IN THE

SUPREME COURT OF THE UNITED STATES

No. 09- ____

LAWRENCE JOSEPH JEFFERSON
Petitioner,

versus,

STEPHEN UPTON, Warden,
Respondent.

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

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CAPITAL CASE

QUESTIONS PRESENTED

When reviewing trial counsel's decision to abandon investigation suggested by the retained defense mental health expert, a majority of the Eleventh Circuit afforded counsel decision a higher-than-strong presumption of reasonableness. *See Jefferson v. Hall*, 570 F.3d 1283, 1301-02 (11th Cir. 2009) ("[a] decision to limit investigation is accorded a strong presumption of reasonableness . . . [and] [t]he standard is even higher where experienced counsel is involved."). This Court, in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 and *Porter v. McCollum*, 130 S.Ct. 447 (2009), has reviewed trial counsel's decisions surrounding the scope of investigation under prevailing professional norms and without applying a presumption of reasonableness.

Thus, the question presented by this case is whether the majority opinion, in affording trial counsel's decision to limit the scope of investigation in a death penalty case "higher-than-strong presumption of reasonableness" conflicts with this Court's precedent as announced in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 and *Porter v. McCollum*, 130 S.Ct. 447 (2009).

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

SUPREME COURT CASES

CIRCUIT COURT CASES

DISTRICT COURT CASES

STATE CASES

CONSTITUTIONAL PROVISIONS

STATUTORY PROVISIONS

Title 28 U.S.C.

MISCELLANEOUS

O.C.G.A.

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Mr. Jefferson respectfully petitions this Court to review the decision of the United States Court of Appeals for the Eleventh Circuit.

JURISDICTION AND LOWER COURT OPINION

The majority and dissenting opinions of the United States Court of Appeals for the Eleventh Circuit are published at 570 F.3d 1283 (11th Cir. 2009), and reprinted at Appendix 1. The Eleventh Circuit opinion issued June 12, 2009. Rehearing was denied on August 28, 2009. *See* Appendix 2. Petitioner received an extension of time to file this Petition until January 25, 2010. *See* Appendix 3. This Court has 28 U.S.C. section 1254 jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense

STATEMENT OF THE CASE

A. Course of Proceedings

On March 8 and 9, 1986, a jury sitting in Cobb County Georgia, found Petitioner guilty of felony murder and sentced him to death for the killing of Edward Taulbee, a friend and co-worker. The Georgia Supreme Court affirmed the conviction and death sentence, *Jefferson v. State*, 256 Ga. 821, 353 S.E. 2d 468 (1987), and a Motion for Rehearing was denied on March 24, 1987. On October 5, 1987, the Supreme Court of the United States denied the Petition for Writ of Certiorari, with Justices Marshall and Brennan dissenting. *Jefferson v. Georgia*, 484 U.S. 911(1987). The Court subsequently denied rehearing. *Jefferson v. Georgia*, 484 U.S. 872(1987).

Thereafter, Petitioner sought state post conviction relief pursuant to O.C.G.A. §9-14-40, *et seq*. and filed a petition for writ of habeas corpus in the Superior Court of Butts County. The Superior Court conducted an evidentiary hearing wherein a number of witnesses testified (either live or via affidavit[1]). At the conclusion of the hearing the court allowed briefing on the issues raised. After briefing the court, via *ex parte*

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[1] *See* O.C.G.A. §9-14-48(a), which allows indigent habeas petitioners to present substantive evidence via affidavit or deposition.

communications with Respondent, solicited findings of fact and conclusions of law. Respondent submitted a proposed order which contained glaring errors, including listing a local attorney (Michael Hauptman) as having testified for the Petitioner (he did not) and then finding the witness **who did not testify** to be incredible. The court, rather than correcting this (and other[2]) errors, signed verbatim, Respondent's order denying relief on all grounds.[3] (Appendix 4 at pg. 24).

Petitioner filed a Certificate of Probable Cause to Appeal with the Georgia Supreme Court asserting the state habeas court's actions surrounding the *ex parte* solicitation of a proposed order from Respondent, along with the court's verbatim adoption of the order, denied Petitioner due process and equal protection. In addition, Petitioner asserted the habeas court erred in finding trial counsel rendered effective assistance of counsel. The Georgia Supreme Court granted a Certificate of Probable Cause to Appeal, heard oral argument, and ultimately ruled that although it had "criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties. . . the 45-page order in this case [was] well supported by citations to the record and . . . [w]e decline Jefferson's invitation to accord the order less deference than mandated . . . " *Jefferson v. Zant*, 263 Ga. 316, 317 (Ga. 1993). Further, the court found that trial counsel

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[2] Even the same spelling and punctuation errors are repeated. *Compare* 12/26/91 Response Brief at 41 ("The prosecutors (sic) remakrs (sic) were based....") with Final Order at 35 ("The prosecutors (sic) remakrs (sic) were based....").

[3]Petitioner formally objected and moved to recuse the state habeas court judge. The objection was overruled and the motion denied without a hearing.

did not perform deficiently in failing to investigate penalty phase mental health issues. *Id*. at 319. The court thus affirmed the judgement of the state habeas court. *Id*. On April 18, 1994, the United States Supreme Court denied Mr. Jefferson's Petition for Writ of Certiorari. *Jefferson v. Zant*, 511 U.S. 1046 (1994). Similarly, on June 13, 1994, the Supreme Court denied Mr. Jefferson's Petition for Rehearing. *Jefferson v. Zant*, 512 U.S. 1215 (1994).

Thereafter, on April 23, 1996, Mr. Jefferson filed a Petition for Writ of Habeas Corpus Under 28 U.S.C. Section 2254.[4] The Petition was amended on January 30, 1998. Petitioner filed a Motion for Discovery which the district court granted in part and denied in part on August 28, 1996. Petitioner's Motion for Evidentiary hearing was similarly granted in part and denied in part on August 31, 1999, and on February 21, 2001, the first portion of an evidentiary hearing was conducted. Thereafter, on May 7, 2002, the district court concluded the hearing. Ultimately, after briefing by the parties, the district court issued an order on May 10, 2007, granting in part and denying in part, the Petition for Writ of Habeas Corpus. *Jefferson v. Terry*, 490 F.Supp. 2d 1261 (N.D. Ga. 2007), Appendix 5. The district court found Petitioner was denied effective assistance of counsel during the penalty phase of his trial and ordered the death sentence vacated. The court denied relief on all other grounds.

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[4]Because the Petition was filed before April 26, 1996, the provisions of the Anti-Terrorism and Effective Death Penalty Act do not apply. *See Lindh v. Murphy*, 521 U.S. 320 (1997).

On May 29, 2007, Respondent filed his notice of appeal and on June 7, 2009, Petitioner filed his notice of cross-appeal. On July 12, 2007, the district court granted Petitioner's Motion for Certificate of Appealability. Essentially there were two issues presented to the circuit court: (1) whether Petitioner was denied effective assistance of counsel at sentencing; and (2) whether Petitioner's right to due process and a reliable sentencing proceeding was violated when a juror consulted a Bible during penalty phase deliberations. After hearing argument on the issues, the Eleventh Circuit reversed the district court's grant of penalty phase relief and affirmed the district court's denial of relief on the juror misconduct claim. *Jefferson v. Hall*, 570 F.3d 1283 (11th Cir. 2009). Judge Carnes filed a dissenting opinion wherein he outlied the reasons he believed the district court was correct in finding Petitioner was denied effective assistance of counsel during at sentencing. *Id*. A timely filed Petition for Rehearing *En Banc* was denied on August 28, 2009. Mr. Jefferson was granted an extension of time to file his Petition for Writ of Certiorari until January 25, 1010. This Petition is timely filed.

B. Facts Relevant to Questions Presented

1. The Trial

a. The Guilt Phase

The facts of the case developed at trial are summarized by the district court as follows:

> Jefferson and the victim, Edward Taulbee, were both employed by the Zenith Construction Company. Taulbee was Jefferson's immediate

supervisor. Some time after Taulbee purchased an automobile, Taulbee would take Jefferson home, and Taulbee would sometimes bring Jefferson to work in the morning.

On the day that Taulbee was murdered, May 1, 1985, the employees at Zenith Construction Company got paid [and]. . . both Taulbee and Jefferson were paid on that day. [A supervisor] left the job site at about 4:00 p.m., . . . [and] saw Taulbee and Jefferson working together. . .

Taulbee was killed some time after he left work on May 1, 1985. His body, which was lying in the woods off of Highway 41 in Cobb County, was spotted by two construction inspectors from Cobb County who were passing by in an automobile the next morning . . .

Taulbee's body was found face down in kudzu, and Taulbee was dressed in a yellow shirt, overalls, and boots . . .A large log was laying across Taulbee's head, and the log had blood on it. The police also found near Taulbee's body two sticks or clubs, and one of the sticks appeared to have been shattered in several places. On the stick was some blood and hair. The police observed that Taulbee's head had been driven into the ground, apparently by the log. No wallet was found on Taulbee's body. However, the authorities did find on Taulbee a still-ticking Timex watch, a pocket knife, and a small amount of cash.

Cobb County Police Lt. Carlton Morris . . . and the medical examiner found in Taulbee's belongings a pay stub from Zenith Construction Company. Morris telephoned Zenith Construction Company and ascertained that the pay stub number corresponded to Taulbee. Morris then talked to [the supervisor] who informed Morris that Jefferson worked with Taulbee. Morris requested that . . . Jefferson come down to police headquarters . . .

During Morris' interview of Jefferson, Jefferson informed Morris that he was originally from Louisville, Kentucky, and that he worked at Zenith with Taulbee. He also told Morris that he had been down in Georgia for about six months and that he had worked with and had known Taulbee about that long. With respect to the day of the murder, Jefferson told Morris that he had seen Taulbee leave the Zenith construction site alone around 5:30 p.m. and head north in his automobile to go fishing. Jefferson stated that he knew Taulbee was going fishing because Taulbee, around 3:00 p.m. that day, had dug up some worms in order to use them for fishing at Lake

Allatoona. Jefferson also told Morris that he did not go fishing with Taulbee because "he didn't have the patience to fish." Jefferson stated that when Taulbee left the Zenith construction site, he got on his bicycle and rode home. Jefferson, who lived alone, stated that he watched television, drank beer, and stayed home that afternoon and night.

Jefferson told the police that Taulbee had loaned him $120 and that it was due on Thursday, May 2, 1985. He further stated that he had not paid Taulbee but that he had not gotten his paycheck from Stewart at lunch on payday, the day of the killing. Stewart informed Morris that Taulbee and Jefferson had never had any money problems.

. . . Jefferson consented to a search of his apartment . . . [and] cooperated with the police . . . opening drawers and closet doors while the police searched the apartment. Morris did not find anything connecting Jefferson to the murder of Taulbee. Morris also did not find any signs of struggle on Jefferson.

Rhonda Glade, one of Jefferson's neighbors, testified that she saw Jefferson, Taulbee, and Dwayne Mitchell . . talking outside of Jefferson's apartment at approximately 4:15 p.m. on the day of Taulbee's murder. She testified that she had seen Jefferson and Taulbee leave from Jefferson's apartment to go fishing. Rhonda Glade also testified that later on the night of the killing she saw Jefferson return to his apartment on foot and heard no car arrive.[5] Ms. Glade further testified that Jefferson came to her apartment on May 2, 1985, and gave her an automated teller bank card (referred to herein as an "ATM card") and asked her to get rid of the card. Jefferson also gave her a

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[5]The district court, in a footnote recounted:

> In her pretrial statement, however, Rhonda Glade said she heard a car arrive and two doors slam when Jefferson returned home that evening. (R. Ex. 21 at 427.) Moreover, in her pretrial statement, she said she was "sure" Ronald Glade and Dwayne Mitchell had not gone to the lake that night because they spent the evening of May 1, 1985, with her. (*Id.* at 434-36.) To the contrary, at trial, Rhonda Glade testified that both Ronald Glade and Dwayne Mitchell had left the apartment during the course of the evening. (*Id.* at 436.)

fishing tackle box.

Ronald Glade, Rhonda Glade's brother and another neighbor of Jefferson's, testified that on May 1, 1985, he had gone to Jefferson's apartment around 6:00 p.m. He testified that Jefferson had locked the door to his apartment, although Jefferson was inside, which Ronald stated was unusual . . . Jefferson was acting funny and that his chest appeared to be red . . . Jefferson had, prior to the murder of Taulbee, made a statement about hitting his boss on the head and that, after the murder, had informed him that his "little fat buddy was dead." Ronald Glade further testified that on the evening of May 1, 1985, Jefferson stated he had lost his wallet and went out with Dwayne Mitchell to look for it, although Ronald later found the wallet in Jefferson's apartment with approximately $100.00 in cash in the wallet.

Dwayne Mitchell testified that he took Jefferson to buy marijuana and liquor on the night of May 1, 1985. He further testified that Jefferson asked him to drive him to Lake Allatoona the night of the murder to find his wallet, which Jefferson claimed was missing. Mitchell stated that when they arrived at Lake Allatoona, Jefferson left the car for 5 to 10 minutes and returned with a fishing pole and a tackle box . . . Jefferson discarded the fishing pole and gave the tackle box to him . . . on the way back from the lake, Jefferson asked him to take him to a bank with an automated teller machine, where Jefferson disguised himself with a straw hat and sunglasses and attempted unsuccessfully to make a cash withdrawal. Prior to going to the automated teller, Jefferson asked Mitchell if the automated teller machine took pictures of those people who used the machines.

On May 7, 1985, Taulbee's car was located in the parking lot of a food store in Cobb County. The parking lot where the car was located was close to Jefferson's residence. The authorities also found the keys to the car inside the automobile. Also found in the glove compartment of the car was a twenty-four hour automatic teller transaction receipt, and the authorities determined that the receipt was dated May 2, 1985, at approximately 1:07 a.m.

The bank card that had earlier been given to Rhonda Glade was subsequently recovered. Taulbee's name was on the card. The authorities also located other fishing items that had belonged to Taulbee and of which Jefferson had apparently attempted to dispose.

The authorities arrested Jefferson on May 7, 1985. A smoking marijuana cigarette was found on the coffee table in Jefferson's living room at the time of his arrest. Jefferson was given the *Miranda* warnings and was taken to the police headquarters where he was again given the *Miranda* warnings before he was interrogated without counsel beginning at 10:45 p.m. When asked why he had killed Taulbee, Jefferson, according to the testimony of Detective B.J. Banks, stated that "he didn't need to be around other people, that he wanted to be executed, and that he wanted to be put to sleep." Lieutenant Morris likewise testified that Jefferson stated the following during the interrogation:

> I don't need to be around people.... I talk to myself. I ain't crazy. I don't know nothing. I got hit by an auto when I was a kid. I had another dream and saw the man in my dream. I call myself Tony. I don't think I am two people. How quick can I be put to sleep? I don' t feel anything about this. Do you believe in Heaven and Hell. .... I want to be put to sleep.... I want to be executed.

The authorities later determined that Taulbee had cashed his paycheck on May 1, 1985, and had received $223.15. It further appeared that Jefferson, who was paid on May 1, 1985, did not cash his paycheck until May 3, 1985. At that time, Jefferson received approximately $136.21. The authorities also determined that in the early morning hours of May 2, 1985, someone attempted to use Taulbee's ATM card to make a withdrawal.

* * *

The medical examiner . . . testified that the cause of death was the head and brain injuries to Taulbee, and that Taulbee's death was some time on May 1, 1985, between the hours of 5:00 p.m. and 11:00 p.m. . . . [and] it was his opinion that Taulbee was probably knocked to the ground by the blows to the head, and that the log was then dropped on the Taulbee's head, driving his face into the ground.

Jefferson v. Terry, 490 F.Supp.2d at 1271-1275 (foot note substituted, citations omitted).

Based on this evidence, the jury found Mr. Jefferson guilty of felony[6] murder and armed robbery.

b. The Penalty Phase

After the jury returned is guilty verdict, the state pursued two statutory aggravating circumstances: (1) the murder occurred during the commission of another felony - - armed robbery (O.C.G.A. §17-10-30(b)(2); and the murder was outrageously or wanton vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim (O.C.G.A. §17-10-30(b)(7)). The state presented documents from Petitioner's prior convictions and/or arrests, and the witnesses who testified, testified solely about those priors. Trial counsel, offered the testimony of only five witnesses (two jailers, Jefferson's mother and younger sister, and the mother of Jefferson's children), plus Petitioner, consuming only 80 pages of transcript. As the state habeas corpus court found, the extent of the case in mitigation was

> the testimony of Cobb County Deputy Sheriff Bill Wigley that Petitioner had been a good inmate; Deputy Kevin Shrodes that Petitioner was not a problem inmate; Petitioner's mother who testified about Petitioner's car accident and background; Petitioner's sister who testified about Petitioner being in the Navy and later attending vocational/technical school; Linda Dale, the mother of Petitioner's two children who described Petitioner as a good worker and father; and Petitioner himself who testified about his background, his handwritten autobiography which was admitted and denied having made the statement that he had allegedly told police he wanted to be executed.

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[6]The jury was specifically instructed on both malice murder and felony murder (T. 1087) and returned a guilty verdict for felony murder. (T. 1154)

(Appendix 4 at 19-20) (citations omitted). The jury found the existence of both statutory aggravating circumstances and recommended a death sentence which the trial court imposed.

2. Proceedings in the State Habeas Court

a. The State Habeas Court Abdicated Its Fact-Finding Duty to Respondent

Mr. Jefferson filed a petition for writ of habeas corpus with the Superior Court of Butts County, Georgia, asserting, among other issues, trial counsel were ineffective in failing to conduct a reasonable investigation into mental health related mitigation. At an evidentiary hearing Petitioner called five witnesses, trial counsel Stephen Schuster, and Marc Cella, appellate counsel Ralph Kearns, post-conviction investigator, Julie Brain, and Attorney, Michael Mears. In addition, Petitioner submitted testimony from Dr. James Merikangas, Dr. David Price, Ph.D., James Jefferson, Petitioner's brother, Vera Jefferson, Petitioner's mother, Michael Dale, Petitioner's brother-in-law, Linda Dale, Petitioner's common law wife, Janice Jefferson, Petitioner's younger sister, Dr. Gary Dudley, Ph.D., the mental health expert utilized by trial counsel and ACLU attorney, George Kendall. Further, Petitioner presented documentary evidence including a report prepared by Dr. Gary Dudley. Respondent called no witness and submitted three exhibits which were the billing records of trial counsel Marc Cella[7] and Stephen Schuster.

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[7]Contained in the billing records of Mr. Cella were the billing records of Dr. Gary Dudley.

After the parties briefed the issues, the state habeas court, rather than acting as a detached and neutral decisionmaker, sought, *ex parte* and without prior notice, proposed findings of fact and conclusions of law from Respondent.[8] The state habeas court signed the proposed order without any change and no doubt without reading it. For example, the proposed order listed Michael Hauptman as a witness called at the evidentiary hearing by Petitioner. But, **Mr, Hauptman was not called as a witness and had absolutely no role in any of the proceedings in Petitioner's case**. Not only was Mr. Hauptman erroneously described as a witness, his non-existent testimony was found to be irrelevant. As mentioned above, the order signed by the state habeas court included the same spelling and punctuation errors found in Respondent's proposed order.

Respondent made credibility findings that credited the testimony of trial counsel (who were being alleged ineffective) over an independent expert witness, Gary Dudley, who had been retained by trial counsel. Ultimately, Respondent's order had the state habeas court denying relief on all grounds. In particular, the order found trial counsel did not perform deficiently by failing to further investigate mental health as mitigation. The order did not address prejudice.

The state habeas court, rather than reviewing the proposed order to ensure its accuracy, and rather than making independent judgments, merely signed the proposed order verbatim without noticing the phantom witness or correcting other mistakes. Upon

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[8]The court did not seek a proposed order from Petitioner.

learning of the "ghostwritten" order, Mr. Jefferson sought reconsideration, and filed a Motion to Recuse the state habeas court judge. Both motions were denied.

3. The Georgia Supreme Court Rubber-Stamps Respondent's Fact-Finding

Mr. Jefferson sought a Certificate of Probable Cause to Appeal with the Georgia Supreme Court asking the Court to prohibit the practice of having a party draft the final order in death penalty cases. Further, Mr. Jefferson asked the Georgia Supreme Court to vacate the order drafted by Respondent. Lastly, Mr. Jefferson asked that the court find he received ineffective assistance of counsel at the penalty phase of his trial.

While criticizing the state habeas court "for [its] verbatim adoption of findings of fact prepared by prevailing parties" and recognizing the order referred to a phantom witness who never testified, the court nevertheless rubber-stamped the habeas court's order because the "order in this case is well supported by citations to the record." *Jefferson v. Zant*, 263 Ga. 316, 317 (1993).

As to the merits of Petitioner's claim trial counsel rendered ineffecitve assistance of counsel by failing to conduct an adequate investigation into mental health mitigation, the Georgia Supreme Court found trial counsel did not act deficiently because:

> Jefferson's attorneys prepared extensively for a possible sentencing phase, including travelling[9] [sic] to Jefferson's home in Kentucky to interview

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[9]The billing records submitted by Respondent in state post-conviction proceedings reveal that trial counsel traveled to Louisville on February 20, 1986, four (4) days prior to the beginning of trial. Further, the trip, from beginning to end (including the drive to and

> family members and obtaining a psychological evaluation by a psychologist recommended to them by the American Civil Liberties Union. The psychologist reported that Jefferson was of average intelligence, and, although he was impulsive, immature, had poor impulse control and would "pursue immediate gratification without properly considering possible consequences," he was not psychotic or seriously mentally ill.
>
> The report did suggest that a neuropsychological evaluation might be "worthwhile ... to rule out an organic etiology." However, in subsequent telephone conversations with Jefferson's attorneys, the psychologist indicated that further examination would not likely be beneficial because Jefferson did not have serious mental problems and was of normal intelligence. Counsel explained that in light of this advice, as well as their own observations of Jefferson and Jefferson's adamant assertion that he had not committed the crime, they concluded that there was no reason to explore further any mental issue, or to call the psychologist to testify in mitigation.[10]

Jefferson v. Zant, 263 Ga. at 319. Thus, the court concluded that "although other attorneys might have explored the mental issue further, we cannot conclude that the investigation and tactical judgement of Jefferson's attorneys was outside the wide range of reasonably effective assistance." *Id*. The state court, finding no deficient performance, never reached the issue of prejudice. *Id*.

4. Post-Conviction Proceedings in the District Court

Mr. Jefferson, pursuant to 28 U.S.C. §2254, filed a Petition for Writ of Habeas Corpus in the district court. The district court granted discovery on a claim that the prosecutor's decision to seek death was impermissibly based on race. In addition, the

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from Louisville) lasted from 5:00 a.m. to 11:00 p.m., 18 hours.

[10]The Georgia Supreme Court's fact finding was essentially the same as the fact-finding of the Butts County Superior Court.

deposition[11] of a sitting juror, Richard Berry, was taken wherein he revealed "towards the end of our sentencing when we were deciding what the sentence should be" and when the foreman of the jury was going around the table allowing each of the jurors to "have their say about the subject", an elderly juror "just opened the Bible up and read a passage." Although he could not recall the specific Biblical passage that the juror read, and he could not recall her making any statement about the passage, it clearly appeared to him that what she had read "justified what she was doing at the time." The juror who read the passage was identified as Marjorie West but could not be called to testify due to her age at the time and the fact that she was mentally infirm and incompetent.

Noting that Petitioner's case was initiated prior to April 26, 1996, the district court correctly held that the deferential provisions of the AEDPA did not apply to Petitioner's claims. *Jefferson v. Terry*, 490 F.Supp. 2d at 1280-81. Reviewing questions of law *de novo* and affording deference to state court findings of fact, the district court found trial court performed deficiently in two areas.

First, that trial counsel failed to object to the prosecutor's questioning which implicated Mr. Jefferson's invocation of his right to remain silent - - *i.e.*, a violation of the rule announced in *Doyle v. Ohio*, 426 U.S. 610 (1976). Specifically, the court found that the testimony of law enforcement about Petitioner's "refusal to talk about the crime

[11]The deposition of Mr. Berry was made part of the district court record and forms the basis for Petitioner's jury misconduct claim.

or the ATM card and tackle box . . . impermissibly commented on Jefferson's silence. . ." and [counsel's] failure to object constituted deficient performance." *Jefferson v. Terry*, 490 F.Supp. 2d at 1313-14. The court, however, found Petitioner had still not established an ineffective assistance of counsel claim "because he has failed to demonstrate . . . there is a reasonable probability that the results of the proceedings would have been different." *Id*. at 1314.

Second, the district court found that trial court performed deficiently in their failure to investigate fully mental health as mitigation. The court noted, "an attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Id*. at 1318 (*citing Grayson v. Thompson*, 257 F.3d 1194, 1225 (11th Cir. 2001)). The court adopted the findings of fact from the state courts and determined that

> Attorney Cella contacted Dr. Gary E. Dudley to conduct the examination of Petitioner. Following the examination, Dr. Dudley related to Attorney Cella that Petitioner was in the midrange level of intelligence and that any mental deficiencies were "quite mild and in no way impaired his judgment or his decision-making capacity." Dr. Dudley also indicated to counsel that he found Petitioner both competent to stand trial and sane at the time of the offenses.

Id. at 1320. However, Dr. Dudley also prepared a report dated November 10, 1986, which indicated those findings but also noted:

> One possibility that could not be explored because of his incarceration has to do with the sequelae to head injury experienced during childhood. In my opinion, it would be worthwhile to conduct neuropsychological evaluation of this individual to rule out an organic etiology.

See, *Jefferson v. Hall*, 570 F.3d at 1294.

The district court noted that Mr. "Schuster then conferred with Dr. Dudley about his written report and, in particular, Dr. Dudley's suggestion that a neuropsychological evaluation be conducted to rule out an organic etiology." *Jefferson v. Terry*, 490 F.Supp. 2d at 1319. The district court found that:

> In this subsequent conversation[12], Dr. Dudley led Mr. Schuster to believe that further investigation would simply be a waste of time because Petitioner was not psychotic, was intelligent and had a fairly high I.Q. Based upon Dr. Dudley's written report and the follow-up conversation, counsel saw no need to have further neuropsychological testing done,

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[12]Judge Carnes, in his dissent, noted that although the federal courts were "obliged" to accept as true the testimony of Mr. Schuster (because the state habeas court expressly credited it), "there are reasons to doubt it." *Jefferson v. Hall*, 570 F.3d at 1312. One of the reasons to doubt Schuster's testimony is that his detailed billing records, submitted by Respondent into evidence in state post-conviction proceedings, do not reflect any conversations with Dr. Dudley *after* Dr. Dudley's report was written.

When examining the billing records of Mr. Schuster and Mr. Cella, the following is revealed. Mr. Cella telephonically contacted Dr. Dudley on November 25, 1985 and spoke with him for approximately12 minutes. The following day, Mr. Cella had a "conference" with Dr. Dudley which lasted 45 minutes. Mr. Cella's billing records reflect no further contact with Dr. Dudley. Mr. Schuster's billing records reflect that he had one contact with Dr. Dudley, a "conversation . . . re: Client's mental health" which occurred on December 10, 1985 and lasted for 12 minutes. Dr. Dudley's report, however, was dated February 10, 1986, *after* Schuster's last contact with Dr. Dudley. Further, Dr. Dudley's billing records indicate his last visit with Mr. Jefferson was on December 13, 1985. Thus, by the documentary evidence submitted by both parties, it appears that Schuster did not have a conversation with Dr. Dudley *after* the he received Dr. Dudley's report recommending neuropsychological testing. Nevertheless, in signing Respondent's proposed order, without even reading it, the state habeas corpus court credited Mr. Schuster's testimony over that of Dr. Dudley despite the fact that Mr. Schuster's own billing records contradicted his testimony.

Id. Further, based upon Dr. Dudley's informal description of Petitioner as "just a criminal" counsel concluded Dr. Dudley had no helpful testimony, and chose not to call Dr. Dudley in mitigation.[13] *Id*. The court noted that even though counsel knew Petitioner had suffered a head injury in the past, Dr. Dudley's statements led counsel "to believe that further neuropsychological testing would be a waste of time." *Id*. at 1320.

Contrary to the state court however, the district court found trial counsel's decision not to call Dr. Dudley was not reasonable. The court noted the question before it was "not whether counsel should have presented additional mitigating evidence . . . [but] is whether the investigation supporting counsel's decision not to investigate further for mitigating evidence was reasonable." *Id*. at 1321 (*citing Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003)). The court concluded that "had Petitioner's trial counsel not abandoned their investigation of Petitioner's mental health prematurely, they should have and likely

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[13]Another "reason to doubt" the fact findings of the state court (*see* n. 13, *supra*) is the fact that Respondent wrote the order wherein the state habeas court purportedly credited the testimony of Schuster over Dr. Dudley who:

> adamantly den[ied] that he had ever said anything of the sort to Schuster or to anyone else. Dr. Dudley insisted that it had always been his expert opinion "that neuropsychological testing was necessary" and that he "meant it." He swore: "I never, before or after that report, suggested to [Jefferson's attorneys] that such an evaluation was not necessary or that it would not be worthwhile."

Jefferson V. Hall, 570 F.3d at 1312 (Carnes, J. dissenting). This is especially true when the state habeas court signed verbatim the order prepared by Respondent which listed a witness for Petitioner **who did not testify** and then rejected the relevance of that phantom witness.

would have become aware of Petitioner's brain damage." *Jefferson v. Terry* 490 F.Supp. 2d at 1321. Further, the court found trial counsel's investigation lacking in that they failed to present any background information to Dr. Dudley *id*. at 1324 ("Dr. Dudley, who had no background information furnished to him by trial counsel . . .") and failed to contact the family until just before trial and *after* Dr. Dudley's report had been completed and the decision not to use mental health was already made. *Id*. at 1322-23 ("had trial counsel . . . developed questions concerning the injury as a part of their background investigation of Jefferson, and **contacted the family members and friends of Jefferson earlier in the case**, counsel likely would have learned critical information about the head injury and the medical problems that Jefferson had as a child. (emphasis added)).

While the district court found that trial counsel did, in fact, choose not to further investigate mental health, the court found that this choice was not reasonable because it was "not supported by reasonable professional judgment." *Id*. at 1325. Instead, the court found:

> no competent lawyer would have abandoned an investigation into potential mitigating evidence based on the oral opinion of a mental health expert that the defendant was "just a criminal," particularly when that mental health expert previously had provided a written expert report explicitly stating that it would be worthwhile to conduct further testing to determine whether the defendant suffered from "organic etiology" or brain damage. While "reasonably diligent counsel may draw a line [in their investigation] when they have good reason to think further investigation would be a waste," *Rompilla v. Beard*, 545 U.S. 374, 383, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), trial counsel did not have a good reason here.

Id.

Having found counsel performed deficiently, the district court went on to determine whether Petitioner was prejudiced. In concluding in the affirmative, the court found:

> In regard to what counsel would have discovered with further reasonable investigation, including specifically a neuropsychological evaluation . . . Petitioner suffers from permanent brain damage of the acquired, post-traumatic type, which is most pronounced in the right hemisphere of the brain, including the frontal lobe . . frontal lobe syndrome or brain damage . . .causes abnormal behavior . . . over which he has no or substantially limited control . . .

Id. at 1321. The court went on to find "[b]ecause of counsel's omissions in this case, the jury was deprived of the singularly most powerful explanation for the crime-Petitioner suffered from organic brain damage that impaired his judgment and his ability to control his behavior." *Id*. at 1327. Ultimately, the court found:

> Petitioner has presented a compelling and unrebutted case that he suffers (and suffered) from organic brain damage, a dysfunction that affected his cognitive ability and his ability to conform his actions. This compelling evidence could and should have been presented to the sentencing jury. Had such evidence been presented, there is a reasonable probability that the jury would have returned a sentence of life in prison rather than a death sentence. Because trial counsel unreasonably failed to investigate and present this compelling mitigating evidence, this Court's confidence in the outcome actually reached at sentencing is significantly undermined. Petitioner has therefore established the prejudice resulting from trial counsel's ineffectiveness, and Petitioner is entitled to a new a sentencing hearing at which this mental health evidence can be presented.

Id. at 1328.

5. The Eleventh Circuit Majority Opinion

Respondent appealed the district court's granting of penalty phase relief and

Petitioner cross-appealed the denial of relief on the juror misconduct claim. A divided panel of the Eleventh Circuit reversed the grant of habeas relief based on ineffective assistance of counsel and affirmed the denial of relief based on juror misconduct. Judge Carnes filed a dissenting opinion wherein he found trial counsel were ineffective.

Judge Marcus, joined by Judge Tjoflat, found that the district court erred in determining trial counsel performed deficiently in prematurely abandoning their mental health as mitigation investigation. The majority acknowledged that trial counsel ceased its mental health investigation after receiving Dr. Dudley's report and consulting with him thereafter. The majority went on to state that

> Since Jefferson's claim stems from his lawyers' decision to limit the scope of their investigation into potentially mitigating mental health evidence, we view the deference owed these strategic judgments

Jefferson v. Hall, 570 F.3d at 1301. The majority went on to note that [i]n reviewing a lawyer's professional judgements, a decision to limit investigation is accorded a strong presumption of reasonableness." *Id*. (*Citing Mills v. Singletary*, 63 F.3d 999, 1021 (11th Cir. 1995), *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987), and *Strickland v. Washington*, 466 U.S. 668 (1984)), and that when trial counsel is experienced the presumption is even higher. *Id*.

With this presumption in mind, the majority found "the decision of Jefferson's trial counsel not to conduct neuropsychological testing or to present mental health at the penalty phase of the trial was not constitutionally ineffective." *Id*. at 1302. The majority

then listed all of the things trial counsel did in preparation for trial, the majority of which centered on the guilt phase of the trial: filing 30 motions; visiting the crime scene; visiting Petitioner's apartment and place of employment; interviewing state witnesses; traveling to Kentucky to visit with Petitioner's family.[14] *Id*. at1302-03.. The majority also noted that although Petitioner protested his innocence and they saw no evidence of mental illness, trial counsel "took the added precaution of requesting a psychological evaluation of Jefferson" and upon consulting with a lawyer from the ACLU, hired Dr. Gary Dudley. *Id*.

The court went on to note that Dr. Dudley met with Petitioner four times after which he provided a written report to trial counsel.

> The report concluded that Jefferson was in the middle range of intelligence, that the magnitude of his deficiencies was quite mild, and in no way impaired his judgment or decision-making capacity, and that he was not psychotic. The report also mentioned "sequelae to head injury experienced during childhood" as a "possibility" that Dr. Dudley was unable to explore, and said that "it would be worthwhile to conduct neuropsychological evaluation of [Jefferson] to rule out an organic etiology."

Id. at 1303. Like the state courts, the majority noted that attorney Schuster had a conversation with Dr. Dudley after being provided the report wherein Dr. Dudley

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[14]The billing records of trial counsel indicate that this trip to Kentucky occurred 4 days prior to the start of trial and the entire trip, including driving to and from Louisville, took approximately 18 hours. A Mapquest inquiry reveals that the estimated time of travel one way from Marietta, Georgia to Louisville, Kentucky would take six hours and twenty three minutes. Assuming the accuracy of this estimate, counsel therefore spent a total of less than five and one half (5 ½) hours to meet Petitioner's family, visit the courthouse and interview government penalty phase witnesses.

indicated further neuropsychological testing would likely be a waste of time and that Petitioner was "just a criminal." *Id*. at 1304. Based on this conversation, and their observations that Petitioner did not overtly exhibit symptoms of mental illness, trial counsel elected not to further investigate mental health. *Id*.

The majority also found there were other reasons justifying trial counsel's decision not to further investigate mental health. First, the majority found important the fact that "Jefferson had unwaveringly proclaimed his innocence, and that the State's case against him suffered from many weaknesses." *Id*. at 1305. Second, the majority found that pursuing an innocence defense at trial "would not have meshed easily with the presentation of a mental illness defense at the penalty phase." *Id*. Thus, reasoned the majority, the decision to pursue a "residual doubt" penalty phase defense, among other things, was not unreasonable. *Id*. at 1306.

Lastly, the majority found unpersuasive the argument that there was no down side to seeking further neuropsychological testing because "attorneys in these cases have finite resources to expend, seeking funds for and gathering additional mental health evidence may have hampered the ability of Jefferson's counsel to work on establishing his innocence." *Id*. The majority went on to reverse the district court's grant of habeas relief finding "the performance of Jefferson's counsel at the penalty phase of his trial was reasonable." *Id*. Having found no deficient performance, the majority never addressed the prejudice prong of *Strickland*.

6. Judge Carnes' Dissent

Judge Carnes authored a strenuous dissent noting:

The twelve men and women who decided whether Lawrence Jefferson should live or die heard only a brief reference to the fact that when he was two years old a car ran over the top of his head, he was taken to the hospital, and "he just barely made it." The jury heard nothing else about the extent of his injuries and nothing about the devastating effect those injuries had on his life. The jury was not told that he was hospitalized for weeks. That the trauma he suffered permanently misshaped his head, leaving him with a cranial indentation and an abnormally enlarged skull caused by the pressure of cerebrospinal fluid. That it resulted in frontal lobe and neurological damage, which had a profound and lifelong impact on his behavior. That it caused learning disabilities, emotional instability, diminished impulse control, and intermittent outbursts of rage. That it led to impaired judgment and paranoia. That the neurological damage resulting from the head injury deprived him of a normal ability to premeditate, deliberate, distinguish right from wrong, and act rationally. That he had substantially limited or no control over the abnormal behavior caused by the brain damage he suffered.

The jury was told nothing about the impact of Jefferson's childhood injury on his life and his behavior. As far as the jury knew, Jefferson did not suffer from brain damage or neurological impairment; he had no organic disorders or pathologies; his emotional stability, impulse control, and judgment were perfectly normal; he could premeditate, deliberate, distinguish right from wrong, and act rationally as easily as the next person. The jury had that misleading picture of Jefferson's moral culpability because the most important mitigating circumstances were withheld from it.

The reason the jury did not know the critical facts about Jefferson's organic brain damage and its devastating effects on him is that his trial counsel failed to request a neuropsychological examination. They failed to request one even though they knew from what Jefferson told them, from the statements he made to the detectives, and from what his mother said that Jefferson had suffered a serious head injury as a child when he was run over by a car. They failed to request an examination even though they were advised to do so by Dr. Gary Dudley, the psychologist who had seen Jefferson.

Jefferson v. Hall, 570 F.3d at 1311.

Although "[n]europsychological testing was "available and routine at the time of Mr. Jefferson's trial," and "it is undisputed that the testing ... could have easily been performed by available mental-health professionals in the Atlanta area prior to [Jefferson's] sentencing," trial counsel's "main excuse for not asking is Dr. Dudley discouraged [trial counsel] from seeking a neuropsychological examination . . .basically sa[ying] it may be a waste of time. . .and that Jefferson was "just a criminal." *Id*. at 1312. Judge Carnes noted that Dr. Dudley submitted an affidavit adamantly denying he discouraged further testing and/or that he said Petitioner was "just a criminal" but, even though there was reason to doubt[15] the state court's crediting trial counsel's testimony over that of Dr. Dudley, he noted he was bound to give deference to the state court's findings. *Id*. Nevertheless, Judge Carnes noted that even taking everything Schuster said as true, trial counsel's "representation still falls outside of the wide range of reasonably effective assistance." *Id.*

The dissent noted trial counsel knew Petitioner had his head run over by a car because they had a transcript of a statement wherein Petitioner mentioned the accident, Petitioner's mother had also told them about it, and Dr. Dudley referenced it in his report. *Id*. Indeed, an indentation in Petitioner's skull resulting from the accident was clearly apparent. *Id*. Rather than affording a presumption of reasonableness to trial counsel's

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[15]*See* footnotes 13, 14 & 17.

decision to abandon mental health investigation, the dissent, following this Court's precedent in *Williams v. Taylor*, *supra, Wiggins v. Smith, supra*, and *Rompilla v. Beard*, *supra*, found:

> Schuster has never explained why he thought Dr. Dudley, after issuing a formal report recommending an important examination to check for organic brain injury, would pivot 180 degrees and take back that recommendation when he spoke informally with Schuster over the phone. The facts Dr. Dudley allegedly mentioned to Schuster during their telephone conversation are all facts he knew at the time he submitted his written report recommending the examination. Indeed, they are all set out in the same report that contains the recommendation. Yet, from all that appears in the record, Schuster never even asked Dr. Dudley why he would write one thing in the report and say exactly the opposite thing over the telephone. *See* Dist. Ct. Order at 85 ("There is no indication, however, that [Jefferson's] trial counsel ever sought a clear-cut explanation from Dr. Dudley as to how or why he went from stating his opinion in a written report that it would be worthwhile to conduct a neuropsychological evaluation to stating orally that such an evaluation would likely be a waste of time and that [Jefferson] was 'just a criminal.'").
>
> Knowing that his client had suffered a serious head injury as a child and that a psychologist had issued a formal report recommending further testing to determine if the injury had caused organic brain damage, no reasonable attorney would have let the matter drop because of informal remarks made to him during a telephone conversation. Not without a convincing explanation for the change of mind, and there was none. Absent any explanation for the about-face, any reasonable attorney would have filed a motion for a neuropsychological examination, citing the head injury and the recommendation in the report. Schuster's failure to do so was deficient performance. *See* Dist. Ct. Order at 85 ("[N]o competent lawyer would have abandoned an investigation into potential mitigating evidence based on the oral opinion of a mental health expert that the defendant was 'just a criminal,' particularly when that mental health expert previously had provided a written expert report explicitly stating that it would be worthwhile to conduct further testing to determine whether the defendant suffered from 'organic etiology' or brain damage.").

Jefferson v. Hall, 570 F.3d at 1313.

Judge Carnes also took issue with the majority's conclusion that trial counsel rendered effective assistance based on their preparation for trial. First, the fact that trial counsel filed thirty motions did not carry the day as:

> [v]irtually all of those motions relate solely to the guilt stage, and all of them are beside the present point. Adequate, or even stellar, performance in regard to one aspect of the trial does not bar a conclusion that counsel performed ineffectively in another regard. The cases are legion in which an attorney's performance has been found to be effective at the guilt stage and ineffective at the sentence stage.

Id. at 1314.

Further, the majority's reasoning that trial counsel was justified in not seeking neuropsychological testing because they chose instead "to follow a residual doubt strategy" was unpersuasive for at least three reasons. First, that decision was not reasonable because it was based on an investigation that was incomplete. *Id*. The dissent, applying this Court's precedents in *Strickland v. Washington*, 466 U.S. at 690-91, and *Wiggins v. Smith*, 539 U.S. at 527-28 (finding ineffective assistance because "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible"), found

> defense counsel's investigation into the effects of the serious head injury Jefferson suffered as a child was not just "less than complete," it was virtually non-existent. Reasonable professional judgment did not support their failure to file a motion requesting a neuropsychological examination. The decision that followed from that failure was not based on strategy but on ignorance, not only about whether Jefferson was brain-damaged but also about how it might affect his behavior . . . Making decisions based on

ignorance is not professionally reasonable.

Id. at 1315 (footnote omitted).

Second, the dissent reasoned that results from further neuropsychological testing would not have been inconsistent with the theory of defense that had been presented by trial counsel. Judge Carnes noted that trial counsel put up witnesses who spoke of the difficult life Petitioner had growing up, that he served in the Navy, he was a hard worker, good father, good son, and brother. *Id*. Moreover, trial counsel elicited from Petitioner's mother, albeit "almost in passing," that Petitioner had his head run over by a car when he was two years old. Thus, Judged Carnes correctly reasoned, "[i]f the existence of that kind of head injury is not inconsistent with a residual doubt strategy, the fact that it had resulted in permanent and profound organic brain damage is not either." *Id*.

Last, the dissent persuasively pointed out:

> There is a third reason that pursuit of a residual doubt strategy does not excuse trial counsel's failure to investigate Jefferson's brain damage and its effect on his life and behavior. Trial counsel did not actually pursue a residual doubt strategy, at least not one worthy of the name. The state collateral court never found that a residual doubt strategy was actually used. The majority says one was, but the record tells another story.

Id. at 1316. None of the witnesses who testified said anything about residual doubt. But even more important, the defense called Petitioner to testify and in his testimony he never even hinted he did not commit the crime. The dissent noted, trial counsel never even asked Petitioner if he had committed the crime and their failure to do so "is inconsistent with the majority's theory that a residual doubt strategy trumped the need to investigate

mitigating circumstances based on the serious head injury Jefferson had suffered." *Id*.

Perhaps the best evidence residual doubt was not pursued was, as the dissent pointed out, trial counsel, in closing, actually admitted guilt. Mr. Cella argued to the jury that Petitioner's "background, his life experience, has caused him to strike out at a defenseless person, such as Ed Taulbee, that he killed without necessity, and ya'll found that." *Id*. at 1318. Further, trial counsel repeatedly emphasized Petitioner's hard life growing up "in the ghetto and mostly without a father." *Id*. at 1316. Counsel urged the jury to consider that the people Petitioner had grown up with and associated with were a bad influence on him. They asked the jury to look at his good qualities, to look into their own hearts "to find some understanding, some love, some compassion" for Petitioner. The dissent noted that instead of residual doubt, trial counsel's closing stressed, "mercy-despite-guilt." *Id*. at 1317. All-in-all,

> in a combined twenty-seven transcribed pages of argument Jefferson's attorneys made only two passing references to possible weaknesses in the state's case. One counsel acknowledged that the issue of guilt was closed while the other conceded that Jefferson had committed the murder, stating that his "background, his life experience, has caused him to strike out at a defenseless person, such as Ed Taulbee, that he killed without necessity." A residual doubt strategy that concedes the defendant murdered the defenseless victim is not a strategy at all.

Id. at 1318-19.

The dissent ultimately determined trial counsel performed deficiently in not seeking the neuropsychological testing recommended by Dr. Dudley:

> Given that Jefferson's head was run over by a car when he was a child, it

> was unreasonable to abandon an investigation into organic brain damage as a source of mitigating circumstances in favor of a throw-away residual doubt argument-especially one that actually was thrown away in closing argument. Showing that Jefferson suffered from organic brain damage which had a profound and lifelong impact on his behavior, causing him all kinds of emotional and behavioral problems and leaving him with impaired judgment and diminished impulse control, would have fit perfectly into counsel's mercy-despite-guilt arguments. The best evidence to support a mercy argument is that, through no fault of his own, Jefferson had a damaged brain that deprived him of a normal ability to premeditate, deliberate, and distinguish right from wrong and that caused him to behave abnormally. But trial counsel's unreasonable failure to file a motion requesting a neuropsychological examination deprived Jefferson of all that mitigating evidence.

Id. at 1319.

Noting that "Georgia law mandates a life sentence unless the jury unanimously agrees on death. *Hill v. State,* 250 Ga. 821, 301 S.E.2d 269, 270 (1983); *Miller v. State,* 237 Ga. 557, 229 S.E.2d 376, 377 (1976)" the dissent correctly reasoned that "the measure of prejudice is whether "there is a reasonable probability that at least one juror would have struck a different balance" of aggravating circumstances and mitigating circumstances. *Wiggins,* 539 U.S. at 537, 123 S.Ct. at 2543." *Jefferson v. Hall*, 570 F.3d at 1320. Based on the evidence developed in post-conviction proceedings, the dissent found:

> there is that reasonable probability and more. The results the examination would have produced . . . are not disputed. *See* Dist. Ct. Order at 91 (noting that Jefferson "has presented a compelling and unrebutted case that he suffers (and suffered) from organic brain damage, a dysfunction that affected his cognitive ability and his ability to conform his actions"); *id.* at 87 (referring to the "powerful mitigating evidence regarding [Jefferson's] brain damage"). On this record depriving the jury of all that strong

> mitigating circumstance evidence does not just undermine confidence in the death sentence but substantially undermines it.

As the dissent emphasized, "the prejudice question is not even close to being close. *Id*.

REASONS FOR GRANTING THE WRIT

I. The Majority Application of a Presumption of Reasonableness to Trial Counsel's Decision to Abort Mental Health Investigation is Conflicts With This Court's Holdings in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005) and *Porter v. McCollum*, 130 S.Ct. 447 (2009).

Two of the four federal judges who have examined this case *de novo* (as is required in pre-AEDPA cases) have determined Petitioner received ineffective assistance of counsel at the penalty phase of his capital trial. This Court must break that tie.

A. The Erroneous Standard Applied by the Eleventh Circuit Majority

The Eleventh Circuit majority in assessing whether trial counsel's performance was deficient determined that when it reviewed "[a] decision to limit investigation" it would "accorded a strong presumption of reasonableness" to that decision. *Jefferson v. Hall*, 570 F.3d at 1301. Further, the majority indicated it would apply an even greater presumption in this case. *Id*. ("The standard is even higher where experienced counsel[16] is involved." *citing Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000)). This "higher-than-strong presumption of reasonableness" is in direct contravention of this Court's decisions in *Williams v. Taylor, supra*, *Wiggins v. Smith, supra*, *Rompilla v.*

[16]The majority subsequently described trial counsel as "seasoned criminal defense lawyers." *Jefferson v. Hall* 570 F.3d at 1302.

Beard, *supra* and *Porter v. McCollum*, *supra*, none of which afforded such a presumption but reviewed trial counsel's decisions on investigation through the prism of "prevailing professional norms."

B. Analysis Under the *Correct* Legal Framework

Without the distorting effect of the majority's "higher-than strong presumption of reasonableness," it is clear that the district court and Judge Carnes' were correct in finding trial counsel rendered ineffective assistance of counsel. In order to establish a violation of the right to effective assistance of counsel a habeas petitioner must satisfy a two pronged test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). A showing of deficient performance requires a showing that "counsel's representation fell below an objective standard of reasonableness" and a showing of prejudice requires demonstrating that "but for counsel's unprofessional errors, there is a reasonable probability the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome" *Id*. at 687-88.

In assessing the performance prong, this Court has noted, "strategic choices made

after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id*. at 690. However, "choices made after less than complete investigation" are not afforded such a presumption of reasonableness. Instead, those decisions made after less than complete investigation are to be scrutinized to determine if "reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id* at 691.

It is now "unquestioned that under the prevailing professional norms at the time of [Petitioner's] trial, counsel had an obligation to conduct a thorough investigation of the defendant's background." *Porter v. McCollum*, 130 S.Ct. 447, 452 (2009) (*quoting Williams v. Taylor*, 529 U.S. 362, 396 (2000)). Although "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing," counsel has a duty to conduct a "requisite diligent investigation into his client's . . . background." *Williams v. Taylor*, 529 U.S. at 415, (O'Connor, J., concurring). Hence, a decision not to investigate . . . must be directly assessed for reasonableness in all the circumstances. *Wiggins v. Smith*, 539 U.S. 510, 533 (2003).

Here, there is no question trial counsel was on notice that Petitioner had suffered a head injury when, at two years old, his head was run over by a car. Petitioner said as much in a tape recorded statement provided to trial counsel by the state and his mother

informed them of the accident (and subsequently testified to it at trial) and it clearly apparent in Petitioner's skull.. Further, it is undisputed that trial counsel was aware that Dr. Dudley had suggested further investigation - - neuropsychological testing - - because he suspected Petitioner suffered from organic brain damage. Thus, as the district court noted, the question to be answered was "whether the investigation supporting counsel's decision not to investigate further was reasonable." *Jefferson v. Terry*, 490 F.Supp. 2d at 1321 (*citing Wiggins v. Smith*, 539 U.S. at 522-23).

In the instant case, as in *Wiggins*, trial counsel "attempt[ed] to justify their limited investigation as reflecting a tactical judgment . . . to pursue an alternative strategy." 539 U.S. at 521. Specifically, trial counsel claimed to have abandoned mental health investigation because Dr. Dudley "basically said it may be a waste of time because the rest of the report ... said that [Jefferson] was non psychotic, that he was intelligent, he had a fairly high IQ..." *Jefferson v. Hall*, 570 F.3d at 1312.[17] As the district court noted:

> [w]hile "reasonably diligent counsel may draw a line [in their investigation] when they have good reason to think further investigation would be a waste," *Rompilla v. Beard,* 545 U.S. 374, 383, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), trial counsel did not have a good reason here. Therefore, even if Petitioner's attorneys made a strategic choice not to spend additional time investigating Petitioner's mental health, the limit that counsel placed on the investigation was not supported by reasonable professional judgment. *See Wiggins,* 539 U.S. at 533, 123 S.Ct. 2527

[17]The district court found that trial counsel "unreasonably limited their mental-health inquiry to what they perceived as the three standard mental-health defenses (i.e. competency at the time of the crime, at the time of trial or mental retardation.)." *Jefferson v. Terry*, 490 F.Supp. 2d at 1325.

Jefferson v. Terry, 490 F.Supp 2d at 1325. *See also*, *Jefferson v. Hall*, 570 F.3d at 1313 (Carnes, J., dissenting) ("Taking everything that Schuster says as true, his representation still falls outside of the wide range of reasonably effective assistance.").

There was no need to draw a line in the investigation here. "All that it would have taken is a simple, short motion informing the court of Jefferson's serious childhood head injury and attaching a copy of Dr. Dudley's report," *Jefferson v. Hall*, 570 F.3d at 1315, n. 3., and trial counsel would have had the funds for neuropsychological testing. Because trial counsel did not seek the funds, they did not obtain the testing that would have revealed Petitioner suffered from a serious mental disorder - - organic brain damage. Thus, counsel's decision to forego testing was not "strategic [] since trial counsel was not aware of the mental health evidence that might have been available." *Jefferson v. Terry*, 490 F.Supp. 2d at 1324. A decision "based on ignorance is not professionally reasonable." *Jefferson v. v. Hall*, 570 F.3d at 1315 (Carnes, J., dissenting) (*citing Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995)). As a result of this ignorance,"defense counsel's investigation into the effects of the serious head injury Jefferson suffered as a child was not just less than complete, it was virtually non-existent." *id*. at 1315.

The majority's application of a presumption of reasonableness to a decision to abandon mental health investigation is directly in contradiction of this Court's holding in *Wiggins v. Smith*. As Judge Carnes noted, in *Wiggins*:

> defense counsel testified that they had made a reasonable strategic decision to focus the jury's attention on the defendant's role in the crime instead of

> presenting the defendant's difficult life and history as mitigating circumstances. The Supreme Court rejected that justification for counsel's failure to perform a more thorough investigation. It did so because "[t]he record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct" by showing that the failure to investigate was not the result of reasoned strategic judgment. What the record showed in *Wiggins* was that "[f]ar from focusing exclusively on petitioner's direct responsibility, then, counsel put on a halfhearted mitigation case." Likewise, the record in this case shows that far from focusing exclusively on a residual doubt strategy, counsel put on a halfhearted mitigation case. Here, as in *Wiggins,* the decision not to investigate further into the mitigating circumstances stemming from the childhood head injury was not reasonable.

Jefferson v. Hall, 570 F.3d at 1316.

C The Need for Supreme Court Clarification

The problem with the Eleventh Circuit's majority decision is that it creates a virtually insurmountable obstacle to challenging a stated decision by trial counsel to limit the investigation of potentially compelling mitigating evidence, no matter how clearly counsel is on notice that the evidence should be explored and no matter how profoundly a capital defendant is prejudiced by the failure to develop the evidence. If a "strong presumption of reasonableness' attaches to every investigative decision made by counsel and that presumption is "even higher" when experienced counsel is involved, presumably a "higher-than-strong presumption of reasonableness", as the facts of this case reveal, where counsel, indisputably on notice of a serious brain injury that could explain, not excuse, what was an irrational attack by Petitioner on a friend and co-worker, yet failed to even explore this evidence in lieu of a mitigation case never implemented, then it is hard

to imagine any failure to investigate which would not past constitutional muster.

The panel majority's impregnable barrier to successfully raising an ineffective assistance of counsel claim to a decision to forego fruitful mitigation investigation is simply not the law and is contrary to decisions of this court from *Strickland v. Washington*, 466 U.S. at 690-91, to *Wiggins v. Smith*, 539 U.S. at 527-28, to *Rompilla v. Beard*, 545 U.S. at 380-81, and *Porter v. McCollum*, 130 S.Ct. at 452 -53. The simple question is whether the decision not to pursue a mitigation effort after "less than complete investigation" is itself "reasonable," that is "whether the known evidence would lead a reasonable attorney to investigate further." *Strickland v. Washington*, 466 U.S. at 690-91, *Wiggins v. Smith*, 539 U.S. at 527. It is not some sort of "super-unreasonableness" standard as advanced by the panel majority.

In judging whether a decision to limit investigation in favor of a claimed different, inconsistent mitigation strategy is reasonable, the teachings of this Court in *Wiggins* is that courts must look to whether in fact an alternative strategy was actually employed.[18] After all in *Wiggins,* this Court rejected a claim that the failure to conduct a complete investigation of the defendant's deprived and difficult childhood could be excused because of counsel's claimed strategic decision to argue as their case for life the limited role of the defendant in the charged murder. The Court rejected this rationale because the

[18]As the dissenting opinion of Judge Carnes demonstrated, the claimed strategy was not employed here.

record showed that counsel's mitigation case and argument did not, in fact, focus on "the defendant's role in the offense" but instead was the same type of "half hearted mitigation case" that was presented here. *Wiggins v. Smith* 539 U.S. at 526.

Here, however, the panel majority's "super-unreasonableness" standard allowed it to consider that it was nevertheless sufficient for counsel to ignore Petitioner's obvious brain injury and their own expert's written recommendation for further testing in lieu of a claimed residual doubt case never presented (Petitioner testified and never denied the crime and trial counsel conceded guilt in closing) or a mercy case (without any reason why mercy was due). This conclusion misapplied the settled law of this Court from *Strickland* thru *Wiggins, Rompilla* and *Porter*, by applying an unprecedented standard of review of counsel's conduct which would eviscerate the Sixth Amendment's guarantee of effective assistance of counsel.

As Judge Carnes, in his dissent aptly noted:

> Because Jefferson beat a man to death with a tree limb in the course of robbing him, the law demands that he suffer one of two severe punishments: life imprisonment or death. But the law also demands that he have a fair chance to persuade a jury that the less severe punishment is enough, and that requires effective assistance of counsel. Because Jefferson did not have effective assistance of counsel at sentencing, he has not yet had his fair chance.

Jefferson v. Hall, 570 F.3d at 1321. This Court should exercise its discretion and grant a Writ of Certiorari. *See* Supreme Court Rule 10(c).

CONCLUSION

Wherefore, Petitioner respectfully requests that the Court grant this petition.

Dated, this the 25th day of January, 2010.

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CERTIFICATE OF SERVICE

This is to certify that upon this date, I caused a copy of the forgoing to be served upon counsel for Respondent by placing a copy of same in the United States Mail, first class postage prepaid, and addressed as follows:

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40 Capital Square
Atlanta, Georgia 30303

Dated, this the 25th day of January, 2010.

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