11-295

No. ____

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IN THE

Supreme Court of the United States

HAROLD LEE HARVEY, JR.,
Petitioner,

v.

WALTER MCNEIL, WARDEN
Respondent.

On Petition for a Writ of Certiorari to the 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, in direct conflict with the Sixth Circuit, the court below properly held that counsel's failure to strike an openly biased juror does not constitute objectively unreasonable performance under *Strickland v. Washington* and that petitioner must bear the affirmative burden of proving that he did not consent to the biased juror, and whether, in direct conflict with the Fifth Circuit, the court below properly held that a court may presume a strategic purpose from a silent record caused by counsel's failure of memory as to why he made decisions that are on their face objectively unreasonable.

2. Whether the court below had the obligation to decide for itself which of "two equally compelling" interpretations of *Florida v. Nixon* was correct rather than deferring to the state court's interpretation under AEDPA, 28 U.S.C. §2254(d), and whether the state court's interpretation of *Florida v. Nixon* to require that all unauthorized concessions of guilt by counsel in capital cases be evaluated under the *Strickland* actual-prejudice standard was actually correct.

3. Whether trial counsel renders effective assistance of counsel under the clearly established law of *Rompilla v. Beard* and *Wiggins v. Smith* where the facts regarding counsel's failure to prepare or put on a proper

mitigation case are materially indistinguishable from those in *Rompilla* and *Wiggins*.

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PETITION FOR WRIT OF CERTIORARI

Harold Lee Harvey, Jr. ("Harvey") petitions for a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit").

OPINIONS BELOW

The Florida Supreme Court's opinions are reported at 656 So.2d 1253 (Fla. 1995) (Appx. C, 129a-141a) and 946 So.2d 937 (Fla. 2006) (Appx. E, 159a-187a), and its 2003 opinion granting Harvey a new trial, which was withdrawn, is unreported. (Appx. D, 142a-158a.) The decision of the United States District Court for the Southern District of Florida ("district court") denying Harvey's 28 U.S.C. § 2254 habeas petition is unreported. (Appx. B, 81a-128a.) The opinion of the Eleventh Circuit affirming the district court is reported at 629 F.3d 1228 (11th Cir. 2011) (Appx. A, 1a-80a), and its order denying rehearing is unreported (Appx. H, 209a-210a).

JURISDICTION

The court of appeals entered judgment on January 6, 2011 and denied rehearing on April 7, 2011. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254, which authorizes this Court to review a judgment of a court of appeals denying a petition for writ of habeas corpus under 28 U.S.C. § 2254. (Appx. J, 213a-217a.)

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment to the United States Constitution (Appx. J, 213a), which provides in pertinent part: "In all criminal

prosecutions, the accused shall enjoy the right to . . . trial[] by an impartial jury . . . . and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

A. Procedural Background.

1. Harvey's Trial and Direct Appeal. In June 1986, a jury convicted Harvey of first-degree murder in the 1985 shooting deaths of William and Ruby Boyd in Okeechobee, Florida. The jury recommended Harvey be sentenced to death. The Okeechobee trial court, sitting in Vero Beach to try to ameliorate the effects of pre-trial publicity about the case, sentenced Harvey to death for the murders.

On June 16, 1988, the Florida Supreme Court affirmed the trial court's judgment. *Harvey v. State*, 529 So.2d 1083, 1088 (Fla. 1988). This Court denied certiorari on February 21, 1989.

2. State Post-Conviction Proceedings. On August 27, 1990, Harvey filed a petition for state post-conviction relief. On October 5, 1992, the trial court summarily denied all of Harvey's claims except for one that sought relief based on participation of a biased juror. On March 17, 1993, the trial court denied the biased-juror claim after an evidentiary hearing. (Appx. F, 188a-190a.)

On February 23, 1995, the Florida Supreme Court affirmed denial of post-conviction relief regarding the biased-juror issue. (Appx. C, 129a-141a.) In the same opinion, the court remanded for an evidentiary hearing on several of Harvey's other claims.

On January 26, 1999, the trial court denied post-conviction relief on the remanded claims following an evidentiary hearing. (Appx. G, 207a.)

Harvey appealed the trial court's judgment on the remanded claims back to the Florida Supreme Court.

On July 3, 2003, the Florida Supreme Court granted Harvey a new trial, finding that trial counsel rendered ineffective assistance by conceding Harvey's guilt to first-degree murder without Harvey's consent. (Appx. D, 154a-155a.)

On July 18, 2003, the State moved for rehearing.

On June 15, 2006, the Florida Supreme Court granted rehearing of its 2003 opinion and vacated its order granting Harvey a new trial based on the concession-of-guilt issue. (Appx. E, 184a.) The sole basis for the court's reversal was this Court's intervening decision in *Nixon v. Florida*, 543 U.S. 175 (2003). (*Id.* at 163a.) The Florida Supreme Court also denied Harvey's other claims in its opinion.

3. Federal Habeas Proceedings. On January 24, 2008, Harvey timely filed a Petition for a Writ of Habeas Corpus in the district court under 28 U.S.C. § 2254, raising twelve constitutional violations. On September 5, 2008, the district court denied Harvey's petition. (Appx. B, 81a-128a.)

Harvey timely appealed to the Eleventh Circuit. On January 6, 2011, the court of appeals affirmed the district court's judgment denying Harvey's habeas petition. (Appx. A, 1a-80a.) On April 7, 2011, it denied rehearing. (Appx. H, 209a-210a.)

B. Factual Background

1. Trial Counsel Failed To Strike An Openly Biased Juror.

This case generated significant pre-trial publicity at the trial level because of the wealth and station of the victims. As a result, the trial court moved the venue from Okeechobee to Vero Beach and permitted sequestered voir dire of individual jurors.

During *voir dire*, potential juror Marlene Brunetti ("Juror Brunetti") admitted that she had seen information about Harvey's case in the news and knew he had confessed involvement. Juror Brunetti stated that she had prejudged Harvey as guilty of first-degree murder and could not be impartial:

THE COURT: Do you have any biases or prejudices for or against the state or for or against the defendants in general that might affect your ability to be a juror here?

MRS. BRUNETTI: Only from the news media.

* * *

(Appx. A, 21a.)

THE COURT: Okay, Now you've seen something on television; is that correct?

MRS. BRUNETTI: And the Miami Herald.

* * *

THE COURT: What do you recall?

MRS. BRUNETTI: Well, I recall that he confessed to doing it and that's why I feel that I couldn't be, you know, impartial about it.

THE COURT: Why do you think there was a confession?

MRS. BRUNETTI: Because I think he did it. I think he did it and he confessed to doing it.

* * *

THE COURT: What was the name of the person who confessed; do you know that?

MRS. BRUNETTI: Harvey.

THE COURT: You're sure of the name?

MRS. BRUNETTI: Yes.

* * *

THE COURT: Do you recall any of the incidents about the events?

MRS. BRUNETTI: That it was a robbery case. They robbed the people and that they had a big dairy farm or something, farmers of some kind.

THE COURT: What you recall about the case or think you recall about the case, would that affect your ability to be fair

and impartial here and confine your decision in the case only to the evidence and the law that I will instruct you?

MRS. BRUNETTI: I don't think I could be impartial after reading about it.

(Appx. K, 221a-223a.)

The prosecutor tried to rehabilitate Juror Brunetti in chambers, but she stated that she would be unable to follow the court's instructions:

MR. COLTON (prosecutor): One of the instructions on the law that the Judge will give you is that you're to put aside anything that you read or heard about the case and form your verdict based on the evidence that you heard in the courtroom; could you do that?

MRS. BRUNETTI: I don't know if I honestly could.

(*Id.* at 224a.)

Harvey's trial counsel, Robert Watson ("Watson"), also questioned Juror Brunetti. She continued to admit her bias and describe facts of the case that she had prejudged to be true:

WATSON: What is your present perception as to what happened based upon those articles?

MRS. BRUNETTI: Well, I think they broke in, is the best that I can remember, and they robbed them or something and then they were afraid they would be identified and they killed them.

WATSON: Okay. Do you have any feeling at this time if that's what happened what the punishment should be in that situation if that should happen?

MRS. BRUNETTI: I'm kind of confused on the death penalty after listening to all these different people. I think it's a deterrent because a person would not be able to get out to do the same thing again. But I don't necessarily believe that two wrongs make a right.

* * *

WATSON: When you say that you think he did it, do you mean that you think that he shot the people or when you say

you think that he did it, do you mean you think he committed a certain crime?

MRS. BRUNETTI: I feel that he committed the crime that he was charged for.

WATSON: First degree murder?

MRS. BRUNETTI: Yes.

WATSON: But the judge hasn't give you the instructions.

MRS. BRUNETTI: I know.

WATSON: But from what all you said up there that's what, you know – you've come to a conclusion as to what first degree murder is based upon what Mr. Colton and I said?

MRS. BRUNETTI: Yes.

WATSON: You think that that falls into this category?

MRS. BRUNETTI: Yes.

WATSON: Do you feel because Mr. Colton and I may not have explained to you as well as the Judge would later, do you think you could follow the Judge's instructions?

> MRS. BRUNETTI: I can't honestly say that I could have an open mind after reading it and seeing it on the news. I have to be honest. I wouldn't want to get on the jury and not say what I feel.

(*Id.* at 226a, 228a-229a.)

Juror Brunetti was never rehabilitated. Despite her comments as to Harvey's guilt of first-degree murder, Watson, who intended to argue for second-degree murder during the guilt phase, did not challenge her for cause or use a peremptory strike. (*Id.* at 229a-230a.) Although she was originally seated as an alternate, Juror Brunetti became a full-fledged member of the jury on the first morning of trial when the court excused another juror for medical reasons. (*Id.* at 232a-233a.)

As a result, Juror Brunetti, a self-admitted biased juror, who swore under oath she could not set aside her bias against Mr. Harvey, served on the jury that convicted Harvey of first-degree murder and recommended a death sentence for him.

During a post-conviction evidentiary hearing on this issue in 1993, Watson testified that he had no recollection of Juror Brunetti or what factors he may have considered in not striking her. (DK-21/Ex.A/113.)[1] He admitted that grounds existed to

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[1] Record citations to the State's Appendix will be as follows: DK-11/[Volume Number]/[Page Number]. Citation to part of the record that was not included in the State's Appendix is as

strike Juror Brunetti for cause and that the trial court expressly invited him to do so. (*Id.*) He did not testify that he had any strategic purpose for keeping her on the jury. This was the only area in which Watson had difficulty remembering his strategic choices.

In 1995, the Florida Supreme Court affirmed denial of state post-conviction relief on this issue. While the court acknowledged that Watson had no recollection of why he did not strike Juror Brunetti, the court presumed out of whole cloth that Watson must have kept her based on a strategy of finding jurors likely to recommend a life sentence. (Appx. C, 135a.) (Watson did not testify to that.)

On appeal to the Eleventh Circuit, Harvey's claims based on Juror Brunetti included the following:

First, Harvey asserted that the participation of a known biased juror in a capital trial creates a structural error in violation of his Sixth Amendment right to an impartial jury and that counsel can never make a strategic decision to keep a biased juror.

The court of appeals disagreed and held that counsel can make a strategic decision to keep a biased juror who may be open to a sentence of life imprisonment. Moreover, the court held that because it was Harvey's burden to show counsel's "deficiency" under *Strickland v. Washington*, 466 U.S. 668 (1984), Harvey must bear the

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follows: DK-[District Court Docket Number]/[Tab Number]/[Page Number].

additional burden of proving that he did *not* consent to the biased juror. (Appx. A, 32a-33a.) Finding the record silent on the issue of consent, the court held that Harvey had not met his burden. (*Id.*)

Second, Harvey argued that even if *Strickland* applies and permits a lawyer to make a strategic decision to keep a biased juror, there is no basis in this record to find that Watson had such a strategic purpose because Watson testified that he could not remember Juror Brunetti or why he failed to strike her.

The court below did not dispute this point, but held that it was constrained by its circuit's "[b]inding precedent" in *Williams v. Head,* 185 F.3d 1223 (11th Cir. 1999), which it interpreted as requiring a presumption in cases of memory failure that counsel acted with a legitimate strategic purpose. (Appx. A, 36a.) Because Watson could not remember anything about Juror Brunetti, the court relied on *Williams* to presume, without supporting evidence, that Watson kept Juror Brunetti for some strategic reason. (*Id.* at 33a-36a.) The court of appeals acknowledged that its holding conflicted with the rule followed in the Fifth Circuit and that "the Fifth Circuit's jurisprudence will give the petitioner the benefit of trial counsel's short memory. Binding precedent [*Williams*] prevents us from deviating toward such a standard." (*Id.* at 36a.)

2. Trial Counsel Conceded Harvey's Guilt To First-Degree Murder Without Consulting With Harvey Or Obtaining His Consent.

During his opening statement in the guilt phase, Watson conceded Harvey's guilt to the charged crime of first-degree murder in front of the jury without consulting Harvey or obtaining his consent. The jury found Harvey guilty of first-degree murder after a short deliberation.

In July 2003, on appeal from the trial court's denial of post-conviction relief, the Florida Supreme Court held that (i) Watson had conceded Harvey's guilt to first-degree murder under Florida law despite a supposed guilt-phase strategy of arguing for second-degree murder; and (ii) Watson's concession was improper because he had not consulted Harvey or received his consent before making that admission. (Appx. D, 153a.) The Florida Supreme Court deemed the unauthorized concession of guilt to be structural error and held that prejudice must be presumed under *United States v. Cronic*, 466 U.S. 648 (1984). (*Id.* at 154a-155a.) The court awarded Harvey a new trial.

The state petitioned for rehearing. Before the Florida Supreme Court decided that petition, this Court decided *Nixon v. Florida*, 543 U.S. 175 (2004), a case involving a concession-of-guilt issue in which counsel conceded guilt, but only after repeatedly trying to consult with the defendant about the issue and finding him unresponsive. In *Nixon,* this Court held that *Strickland's* actual-prejudice standard,

rather than *Cronic's* presumed-prejudice standard, governs analysis of a concession-of-guilt claim where counsel has tried to consult with the defendant about the strategy of conceding guilt but the defendant is unresponsive.

In 2006, the Florida Supreme Court granted the State's 2003 petition for rehearing based solely on *Nixon*. The Florida Supreme Court interpreted *Nixon* as requiring that *Strickland's* actual-prejudice standard be applied in *all* cases in which counsel concedes guilt without consent, even where counsel did not consult with the defendant before admitting guilt. (Appx. E, 163a.) The court denied relief because it found Harvey had not established actual prejudice. (*Id.* at 169a.)

In his appeal to the Eleventh Circuit from denial of federal habeas relief, Harvey argued that the Florida Supreme Court had misinterpreted *Nixon* as requiring use of the *Strickland* framework in cases where, as here, counsel had conceded guilt without trying to first consult with the defendant. Harvey noted that *Nixon* clearly states that *Strickland* should be used only where counsel first has tried to consult with the defendant about the admission.

In its ruling below, the Eleventh Circuit acknowledged that "*Nixon* can be read in two equally compelling ways." (Appx. A, 50a.) The court agreed that "Harvey's quoted text [from *Nixon*] does suggest that consultation could be the key fact that requires *Strickland* prejudice to be presumed under *Cronic*." (*Id.*) But the court stated that the Florida Supreme Court's interpretation was not unreasonable because

Nixon also emphasized the distinction between a guilty plea and a concession strategy. (*Id.* at 50a-51a.)

The Eleventh Circuit did not decide for itself which of the two interpretations correctly reflected the "clearly established law" of this Court as articulated in *Nixon.* Instead, finding both interpretations "equally compelling," the court denied relief because it construed the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d)(1), as requiring it to "defer" to the Florida state court's interpretation of this Court's precedent:

> The failing of Harvey's argument lies not with its logic, but with the deference we must afford the Florida Supreme Court under AEDPA. Under AEDPA, we can grant Harvey's request only if that court's holding was "unreasonable." *See* 28 U.S.C. 2254(d)(1) . . . . With two equally compelling readings [of *Nixon*] available, we cannot conclude that the court was unreasonable for choosing one reading over the other.

(*Id.* at 40a-51a.)

3. Trial Counsel Failed To Conduct A Reasonable Mitigation Investigation.

Before performing any mitigation investigation, Watson decided he would present at trial a mitigation case that Harvey was a "good person" and

that the murders were out of character. Watson limited his mitigation investigation to finding evidence to support that theory. As part of this limited investigation, Watson hired a local school psychologist, Dr. Fred Petrilla, to perform a "personality evaluation" of Harvey. (DK-11/C-15/959.) A test administered by Dr. Petrilla produced results indicative of organic brain damage. (DK-11/C-15/965-66.) Because he had no training in neuropsychology, Dr. Petrilla told Watson to have Harvey seen by a psychiatrist for further evaluation. (DK-11/C-15/973-75.)

Watson got the message and took initial steps to retain a psychiatrist. On May 3, 1985, he filed a motion requesting authorization to retain a psychiatrist, representing in the motion that "[i]t is necessary to have both the psychiatric examination and the psychological examination in order to receive a total picture of the defendant's total condition at the time of the alleged offense"; the motion was granted. (DK-11/A-19/3167; DK-11/C-10/72-77.) On May 22, 1985, Dr. Petrilla telephoned Watson with the names of specific psychiatrists he recommended for Harvey; the phone slip with those names was found in Watson's files. (Appx. M, 235a.) On January 27, 1986, Watson moved to postpone the penalty phase to allow for a psychiatric evaluation prior to the penalty phase. (DK-11/A-20/3318-19.) On February 18, 1986, Watson moved the court to increase his fee allowance so he could obtain a psychiatrist; the court approved the request. (DK-11/C-10/79-80.) On February 26, 1986, Watson prepared a "Memo to File" reminding himself to

retain a psychiatrist: "I need to get ahold [*sic*] of a psychiatrist to examine Mr. Harvey. I should probably call one of the Desais in Fort Pierce." (Appx. L, 234a.)

Despite these efforts, Watson in the end did not retain a psychiatrist or have Harvey examined by a psychiatrist. (DK-11/C-10/72-73.)

Having no psychiatric testimony available, Watson's mitigation presentation at trial consisted of short testimony from various witnesses, each of whom generally testified that Harvey was a good person. (Appx. E, 177a-178a.) The jury recommended a death sentence.

During post-conviction proceedings, Harvey was examined by Yale University psychiatrist Dr. Michael Norko. Dr. Norko clinically assessed Harvey, reviewed psychological tests administered to Harvey by a forensic psychologist, and investigated Harvey's life history.

Dr. Norko diagnosed Harvey as suffering from four mental illnesses at the time of the 1985 crime: (1) Organic Brain Dysfunction, consistent with both frontal lobe and brain stem damage; (2) Major Depressive Disorder; (3) Post-Traumatic Stress Disorder; and (4) Substance Abuse Disorders related to long-term drug and alcohol abuse. (DK-11/C-111/290.) Dr. Norko also identified problems with Harvey's brain functions that affect organization, insight, foresight into planning, decision making and behavior. (DK-11/C-11/315-16.)

Dr. Norko found that Harvey had suffered repeated head injuries that had a cumulative

adverse effect, including a 1979 car accident that critically injured Harvey. Dr. Norko identified significant personality changes in Harvey after that car accident, including decreased attention, affective lability, irritability, a sudden changing of expressed emotion or mood for no apparent reason, depression, recklessness, staring into space, intolerance at being touched, excessive interpersonal withdrawal, hopelessness, and increased drug and alcohol use. (DK-11/C-11/304-08.)

Based on his investigation and diagnoses, Dr. Norko opined that the following three statutory mitigating factors were present at the time of the offense: (1) Harvey lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law (DK-11/C-12/435-44); (2) Harvey acted under the substantial duress or domination of his co-defendant (DK-11/C-11/444-51); and (3) Harvey committed the offense under the influence of an extreme mental or emotional disturbance. (DK-11/C-11/292.)

None of this mental health evidence was presented to the jury. Watson testified he would have changed his mitigation strategy if he had known about the organic brain damage. (DK-11/C-12/389.)

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review To Resolve The Framework Under Which To Analyze The Participation Of A Biased Juror.

The decision below creates two separate splits of authority regarding the application of *Strickland*

v. Washington to a habeas petitioner's claims that he was denied his Sixth Amendment right to an impartial jury. *First*, in direct conflict with the Sixth Circuit, the court below held that petitioner's right to an impartial jury must be analyzed under the presumptions of strategic decision-making in *Strickland* instead of finding that the failure to strike a biased juror constitutes per se objectively unreasonable conduct by counsel, and it exacerbated that split by assigning to petitioner the burden of proving he did not waive his right to an impartial jury. *Second*, in direct conflict with the Fifth Circuit, the court below held that under *Strickland*, a strategic purpose to keep a biased juror could be presumed from a silent record caused by counsel's failure to remember the reasons for his decision. This Court's review is therefore required to clarify the proper framework under which to analyze claims that petitioners were denied their Sixth Amendment right to an impartial jury.

A. The Eleventh Circuit's opinion creates a split of authority as to whether, under *Strickland*, trial counsel can properly make a "strategic decision" to keep a biased juror, and is contrary to this Court's precedent.

The opinion below creates a direct split of authority with the Sixth Circuit and is contrary to this Court's precedent regarding the framework under which courts should analyze claims that a lawyer failed to strike a biased juror. The split with the Sixth Circuit exists on two issues.

First, the Eleventh Circuit in this case held that a lawyer's failure to strike a biased juror is not objectively unreasonable under *Strickland* if the lawyer had a valid strategic reason to keep the juror. The Fifth, Eighth and Tenth Circuits also appear to consider whether a lawyer had a strategic reason for not striking a biased juror. In contrast, the Sixth Circuit repeatedly has held that the failure to strike a biased juror constitutes per se objectively unreasonable performance under *Strickland* because a lawyer can never properly make a strategic decision to keep a biased juror since this would constitute an independent violation of the defendant's Sixth Amendment right to an impartial jury.

Second, the Eleventh Circuit held that to prove deficient performance of counsel for failure to strike a biased juror, *Strickland* requires a petitioner to prove that he did *not* consent to the juror, thereby shifting to petitioner the affirmative burden of proof as to waiver of his right to an impartial jury. Finding the record silent as to waiver, the Eleventh Circuit presumed that Harvey had waived his right. This holding directly conflicts with the Sixth Circuit, which does not make petitioner prove "no waiver" as part of showing deficient performance under *Strickland* and indeed requires a showing of "fully informed and publicly acknowledged consent" of petitioner before a waiver of the right to an impartial jury will be found. The Eleventh Circuit's holding also directly conflicts with the precedent of this Court, which assigns to the *state* the "heavy" burden of proving waiver of a defendant's jury trial right and

proscribes courts from inferring waiver of that right from a silent record.

1. Here, there is no dispute that Juror Brunetti was biased against Harvey; no court below, state or federal, has ever questioned that proposition. There is also no dispute that Watson knew of her bias during jury selection, failed to strike her with either a for-cause or peremptory challenge, and to this day has provided no explanation, strategic or non-strategic, for his failure to strike Juror Brunetti. Watson has testified that he has no recollection of Juror Brunetti and cannot explain what factors he considered in failing to strike her.

This Court has long identified the participation of a biased factfinder as a structural error in the trial mechanism. *Chapman v. California,* 386 U.S. 18, 23 (1967) (impartial factfinder is one of the "constitutional rights so basic to a fair trial that their infraction can never be treated as a harmless error"). The structural nature of the error is rooted in the Sixth Amendment, which "guarantee[s] a defendant on trial for his life the right to an impartial jury." *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988). Even one biased juror is unconstitutional under the Sixth Amendment; a criminal defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker v. Gladden*, 385 U.S. 363, 366 (1966). For these reasons, this Court requires reversal of a conviction where there is a participation of a biased juror. *United States v. Martinez-Salazar,* 528 U.S. 304, 316 (2000).

In keeping with this precedent and in contrast to the opinion below, the Sixth Circuit has held that counsel's performance is objectively unreasonable under *Strickland* where a lawyer fails to strike a biased juror. In *Hughes v. United States,* 258 F.3d 453, 463 (6th Cir. 2001), the Sixth Circuit emphasized that its inquiry was limited to whether the juror was actually biased, not whether any supposed "strategy" supported keeping the biased juror:

> The question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction. . . . If counsel's decision not to challenge a biased venireperson could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury.

Hughes, 258 F.3d at 463; *see also Miller v. Webb*, 385 F.3d 666, 676-77 (6th Cir. 2004) (same).

As the Sixth Circuit observed, analyzing whether a lawyer had a "strategy" for keeping a biased juror would create significant tension with this Court's jurisprudence regarding waiver of the right to an impartial jury: Since trial counsel cannot waive a defendant's Sixth Amendment right to a *jury* "without the fully informed and publicly acknowledged consent of the client," *Taylor v. Illinois,* 484 U.S. 400, 417 n.24, 418 (1988), it follows

that trial counsel also cannot waive the defendant's right to an *impartial* jury without the same informed and publicly acknowledged consent. *Hughes,* 258 F.3d at 463; *Miller,* 385 F.3d at 676-77 (no sound trial strategy could support what is essentially a waiver of defendant's basic Sixth Amendment right to trial by impartial jury).

Thus, the decision below creates a direct split of authority with the Sixth Circuit. In the Sixth Circuit, a petitioner will establish deficient performance under *Strickland* simply by showing that the juror was actually biased and that counsel failed to strike her. In the Eleventh Circuit, in contrast, a court will inquire whether the lawyer had a strategic reason for failing to strike the biased juror. The Fifth, Eighth, and Tenth Circuits also appear to follow this practice. *See Virgil v. Dretke,* 446 F.3d 598, 610 (5th Cir. 2006); *Johnson v. Armontrout*, 961 F.2d 748, 755 (8th Cir. 1992); *Jones v. Estep*, 219 Fed. Appx. 723, 725 (10th Cir. 2007).

In holding that a lawyer's strategy can trump a defendant's Sixth Amendment right to an impartial jury, the Eleventh Circuit conflates a defendant's Sixth Amendment right to an impartial jury with his Sixth Amendment right to effective assistance of counsel. But the two rights are distinct, as the Sixth Circuit recognizes. Moreover, by forcing petitioners to overcome *Strickland's* "strong presumption" that counsel's strategic decisions were reasonable before vindicating the right to an impartial jury, the Eleventh Circuit devalues that right by suggesting that the question whether to waive an impartial jury is merely a strategic decision committed to the

judgment of counsel. Therefore, this Court should grant review to resolve the split and should hold that the rule followed in the Sixth Circuit is correct.

2. The opinion below also creates a separate split with the Sixth Circuit, and with the precedent of this Court, regarding whether a showing of deficient performance under *Strickland* requires petitioner to bear the burden of proving he did not consent to the biased juror and whether his consent to that juror can be inferred from a silent record.

The Sixth Circuit will find counsel's performance to be objectively unreasonable under *Strickland* simply upon a showing that trial counsel failed to strike a known biased juror. The Sixth Circuit does not require petitioner to prove that he did not consent to the biased juror or infer such consent from a silent record. In fact, the Sixth Circuit observed a petitioner's waiver of his right to an impartial jury requires a showing of "fully informed and publicly acknowledged consent." The Eleventh Circuit, on the other hand, cited *Strickland* as a basis to shift to petitioner the affirmative burden of showing that he did not consent to the juror before deficient performance of the lawyer will be found.

In addition to being contrary to the rule in the Sixth Circuit, the Eleventh Circuit's shifting of the burden regarding waiver to petitioner and its use of *Strickland* to presume a waiver are both in significant tension with the precedent of this Court.

This Court has long employed a presumption *against* waiver of fundamental rights, including the right to trial by an impartial jury. In *Johnson v.*

Zerbst, 304 U.S. 458, 464 (1938), this Court observed that "'courts indulge every reasonable presumption against waiver' of fundamental rights and that we 'do not presume acquiescence in the loss of fundamental rights.'" Because of this presumption against waiver, this Court has assigned the burden for proving waiver to the state. In *Schneckloth v. Bustamonte*, 412 U.S. 218, 236-37 (1973), for example, this Court considered whether petitioner or the state bore the burden with respect to waiver of a jury trial. The Court held: "To preserve the fairness of the trial process the Court established an appropriately heavy burden on the Government before waiver could be found—an intentional relinquishment or abandonment of a known right or privilege" "such as the right . . . to a jury trial." *Id.*

Likewise, in *Carnley v. Cochran,* 369 U.S. 506 (1962), the Court considered an argument that petitioner had waived his right to counsel. Rejecting the state's suggestion that petitioner should bear the burden of showing that he did not consent to be tried without counsel, this Court stated that "[t]o cast such a burden on the accused is wholly at war with the standard of proof of waiver of the right to counsel which we laid down in *Johnson v. Zerbst.*" *Id.* at 514.

In further conflict with the opinion below, this Court has held that the state cannot meet its heavy burden of proving waiver of fundamental rights by relying on a silent record. In *Carnley,* for example, the Court held:

> Presuming waiver from a silent record is impermissible. The record must

> show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.

Id. at 513, 516; *see also Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (applying *Carnley* to questions of a jury waiver, and holding that courts "cannot presume a waiver of [the right to trial by jury] from a silent record").

Thus, this Court's review is required to clarify (i) whether, under *Strickland*, counsel's performance is objectively unreasonable where counsel fails to strike an openly biased juror, or whether counsel may rebut the showing of deficiency by proffering a strategic purpose for keeping the biased juror; and (ii) whether deficient performance for failure to strike the juror requires petitioner, as opposed to the state, to bear the burden of proof as to waiver and whether waiver may be inferred from a silent record.

B. The Eleventh Circuit's opinion creates a further split of authority regarding whether *Strickland* permits courts to presume that counsel provided reasonable assistance where counsel has a failure of memory as to critical decisions.

Even assuming that *Strickland* permits counsel to make a strategic decision to keep a biased juror, the opinion below creates an additional split of authority with the Fifth Circuit as to whether courts can presume that counsel followed a reasonable strategy

where counsel has a total memory failure as to why he made decisions that seem objectively unreasonable. The Eleventh Circuit itself acknowledged a split with the Fifth Circuit regarding whether the presumptions under *Strickland* can properly be used, in cases where counsel cannot remember why he failed to strike a biased juror, to presume that counsel had a reasonable strategic purpose.

In this case, Watson could not remember Juror Brunetti at all or any factors he considered in failing to strike her. Despite this memory failure and an undisputed showing by Harvey that the juror was actually biased, the Eleventh Circuit held that it was constrained by circuit precedent in *Williams v. Head,* 185 F.3d 1223 (11th Cir. 1999), to use *Strickland's* presumption to presume from a silent record that Watson had a strategic reason for not striking the biased juror. (Appx. A, 36a).

In reaching its decision, the court below expressly acknowledged a split with the Fifth Circuit in *Virgil v. Dretke*, 446 F.3d 598, 610 (5th Cir. 2006). In *Virgil,* the Fifth Circuit granted habeas relief where trial counsel failed to strike jurors who stated they could not be impartial. 446 F.3d at 610. Despite analyzing the issue under *Strickland,* the Fifth Circuit looked to the government to prove that counsel had a strategic purpose in keeping the juror once petitioner had established a prima facie case of deficient performance. The court found that the affidavit of trial counsel relied upon by the government was "conclusory" as it "lack[ed] any suggestion of a trial strategy for not using

peremptory or for-cause challenges." *Id.* Moreover, the Fifth Circuit rejected post-hoc attempts by counsel and the state to reconstruct why counsel may have failed to strike the biased jurors, stating that self-serving "justifications not evident on the record and presented for the first time in response to" a habeas petition "have little value." 446 F.3d at 610-11.

The Eleventh Circuit expressly acknowledged that "[t]his language suggests that the Fifth Circuit's jurisprudence will give the petitioner the benefit of trial counsel's short memory. Binding precedent [*Williams*] prevents us from deviating toward such a standard." The Eleventh Circuit also suggested that the Fifth Circuit's analysis "turn[s] [*Strickland's*] presumption on its head." (Appx. A, 35a-36a.)

In fact, it is the Eleventh Circuit that abuses the *Strickland* presumption, extending it far beyond its purpose to construe any gaps in the record against petitioner. Under the Eleventh Circuit's interpretation of *Strickland*, counsel's actions, although objectively unreasonable on their face (as here, in failing to strike an obviously biased Juror Brunetti), will automatically be presumed to be reasonable strategic decisions even if counsel cannot remember why he made the decision. Thus, if counsel refuses to testify or claims (or feigns) an inability to recall his motives for taking certain actions, the Eleventh Circuit will simply "presume" that counsel acted for a legitimate strategic purpose.

In contrast, the Fifth Circuit's approach recognizes that this Court did not intend *Strickland's*

presumption of reasonable assistance to permit courts to make up facts as to critical issues like waiver of a fundamental right or a strategic purpose. The original purpose of the *Strickland* presumption was to grant deference to counsel's decisions about strategy and eliminate second-guessing of articulated strategic decisions. 466 U.S. at 681, 691. But that purpose presupposes some evidence of what counsel's decisions were and why they were made – evidence that can only come from counsel. Without knowing why counsel made decisions, it is impossible to evaluate whether those decisions were reasonable or to apply *Strickland*'s presumption that the decisions were reasonable.

Moreover, adopting the Eleventh Circuit's approach will incentivize memory loss by lawyers facing allegations of ineffective assistance of counsel. In the Eleventh Circuit, any time a lawyer's reasoning is challenged in a habeas proceeding, that lawyer will claim that he cannot remember the basis for his actions and be rewarded with a presumption that his seemingly unreasonable conduct was undertaken for strategic reasons. Petitioners will not be able to rebut this presumption because the evidence as to whether counsel's decisions were strategic can normally be found only in the thoughts and mind of counsel. Indeed, because counsel is the only one who can provide the evidence as to whether his actions were taken pursuant to reasonable strategy, most Circuits shift to the state the burden of proving a strategic reason for counsel's decisions once a petitioner establishes a prima facie case of unprofessional conduct. *See Virgil,* 466 F.3d at 610

(looking to state to establish strategic purpose in failing to strike biased juror); *Government of Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1427 (3d Cir. 1996) (stating that "burden shifted to the government to show that Weatherwax's counsel had proceeded on the basis of 'sound trial strategy'" where petitioner established prima facie deficient conduct); *Mapes v. Tate*, 388 F.3d 187, 191, 193 (6th Cir. 2004) (noting that district court had shifted burden to state where counsel could not recall critical facts).

Thus, this Court should grant review to resolve the splits between these Circuits regarding whether a court may presume a strategic purpose where counsel cannot remember why he made a decision that is on its face objectively unreasonable.

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A petitioner's ability to succeed on a claim regarding the denial of the fundamental right to an impartial jury should not depend on which circuit considers petitioner's claim. Yet that is the current state of affairs. Though Harvey likely would have succeeded on his claim in the Third, Fifth, and Sixth Circuits, he lost in the Eleventh. This Court should grant review to clarify the rules regarding denial of Sixth Amendment rights and to resolve the conflict among the circuits.

II. This Court Should Grant Review To Resolve Which Of "Two Equally Compelling Readings" Of *Nixon v. Florida*, Should Apply Where Counsel Fails To Consult With A Capital Defendant Before Conceding Guilt.

As noted above, the Florida Supreme Court in 2003 granted Harvey a new trial after finding that Watson conceded Harvey's guilt without consulting with Harvey. In 2006, the Florida court reversed its decision based on this Court's intervening decision in *Nixon.*

On appeal to the Eleventh Circuit, Harvey explained that the Florida Supreme Court had read *Nixon* too broadly as requiring that all unauthorized concessions of guilt in capital cases be evaluated under the *Strickland* actual-prejudice standard. Harvey showed that *Nixon* is much more narrowly circumscribed and holds that a defense attorney may concede guilt without consent, subject to the *Strickland* actual-prejudice analysis, only in the unusual circumstance where (1) the attorney first consults with the client about the strategy and asks for consent, and (2) the client does not approve or reject the strategy because the client is silent or uncooperative. *Nixon*, 543 U.S. at 189-92.

In its opinion below, the Eleventh Circuit stated that "*Nixon* can be read in two equally compelling ways": (1) Harvey's interpretation, under which prejudice should be presumed where counsel does not consult with a defendant before admitting guilt, and (2) the Florida state court's interpretation, under which a petitioner must prove actual prejudice even

where trial counsel concedes guilt without prior consultation or approval. (Appx. A, 50a.) Finding the "equally compelling" interpretations to be a draw, the Eleventh Circuit held that it was constrained by "the deference we must afford the Florida Supreme Court under AEDPA." (*Id.* at 49a-50a.) Because it found that the Florida Supreme Court's legal interpretation of *Nixon* was one of "two equally compelling readings available, we cannot conclude that the court was unreasonable for choosing one reading over the other." (*Id.* at 51a.)

1. The Eleventh Circuit held that there were two "equally compelling" interpretations of *Nixon* -- but rather than deciding which of these two interpretations properly reflected the law of this Court as articulated in *Nixon*, the Eleventh Circuit punted and held that AEDPA required it to defer to the state court's interpretation. Under AEDPA, a habeas petition may be granted only if the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). The court below interpreted this statutory language to mean that Harvey could obtain relief "only if [the state court's] holding was 'unreasonable.'" (Appx. A, 50a.) Because the Eleventh Circuit found that the two conflicting interpretations of *Nixon* were equally compelling, it concluded that the Florida Supreme Court's holding was not "contrary to, or an unreasonable application of, clearly established Federal law."

The Eleventh Circuit completely misapplied AEDPA. AEDPA does not require deference to every

holding of a state court. Deference to a state court decision is required only when that decision is not "contrary to, or an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court held that the "contrary to" clause could support granting a writ of habeas corpus if "the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 413. This Court further held that under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court "identifies the correct governing legal principle from this Court's decision but unreasonably applies that principle to the facts of the prisoner's case." *Id.*

Thus, one first needs to identify the "clearly established law" of this Court before one can apply the "contrary to" and "unreasonable application" tests set out in AEDPA. It is the duty of the Article III federal appellate court to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). As this Court noted in *Taylor*, "[w]e have always held that federal courts, even on habeas, have an independent obligation to say what the law is." 529 U.S. at 411. AEDPA does not empower state courts to articulate federal law, and does not require a federal appellate court to defer to the state court's "interpretation" of federal law.

Here, the Eleventh Circuit abdicated its independent obligation to "say what the law is" by refusing to decide which of the "two equally

compelling" interpretations of *Nixon* was correct and by deferring to the state court. As a result, the Eleventh Circuit could not properly have applied AEDPA because it had not identified the "clearly established law" established by this Court in *Nixon*. Without articulating that "clearly established law," the Eleventh Circuit could not properly analyze whether the Florida state court's decision was "contrary to" or "an unreasonable application" of that law.

This Court's intervention is necessary to clarify the proper application of AEDPA -- that AEDPA does not require blunt deference to a state court interpretation of this Court's law where the federal court recognized that there is a competing interpretation that is "equally compelling." An Article III court must execute its "independent obligation" to "say what the law is" and decide the content of the clearly established law by this Court. Only then can a court properly and fairly apply AEDPA in the way it was intended by Congress.

2. By failing to decide which of the "two equally compelling readings" of *Nixon* was correct, the lower court let stand an erroneous interpretation by the Florida Supreme Court that the failure of capital trial counsel to consult with a defendant before admitting guilt during the guilt-phase is subject to the actual prejudice standard of *Strickland*. That interpretation is flatly wrong under *Nixon*.

Nixon is a narrow decision that requires a showing of *Strickland's* actual prejudice only in special cases where the defendant has been

consulted about the concession-of-guilt strategy but is non-responsive. In *Nixon*, defense counsel consulted with his client about his strategy of conceding guilt but was unable to obtain the client's consent because the client remained silent and uncooperative in the face of the consultation. In declining to find that counsel was *per se* ineffective in that situation, this Court clearly drew a distinction between cases in which a defendant is consulted and those, like Harvey's case, in which he is not:

> Defense counsel undoubtedly *has a duty to discuss* potential strategies with the defendant. . . . But when a defendant, *informed by counsel,* neither consents nor objects to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing the course. The reasonableness of counsel's performance, *after consultation with the defendant yields no response,* must be judged in accord with [the *Strickland* standard]. . . . A presumption of prejudice is not in order based solely on a defendant's failure to provide express consent to a tenable strategy *counsel has adequately disclosed to and discussed with the defendant.*
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> * * *

> Corin *was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon.* Given Nixon's constant resistance to answering inquiries put to him by counsel and court, Corin was not additionally required to gain express consent before conceding Nixon's guilt. . . . *Corin fulfilled his duty of consultation by informing Nixon of counsel's proposed strategy and its potential benefits.*
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> * * *
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> To summarize, in a capital case, . . . *[w]hen counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive,* counsel is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the Strickland standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.

543 U.S. at 178-79, 189, 192 (citations omitted) (emphasis added).

Contrary to the Florida Supreme Court's broad interpretation of *Nixon*, these quotations show that the only situation in which prejudice will not be presumed where a lawyer concedes his client's guilt

without consent is that in which (1) the lawyer first fulfills the obligation of consulting with the client about the strategy and asking for consent and (2) the client does not approve or reject the strategy because the client is silent or uncooperative. *Nixon* does not preclude a presumption of prejudice where counsel did not consult with his client. If the Florida Supreme Court's interpretation of *Nixon* were correct, then defense counsel would never need to consult with their clients or try to obtain consent before conceding guilt. Counsel could just do what he or she thought was best (or easiest) and hope a reviewing court later thought the decision was a reasonable one.

Accordingly, this Court should resolve which of the two "compelling" interpretations of *Nixon* is correct and clarify whether capital counsel can concede a defendant's guilt to the charged crime even where he has not first consulted with the defendant about that strategy.

III. The Eleventh Circuit Decision Is Contrary To This Court's Decisions In *Rompilla v. Beard* and *Wiggins v. Smith*.

As noted above, during Watson's mitigation investigation, Watson's own psychologist told him that Harvey needed to be examined by a psychiatrist because of the results on one of the psychological tests. Watson took many affirmative steps to retain that psychiatrist, including moving the court for approval and writing reminder memos to himself, but ultimately failed to retain the psychiatrist. As the post-conviction investigation showed, a

psychiatric examination would have revealed evidence of organic brain damage and a host of other compelling mitigation evidence. Watson admitted that he would have changed his mitigation strategy if he had known Harvey suffered from organic brain damage. (DK-11/C-12/389.)

The state court's denial of relief based on Watson's failure to follow up on the recommendation of his own expert to retain a psychiatrist constituted an unreasonable application of the clearly established law of this Court requiring reasonable mitigation investigations, particularly that articulated in *Rompilla v. Beard,* 545 U.S. 374 (2005) and *Wiggins v. Smith,* 539 U.S. 510 (2003), which are both analogous to Harvey's case.

In *Rompilla*, this Court found counsel ineffective despite their fairly extensive mitigation investigation in which they spoke to Rompilla, his five family members, and hired three mental health experts. Like Harvey's trial counsel, Rompilla's counsel formulated a "benign conception of Rompilla's upbringing," including that Rompilla was a "good man." 545 U.S. at 378, 391. The three mental health experts hired by Rompilla's counsel turned up "nothing useful." *Id.* at 382. Despite these efforts, this Court found counsel's investigation ineffective because trial counsel had failed to review a file from one of Rompilla's previous convictions that contained "a range of mitigation leads that no other source had opened up," including "plenty of 'red flags' pointing up a need to test further." *Id.* at 390, 392. Noting the "red flags," the Court found that if counsel had reviewed prior psychiatric evaluations, it would have

"destroyed the benign conception of Rompilla's upbringing and mental capacity counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts . . . and [counsel] would unquestionably have gone further to build a mitigation case." *Id.* at 391.

In *Wiggins*, this Court found the defendant's counsel ineffective where "counsel abandoned their investigation of [his] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." 539 U.S. at 524. Although Wiggins' counsel obtained a Presentence Investigation Report and other records prior to trial, this Court held that "[t]he scope of [counsel's] investigation was also unreasonable in light of what counsel actually discovered in the [Department of Social Services] records," including evidence of alcoholism and neglect on the part of Wiggins' mother. *Id.* at 525. Faced with these "glimpses" into mitigating childhood facts, this Court found that Wiggins' counsel had "abandon[ed] their investigation at an unreasonable juncture," *id.* at 527, because "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Id.* at 525. The Court concluded: "The record of the actual sentencing proceedings . . . suggest[s] that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Id.* at 526.

Rompilla and *Wiggins* are materially indistinguishable from this case. In this case,

Watson decided from the beginning on a "good person" theory of mitigation, acquired only a rudimentary knowledge of Harvey's life history because of his singular focus on the "good person" theory, and failed to follow up on the direction from his own expert to get a psychiatrist to examine Harvey, a "red flag" that required additional investigation and would have led to compelling mitigation evidence of mental illness.

For its part, the Eleventh Circuit tried to distinguish *Rompilla* and *Wiggins* as its basis for denying relief to Harvey. The court held that *Rompilla* was distinguishable because trial counsel in *Rompilla* "was required to read the court file only because he knew that the prosecution would introduce the petitioner's prior convictions," but that "[n]othing similar occurred in Harvey's case." (Appx. A, 67a-68a.) The court distinguished *Wiggins* because counsel there "both failed to investigate and had key leads in documents before him," but that "Watson faced nothing as glaring in readily-available files." (*Id.* at 68a.)

These facile distinctions miss the point. The point of *Rompilla* and *Wiggins* is that trial counsel must continue investigating when he is aware of information, or "red flags," that would cause a reasonable lawyer to investigate further. The information requiring follow-up need not be the specific type of file or document that was at issue in *Rompilla* or *Wiggins,* but rather can be any information that reasonably would require a competent attorney to do a follow-up investigation. Given a defendant's constitutional right to

psychiatric assistance, *Ake v. Okalahoma,* 470 U.S. 68, 83 (1985), a recommendation that a psychiatrist examine the defendant is certainly the type of information requiring follow-up.

Under *Rompilla* and *Wiggins,* Watson had a duty to follow up on the advice of his own expert and have Harvey examined by a psychiatrist qualified to opine on neuropsychological mental health issues, including organic brain damage, particularly where Watson had not bothered to investigate for forensic mental health mitigation previously. The fact that Watson wrote notes reminding himself to get the psychiatrist and that the trial court granted him authorization and funds for this purpose shows that Watson knew he should follow up on Dr. Petrilla's request. Given these facts, Watson's failure to retain the psychiatrist can only be the product of negligence, not strategy. The state court's denial of relief in the face of these analogous facts constitutes an unreasonable application of federal law as articulated in *Rompilla* and *Wiggins*.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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