COPY

DEATH PENALTY CASE
No. 09-8852

IN THE

SUPREME COURT OF THE UNITED STATES

LAWRENCE JOSEPH JEFFERSON

Petitioner,

v.

STEPHEN UPTON, WARDEN,

Respondent.

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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Petitioner Lawrence Joseph Jefferson, pursuant to Rule 15(6) of the Rules of the Supreme Court of the United States, hereby files his Reply Brief to the Brief in Opposition on Behalf of Respondent to respond to Respondent's claims regarding the worthiness of this case for Supreme Court review by way of a writ of certiorari.

In the Brief in Opposition on Behalf of Respondent (the "Respondent's Brief"), the Respondent fails to come to grips with the essential argument made by Petitioner as to why this case merits Supreme Court review. While Petitioner would concede that "the experience of the (trial) attorney" may be "among the factors" to consider in determining the reasonableness of a

claimed strategic choice in representing a capital defendant, as this Court observed in Strickland v. Washington, 466 U.S. 668, 681 (1984), neither Strickland or any other ineffective assistance of counsel case decided by this Court would, as the Eleventh Circuit majority opinion did in this case, turn what this Court described as a "factor" into a "higher" presumption of reasonableness than would otherwise apply. Jefferson v. Hall, 570 F.3d 1283, 1302 (11th Cir. 2009).

Indeed, this Court has never announced a "presumption" with respect to investigatory decisions, such as the failure to investigate the potential of a capital defendant's significant brain injury, when, as in this case, there was every indication that such an injury may have occurred. Strickland talks about a presumption of reasonableness after a "thorough investigation of law and facts relevant to plausible options", but with respect to strategic choices made after less than a complete investigation, as here, the simple question is whether counsel made "a reasonable decision that makes particular investigations unnecessary" which, while "applying a heavy measure of deference to counsel's judgment", nevertheless "must be directly assessed for reasonableness in all the circumstances." Strickland, 466 U.S. 690-691.

Here, the Eleventh Circuit applied compounding levels of presumptions, a process never envisioned by Strickland or any other ineffective assistance of counsel case decided by this Court. Indeed, the Eleventh Circuit did not merely apply a presumption of reasonableness to the decision to forego what appeared to be a fruitful area of mitigation investigation, but layered onto that presumption an even "higher" presumption of reasonableness when so-called "seasoned" counsel are involved.[1] Jefferson v. Head, 570 F.3d 1283, 1301-1302 (11th Cir. 2009). By employing this super-reasonableness standard, any ineffectiveness claim is effectively doomed once the "experience" of trial counsel in the criminal justice system is recounted. This result is hardly what this Court intended in Strickland and its later ineffective assistance of counsel decisions.

It should not be ignored what the application of this double-layered presumption of reasonableness standard permitted in this case. Petitioner was convicted of killing a friend and

[1]In describing Petitioner's trial counsel as "seasoned", it should be remembered that there are different types of seasoning. While his trial counsel may have had substantial experience as prosecutors, neither had ever defended a death penalty case and the "experience" in defending a death penalty prosecution is much different from the "experience" in prosecuting a capital case. This is especially true with regard to the development of mitigation evidence, something that a prosecutor would never have occasion to do.

co-worker, from whom he had previously borrowed money without any incident, supposedly over a relatively miniscule amount of money and some fishing gear. While Petitioner protested his innocence, counsel clearly had a duty to explore any mitigation evidence which might help explain, although not excuse, the criminal acts with which the Petitioner was charged. See, Guideline 10.7 of the Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Here, counsel knew that Petitioner's head had been run over when he was only two years old. An indentation in the Petitioner's skull resulting from this injury was still clearly apparent. Petitioner described this injury when he was first arrested by the police and Petitioner's mother had told counsel about it. She even testified during the penalty phase regarding this injury, without further comment or any expert testimony to explain its impact. When Petitioner was evaluated by a psychologist, the psychologist recommended in his written report that further neuropsychological testing be conducted with respect to this injury. As the psychologist explained in his written report he could not assess the "sequelae to head injury during childhood", given the conditions of Petitioner's incarceration. Accordingly, "it would be worthwhile to conduct neuropsychological evaluation of this individual to rule out an

organic etiology."

Despite all of this information, counsel did not investigate further, ostensibly based upon a disputed conversation in which the psychologist expressed a belief that further evaluation might not be helpful. Counsel claimed that they chose to present instead a lingering doubt defense at sentencing. But the record clearly reflects that they never in fact implemented this defense. They called Petitioner to testify at sentencing but he never denied killing the victim. In closing argument both counsel conceded guilt. As a consequence, the jury sentenced Petitioner to death without any appreciation of the brain injury he had suffered as a child, which would have offered an explanation, although not an excuse, for his criminal conduct.

Yet, the majority of the Eleventh Circuit panel found no constitutional complaint, based upon a multileveled and ever increasing presumption of reasonableness. Although counsel had every reason to believe that Petitioner may be suffering from a brain injury, the failure to investigate this injury was nevertheless determined to be reasonable despite the fact that the claimed alternative mitigation case of lingering doubt was never presented.

The facts of this case are virtually indistinguishable from

those of other post-Strickland ineffective assistance of counsel decisions of this Court, such as Wiggins v. Smith, 539 U.S. 510 (2003). In Wiggins, counsel had available a one page account of the defendant's "personal history" in a written presentence investigation report, which described the defendant's "misery as a youth" and quoting the defendant's description of his own background as "disgusting." Id., at 523. Counsel also reviewed Department of Social Services records regarding the defendant's foster care placements. Yet counsel did no further investigation of the defendant's background, such as creating a social history, which would have revealed incidents of physical and sexual abuse. They claimed that they intended to focus the mitigation case instead on "retry[ing] the factual case" by "disputing Wiggins' direct responsibility for the murder." Id., at 517. This Court found that even under the deferential standard of 28 U.S.C. §2254, a conclusion that counsel's representation in this situation was effective assistance of counsel was an "unreasonable application" of "clearly established" Supreme Court law.

In so concluding, the Court noted the duty of counsel to conduct a mitigation investigation that "should comprise efforts to discover *all reasonably available* mitigating evidence", citing to Guideline 11.4.1(C) of the ABA Guidelines for the

Appointment and Performance of Counsel in Death Penalty Cases (1989). Id., at 524. (emphasis added). As to the claim that counsel had made a reasonable strategic decision to focus on the defendant's responsibility for the murder, the Court noted that the record did not reflect that such a strategy was actually employed. Instead, "[f]ar from focusing exclusively on petitioner's direct responsibility," counsel put on a "half-hearted mitigation case", similar to the mitigation case presented here. Given this record, this Court understandably concluded that the claim of a "strategic decision" to justify the limited mitigation investigation was "more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." Id., at 526-526.

Just as Wiggins' counsel knew from the presentence report of their client's horrible childhood, Petitioner's counsel here well knew that Petitioner had been run over by a car when he was only two years old and likely had suffered brain damage. His mother told them. Petitioner told the police and the injury was still visible on Petitioner's skull. In his written report, the psychologist they retained recommended neuropsychological testing to rule in or out brain injury. But, just as the Wiggins attorneys failed to follow up on the presentence report,

Petitioner's attorneys failed to follow up on the information that they had and the written recommendation of their own psychologist. While, after trial, they claimed that they made a strategic decision to concentrate on a lingering doubt mitigation case, the record shows that this claimed alternative defense of lingering doubt was never employed, just as the claimed no direct involvement in the murder argument was never advanced at sentencing in Wiggins. Petitioner was called, but never denied his guilt. Indeed, his attorneys admitted his guilt in closing argument. This claim of a strategic choice of an alternative defense, accepted by the state courts and by the majority of the Eleventh Circuit panel, was nothing more than the same type of "*post hoc* rationalization of counsel's conduct" in order to excuse a "half hearted mitigation case", when compelling mitigation was available, advanced by the attorneys in Wiggins. Id., at 526-527.

Moreover, in Wiggins the issue was whether the lower courts' conclusions that the defendant had received effective assistance of counsel at sentencing was nevertheless a reasonable application of settled Supreme Court law, and this Court found the lower court's decisions were not. In this case, because Petitioner's petition for relief under 28 U.S.C. §2254 was filed prior to the enactment of the Antiterrorism and

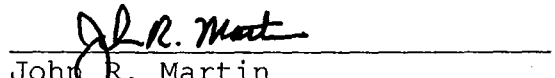
Effective Death Penalty Act of 1996, there is no need even to apply the current deferential standard under 28 U.S.C. §2254. Lindh v. Murphy, 521 U.S. 1215 (1994). Therefore, it is even a more compelling case for relief than Wiggins and an even more compelling case of the failure of the lower courts to follow the binding authority of this Court.

The standard employed by the majority in the panel decision of the Eleventh Circuit is not consistent with the holdings of this Court in Strickland; Wiggins; Williams v. Taylor, 529 U.S. 362 (2000); Rompilla v. Beard, 545 U.S. 374 (2005) and Porter v. McCullom, 130 S.Ct. 447 (2009). The Eleventh Circuit has now adopted a super-presumption of reasonableness standard never envisioned by the decisions of this Court. Accordingly, this Court should exercise its discretion under Supreme Court Rule 10(c) to grant a writ of certiorari in this case in order to correct the misapplication of binding Supreme Court authority in an important area of ineffective assistance of counsel law.

[signatures on next page]

This 23rd day of February, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have this day served Ms. Beth Burton, Assistant Attorney General, 40 Capitol Square, S.W., Atlanta, GA 30334-1300 with a copy of the within and foregoing **Reply Brief to Brief in Opposition on Behalf of Respondent** by depositing in the U.S. Mail in a properly addressed envelope with sufficient postage affixed thereon to assure delivery.

This 23rd day of February, 2010.

John R. Martin