17, Sept. 18, 2000 Tr. at 211-12, 215; Vol. 28, Aug. 4, 2003 Tr. at 36.) In addition, counsel never obtained an independent psychological evaluation of Mr. Wood, which would have confirmed, consistent with his teachers' testimony, that Mr. Wood is either mentally retarded or operating in the borderline range of intellectual functioning. As explained below, even the State's experts conceded during the state court Rule 32 proceeding that Mr. Wood has significant deficits in intellectual functioning (IQ below 70) and significant deficits in at least one area of adaptive functioning (functional academics) that manifested prior to the age of eighteen. But the jury considering Mr. Wood's sentence never heard that evidence. Trial counsel's failure to investigate, develop and present this mitigating evidence to the jury was not a strategic decision, but instead was simply the result of a gross lack of diligence, experience and judgment.

At the penalty phase hearing, the State argued the existence of three aggravating circumstances: (1) the crime had been committed during the course of a burglary; (2) Mr. Wood had a prior violent felony conviction; and (3) the crime was committed while Mr. Wood was on parole. Trotter called four of Mr. Wood's family members as witnesses during the penalty phase, who he identified at the courthouse the night before the penalty phase presentation to the jury. He had not met with them prior to Mr. Wood's conviction. (Vol. 17, Aug. 22, 2001 Tr. at 36, 121; Vol. 16, Sept. 18, 2000 Tr. at 170-71.)

After the presentation of evidence, the jury recommended that Mr. Wood be sentenced to death by a vote of 10 to 2 (Vol. 6 at 1087), which is the bare minimum necessary for such a recommendation under Alabama law. *See* ALA. CODE § 13A-5-46 (1994).

Interestingly, 10 to 2 was also the racial make-up of Mr. Wood's jury: 10 white jurors and 2 black jurors. During the *voir dire* phase of Mr. Wood's trial, the State used two-thirds of its peremptory strikes to exclude potential black jurors on the basis of their race, and its justification for their removal was a pretext for discrimination. (Vol. 2 at 356-58; Vol. 11 at 954-55.) At least eight times, the State's proffered explanation for striking black panelists applied to otherwise similarly situated white panelists. For example, the State struck a black panelist solely because she did "not believe in an eye for an eye or in capital punishment." (Vol. 2 at 362.) However, the State did not strike three white panelists, including the eventual jury foreman, who also stated that they did not believe in an "eye for an eye" punishment. (*Id.* at 249, 251, 300.) The State struck another black panelist because he did not believe in an "eye for an eye" punishment and had a family member who was caught stealing. In contrast, the State did not exclude a white panelist, even though he did not believe in an "eye for an eye" punishment and had an aunt who was convicted of manslaughter. (Vol. 2 at 299, 363-64; Vol. 11 at 815.) With one exception, the State did not even question the black panelists about the reasons it gave for striking them. The prosecution simply lifted the information for its supposedly neutral explanations from juror questionnaires, which also indicated the panelists' race. (Vol. 10 at 707.) As a result of the State's discriminatory peremptory strikes, the jury that ultimately convicted Mr. Wood of capital murder and recommended that he be sentenced to death was comprised of 10 white jurors and 2 black jurors.

The trial court accepted the jury's recommendation, finding that the State had proven three aggravating circumstances and that there were no mitigating circumstances, and sentenced Mr. Wood to death. (Vol. 6 at 1123-26.) Mr. Wood's conviction and sentence were

affirmed on direct appeal. *Wood*, 715 So. 2d 812; *Ex parte Wood*, 715 So. 2d 819, *cert. denied*, 525 U.S. 1042 (1998).

II. The State Court Post-Conviction Proceedings

On November 30, 1999, Mr. Wood filed a timely petition for post-conviction review under Alabama Rule of Criminal Procedure 32. (Vol. 18, 48-213.) Among other claims, Mr. Wood sought relief on the grounds that: (1) his counsel rendered ineffective assistance at the penalty phase of his trial in violation of his Sixth and Fourteenth Amendment rights ("ineffective assistance claim"); (2) his execution would violate the Eighth Amendment because he is mentally retarded ("*Atkins* claim"); and (3) the District Attorney exercised peremptory strikes in a racially discriminatory manner in violation of the Fourteenth Amendment ("*Batson* claim").

After the presentation of evidence at an evidentiary hearing over two days on September 18, 2000 and August 22, 2001, the Alabama Attorney General's Office filed a proposed 73-page order setting forth the Attorney General's legal and factual assertions. On November 27, 2001, the state court signed the Attorney General's proposed order *verbatim* and denied Mr. Wood's Rule 32 petition in its entirety. Appendix D. In part, this order found that "the record also shows that trial counsel investigated a potential mental health defense, but decided against presenting it." Pet. App. 201a. This finding is unsupported by the evidence.

While Mr. Wood's case was on appeal to the Alabama Court of Criminal Appeals ("CCA"), this Court issued its decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that the Eighth Amendment of the U.S. Constitution prohibits the execution of the mentally retarded. On April 25, 2003, the CCA remanded the case to the circuit court to conduct an evidentiary hearing on whether Mr. Wood is mentally retarded and whether his trial attorneys rendered

ineffective assistance due to their failure to develop and present evidence of Mr. Wood's mental retardation. *Wood*, 891 So. 2d at 411.

Each of the clinical psychologists who testified at the evidentiary hearing confirmed that, for purposes of determining whether Mr. Wood was mentally retarded, the standards developed by the American Association of Mental Retardation ("AAMR") and the American Psychiatric Association ("APA"), and referenced in *Atkins*, should be used. Under the AAMR definition, mental retardation is "characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work," manifesting themselves prior to the age of 18. *Atkins*, 536 U.S. at 308 n.3 (*quoting Mental Retardation: Definition, Classification, and Systems of Supports 5* (9th ed. 1992) ("AAMR 1992")). The APA definition is similar to the AAMR definition. *See Atkins*, 536 U.S. at 308 n.3 (*quoting* APA, *Diagnostic and Statistical Manual of Mental Disorders 41* (4th ed. 2000) ("DSM-IV")).

The state court record is undisputed that Mr. Wood has significantly subaverage intellectual functioning, which manifested prior to the age of eighteen. Both Mr. Wood's expert, Dr. Salekin, and the State's experts, Dr. McClaren and Dr. Prichard, agreed that "Wood's IQ falls within the range of mentally retarded" and that his significant deficits in intellectual functioning "most likely" manifested prior to the age of eighteen. (Vol. 28, Aug. 4, 2003 Tr. at 88, 90, 163, 187; Vol. 29 at 47, 51, Aug. 4, 2003 Tr. at 235.) The conclusion reached by each of the experts was confirmed by the testimony of two special education teachers who taught Mr. Wood from age twelve to sixteen. (Vol. 28, Aug. 4, 2003 Tr. at 34, 48, 50, 51.)

With respect to adaptive functioning, all the experts agreed that Mr. Wood has significant limitations in functional academics, which manifested prior to the age of eighteen. Based on the results of a Wide Range Achievement Test ("WRAT") that Dr. Salekin administered to Mr. Wood, Dr. Salekin determined that "Wood's reading ability was assessed to be at the sixth grade level (4th percentile), his spelling was assessed to be at the third grade level (0.9th percentile), and his arithmetic score was assessed to be at the third grade level (0.8th percentile)." (Vol. 29 at 47; Vol. 28, Aug. 4, 2003 Tr. at 93-94.) Based on a WRAT test that Dr. McClaren administered to Mr. Wood, Dr. McClaren testified that Mr. Wood's "functional academics are very low, like second to fourth grade level," which "I believe, is an area that he functions in the mentally retarded range." (Vol. 28, Aug. 4, 2003 Tr. at 186.) Likewise, Dr. Prichard testified that Mr. Wood has "some limitations in academic function; reading, writing, and arithmetic essentially." (Vol. 29, Aug. 4, 2003 Tr. at 219.) These findings are consistent with the competency evaluation performed at the time of Mr. Wood's trial that reported that Mr. Wood was "reading on a 3rd grade level." (Vol. 7 at 243.)

Thus, having established by consensus that Mr. Wood has significant limitations in one of the listed adaptive skill areas, the issue before the state court was whether Mr. Wood has significant limitations in at least one other area of adaptive functioning. The state court record shows that Mr. Wood also has significant limitations in the adaptive skill areas of communication, social skills, and self-direction, as demonstrated by the responses to the Vineland questionnaires. (Vol. 29, Aug. 4, 2003 Tr. at 4, 17, 30, 33, 226-27.)[2] For example, the questionnaire responses of Mr. Wood's former special education teachers indicate that Mr. Wood

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[2] The expert psychologists administered Vineland questionnaires to various individuals who knew Wood as a method for evaluating his adaptive functioning.

has difficulty controlling his anger, refraining from asking questions or making statements that may embarrass or hurt others, and setting realistic goals and following through with them. (Vol. 29 at 5, 14, 21, 30.) In the same vein, Ralph testified that he tried to talk to Mr. Wood, "but he was basically very non-communicative" and that "[m]ost of the time when we would ask him questions, he wouldn't even answer us." (Vol. 16, Sept. 18, 2000 Tr. at 75-76.) Similarly, Trotter testified that "Wood was more or less a passive participant in the [trial and preparation] process . . . ." (Vol. 17, Aug. 22, 2001 Tr. at 52.) Analyzing Mr. Wood's bizarre behavior after being stopped for speeding (Vol. 28, Aug. 4, 2003 Tr. at 23-31), Dr. Salekin explained that Mr. Wood's judgment "was quite impaired" and that he does not "understand[] the consequence[s] of his own behavior at times." (*Id.* at 127-28.)

Although the clinically accepted definitions of mental retardation focus specifically on whether an individual has *limitations* in adaptive functioning, the state court's order rejecting Mr. Wood's *Atkins* claim ignored the evidence of Mr. Wood's limitations and focused instead on Mr. Wood's supposed relative *strengths*: (1) "Wood was able to obtain and maintain employment," Pet. App. 245a; (2) "Wood is able to function well independently and does not need the assistance of others to complete his daily tasks," Pet. App. 247a; and (3) "Wood is able to form and maintain interpersonal relationships with others." Pet. App. 250a. On January 6, 2004, the CCA adopted the circuit court's findings and affirmed. *Wood*, 891 So. 2d at 413. The Alabama Supreme Court denied Mr. Wood's petition for certiorari. *Ex parte Wood*, 715 So. 2d at 824.

III. The Federal Habeas Proceedings

On May 26, 2004, Mr. Wood filed a petition for a writ of habeas corpus in which he asserted his ineffective assistance, *Atkins* and *Batson* claims, among others. Petition for Writ of Habeas Corpus By Prisoner in State Custody Under Death Sentence, *Wood v. Campbell, et al.,*

No.2:04 cv509 (M.D. Ala. filed May 26, 2005). On November 20, 2006, the District Court denied Mr. Wood relief on his *Atkins* and *Batson* claims and granted relief on his ineffective assistance claim. Appendix B.

With respect to the *Atkins* claim, the District Court deferred to the state court's decision, which was copied *verbatim* from the State's proposed order, and found that the decision involved neither an unreasonable application of *Atkins* nor an unreasonable determination of the facts. Pet App. 121a. The district court rejected Mr. Wood's argument that the decision was unreasonable because the state court focused on Mr. Wood's relative strengths in adaptive functioning as opposed to his weaknesses. Pet. App. 122a (citing Vol. 28 at 189). The District Court also rejected Mr. Wood's *Batson* claim on procedural grounds, finding that his trial counsel had neglected to present to the state trial court "any argument or evidence of comparability between the potential African American jurors who were struck and any white potential jurors who were not struck by the defense." Pet. App. 128a.

With respect to the ineffective assistance claim, the District Court found "nothing in the record to even remotely support a finding that counsel made a strategic decision not to let the jury at the penalty stage know about Wood's mental condition." Pet. App. 147a. The District Court held that "the clear and convincing record evidence indicates that Trotter, who did not have the requisite years of experience, was left to conduct the mitigating evidence investigation on his own with little assistance from the attorneys who had the requisite experience, and did not make a strategic decision not to pursue or present evidence of mental retardation." Pet. App. 146a. The District Court concluded that "[a] finding by the state courts that a strategic decision was made not to investigate or introduce to the sentencing jury evidence of mental retardation is an unreasonable determination of the facts in light of the clear and

convincing evidence presented in the record." Pet. App. 147a. The District Court further found that "there is a reasonable probability that evidence of Wood's intellectual functioning, even if it had not been enough to establish that he was mentally retarded and had merely demonstrated that he was on the borderline of mental retardation, would have established a non-statutory mitigating circumstance" and that "[c]ounsel's failure to investigate and present any evidence of intellectual functioning, therefore, is sufficient to undermine confidence in the application of the death sentence." Pet. App. 151a.

As a result, the District Court ordered the State "to either (1) vacate Holly Wood's sentence and resentence him to life without possibility of parole, or (2) conduct a new sentencing hearing for Holly Wood that is consistent with the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984)." Pet. App. 152a. The State appealed the District Court's order, and the District Court granted Mr. Wood a certificate of appealability to cross-appeal from the denial of his *Atkins* and *Batson* claims.

On appeal, the Eleventh Circuit affirmed the denial of Mr. Wood's *Atkins* and *Batson* claims, and a divided panel reversed the grant of relief on his ineffective assistance claim. Appendix A. The Eleventh Circuit did not specifically address Mr. Wood's argument that it was unreasonable for the state courts to focus on Mr. Wood's relative strengths instead of limitations in adaptive functioning in reaching a decision on Mr. Wood's mental retardation. With respect to Mr. Wood's ineffective assistance claim, restricting its obligation under AEDPA to "examining whether there is evidence to support the state courts' findings" (Pet. App. 50a n.23), the majority held that "the Rule 32 evidence amply supports the state courts' fact findings" that "(1) 'counsel decided that calling Dr. Kirkland [who prepared the Competency Report] would not be in Wood's best interest'; and (2) 'counsel investigated a potential mental health defense,

but decided against presenting it.'" Pet. App. 48a. The majority also held that Mr. Wood had failed to establish prejudice, although it did not purport to base that conclusion on any fact findings of the state court. Pet. App. 61a-71a.

The dissent concluded that, in contravention of Supreme Court and Eleventh Circuit precedent, the majority opinion "altogether disregards direct and specific evidence" contrary to "the state court's finding that Wood's counsel decided against pursuing or presenting evidence of Wood's mental impairments." Pet. App. 73-74a. As for prejudice, the dissent stated that "evidence of Wood's mental deficiencies was essential to mitigation" and, given the statutory minimum death penalty vote of 10 to 2, "there is a reasonable probability that the outcome of Wood's penalty phase would have been different had Wood's lawyers rendered effective assistance of counsel." Pet. App. 90a, 92a.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari To Resolve A Conflict Regarding The Application Of AEDPA To The Review Of State Court Decisions Involving Factual Determinations

A. There Is A Conflict Among The Circuits Regarding The Interaction Of Sections 2254(d)(2) And 2254(e)(1)

Review of state court fact determinations is governed by two distinct subsections of AEDPA. Under 28 U.S.C. § 2254(d)(2), a federal court can grant a writ of habeas corpus with respect to a claim adjudicated on the merits in a state court proceeding where the adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Under 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct" and the "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

"[A]lthough AEDPA is now over a decade old, courts, commentators and practitioners all continue to struggle to make sense of [these two] provisions dealing with questions of fact in federal habeas proceedings." Justin F. Marceau, *Deference and Doubt: The Interaction of AEDPA § 2254(D)(2) and (E)(1)*, 82 Tul. L. Rev. 385, 387 (2007); *see Teti v. Bender*, 507 F.3d 50, 57 (1st Cir. 2007) ("The relationship between § 2254(d)(2) and § 2254(e)(1), both of which apply to state court fact determinations has caused some confusion"), *cert. denied*, 128 S. Ct. 1719 (2008); *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004) ("Despite the Supreme Court's pronouncements in *Miller-El* and *Wiggins*, a comprehensive interpretation of AEDPA's factual review scheme has yet to emerge from the federal courts"), *cert. denied*, 544 U.S. 1063 (2005); Wright, Miller, Cooper & Amar, *Federal Practice & Procedure: Jurisdiction 3d* § 4265.2 at 357 (2007) ("It is not clear how this invitation to decide whether the state fact determinations were reasonable will fit with the presumption that the state fact determinations are correct").

Lacking definitive guidance, the Courts of Appeals have divided over how to review state court factual findings under AEDPA. In *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004), *cert. denied*, 543 U.S. 1038 (2004) the Ninth Circuit held that where a habeas petitioner challenges state court factual findings "based entirely on the state record," a federal court only reviews those findings for their reasonableness under 2254(d)(2). Writing for that Court, (now Chief) Judge Kozinski explained, "[t]he additional requirements of 2254(e)(1) do not apply in that situation, because the challenge is governed by the deference implicit in the 'unreasonable determination' standard of section 2254(d)(2)." *Id.* at 1000. If, however, a habeas petitioner challenges state court factual findings based in part on evidence that was extrinsic to the state court record, 2254(e)(1)'s requirements "come into play once the state court's fact-

findings survive any intrinsic challenge" under 2254(d)(2). *Id.* Thus, the federal court first reviews the state court's factual findings to determine if they were reasonable *in light of the state court record*, and if they are, those findings are then presumed correct unless rebutted by clear and convincing evidence *that was not part of the state court record* (and was appropriately introduced in the federal habeas proceedings under 2254(e)(2)).

The Third Circuit likewise has held that "the language of § 2254(d)(2) and § 2254(e)(1) implies an important distinction: § 2254(d)(2)'s reasonableness determination turns on a *consideration of the totality of the 'evidence presented in the state-court proceeding,'* while § 2254(e)(1) contemplates a challenge to the state court's individual factual determinations, including a challenge based wholly or in part on evidence outside the state trial record." *Lambert*, 387 F.3d at 235 (emphasis added).

By contrast, other Courts of Appeals, including the Eleventh Circuit, have held that section 2254(e)(1) applies even where, as here, the petitioner challenges state court decisions based *solely* on the state court record under section 2254(d)(2). Pet. App. 6a-7a; *Trussell v. Bowersox*, 447 F.3d 588, 591 (8th Cir. 2006) ("Trussell is only entitled to federal habeas relief if the state court made 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' 28 U.S.C. § 2254(d)(2), which requires clear and convincing evidence that the state court's presumptively correct factual finding lacks evidentiary support"), *cert. denied*, 549 U.S. 1034 (2006).[3] The Eleventh Circuit in this case evaluated the

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[3] Still other Courts of Appeals hold that section 2254(d)(2)'s standard can be satisfied by showing, under section 2254(e)(1), that a state court decision "rests upon a determination of fact that lies against the clear weight of the evidence" because such a decision "is, by definition, a decision so inadequately supported by the record as to be arbitrary and therefore objectively unreasonable." *Ben-Yisrayl v. Buss*, 540 F.3d 542, 549 (7th Cir. 2008) (internal quotations omitted).

reasonableness of the state court's factual determinations under 2254(d)(2) by assessing whether, "[a]t a minimum," Mr. Wood presented clear and convincing evidence rebutting those factual determinations. Pet. App. 50a n.23.

Importing the "clear and convincing evidence" standard to the state court record, contrary to the Ninth and Third Circuit's construction of AEDPA, leads these federal courts to ignore this Court's teaching that defects in the state court's fact finding "can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable" *Taylor,* 366 F.3d at 1001 (citing *Wiggins v. Smith*, 539 U.S. 510, 527-528 (2003) and *Miller-El v. Cockrell,* 537 U.S. 322, 346 (2003)). Thus, in this case, notwithstanding that the state courts ignored critical evidence supporting Mr. Wood's ineffective assistance claim, the Eleventh Circuit concluded that the state courts' factual determinations were reasonable because, "there is evidence to support the state courts' findings." Pet. App. 50a n.23. Under this approach of "see if there is *any* evidence to support what the state court found," the court abdicated its responsibility to review the *entire* record and instead made its determination of reasonableness on the basis of only *part* of the record.

In *Miller-El*, 537 U.S. at 341, this Court taught that it is "incorrect . . . to merge the independent requirements of §§ 2254(d)(2) and (e)(1)." As the Court explained:

> AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable requirement and applies to the granting of habeas relief . . . .

Id. at 341-42. The Court, however, has not decided whether section 2254(e)(1) always applies in the context of review under section 2254(d)(2) even when that review is based solely on the state

court record, nor, assuming that it does, how the two provisions interact in a court's ultimate assessment of whether to grant habeas relief under section 2254(d)(2). *See Rice v. Collins*, 546 U.S. 333, 339 (2006) ("Although the Ninth Circuit assumed § 2254(e)(1)'s presumption applied in this [2254(d)(2)] case, the parties disagree about whether and when it does. We need not address that question"). The Eleventh Circuit's insistence that state court decisions must be accepted as reasonable even if they ignore critical evidence in the record, unless the subsidiary factual findings are refuted by "clear and convincing evidence," is in tension with *Miller-El*'s admonition that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review" and "does not by definition preclude relief." 537 U.S. at 340.

Further, in *Wiggins v. Smith*, 539 U.S. 510, 526 (2003) this Court held that a habeas petitioner had satisfied his burden under AEDPA where "[t]he record of the actual sentencing proceeding underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." The Court concluded that when viewed in light of the record of the actual sentencing proceeding, "the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." *Id.* at 526-27. The Court should grant certiorari to ensure that federal courts are conducting the meaningful reasonableness review required by section 2254(d)(2).

B. Contrary To AEDPA, The Eleventh Circuit Failed To Conduct The Reasonableness Analysis Required Under Section 2254(d)(2), Which Resulted In Abandonment Of Judicial Review

1. The Eleventh Circuit Failed To Review The Reasonableness Of The State Court's Decision In Light Of The State Court's Failure To Consider The Entire State Court Record, Including Trial Counsel's Admission That They Did Not Make A Strategic Decision Regarding The Introduction Of Mental Health Mitigation Evidence At The Penalty Phase

The state court's finding that counsel made a strategic decision after an investigation not to present evidence of Mr. Wood's impaired intellectual functioning was based almost exclusively upon the testimony of Dozier who speculated about what he "would have" done with respect to events *six years* prior to his testimony because he had no specific recollection about what trial counsel did or why they did or did not make certain decisions at the penalty phase, and had "no files" from Mr. Wood's case that might shed light on that issues. Pet. App. 19a, 49a; (Vol. 16, Sept. 18, 2000 Tr. at 57, 58, 61.).

But even Dozier's testimony does not support the state court's finding that he made a decision not to pursue and present mental health mitigation evidence.

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

(Vol. 16, Sept. 18, 2000 Tr. at 56-57, 61.)[4] Moreover, Dozier testified that trial counsel would have presented information in the Competency Report that they found useful to Mr. Wood at the penalty phase and would have presented information about "mental health problems" at the penalty phase if that information had been available. (*Id.* at 57, 58.) But the Competency Report indicated that information about mental health problems was available and trial counsel did nothing to develop that information and did not present it to the jury when it would have mattered most.

More importantly, the state court finding that counsel made a strategic decision is contradicted by trial counsel's own admission that they failed to investigate Mr. Wood's mental health problems. Thus, the state court record cannot reasonably be characterized as "silent" as to why evidence of Mr. Wood's "mental deficiencies was not presented to the jury in the penalty phase." Pet. App. 50a, 52a. Trotter plainly answered that question on the morning of the sentencing hearing when he told the trial judge that "[n]o further investigation has been done, psychologically of those points" even though the Competency Report "indicates that the defendant may have psychological problems *that need further assessment.*" (Vol. 5 at 967 (emphasis added)). There would have been no reason for Trotter to seek an independent psychological evaluation of Mr. Wood if, as the state court concluded, counsel had made a decision that the Competency Report itself constituted a sufficient investigation and there was nothing in it that merited counsel's further consideration.

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[4] When asked to describe counsel's general strategy at the penalty phase, Dozier testified "Only thing I remember was something about his childhood, and I don't recall what it was all about. I just don't recall. I mean, that's been a long time ago." (Vol. 16, Sept. 18, 2000 Tr. at 55.)

In addition, after the penalty phase before the jury, but before sentencing by the trial court, Trotter wrote to his co-counsel reiterating that "we should request an independent psychological evaluation -- even if that means asking for a postponement of the sentencing hearing [before the judge]." (Vol. 18 at 27-28.) The record reflects that Counsel's failure to request an independent psychological evaluation at that late date was not based on a weighing of the pros and cons for Wood, but solely based on their conclusion "that the judge would never grant a continuance or they didn't think the Judge would grant a continuance." (Vol. 17, Aug. 22, 2001 Tr. at 47-48.) Furthermore, Trotter submitted the Competency Report at the sentencing hearing before the trial court and referred specifically to matters in the Report that the state court found trial counsel had decided not to pursue and present.[5]

These facts demonstrate, as the district court (Pet. App. 146a-47a) and the Eleventh Circuit dissent concluded, that counsel "realized too late what any reasonably prepared attorney would have known: that evidence of Wood's mental impairments could have served as mitigating evidence and deserved investigation so that it could properly be presented before sentencing." Pet. App. 85a-86a.

The state court decision (copied verbatim from the State's proposed findings) does not even address any of the critical evidence regarding the actual penalty and sentencing proceedings. Under the Ninth Circuit's construction of AEDPA, that "failure to take into account and reconcile key parts of the record" itself is sufficient to conclude that the state court's

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[5] The fact that counsel belatedly introduced evidence with no context at the sentencing phase before the trial judge does not cure the failure to do a proper investigation and present mitigating evidence to the jury. *See Brownlee v. Haley*, 306 F.3d 1043, 1075 (11th Cir. 2002) ("the role of the advisory jury is so essential that a failure to present mitigating evidence to the jury cannot easily be cured at the judicial sentencing stage").

decision was an unreasonable determination of the facts under section 2254(d)(2). *See Maddox*, 366 F.3d at 1008.

The Eleventh Circuit's holding has far reaching implications. Post-conviction proceedings commenced after direct appeals typically involve testimony of trial counsel years after the trial. In many cases, like this one, counsel's recollection of events will have faded. If, as the Eleventh Circuit held, counsel's testimony concerning what they "would have" done can trump direct evidence of what they said and did contemporaneously at trial, state court decisions based on counsel's vague speculation will become unassailable on federal habeas review.

It is critical that the Court resolve the conflict between the Courts of Appeals over the applicability of 2254(e)(1) to 2254(d)(2) and determine what inquiry a federal court should undertake when determining whether to grant habeas under 2254(d)(2). Had the Eleventh Circuit applied the correct inquiry in this case, which Judge Kozinski articulated in *Maddox*, it would have granted Mr. Wood's ineffective assistance claim. Indeed, as the district court and the dissenting Eleventh Circuit opinion found, the factual record before the state court merits habeas relief on that claim. If the Court allows the conflict to persist, Courts of Appeals will undoubtedly continue to abdicate their responsibility to conduct meaningful review under the guise of AEDPA deference and to permit unreasonable state court factual decisions to stand. *See Wingo v. Wedding*, 418 U.S. 461, 468 (1974) ("More often than not, claims of unconstitutional detention turn upon the resolution of contested issues of fact"). Consequently, this Court should grant certiorari.

2. The Eleventh Circuit Also Incorrectly Ruled That The State Court's Factual Findings With Regard To Mr. Wood's Ineffective Assistance Claim Were Not Contradicted By Clear And Convincing Evidence

The evidence described above, all of which the state court ignored, also constitutes clear and convincing evidence that rebuts the state court's subsidiary factual finding

that trial counsel made a strategic decision. Accordingly, even if section 2254(e)(1) applies when a federal court determines whether the state court's decision was an unreasonable determination of the facts based solely on the state court record under section 2254(d)(2), the Eleventh Circuit erred in its application of AEDPA.

C. The Eleventh Circuit Also Misapplied Section 2254(d)(1)

Even accepting the state court's finding that counsel made a strategic decision not to pursue mental health evidence as mitigation evidence, its rejection of Mr. Wood's ineffective assistance claim constituted an unreasonable application of federal law under this Court's precedents, which repeatedly have held that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 690); *accord Williams v. Taylor*, 529 U.S. 362, 395-96 (2000).

Other Courts of Appeals have consistently held that the talismanic invoking of a "strategic decision" does not shield a state court decision from scrutiny if that decision was not supported by a reasonable investigation. For example, in *Dickerson v. Bagley*, 453 F.3d 690, 696 (6th Cir. 2006), the Sixth Circuit held that a state court decision constituted an unreasonable application of *Strickland* notwithstanding the state court's determination "of so-called 'strategic decisions' of counsel not to conduct . . . a comprehensive investigation." The Sixth Circuit concluded that had counsel conducted a comprehensive investigation, "reasonable lawyers surely *would not have limited* the mitigation proof in this case . . . [and] would have put on proof that his low IQ brought him close to the line of retardation." *Id.* at 696-97; *see Bond v. Beard*, 539 F.3d 256, 289 (3d Cir. 2008) ("[s]trategy is the result of planning informed by investigation, not guesswork").

1. The Eleventh Circuit Incorrectly Ruled That The State Court's Holding On the Performance Prong Was Not An Unreasonable Application Of This Court's Precedents Where Trial Counsel Admitted That A Decision Not To Present Mental Health Mitigation Evidence Was Not Supported By An Adequate Investigation

In this case, the Eleventh Circuit reversed the district court and deferred to the state court's determination that it was reasonable for counsel not to pursue the matters in the Competency Report suggesting the existence of mental health mitigation evidence. But counsel admitted on the morning of the hearing that those matters "need[ed] further assessment" and that "[n]o further investigation has been done, psychologically, of those points." (Vol. 5 at 967.)

Counsel's determination that the Competency Report was not itself sufficient investigation is hardly surprising in light of the fact that the Competency Report was prepared for the stated purpose of assessing Mr. Wood's "competency to stand trial and mental state at the time of the offense." (Vol. 7 at 240.) "Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial." *Atkins*, 536 U.S. at 318. Therefore, "[o]btaining competency evaluations from mental health experts for guilt phase purposes does not discharge counsel's duty to consult such experts for the penalty phase because the considerations involved *are very different in the two phases*." *Belmontes v. Ayers*, 529 F.3d 834, 859 (9th Cir. 2008) (emphasis added).

The issue was not, as the state court found and the Eleventh Circuit accepted, whether trial counsel made a strategic decision not to call Dr. Kirkland as a witness or to present his report to the jury. Pet. App. 50a-53a. Rather, "[i]n assessing the reasonableness of an attorney's investigation. . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Counsel had a duty to develop the potential mental health mitigation evidence so that they could make a decision whether to present it in its

full and proper context. But trial counsels' investigation consisted of little more than interviews with Mr. Wood's family at the courthouse the day before the sentencing hearing began, which revealed nothing about his significantly impaired mental functioning.

In an attempt to bolster that investigation, the Eleventh Circuit relied on state court findings, which do not support the state court's conclusion that it was reasonable for counsel to conclude its investigation of Mr. Wood's severely impaired intellectual functioning with the Competency Report. For example, the majority relied on the state court's finding that "counsel employed investigator Taylor, who met with Wood's family members to seek out mitigation evidence." Pet. App. 56a-57a. But Taylor's contemporaneous notes of those interviews, which he confirmed represented the substance of the interviews (Vol. 17, Aug. 22, 2001 Tr. at 90-91), show that he focused solely on guilt/innocence issues -- not on potential mitigation evidence. (Vol. 18 at 40-47.) Moreover, when asked to define mitigating circumstances, he testified, "As I understand it, mitigating circumstances could and would be such circumstances that would likely tend to cause a person to do a deed or to do a thing or possibly do the crime that he was charged with." (Vol. 17, Aug. 22, 2001 Tr. at 93). That testimony defines a motive for a crime, not mitigating circumstances. Thus, contrary to the court's finding, Taylor could not have investigated mitigation evidence because he clearly did not even know what constitutes mitigation evidence.

The majority also relied on the state court's finding that "counsel attempted to get information from Wood's schools and various Alabama institutions where Wood might have spent time." Pet. App. 57a. But Trotter never sought to enforce the subpoena for school records, never obtained such records, and made no effort to contact Mr. Wood's special education teachers. (Vol. 16, Sept. 18, 2000 Tr. at 128, 148; Vol. 17, Sept. 18, 2000 Tr. at 215; Vol. 28,

Aug. 4, 2003 Tr. at 39-40, 55.) Counsel also never obtained any records from the "various Alabama institutions" before the trial. Just before the penalty phase, Trotter told the court that he had not received the records despite the fact that the judge had granted the request for the records two months prior. (Vol. 5 at 968-71.) On the morning of the penalty phase proceeding, counsel obtained records from the Alabama Department of Pardons and Paroles. Information contained in those records further convinced Trotter that counsel should obtain an "independent psychological evaluation" of Mr. Wood even if that meant seeking a postponement of the sentencing hearing. (Vol. 18 at 27-28.) But counsel never did so, and, in any event, by that time it was too late to present the results of any such investigation to the sentencing jury.

2. The Eleventh Circuit Also Incorrectly Ruled That The State Court's Holding On The Prejudice Prong Of Mr. Wood's Ineffective Assistance Claim Was Not Based On An Unreasonable Application Of This Court's Clearly Established Precedents

The Eleventh Circuit's holding on the prejudice prong is also inconsistent with this Court's precedents. This Court has held that "impaired intellectual functioning is inherently mitigating" and that "[e]vidence of significantly impaired intellectual functioning is obviously evidence that 'might serve as a basis for a sentence less than death.'" *Tennard v. Dretke*, 542 U.S. 274, 287-288 (2004); *see Wiggins*, 539 U.S. at 535 ("diminished mental capacities, further augment his mitigation case"); *Williams*, 529 U.S. at 396 (prejudice established where counsel "failed to introduce available evidence that Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school"). Such mitigating evidence "is exactly the sort of evidence that garners the most sympathy from jurors." *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004); *see* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1559 (1998); Samuel R Gross, *Update: American*

Public Opinion on the Death Penalty -- It's Getting Personal, 83 Cornell L. Rev. 1448, 1468-69 (1998).

Relying largely on its own construction of the facts, which are not entitled to any deference under AEDPA, the Eleventh Circuit held that the state court decision that Mr. Wood was not prejudiced by his counsel's deficient performance was neither an unreasonable determination of the facts nor application of this Court's precedents. According to the majority, presenting evidence of Mr. Wood's significantly impaired intellectual functioning would have allowed the State to introduce the Competency Report, including harmful information concerning the facts of the crime and of past crimes. Pet. App. 64a-65a, 67a. But had counsel done a proper investigation, they could have presented such evidence from sources other than the Competency Report -- including from Wood's special education teachers and an independent psychologist.

Next, the majority found that evidence of Mr. Wood's significantly impaired intellectual functioning "would have been eradicated by the State's overwhelming evidence of Wood's high level of adaptive functioning." Pet. App. 66a. But the evidence concerning Mr. Wood's adaptive functioning bears on whether his undisputed significant deficits in intellectual functioning render him mentally retarded. Evidence of significant deficits in intellectual functioning is "powerful mitigating evidence" even if "adaptive intelligence indicate[] that '[the defendant's] skills were somewhat higher'" than a person with mental retardation. *Brownlee v. Haley,* 306 F.3d 1043, 1070 (11th Cir. 2002).[6]

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[6] In any event, the majority's repeated reference to Wood's "high" level of adaptive functioning has no basis in the state court record. At the Rule 32 hearing, all the experts agreed that Wood has significant deficits in at least one area of adaptive functioning (functional academics). (Vol. 28, Aug. 4, 2003 Tr. at 93-94, 186; Vol. 29 at 47, Aug. 4, (continued...)

Finally, the majority held that any additional mitigating evidence would have been outweighed by the three aggravating circumstances. Pet. App. 68a-69a. But the majority overlooked the fact that even with counsel's deficient performance two jurors recommended a sentence of life without the possibility of parole. Under Alabama law, the agreement of a single additional juror would have precluded a death penalty recommendation. *See* ALA. CODE § 13A-5-46. There is a reasonable probability that at least one additional juror would have been swayed by the "inherently mitigating" evidence (*Tennard*, 542 U.S. at 287) that counsel failed to develop and present.

II. The Court Should Grant Certiorari To Reinforce That Mental Retardation Determinations Must Be Based Upon Scientifically Accepted Standards To Comply With *Atkins*

The Alabama state courts rejected Mr. Wood's mental retardation claim and the District Court and the Eleventh Circuit held that the state courts' decision was not contrary to or an unreasonable application of *Atkins*, or based on an unreasonable determination of the facts in light of the entire record. But the Eleventh Circuit did not address Mr. Wood's argument that the state courts' decision was an unreasonable application of *Atkins* because the state court assessed mental retardation without addressing Mr. Wood's limitations in adaptive functioning, which are the cornerstone of the clinical definitions of mental retardation relied on in *Atkins*.

In *Atkins*, the Court embraced two clinical definitions of mental retardation -- the AAMR and the APA definitions. Under those definitions, mental retardation is characterized by: (1) significantly subaverage intellectual functioning, (2) significant limitations in adaptive

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2003 Tr. at 219.) As to other areas of adaptive functioning, the State's expert testified that "his adaptive skills are probably on the borderline -- high borderline range, potentially in some areas even average." (Vol. 29, Aug. 4, 2003 Tr. at 234.)

functioning, which (3) manifest before the age of 18. *Atkins*, 536 U.S. at 308 n.3 (citations omitted).

Although this Court left "to the State[s] the task of developing appropriate ways to enforce" its holding in *Atkins*, 536 U.S. at 317, this Court did not delegate authority to determine whether the standards adopted by the States were consistent with the Eighth Amendment's prohibition on execution of people with mental retardation. *See Schirro v. Smith*, 546 U.S. 6, 7 (2005) (standards adopted by States under *Atkins* "might, in their application be subject to constitutional challenge"). In other words, "while States are free to adopt variations in the wording of the [mental retardation] definition, they cannot adopt a definition that encompasses a smaller group of defendants, nor fail to protect any individuals who have mental retardation under the definition embodied in the national consensus." James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 11, 12 (January/February 2003).[7] This is precisely what has happened in this case and in other cases around the country. Courts are applying definitions of mental retardation that are contrary to the scientifically accepted and established clinical definitions of mental retardation as identified by the Court in *Atkins*. The result is that states are failing "to protect individuals who have mental retardation under the definition embodied in the national consensus." *Id.* at 12.

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[7] *See Walton v. Johnson*, 269 F. Supp. 2d 692, 699 n.4 (W.D. Va. 2003) ("Although *Atkins* left to the States the task of developing a definition of mental retardation, that definition is limited under *Atkins* because it must be consistent with the emerging national consensus and evolving standards of decency described in the Supreme Court's opinion"), *aff'd*, 440 F.3d 160 (4th Cir. 2006) (*en banc*), *cert. denied*, 547 U.S. 1189 (2006).

This non-clinical approach is most evident with respect to the adaptive functioning prong of the mental retardation definition. As discussed above, that prong focuses upon "significant limitations . . . in adaptive behavior." *Mental Retardation: Definition, Classification, and Systems of Supports 5* (10th ed. 2002) ("AAMR 2002") at 1; DSM-IV at 41. The clinical definition thus makes clear that determining limitations in adaptive functioning involves the assessment of what the individual *cannot do*. When assessing adaptive functioning, it is critical to recognize that "[w]ithin an individual, limitations often coexist with strengths." AAMR 1992 at 8.

> This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all other people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. *These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.*

Id. (emphasis added); *see Holladay v. Campbell,* 463 F. Supp. 2d 1324, 1343 (N.D. Ala. 2006) (*quoting* AAMR 2002), *aff'd*, *Holladay v. Allen*, No. 06-16026, 2009 U.S. App. LEXIS 2126 (11th Cir. Jan. 30, 2009). "The focus in evaluations (and ultimately adjudications) under the adaptive prong must remain focused on the individual's limitations, rather than any skills he or she may also possess." Ellis, *supra* at 18 n.29. That is because "[t]he skills possessed by individuals with mental retardation vary considerably, and the fact that an individual possesses one or more that might be thought by some laypersons as inconsistent with the diagnosis (such as holding a menial job, or using public transportation) cannot be taken as disqualifying." *Id.* Rather, "the presence of confirming deficits must be the diagnostician's focus." *Id.*

In this case, however, the state court determined that Mr. Wood was not mentally retarded by applying a mental retardation standard that is inconsistent with the scientifically

accepted and established definition of mental retardation. Rather than focusing on whether Mr. Wood had limitations in areas of adaptive functioning, as the clinical definition requires, the state court focused upon whether Mr. Wood could do certain things that the court decided "are not typically associated with mentally retarded people . . . ." Pet. App. 246a. The state court thus focused on what Mr. Wood could do rather than whether he had limitations in adaptive functioning. The result is that the state court's determination that Mr. Wood is not mentally retarded is divorced from the clinical definitions of mental retardation and is thus objectively unreasonable.

The same thing has happened in other Alabama cases where courts are continuing to reject *Atkins* claims through the application of non-clinical and idiosyncratic definitions of mental retardation that focus on relative strengths and not limitations in adaptive functioning. *See, e.g., Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002) (denying *Atkins* claim and finding adaptive functioning prong not met because the defendant "was able to have interpersonal relationships . . . [and] maintained a job as an electrician for a short period"); *Smith v. State*, CR-97-1258, 2009 Ala. Crim. App. LEXIS 2, at *10 (Ala. Crim. App. Jan. 16, 2009) (denying *Atkins* claim and finding adaptive functioning prong not met because the defendant "was able to maintain a bank account, to save money, to use medical terms that were not normal for mentally retarded persons to use, and his participation in daily activities and other work showed his planning and thought processes"); *Clemons v. Alabama*, No. CR-01-1355, 2005 Ala. Crim. App. LEXIS 128, at *15, *17-*18 (Ala. Crim. App. June 24, 2005) (denying *Atkins* claim and finding adaptive functioning prong not met because the defendant "was still able to hold a few jobs . . . [had] the ability to form interpersonal relationships with women . . . [and his] post-crime conduct

supports the notion that he was a crafty criminal intent on minimizing his culpability and establishing a defense to his crime . . .").

Other state courts outside Alabama are similarly applying a standard that focuses on relative strengths as opposed to limitations in adaptive functioning. *See, e.g., Briseno v. Dretke*, No. L-05-08, 2007 WL 998743 (S.D. Tex. 2007) (Texas court's decision denying *Atkins* claim was not unreasonable under AEDPA), *aff'd*, No. 07-70034 (5th Cir. May 13, 2008) (unpublished), *cert. denied, Briseno v. Quarterman*, 129 S. Ct. 729 (2008); *Brown v. State*, 959 So. 2d 146, 150 (Fla. 2007) (finding that a mental retardation diagnosis "was contradictory to the evidence that Brown was engaged in a five-year intimate relationship prior to the crime, that he had his driver's license and drove a car, and that he was employed in numerous jobs including as a mechanic"); *Wiley v. State*, 890 So. 2d 892, 897 (Miss. 2004) (denying *Atkins* relief based on what the defendant could do, rather than what he could not do).

This case presents an opportunity for this Court to affirm its holding in *Atkins* and to ensure adherence to the Eighth Amendment's prohibition on the execution of defendants who fall within the clinical definition of mental retardation. In the absence of such instruction from this Court, States will continue to apply non-clinical standards in determining mental retardation and the implementation of this Court's decision in *Atkins* will not be moored to any scientific or clinical definition. It will also permit states to make the life or death determination about a defendant's eligibility for the death penalty by relying upon the prejudicial stereotypes that have burdened the mentally retarded throughout history. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring) (observing that the mentally retarded "have been subjected to a history of unfair and often grotesque mistreatment").

This Court has not hesitated in the past to rein in States that have applied standards that failed to ensure that Constitutional rights were not violated. For example, in *Panetti v. Quarterman*, 551 U.S. 930 (2007), this Court determined that the Fifth Circuit had applied a definition of competency that was inconsistent with *Ford v. Wainwright*, 477 U.S. 399 (1986), and thus considered petitioner's claim on the merits and did not defer to that determination under 28 U.S.C. § 2254(d). In that case, as here, the Court had initially left it to the States to establish procedures to implement the Court's interpretation of the Eighth Amendment. However, when presented with the Fifth Circuit's interpretation of competency to be executed, which was inconsistent with this Court's holding in *Ford*, the Court granted certiorari and further clarified its holding. So too here, the Court should grant certiorari to hold that states must apply clinically accepted definitions of mental retardation when making *Atkins* determinations, and that the failure to do so results in a decision that is based on an unreasonable application of *Atkins*.

III. The Court Should Grant Certiorari To Review The Eleventh Circuit's *Batson* Holding, Which Conflicts With The Decisions Of This Court And Other Courts Of Appeals

The Eleventh Circuit affirmed the district court's holding that Mr. Wood's *Batson* claim was procedurally barred on the ground "that although Wood raised a *Batson* claim in the state courts, he did not make any sub-argument comparing black venire members who were struck with white members who were not struck." Pet. App. 14a. That holding conflicts with the holdings of this Court and other Courts of Appeals.

During jury selection at Mr. Wood's trial, after the trial court's removals for cause, 56 prospective jurors remained of whom 18 (32%) were black. (Vol. 2 at 353, 356.) The State used 14 of its 21 (67%) peremptory strikes to remove black panelists. (Vol. 2 at 356-58; Vol. 11 at 954-55.) Only two black jurors were seated. (*Id.*)

At trial, Mr. Wood challenged the state's strikes as discriminatory. The trial court determined that Mr. Wood had satisfied his burden to make "out a prima facie case of discriminatory jury selection," thereby shifting the burden "'to the State to come forward with a neutral explanation for challenging . . . [black] jurors.'" *Miller-El v. Dretke*, 545 U.S. 231, 239 (2005) (quoting *Batson v. Kentucky*, 476 U.S. 79, 97 (1986)).

As demonstrated above, the *voir dire* record showed that at least eight times, the State's proffered explanation for striking black panelists applied to otherwise similarly situated white panelists. The trial court accepted the explanations proffered by the State and denied Mr. Wood's *Batson* motion. On appeal, Mr. Wood argued that the State's proffered explanations for striking at least six black panelists applied to otherwise similarly situated white panelists who ultimately sat on the jury, which reveals those explanations as pretext designed to mask purposeful discrimination. *See* Pet. App. 126a; *Wood*, 715 So. 2d at 816. The District Court declined to address the merits of Mr. Wood's *Batson* claim and the Eleventh Circuit affirmed.

In *Miller-El,* 545 U.S. at 240-41, this Court reversed the denial of habeas relief under AEDPA where the state used two-thirds of its peremptory challenges to strike nearly all black panelists and justified striking two black panelists by referring to characteristics that the black panelists shared with white panelists who were not struck. As the Court explained: "More powerful than . . . bare statistics . . . are side by side comparisons of some black venire panelists who were struck and white panelists allowed to serve." *Id.* at 241.

In so holding, the Court relied on the petitioner's arguments based on a comparative juror analysis even though the petitioner had not raised such arguments at trial or on direct appeal. The Court held that such arguments are cognizable because there "can be no question that the transcript of *voir dire*, recording the evidence on which [the petitioner] bases

his arguments . . . was before the state courts." *Id.* at 241 n.2. As the Court explained, there is a difference between "evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence." *Id.*

Applying *Miller-El*, the Ninth Circuit has held that a petitioner could rely on comparative juror analysis in federal post-conviction review even though he had not relied on such analysis before the state trial court. *See Boyd v. Newland*, 467 F.3d 1139, 1148 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007). In doing so, the Court of Appeals overturned a precedent decided prior to *Miller-El* because, in *Miller-El*, this Court had "conducted a comprehensive comparative juror analysis on appeal" even though that theory had not been presented in the state trial court. *Id.* Similarly, in *Reed v. Quarterman*, No. 05-70046, 2009 WL 58903, at *5, *8 (5th Cir. Jan. 12, 2009), the Fifth Circuit held that *Miller-El* "directs us to consider the comparative analysis" offered by a petitioner on federal habeas review even though that theory had not been presented in the state trial court because "the comparative analysis simply was a theory that involved the evidence before the state court." The Eleventh Circuit's holding in this case that Mr. Wood's *Batson* claim is procedurally barred because his trial counsel failed to present a comparative juror analysis notwithstanding the availability of such record evidence, therefore, is directly contrary to the holdings of the Ninth and Fifth Circuits.

This Court should grant certiorari to clarify the circumstances under which a federal court can consider a comparative juror analysis offered as evidence of a *Batson* violation on habeas review and to resolve the conflict in the Courts of Appeals over the application of *Miller-El*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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