

No. 11-6224—Capital Case

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL WORTHINGTON,

Petitioner,

v.

DONALD ROPER, Warden,

Respondent.

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

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**Brief in Opposition to the Petition for Writ of Certiorari**

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## Table of Contents

Table of Authorities .....	ii
Opinions Below .....	1
Jurisdiction.....	1
Statement of the Case .....	1
I.    The murder.....	1
II.   Procedural history .....	2
III.  The lower court’s disposition of the claim at issue .....	4
A.   The doctors’ testimony.....	4
B.   Worthington’s attorney’s testimony.....	7
C.   The state circuit court’s decision.....	8
D.   The Missouri Supreme Court’s decision .....	9
E.   The district court’s decision.....	10
F.   The Eighth Circuit’s decision .....	11
Argument.....	14
I.    The Missouri courts reasonably held that counsel was not ineffective for failing to further investigate Worthington’s mental health and family background .....	14
II.   This case is not a proper vehicle for a decision analyzing the relationship between 28 U.S.C. §§2254(d)(2) and 2254(e)(1) .....	20
III.  The Eighth Circuit properly chose to consider each of Worthington’s <i>Strickland</i> claims separately.....	22
Conclusion .....	24

## Table of Authorities

### Cases

<i>Bobby v. Van Hook</i> , 130 S.Ct. 13 (2009) .....	18, 19
<i>Bond v. Beard</i> , 539 F.3d 256 (3rd Cir. 2008).....	20
<i>Haliym v. Mitchell</i> , 492 F.3d 680 (6th Cir. 2007) .....	19, 20
<i>Harrington v. Richter</i> , 131 S.Ct. 770 (2011).....	14
<i>Jells v. Mitchell</i> , 538 F.3d 478 (6th Cir. 2008) .....	20
<i>Mason v. Mitchell</i> , 543 F.3d 766 (6th Cir. 2008).....	20
<i>Porter v. McCollum</i> , 130 S.Ct. 447 (2009) .....	16, 17, 18
<i>Sears v. Upton</i> , 130 S.Ct. 3259 (2010) .....	16, 17
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	14, 19, 20, 22
<i>Williams v. Allen</i> , 542 F.3d 1326 (11th Cir. 2008).....	19, 20
<i>Wood v. Allen</i> , 130 S.Ct. 841 (2010) .....	20, 21
<i>Yarborough v. Alvarado</i> , 541 U.S. 652 (2004).....	14

### Statutes

28 U.S.C. §1254(1) .....	1
28 U.S.C. §2254(d)(2) .....	20
28 U.S.C. §2254(e)(1) .....	20

## **Opinions Below**

The Missouri Supreme Court's opinion affirming Worthington's conviction and death sentence is reported at 8 S.W.3d 83 (Mo. 1999). The Missouri Supreme Court's opinion affirming the denial of post-conviction relief is reported at 166 S.W.3d 566 (Mo. 2005).

The district court opinion granting habeas relief (Pet. App. A32) is reported at 619 F.Supp.2d 661 (E.D.Mo. 2009). The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A1) reversing the grant of federal habeas relief is reported at 631 F.3d 487 (8th Cir. 2011). The Eighth Circuit's order denying rehearing (Pet. App. A122) is unreported.

## **Jurisdiction**

The United States Court of Appeals for the Eighth Circuit reversed the grant of habeas relief on January 6, 2011. Pet. App. A1. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## **Statement of the Case**

### **I. The murder**

On the night of September 29, 1995, Michael Worthington broke into Melinda Griffin's condominium by cutting the screen in the kitchen window with a razor blade. Pet App. A2. Worthington strangled her until she became unconscious. *Id.* at A2. Worthington then raped her with such force that he bruised the inside of her vagina, tore both labia minora, and made a large

and very deep tear between her vagina and anus. *Id.* Although Griffin regained consciousness and fought him, Worthington beat her and killed her by strangulation. *Id.* Worthington stole Griffin's jewelry, credit cards, cell phone, and car. *Id.*

Two days after the murder, a neighbor discovered Ms. Griffin's body. *Id.* Officers found Ms. Griffin's body lying bruised, bloody, and naked at the foot of her bed. *Id.* DNA testing established that semen found on Ms. Griffin's body came from Worthington. *Id.*

Later that evening, when police officers found Worthington, he was wearing a "fanny pack" containing Ms. Griffin's jewelry and keys. *Id.* After his arrest, Worthington told the police that he had been high on alcohol and various other drugs for the past four days. *Id.* After the police confronted him with the evidence against him, Worthington confessed to killing Ms. Griffin but claimed not to remember any details of the crime. *Id.*

## **II. Procedural history**

The State of Missouri charged Worthington with one count of first-degree murder, one count of first-degree burglary, and one count of forcible rape. *Id.* at A3. Worthington pled guilty to all of those crimes in the St. Charles County Circuit Court on August 28, 1998. *Id.* He entered an "open plea" without any agreement on punishment. *Id.*

After a four-day sentencing hearing, the court sentenced Worthington to death on the murder count, a life sentence on the rape count, and a thirty-year sentence on the burglary count. *Id.* at A5. The court found two aggravating factors: 1) that Worthington committed the murder while engaged in the perpetration of forcible rape and first-degree burglary; and 2) that Worthington committed the murder for the purpose of receiving money or things of monetary value from the victim. *Id.* The court found, as mitigating factors, that Worthington was raised in a dysfunctional family, that he was neglected and abused as a child, and that he was a long-term drug user. *Id.*

The Missouri Supreme Court denied all of Worthington's claims on direct appeal. *Id.* The state trial court denied Worthington's post-conviction relief (PCR action), *id.* at A5-A6, and the Missouri Supreme Court affirmed, *id.* at A6.

The United States District Court for the Eastern District of Missouri granted Worthington's federal habeas petition on one ground. *Id.* at A6. The United States Court of Appeals for the Eighth Circuit reversed the district court's grant of habeas relief and affirmed the denial of habeas relief on all of the other grounds. *Id.* at A2, A31. The Eighth Circuit unanimously denied rehearing and rehearing *en banc.* *Id.* at 122.

### **III. The lower courts' disposition of the claim at issue**

All of Worthington's questions presented deal with his claim that counsel was ineffective for failing to adequately investigate Worthington's mental health, social, and personal histories and provide that investigation to mental health experts. Respondent thus will briefly set out the facts relating to that claim.

In his state post-conviction relief action, Worthington argued, among other things, that counsel was ineffective for failing to provide a complete social history to expert witnesses. *Id.* at A5. This history, he alleged, would have allowed the expert witnesses to present more compelling testimony in the penalty phase of trial. *Id.*

#### **A. The doctors' testimony**

Dr. Jonathan Pincus, a neurologist, diagnosed Worthington with frontal lobe disorder, Tourette's syndrome, obsessive compulsive disorder, bipolar disorder, and attention deficit disorder. Post-conviction Relief (PCR) Tr. 93, 98, 110, 111.<sup>1</sup> Dr. Pincus concluded that Worthington could not deliberate and was under the influence of an extreme emotional disturbance at the time of the murder. *Id.* at 121. Dr. Pincus also stated that Worthington was undermedicated while in the St. Charles County jail. *Id.* at 124. In addition to the documents Dr. Givon and Dr. Miller had, Dr. Pincus reviewed

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<sup>1</sup> Respondent's Exhibit Q in the district court.

affidavits from Worthington's mother, father, and other friends and family members, as well as Worthington's mother's police reports and his uncle's mental health records. *Id.* at 101-102.

Dr. Pincus conceded that he was the first mental health professional, out of many who had seen Worthington, who diagnosed Worthington with Tourette's syndrome. *Id.* at 164. Dr. Pincus acknowledged that the same observations he believed supported his Tourette's syndrome diagnosis, such as disrupting others and making loud noises, could also support an antisocial personality disorder diagnosis. *Id.* at 160-162. The reports of Worthington having tics before age 13 came from either Worthington or his father and Dr. Pincus only observed one motor tic during his evaluation. *Id.* at 164, 169. His obsessive-compulsive disorder diagnosis was also based on Worthington's self-reporting. *Id.* at 191.

Dr. Dennis Cowan, a neuropsychologist, concluded that Worthington had significant frontal lobe dysfunction resulting in problems with his higher-level abstract reasoning, problem-solving, judgment, decision-making, and short-term functioning. *Id.* at 325-326. Dr. Cowan found these problems were caused by genetics, head injuries, the abuse Worthington's mother suffered during pregnancy, and Worthington's substance abuse. *Id.* at 326. Dr. Cowan diagnosed Worthington with cerebral brain dysfunction, ADHD, Tourette's syndrome, and bipolar disorder. State App. 543. Dr. Cowan interviewed and



performed tests on Worthington's mother, father, uncles and aunt. PCR Tr. 248. The motion court found that the evidence from Dr. Cowan's report dealing with his examination of all the family members was inadmissible and irrelevant. *Id.* at 263; State App. 388.

Dr. Cowan acknowledged that the evidence of Worthington's head injuries was self-reported and that he did not conduct or review any scans or other physical tests in his analysis of Worthington's brain. PCR Tr. 340, 389-390. Dr. Cowan also conceded that the ADHD symptoms he observed and interpreted from Worthington's background are also seen with people who are on drugs and that depressive episodes can also come from substance abuse mood disorder. *Id.* at 353-354, 373. Dr. Cowan also acknowledged that he did not diagnose Worthington with Tourette's syndrome until after Dr. Pincus did so and he did not report seeing a motor tic (a symptom of Tourette's syndrome) in Worthington until his second interview. *Id.* at 404-405.

Dr. Robert Smith, a clinical psychologist and addiction specialist, diagnosed Worthington with ADHD, bipolar disorder, cerebral brain dysfunction, PTSD, and substance dependence. *Id.* at 552. Smith testified that Worthington was suffering from diminished capacity because of his disorders. *Id.* at 554. Smith also stated that after reviewing the St. Charles County record, he determined that Worthington was only "intermittently"

provided with medication, that the seclusion in jail triggered PTSD, and that his “acting out” was from Tourette’s syndrome. *Id.* at 555.

**B. Worthington’s attorney’s testimony**

Worthington’s first trial attorney requested a mental examination pursuant to Mo.Rev.Stat. §552.020 (2000). Direct Appeal Legal File 41-42.<sup>2</sup> Dr. Max Givon examined Worthington and diagnosed him with malingering, cocaine dependence, alcohol abuse, and antisocial personality disorder. State App. 482.

After attorneys Joseph Green and Scott Rosenblum reviewed Givon’s report, Green did not believe that a diminished capacity defense was possible, Green Depo. 450, 531, and Rosenblum believed they would have an “uphill battle” presenting a diminished capacity defense given all the evidence of Worthington’s drug and alcohol use, Rosenblum Depo. 624.<sup>3</sup>

Rosenblum continued investigating a diminished capacity defense. He discussed Worthington’s case with Dr. Daniel Cuneo, *id.* at 628-629, 631, and endorsed Dr. Cuneo as a witness, Direct Appeal Legal File 34. He consulted with Dr. John Raven as well but declined to hire him. Rosenblum Depo. at 629. Rosenblum then retained Dr. Kevin Miller, a forensic psychiatrist, to see if Worthington could have a diminished capacity defense. *Id.* at 629-630.

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<sup>2</sup> Respondent’s Exhibit A in the district court.

<sup>3</sup> Both of these depositions are contained in the first supplemental PCR legal file, submitted to the district court as respondent’s Exhibit M.

Dr. Miller diagnosed Worthington with ADHD, cocaine dependency, alcohol abuse, PTSD, major depressive disorder, and antisocial personality disorder. State App. 497. Dr. Miller needed more information to rule out bipolar disorder, disassociative disorders, malingering, and complex partial seizures. *Id.*

Rosenblum had “lengthy discussions” with Miller and began to “rule him out” as a witness:

He had talked about things that caused me great concern. Things such as self reporting incidents that were not evidenced under hypnosis, which I thought could have played into the malingering issue.

The anti-social personality disorder, which would have collaborated Givon, and one of my main goals was to discredit Givon. That was disturbing, very disturbing.

He ruled out bipolar disorder, which I thought we had some notes from the jail that certainly I could use as cross-examination on Givon because of some of the things Givon did or didn't do when he received some of the jail notes.

So by and large I thought whatever little nuggets that you could mine from Dr. Miller's report it was far outweighed by what I considered substantial, substantial negative impact his testimony would have had.

Rosenblum Depo. 634-635. Further, Rosenblum was afraid that because Miller's hypnosis did not confirm Worthington's self-reporting accounts, Givon's malingering diagnosis would be supported. *Id.* at 635-636.

### **C. The state circuit court's decision**

The circuit court denied the failure to investigate claim. Resp. Ex. L at 1068-1074. The court reviewed this claim under *Strickland v. Washington*,

466 U.S. 668, 687 (1984). *Id.* at 1068. The court found that much of the evidence that Worthington proffered would have supported the diagnoses of the State’s expert: that Worthington had antisocial personality disorder and that he was malingering. State App. 385. The court found that that Dr. Pincus’s evaluation and Dr. Cowan’s evaluation were not credible because they were based largely on “unreliable disclosures” made by Worthington. *Id.* at 385, 389. The court found that Dr. Smith’s testimony, which dealt with the degree of Worthington’s substance abuse, was cumulative to the evidence presented by Dr. Evans at trial. *Id.* The court further found that counsel acted reasonably in having two mental health professionals, Dr. Evans and Dr. Miller, evaluate Worthington before trial and in calling Dr. Evans to testify in the penalty phase. *Id.* at 386.

#### **D. The Missouri Supreme Court’s decision**

Worthington raised his ineffective assistance claim, along with other claims, in his PCR appeal to the Missouri Supreme Court. That court examined—and rejected—Worthington’s claim inasmuch as it applied to his guilty plea. *Worthington v. State*, 166 S.W.3d 566, 573-576 (Mo. 2005). The court stated that it would examine this claim with regard to the penalty phase, *id.* at 574 n.2, but the court did not explicitly analyze the claim. The court rejected all of Worthington’s other claims and affirmed the denial of post-conviction relief. *Id.* at 571.

### **E. The district court's decision**

Worthington next raised his claim of ineffective assistance of counsel, in the United States District Court for the Eastern District of Missouri. The district court granted relief on the ineffective assistance claim. Pet. App. 42-74.

The district court held that the AEDPA standard did not apply to this claim because the Missouri Supreme Court did not address it. *Id.* at 66-70. The district court held that counsel's investigation was insufficient because counsel did not contact more of Worthington's family members, counsel did not obtain more school records, and counsel did not obtain Worthington's records from the Illinois Department of Corrections. *Id.* at 49. The court also found that counsel failed to obtain additional mental health records and did not give Worthington's mental health experts sufficient records. *Id.* at 250. The district court relied, in large part, on the American Bar Association guidelines for capital cases. *Id.* at 48-49, 50.

The district court then held that the state courts erred in discrediting the opinions of Worthington's post-conviction experts. *Id.* at 50-51. The state courts had found those opinions not credible because they were based largely on Worthington's self-reporting and because the diagnostic interviews occurred many years after the crimes. *Id.* at 67. The district court found that

Worthington’s self-reporting was corroborated by statements from his family members and medical records. *Id.*

The district court next held that Worthington had shown *Strickland* prejudice because the expert testimony would have shown that Worthington suffered from bipolar disorder and that there was a reasonable possibility that the trial judge would have imposed a life sentence if she had known those facts. *Id.* at 70-74. The court recognized that Dr. Miller—who Worthington’s attorneys hired before trial—did not submit a new report for post-conviction review. *Id.* at 73. However, the court concluded that “the Court is reasonably certain that Dr. Miller also would have concluded that [Worthington] was suffering from mental illness.” *Id.* The court found it “unlikely” that, without expert testimony, the trial judge would have read all of the medical evidence and discovered that Worthington was suffering from a mental illness. *Id.* Thus, the court held that, if counsel had adduced testimony of Worthington’s mental state, the court “likely” would have found that Worthington suffered from a mental illness and that that mitigating circumstance would have “diminished, if not extinguished” the aggravating evidence. *Id.*

#### **F. The Eighth Circuit’s decision**

The Eighth Circuit reversed the district court. The court first addressed whether the AEDPA applied to Worthington’s claim because the Missouri

Supreme Court did not expressly rule on the merits of the claim. The court held that the state PCR trial court adjudicated Worthington's claim on the merits. Pet. App. A9-A10. The court next held that, under *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), federal courts "look through' the silent opinion and apply AEDPA review to the 'last reasoned decision' of the state courts" "when a state appellate court affirms a lower court decision without reasoning." Pet. App. A10. Thus, the AEDPA applied to Worthington's claim. *Id.* at A10-A11.

The Eighth Circuit then considered whether the state PCR trial court unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984) and whether the state court unreasonably determined the facts in light of the evidence presented in the state courts. *Id.* at A11. The court held that the analysis of Worthington's claim required two inquiries:

whether the state court reasonably decided that counsel had conducted an adequate investigation, and whether the state court reasonably decided that counsel's resulting decision to refrain from further investigating and presenting psychological mitigation evidence was reasonable.

*Id.* at A15.

The court then held that, even though attorney Joseph Green's preparation for the penalty phase "was not ideal," attorney Scott Rosenblum investigated the possibility of mental health mitigation in the penalty phase and made a "reasonable strategic determination not to pursue such an

approach.” *Id.* at A16. The court reiterated that Rosenblum obtained two expert opinions on Worthington’s mental health. *Id.* at A16-A17. That investigation, including “a substantial collection of records pertaining to Worthington’s social and medical history,” was a reasonable investigation for counsel to have conducted. *Id.* at 18.

The court next examined whether counsel made a reasonable decision not to further investigate Worthington’s mental health. The court held that Rosenblum’s decision was reasonable. The court based its holding on Rosenblum’s testimony that he made the decision not to investigate further after “lengthy” discussion with Dr. Miller because Dr. Miller corroborated Dr. Givon’s diagnosis of antisocial personality disorder, a fact “very damaging” to Worthington and one that Rosenblum did not want the jury to hear. *Id.* at A19. Further, Worthington’s self-reporting was inconsistent under hypnosis and Rosenblum believed that the inconsistencies could be used to buttress Dr. Givon’s finding that Worthington was malingering. *Id.* After consideration of these factors, the Eighth Circuit held that counsel’s decision not to pursue further mental health testing was reasonable. *Id.* at A19-A20.



## Argument

This case involves a factbound and straightforward application of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), 28 U.S.C. §2254(d), and 28 U.S.C. §2254(e)(1). This Court should deny certiorari.

### **I. The Missouri courts reasonably held that counsel was not ineffective for failing to further investigate Worthington’s mental health and family background**

This Court has explicitly set out the federal standard for ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Worthington does not disagree with that standard. Worthington merely disagrees with how the Missouri courts and the Eighth Circuit applied that standard to his case. That factbound inquiry does not merit certiorari review.

Under 28 U.S.C. §2254(d) “a state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.” *Harrington v. Richter*, 131 S.Ct. 770, 785 (2011). This Court reaffirmed in *Harrington* that federal habeas review of state-court decisions is precluded “[as] long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” 131 S.Ct. at 786, quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Reasonable jurists could, at most, disagree on the correctness of the Missouri court’s decision. Worthington relies only on the testimony of Joseph Green, one of his attorneys at trial. Worthington ignores the contrary

testimony, credited by the Eighth Circuit, from Scott Rosenblum, Worthington's other attorney.<sup>4</sup> The state courts had the testimony of Green and Rosenblum before them. It was not unreasonable for the state courts to choose to credit Rosenblum's testimony. Implicit credibility findings such as this are required in every hearing in every court when a judge has to decide who to believe.

Taking Rosenblum's testimony as true leads to the Missouri court's reasonable conclusion that Worthington's counsel was not ineffective. Rosenblum reviewed two expert opinions on Worthington's mental health. Pet. App. A16-A17. One of those experts, Dr. Givon, reviewed "a substantial collection of records pertaining to Worthington's social and medical history." *Id.* at 18. The other expert, Dr. Miller, referenced a number of reports documenting Worthington's mental health history, was aware that Worthington suffered physical and sexual abuse as a child, and knew that Worthington's grandmother and parents had been treated for mental disorders. *Id.*

Worthington suggests that the available records would have shown that he was diagnosed with attention deficit hyperactivity disorder (ADHD) at the age of 12 and post-traumatic stress disorder (PTSD) as a teenager. Pet.

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<sup>4</sup> Ironically, Worthington argues in his petition that "the Eighth Circuit ignores ... glaring facts regarding Green's deficient investigation" in order to focus "on Rosenblum's decision to hire Dr. Kevin Miller." Pet. at 26.

at 29. Dr. Miller diagnosed Worthington with ADHD and PTSD. State App. 497. It is difficult to imagine how additional information would have changed those diagnoses. The available records also would have shown, according to Worthington, that he was treated for manic depression and bipolar disorder as a child and a young adult. Dr. Miller diagnosed Worthington with major depression and indicated that he could not rule out a diagnosis of bipolar disorder. *Id.* Again, these diagnoses were favorable to Worthington. Worthington had failed to show that additional information would have altered these findings.<sup>5</sup>

Worthington alleges that this case is controlled by *Sears v. Upton*, 130 S.Ct. 3259 (2010), and *Porter v. McCollum*, 130 S.Ct. 447 (2009). Worthington is wrong. In *Sears*, defense counsel presented mitigation evidence showing only that defendant Sears' childhood was "stable, loving, and essentially without incident" and that a death sentence would devastate his family. 130 S.Ct. at 3261-3262. In his post-conviction action, Sears presented evidence that his parents had an abusive relationship, that he was abused sexually, and that he had significant "frontal lobe abnormalities" that affected his reasoning and understanding. *Id.* at 3262-3263. This Court, like the lower courts, found that counsel's investigation was not reasonable under

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<sup>5</sup> Worthington failed to present any evidence in the state courts that Dr. Miller would have changed his diagnosis if he had seen the additional evidence.

*Strickland*. *Id.* at 3264. This Court remanded the case for a new analysis of *Strickland*'s prejudice prong because the state court did not apply the proper standard. *Id.* at 3267.

*Sears* is inapplicable for two reasons. First, this Court in *Sears* directly reviewed the Georgia state courts' decision. Thus, this Court was not constrained, as it is here, by the AEDPA standard. Second, the question at issue in *Sears* was not whether counsel's investigation was reasonable. The question there was simply whether the state court had applied the correct prejudice standard under *Strickland*. In this case, *Strickland* prejudice was not at issue because the state court and the federal courts resolved this case on *Strickland*'s reasonable performance prong alone. *Sears* does not aid Worthington's case.

Neither does *Porter*. There, in the penalty phase of a capital trial, defense counsel presented only "inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son." 130 S.Ct. at 449. Defense counsel did not investigate or present evidence that Porter was physically abused as a child, *id.* at 449, that Porter served honorably in the United States Army during the Korean War, *id.* at 450, that he fought in two hellacious battles in Korea, *id.*, that Porter developed a serious drinking problem after his return, *id.* at 451, and that he had "dreadful nightmares" about Korea, *id.* at 450. Defense counsel also did

not discover that Porter suffered from brain damage and had “substantial difficulties with reading, writing, and memory.” *Id.* at 451.

Based on these facts, this Court held that counsel acted unreasonably by not conducting any investigation other than briefly consulting with Porter. *Id.* at 452-453. This Court then held that the Florida Supreme Court’s decision that Porter could not show *Strickland* prejudice was unreasonable. *Id.* at 454-456.

This case is readily distinguishable from *Porter*. Here, counsel had two expert opinions about Worthington’s mental health and, after reviewing them, chose not to pursue a mental health mitigation defense. Counsel also knew about much of Worthington’s dysfunctional childhood, including the physical and sexual abuse, drug use, and the criminal lives of his parents. Counsel presented this evidence to the state trial court. In fact, counsel convinced the state trial court to find, as a mitigating circumstance, that Worthington was raised in a dysfunctional family, that he was neglected and abused as a child, and that he was a long-term drug user. Pet. App. A5. The investigation that counsel conducted here was far superior to the one in *Porter*.

This case is near-identical to *Bobby v. Van Hook*, 130 S.Ct. 13 (2009). There, the inmate argued that his attorneys were ineffective for failing to meaningfully investigate his personal and social history. This Court

disagreed. The attorneys in *Van Hook* presented evidence that the inmate began drinking as a toddler, was “barhopping” at age nine, and drank and used drugs with his father from the age of eleven. *Id.* at 18. The sentencing court heard about how the inmate grew up in a “war zone,” suffered physical abuse, observed his father beat his mother weekly and threaten her with weapons. *Id.*

This Court held that given the evidence the attorneys presented to the trial court, “it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated [the inmate’s] parents.” *Id.* at 19. This Court further held that, as in *Strickland*, defense counsel’s decision not to seek more information “fell ‘well within the range of professionally reasonable judgments.’” *Id.*, quoting *Strickland*, 466 U.S. at 699.

That same logic applies here. Counsel presented a considerable amount of evidence to the trial court. Counsel persuaded the trial court to find various mitigating factors. Counsel stopped investigating Worthington’s mental health after consulting with two experts. These decisions, like those in *Van Hook*, were reasonable.

Finally, Worthington contends that the Eighth Circuit’s opinion conflicts with *Haliym v. Mitchell*, 492 F.3d 680 (6th Cir. 2007), *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008), *Mason v. Mitchell*, 543 F.3d 766 (6th

Cir. 2008), *Jells v. Mitchell*, 538 F.3d 478 (6th Cir. 2008), and *Bond v. Beard*, 539 F.3d 256 (3rd Cir. 2008). There is no conflict. All of these cases set out the same test from *Strickland* and the same legal framework under the AEDPA. Pet. App. A7-A8, A12; *Haliym*, 492 F.3d at 689-690, 711; *Williams*, 542 F.3d at 1336-1337; *Mason*, 543 F.3d at 772; *Jells*, 538 F.3d at 487, 491; *Bond*, 539 F.3d at 263, 285. There is no conflict in the law.

The only potential for a conflict is the facts underlying each of these cases. This Court recognized in *Strickland* that “a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.” 466 U.S. at 690. It is hardly surprising that different courts have granted (or denied) relief under *Strickland* and §2254(d) based on the particular facts of the individual cases before those courts. The fact that courts have both granted and denied relief under *Strickland* and §2254(d) based on the particular facts of the cases before them does not create a conflict in the law.

**II. This case is not a proper vehicle for a decision analyzing the relationship between 28 U.S.C. §§2254(d)(2) and 2254(e)(1)**

This Court stated in *Wood v. Allen*, 130 S.Ct. 841, 849 (2010) that it did not need to resolve the question of how §2254(d)(2) and §2254(e)(1) fit together because “our view of the reasonableness of the state court’s factual

determination in this case does not turn on any interpretive difference regarding the relationship between these provisions.” The same logic applies to this case.

As set out in the previous section, the Eighth Circuit resolved this case by finding that attorney Rosenblum’s testimony provided a sufficient factual basis for the state court’s decision that counsel acted reasonably. Pet. App. A16-A19. The Eighth Circuit found that Rosenblum relied on two expert reports before choosing not to investigate more about Worthington’s mental health. *Id.*

Those facts are similar to *Wood*. There, the inmate alleged that counsel was ineffective for not conducting more investigation into the inmate’s mental health. 130 S.Ct. at 845. The state post-conviction relief trial court found that the claim was meritless because counsel retained a mental health expert, reviewed the expert’s report, and determined not to investigate further. *Id.* at 846. The Supreme Court found that the state court record supported the state court’s finding that all of the inmate’s attorneys had read the report. *Id.* at 849-850. This court then stated that “we agree with the State that even if it is debatable, it is not unreasonable to conclude that, after reviewing the [mental health] report, counsel made a strategic decision not to inquire further into the information contained in the report about [the inmate]’s mental deficiencies.” *Id.* at 850.



The same reasoning applies here. The record demonstrates that Rosenblum investigated Worthington’s mental health and chose not to pursue further investigation after reviewing Dr. Miller’s report and discussing it with Dr. Miller. The state court’s factual finding therefore is a reasonable interpretation of the record. Worthington cannot prevail under §2254(d)(2) without considering §2254(e)(1). This question presented is moot.

**III. The Eighth Circuit properly chose to consider each of Worthington’s *Strickland* claims separately**

Worthington contends that the district court and the Eighth Circuit improperly divided his *Strickland* claim into two parts: failure to investigate Worthington’s mental health and failure to investigate his social history. Pet. at 36.

This question is tangential to this case. The Eighth Circuit decided Worthington’s *Strickland* claim based solely on the first prong of *Strickland*—whether counsel acted reasonably in halting his investigation into Worthington’s mental health. Pet. App. A15-A20. Worthington’s question presented, however, goes to *Strickland*’s prejudice prong. Pet. at 37, 39. This Court need not determine the question of prejudice because Worthington cannot demonstrate that his attorney acted unreasonably. 466 U.S. at 697 (“there is no reason for a court deciding an ineffective assistance claim to ...

address both components of the [*Strickland*] inquiry if the defendant makes an insufficient showing on one”).

Further, the district court and the Eighth Circuit both found that additional evidence about Worthington’s childhood would be cumulative to the evidence presented at trial. Pet. App. A25 at n.11, A54-A57. The district court, in detail, discussed how Worthington’s additional evidence was cumulative to the evidence before the sentencing judge. *Id.* at A52-A56. Consideration of this additional evidence would not have made a difference in a *Strickland* prejudice analysis because the sentencing judge already considered identical evidence in sentencing Worthington to death.

## Conclusion

This Court should deny the petition.

Respectfully submitted,

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## Certificate of Service

I hereby certify that I am a member of the Bar of this Court and that the original and ten copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari and the Appendix to the Respondent's Brief in Opposition to Petition for Writ of Certiorari in the case of *Michael Worthington v. Don Roper*, no. 11-6224, were mailed, pursuant to Supreme Court Rules 29.2 and 29.5(b), postage prepaid, on October 5, 2011, to:

William K. Suter, Clerk  
United States Supreme Court  
1 First Street, N.E.  
United States Courthouse  
Washington, D.C. 20543

Further, I hereby certify that three true and correct copies of the foregoing documents were mailed pursuant to Supreme Court Rule 29.5(b), postage prepaid, to:

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