No. 08-9156

IN THE

Supreme Court of the United States

HOLLY WOOD,

Petitioner,

—v.—

RICHARD F. ALLEN, Commissioner,
Alabama Department of Corrections, *et al.*,

Respondents.

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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF ALABAMA IN SUPPORT OF PETITIONER

JOHN HOLDRIDGE
BRIAN STULL
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
201 West Main Street, Suite 402
Durham, North Carolina 27701
(919) 682-5659

ALLISON NEAL
AMERICAN CIVIL LIBERTIES
UNION OF ALABAMA FOUNDATION
207 Montgomery Street, Suite 910
Montgomery, Alabama 36104
(334) 265-2754

LARRY YACKLE
Counsel of Record
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Alabama is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in resolving serious questions regarding federal court authority to enforce the Sixth Amendment right to effective assistance of counsel. Given its longstanding interest in the vindication of federal rights, the questions before the Court are of substantial importance to the ACLU and its members.

STATEMENT OF THE CASE

The petitioner, Holly Wood, was convicted of murder in an Alabama state court and was sentenced to death. In state post-conviction proceedings and in a petition for federal habeas corpus relief, Wood contended that his capital sentence was invalid because defense counsel rendered ineffective assistance at the sentencing phase of the trial. The

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[1] Respondent has filed a blanket letter of consent to all *amicus* briefs. Petitioner's letter of consent to the filing of this *amicus* brief has been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae,* their members or their counsel made a monetary contribution to this brief's preparation or submission.

state court adopted verbatim the Alabama Attorney General's proposed findings of fact and, on that basis, rejected Wood's constitutional claim. The United States District Court for the Middle District of Alabama granted federal habeas relief. The district court concluded that the state court decision was based on an unreasonable determination of the facts and, accordingly, that federal relief is not foreclosed by 28 U.S.C. §2254(d)(2). The district court accepted state court findings that Wood's counsel had procured a report from Dr. Karl Kirkland regarding Wood's competency to stand trial and his ability to form the mental state required for conviction. But the district court held that it was unreasonable for the state court to find that experienced defense counsel made strategic decisions not to investigate or introduce evidence of mental retardation that might persuade the jury to impose a life sentence. A divided panel of the United States Court of Appeals for the Eleventh Circuit reversed on the ground that federal habeas relief is barred by §2254(d)(1) and (2). This Court granted certiorari to address the questions presented.

SUMMARY OF ARGUMENT

This is another case in which the Court must clarify the proper understanding and application of 28 U.S.C. §2254(d), an important provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. 104-132, 110 Stat. 1214. As petitioner's brief amply explains, the court of appeals erroneously concluded that federal habeas relief is foreclosed in this case. This brief focuses on §2254(d)(2) and, in turn, on the interplay between

§2254(d)(2) and 28 U.S.C. §2254(e)(1), an adjacent provision in AEDPA. Lower courts have struggled with the relationship between §2254(d)(2) and §2254(e)(1), both of which deal with the significance of state factual determinations regarding claims for federal habeas relief. This Court has not had occasion to clarify the way these two provisions fit together and, indeed, has expressly reserved decision on the applicability of §2254(e)(1) to cases like this one. The Eleventh Circuit decision below demonstrates that an authoritative treatment is needed and should be provided here to correct the Eleventh Circuit's misunderstanding and resulting erroneous decision.

The court of appeals made five crucial errors. *First*, it failed to recognize that §2254(d)(2) and §2254(e)(1) play complementary roles in cases in which the availability of federal habeas relief depends primarily on the facts underlying petitioners' legal claims. The precise language in these two provisions makes it clear that they function together, each presupposing the other. The §2254(d)(2) "reasonableness" standard governs cases (like this one) in which the only evidence is the evidence presented in state court. The §2254(e)(1) "presumption of correctness/clear and convincing evidence" standard is reserved for cases in which additional evidence is developed in federal habeas proceedings.

Second, the court of appeals applied the §2254(e)(1) presumption to state court conclusions regarding issues on the borderline between matters of fact and mixed issues of law and fact. Then, it

combined the "presumption of correctness/clear and convincing evidence" standard in §2254(e)(1) with the "reasonableness" standard in §2254(d)(2). In so doing, the Eleventh Circuit committed the very error this Court identified in *Miller-El v. Cockrell*, 537 U.S. 322 (2003)—requiring a habeas petitioner to prove by clear and convincing evidence that state factual determinations were unreasonable.

Third, the court of appeals lifted the §2254(e)(1) "clear and convincing evidence" standard out of its proper field of operation (cases involving new evidence in federal court) and injected it into territory governed by the "reasonableness" standard in §2254(d)(2) (cases involving only the evidence presented in state court). In so doing, the Eleventh Circuit erroneously applied the §2254(e)(1) "clear and convincing evidence" standard to state factual determinations without regard to the requirement in §2254(d)(2) that state findings must be reasonable.

Fourth, the court of appeals neglected the explicit language in §2254(d)(2) indicating that federal relief is barred only if the factual determinations on which a state court "based" its "decision" on the merits of a petitioner's claim were reasonable. In so doing, the Eleventh Circuit erroneously concluded that federal relief is barred in this case because *immaterial* state findings were purportedly reasonable.

Fifth, the court of appeals applied the presumption of correctness established by §2254(e)(1) to state factual determinations without regard to the process by which the findings were reached and the evidentiary support they enjoyed. In so doing, the Eleventh Circuit erroneously inferred an

extraordinary change in federal policy from legislative silence. When §2254(e)(1) is read in context with §2254(d)(2), it becomes clear that §2254(e)(1) presupposes that the state findings to which the presumption applies were reached reasonably. If the presumption of correctness in §2254(e)(1) were unconditional, §2254(e)(1) would raise serious questions under the Suspension Clause. To avoid constitutional doubts, the silence in §2254(e)(1) should be construed to accommodate the "reasonableness" standard in §2254(d)(2).

ARGUMENT

I. THE COURT OF APPEALS FAILED TO RECOGNIZE THE COMPLEMENTARY ROLES PLAYED BY §2254(d)(2) AND §2254(e)(1)

The issues before the Court are shaped by the relationship between 28 U.S.C. §2254(d)(2) and 28 U.S.C. §2254(e)(1). Section 2254(d)(2) provides that federal relief is barred unless a state court decision on the merits of a petitioner's claim was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Section 2254(e)(1) provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and that a petitioner can rebut the presumption by "clear and convincing" evidence. The juxtaposition of these provisions has confused the lower courts and muddied litigation in cases in which state court factual determinations are central to the proper treatment of claims for federal relief. On careful

examination, §2254(d)(2) and §2254(e)(1) can be reconciled in a way that gives each a role to play in a coherent and workable framework that is entirely consistent with the statutory language. The circuit court below applied these two provisions without considering their complementary roles and, in so doing, reached an erroneous result.

Both §2254(d)(2) and §2254(e)(1) are concerned exclusively with state court determinations of "factual" issues—that is, questions of primary, historical fact (as opposed to legal issues or mixed questions of law and fact). Beyond that common ground, these two provisions differ in important ways. Three aspects of §2254(d)(2) are salient: *first*, a federal habeas court is concerned only with state factual determinations on which the state court grounded its decision on the merits; *second*, the federal court is to hold those state findings to a standard of "reasonableness"; and, *third*, the court is to judge the reasonableness of state determinations in view of the existing state court record. Three different aspects of §2254(e)(1) are crucial: *first*, a federal habeas court is to decide whether state factual determinations were not only reasonable but correct; *second*, the federal court is to presume state findings to be correct and hold rebuttals to a standard of "clear and convincing evidence"; and, *third*, the court is to judge whether clear and convincing evidence disproves state findings on the basis of all the evidence available—without confining itself to the evidence presented to the state court.

Judge Kozinski has identified the key to understanding *why* §2254(d)(2) and §2254(e)(1)

display these important differences. *Taylor v. Maddox*, 366 F.3d 992, 999-1001 (9th Cir. 2004). These two adjacent provisions appear together and must be read together, each presupposing the other. Both orchestrate a federal court's duties with respect to the facts fortifying federal claims, but they complement each other by addressing different scenarios. Section 2254(d)(2) deals with cases (like this one) in which no additional evidence is introduced in federal court and a federal habeas court's analysis is necessarily limited to an examination of what a state court did with the evidence in the existing state record. This is why §2254(d)(2) concentrates on the evidence that formed the basis of the state court decision on the merits and why §2254(d)(2) limits attention to the evidence developed in state court—that is, by hypothesis, the only evidence in existence. Section 2254(d)(2) does not address cases in which §2254(e)(2) allows petitioners to offer additional proof in federal habeas proceedings. *See Michael Williams v. Taylor*, 529 U.S. 420 (2000). When a case takes that turn, §2254(d)(2) presupposes that the baton will be handed off to §2254(e)(1).

If the state court's decision on the merits *was* based on an unreasonable determination of the facts, the state decision is not entitled to deference. Section 2254(d)(2) does not bar a federal court from awarding habeas relief, provided that the federal court itself concludes that the claim is meritorious. Nor does §2254(e)(1) enter the picture. Since the federal court has already concluded that the state court's factual determinations were unreasonable, the court can

scarcely presume those very findings to be correct. Section 2254(e)(1) presupposes the analysis entailed in §2254(d)(2) with respect to the evidence in state court and is tailored for the different task of evaluating additional evidence, extrinsic to the state record. The presumption in §2254(e)(1) thus favors only state findings found to be reasonable. Where, by hypothesis, the state court's findings were unreasonable, the federal court must determine the factual and legal issues *de novo* and can grant relief if it reaches an independent judgment that the claim is meritorious.

If the state court's decision on the merits was *not* based on an unreasonable determination of the facts, the state decision is entitled to deference on the existing state court record, barring any independent error of law. Section 2254(e)(1) then comes into play and directs the federal court to presume that the facts the state court reasonably determined are correct. The petitioner can now succeed under §2254(e)(1) only by presenting the federal court with new evidence that the state court did not see—evidence that, when added to the evidence in the state record, clearly and convincingly proves that the state court's findings were erroneous. This is why §2254(e)(1) does not restrict the federal court's attention to the evidence as it was in state court. It is also why §2254(e)(1) provides that a state factual determination is presumed to be *correct* (rather than that a state finding is presumed to be *reasonable*) and why the standard for rebuttal is "clear and convincing evidence" (rather than "reasonableness"). When §2254(e)(1) is triggered, state findings

reasonably supported by the state record are entitled to respect—which takes the form of the §2254(e)(1) presumption in their favor and the demanding "clear and convincing evidence" standard for evaluating new evidence in rebuttal. The point is that the federal court is now open to the possibility that the state court acted reasonably in light of the evidence it was given, but still arrived at incorrect factual determinations in ignorance of the additional proof gathered in federal court.

Reading §2254(e)(1) to apply only when petitioners offer new evidence in federal court gives effect to §2254(e)(1) apart from §2254(d)(2), thus satisfying the canon that each provision in a statute should be accorded independent meaning. Section 2254(d)(2) bars federal relief when federal and state courts have a reasonable disagreement about the facts in light of a common body of evidence. Section 2254(e)(1) recognizes that the situation is quite different when a federal court arrives at different factual determinations with the help of additional proof. In a case of that kind, the state court made findings in reliance on an incomplete evidentiary record. With the advantage of new information, the state court might not reach the same conclusions again. Accordingly, in a case in which §2254(e)(2) permits a federal court to take more evidence, the federal court may award habeas relief without simply substituting its own judgment for that of the state court. For all that appears, the state court would agree with the federal court if the state court were to consider evidence that previously escaped its

attention. See *Torres v. Lytle*, 461 F.3d 1303, 1312 (10th Cir. 2006).[2]

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[2] An alternative account of §2254(d)(2) and §2254(e)(1) was suggested to the Court in *Miller-El v. Cockrell*, *supra*, and was later adopted by Judge Chertoff in *Lambert v. Blackwell*, 387 F.3d 210 (3d Cir. 2004). Prior to 1996, when §2254(d)(2) was not yet in place, this Court read the presumption of correctness (then codified at 28 U.S.C. §2254(d)) to draw the gross distinction between issues of fact and mixed questions of law and fact. The Court recognized that the "fact" category embraces a continuum of matters, ranging from primary descriptions of the details of historical events (called "subsidiary" facts in the literature) to inferences drawn from subsidiary facts (called "ultimate" facts), which can determine the outcome of litigation and thus approach the border between facts and judgments on mixed issues. See *Baumgartner v. United States*, 322 U.S. 665, 670-71 (1944). According to this different account, AEDPA introduced §2254(d)(2), and reenacted the presumption in an amended form in §2254(e)(1), in order to draw the distinction between subsidiary and ultimate facts *within* the general category of facts for purposes of habeas corpus. Specifically, the "presumption of correctness/clear and convincing evidence" standard in §2254(e)(1) now applies only to state findings of subsidiary facts, while the "reasonableness" standard in §2254(d)(2) covers state determinations of ultimate facts. This is why, according to this alternative account, §2254(d)(2) expressly attends to factual determinations on which the state court's decision was "based" and why §2254(e)(1) is not similarly focused on the outcome in state court. We think §2254(d)(2)'s attention to state factual findings on which the state court rested its decision is better explained as an indication that §2254(d)(2) controls cases in which federal courts work only with the evidence in state court and examine what the state court did with that evidence. Judge Chertoff himself acknowledged this "*important* distinction" between §2254(d)(2) and §2254(e)(1): "§2254(d)(2)'s reasonableness determination turns on a consideration of the totality of the 'evidence presented in the state-court proceeding,' while §2254(e)(1) contemplates a

This Court has referred, on occasion, to the "clear and convincing evidence" test in cases in which no additional evidence was received in federal habeas proceedings. Yet in those instances, nothing turned on the interplay between §2254(d)(2) and §2254(e)(1) or on the distinction between them. *E.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005) (explaining that a state court determination was "wrong to a clear and convincing degree[,] . . . unreasonable as well as erroneous"); *Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (explaining that a state finding shown to be "incorrect by 'clear and convincing evidence' reflect[ed] an 'unreasonable determination of the facts'") (citation omitted); *see also Miller-El v. Cockrell*, 537 U.S. at 341-48 (referring to both standards in a case implicating only the criteria for a certificate of appealability); *cf. Torres v. Prunty*, 223 F.3d 1103, 1110 n.6 (9th Cir. 2000) (explaining that by concluding that a state determination of fact was unreasonable the court had equally decided that it had been proven incorrect by clear and convincing evidence).

More recently, the Court has expressly reserved decision on the applicability of §2254(e)(1) in cases in which the only evidence is the evidence the state court saw. Writing for a unanimous Court in *Rice v.*

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challenge to the state court's individual factual determinations, including a challenge *based wholly or in part on evidence outside the state trial record*." *Lambert v. Blackwell*, 387 F.3d at 235 (emphasis added).

Collins, 546 U.S. 333 (2006), Justice Kennedy declined to "address" the parties' argument over whether §2254(e)(1) applied to a case not involving new fact-finding in federal court. *Id*. at 338-39. In *Collins*, the result was the same "assuming, *arguendo*, that only §2254(d)(2) applied." *Id*. at 339.

In this case, as in *Miller-El v. Dretke* and *Wiggins*, the evidence in state court demonstrates that the state court's factual determinations were both unreasonable and refuted by clear and convincing evidence. The petitioner's brief explains why this is so.[3] Yet the questions the Court granted certiorari to address draw attention to the relationship between §2254(d)(2) and §2254(e)(1). This *amicus* brief focuses on that relationship.

[3] For the same reasons, habeas relief would also be available in this case if it were analyzed according to the account of §2254(d)(2) and §2254(e)(1) adopted by the Third Circuit. *See* note 2, *supra*. The petitioner's brief demonstrates that the state court's findings of subsidiary facts were rebutted by clear and convincing evidence and that the state court's conclusions of ultimate fact were unreasonable. For example, the state court disregarded a wealth of credible evidence indicating that experienced counsel made no strategic decision to forgo an investigation of the petitioner's mental retardation.

II. THE COURT OF APPEALS ERRONEOUSLY INJECTED THE "CLEAR AND CONVINCING EVIDENCE" STANDARD APPLICABLE TO CASES GOVERNED BY §2254(e)(1) INTO ITS ASSESSMENT OF THE STATE COURT'S WORK UNDER §2254(d)(2)

Rather than recognizing the complementary functions performed by §2254(d)(2) and §2254(e)(1), the Eleventh Circuit merged these two provisions and, in so doing, misapprehended both. Initially, the court of appeals applied the §2254(e)(1) presumption to state conclusions regarding issues that approach mixed questions of law and fact. Then, it aggravated matters by forcing the §2254(e)(1) "clear and convincing evidence" standard of proof into the §2254(d)(2) question whether the state court's decision against Wood's legal claim was based on an "unreasonable" determinations of the facts.

The Eleventh Circuit recognized that the §2254(e)(1) presumption of correctness applies only to state court determinations of fact. But the court failed to acknowledge that the distinction between issues of fact on the one hand, and legal or mixed issues on the other, is a difficult one to draw, and that borderline questions are properly treated as factual when they turn on credibility choices that the judge who saw the witnesses was in a good position to make. *Thompson v. Keohane*, 516 U.S. 99, 111 (1995) (explaining that this Court applies the presumption to issues beyond "what happened" when "their resolution depends heavily on the trial court's appraisal of witness credibility and demeanor"). The

important issues in this case are whether experienced defense counsel investigated Wood's intellectual capacity in search of evidence to offer in mitigation and then made an informed, strategic decision to forgo presenting the sentencing jury with evidence of mental retardation. Both are borderline questions. The circuit court treated them as matters of fact. But they entail more than a description of historical events, and their resolution does not depend upon the credibility of the witnesses. Wood's argument is not that anyone gave false testimony, but that the state court ignored crucial testimony that was uncontested.[4] Moreover, the state court did not justify its factual conclusions in light of the evidence, but rather adopted wholesale the findings proposed by the state. Even if §2254(e)(1) were applicable to this case, the nature of the important issues and the manner in which the state court arrived at its conclusions regarding those issues would counsel against reliance on §2254(e)(1)'s presumption to defeat the petitioner's claim.[5]

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[4] As the petitioner's brief explains, the evidence actually shows that neither of the experienced attorneys assigned to represent the petitioner (Dozier and Ralph) participated in the decision to conduct no further investigation of his retardation. The attorney who had responsibility for investigating mental retardation for sentencing purposes and failed to act was a third lawyer (Trotter) who had been practicing law for less than a year. See *Wood v. Allen*, 465 1211, 1239-40 (M.D. Ala. 2006).

[5] The account of §2254(d)(2) and §2254(e)(1) adopted by the Third Circuit would treat these key issues as questions of ultimate fact and, thus, would deny any state determinations regarding them the presumption of correctness established for state findings of subsidiary facts. *See* note 2, *supra*.

Proceeding on the premise that §2254(e)(1) figures in this case, the court of appeals next made the very mistake this Court identified in *Miller-El v. Cockrell*, *supra*—namely, requiring a habeas petitioner to prove by clear and convincing evidence that state court determinations of fact were unreasonable. 537 U.S. at 341. The Eleventh Circuit first ascribed two findings of fact to the state court: that "experienced counsel (1) decided calling Dr. Kirkland would not be in Wood's best interest, and (2) decided against presenting mental health evidence." *Wood v. Allen*, 542 F.3d 1281, 1304 (11th Cir. 2008).[6] Next, plainly referring to §2254(d)(2), the court of appeals stated that Wood had "wholly failed to show the state courts made an unreasonable determination of the facts"—presumably those same two facts. *Id.* Then, the Eleventh Circuit dropped a footnote insisting that Wood had "not presented evidence, *much less clear and convincing evidence*, that counsel did not make such decisions about Dr. Kirkland's report and a mental health defense." *Id.* at 1304 n.23 (emphasis added). At that point, the circuit court was plainly referring to §2254(e)(1), where the "clear and convincing evidence" standard is found—thus mixing the standard for showing presumptively correct state findings actually to have been wrong with the "reasonableness" standard the

[6] These two determinations regarding counsel's thinking about using Dr. Kirkland and his report as part of the defense at trial were not material to the petitioner's constitutional claim that counsel were ineffective for failing to pursue evidence of Wood's mental retardation for use at the sentencing phase and for failing to make an informed, strategic decision about presenting evidence of retardation in mitigation. *See* note 9, *infra*.

court was purporting to apply. Then, confusing things still further, the Eleventh Circuit said that "Wood ha[d] not presented any evidence to rebut the presumption that experienced trial counsel's decision . . . was reasonable. . . . [I]t was Wood's burden to rebut the *presumption of reasonableness* with evidence." *Id*. at 1305 (emphasis added).

In short, the court of appeals erroneously compounded the standards in §2254(d)(2) and §2254(e)(1), piling one on top of the other. There is no statutory presumption that state factual determinations were *reasonable*. Nor is there any statutory requirement that a habeas petitioner must rebut such a presumption by clear and convincing evidence. As this Court explained in *Miller-El*, the "clear and convincing evidence" standard applies when a state factual determination is entitled to the presumption established by §2254(e)(1) and a habeas petitioner can succeed only by proving that the determination was nonetheless *erroneous*. Nothing in §2254(e)(1) or in §2254(d)(2) imposes the same demanding evidentiary standard when the question is whether a state factual determination was unreasonable for purposes of §2254(d)(2). Congress has required a petitioner to adduce clear and convincing evidence to prove that factual findings that are presumed to be correct were actually wrong, but Congress has not required a petitioner to produce clear and convincing evidence that a state factual finding was unreasonable.

III. THE COURT OF APPEALS ERRONEOUSLY INVOKED THE §2254(e)(1) PRESUMPTION OF CORRECTNESS IN FAVOR OF STATE FACTUAL DETERMINATIONS WITHOUT REGARD TO WHETHER THE STATE FINDINGS WERE REASONABLE

The circuit court's basic mistake was thinking that §2254(e)(1) is implicated in this case at all. As Judge Kozinski has pointed out, §2254(d)(2) is groomed for cases involving only the existing state record, while §2254(e)(1) is concerned with cases in which federal habeas courts take new evidence that was not presented in state court. *Taylor v. Maddox*, 366 F.3d at 999-1001. This fundamental division of labor explains why §2254(d)(2) focuses a federal court's attention on the evidence available to the state court, while §2254(e)(1) does not. In this case, of course, Wood contends that he is entitled to federal habeas relief on the basis of the state court record as it stands. The controlling statutory provision is therefore §2254(d)(2).

Petitioners can win federal relief by exposing weaknesses in the evidentiary basis of a state court's judgment. Not only does §2254(d)(2) invite petitioners to show that state determinations of fact were unreasonable, but §2254(f) provides for calling up the transcript of the state court proceeding if an applicant "challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein." Plainly, the framework Congress has established for handling fact-sensitive cases includes, as one of its core elements, a federal court's

assessment of the extant state record to determine whether, in light of the evidence presented in state court, the state court's determinations of fact were reasonable. This assessment is guided by §2254(d)(2).[7]

Applying §2254(d)(2), the court of appeals should have examined the factual determinations made in state court to decide whether they were reasonable, given the evidence in the state record. Specifically, the court should have considered familiar ways in which the state court may have reached factual determinations unreasonably. For example, the state court may have employed defective process, applied an erroneous legal standard, relied on insufficient evidence, or, as here, disregarded evidence supporting different conclusions. *Taylor v. Maddox*, 366 F.3d at 999-1001. Instead, the Eleventh Circuit jumped the gun and brought §2254(e)(1) into play immediately—insisting that the petitioner failed to disprove state factual findings by "clear and convincing" evidence contained in the existing state record. *Wood*, 542 F.3d at 1304 n.23. The Eleventh Circuit thus treated this case as though it involved an attempt by the petitioner to controvert state factual determinations on the basis of new evidence introduced in federal proceedings.

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[7] *See Lambert v. Blackwell*, 387 F.3d at 236 n.19 (explaining that the "(d)(2) inquiry would come first" where the dispositive question in federal habeas is whether the state court's decision was independently based on reasonably-determined ultimate facts).

The court of appeals failed to recognize that §2254(d)(2) and §2254(e)(1) have separate roles to play in a single, integrated framework in which the meaning of one provision must necessarily account for the other. Section §2254(e)(1) does not direct a federal habeas court to presume the accuracy of state factual determinations at the outset of its analysis, blinding itself to the process by which the state court reached its findings and the evidentiary support the findings enjoyed. If §2254(e)(1) did that, it would render superfluous the clear contemplation in §2254(d)(2) that state determinations of fact defeat federal relief only if they were reasonable in view of the evidence in state court. The presumption in §2254(e)(1) presupposes that the findings in question were reached via fair procedural arrangements and on the basis of adequate evidence—that is, that they were reached reasonably. The presumption is therefore triggered only after the §2254(d)(2) analysis is complete. Then, §2254(e)(1) requires a petitioner to carry the heavy burden of dislodging state findings that were reasonable in light of the evidence in state court alone—by presenting the federal court with evidence the state court did not see.

Reading §2254(d)(2) and §2254(e)(1) to be coordinated in this way makes sense of these two provisions as a package. It is also efficient. In most cases, including this one, petitioners seek federal habeas relief on the basis of the evidence as it was developed in state court. The argument is not that the state court failed to consider other evidence offered for the first time in federal court, but that the

state court failed reasonably to determine the facts in light of the evidence presented in state court. The very point of §2254(f) is to produce the relevant state court transcript so that a federal court can evaluate a petitioner's challenge to the adequacy of the state court's fact-finding process and the sufficiency of the evidence underlying the state court's conclusions. It only makes sense, accordingly, that a federal court faced with an argument grounded in the state court record should address that argument under §2254(d)(2), which is tailored for a federal decision on whether habeas relief is barred in view of a previous state court judgment against the prisoner, based on a reasonable determination of the facts on the evidence presented.

It equally makes sense that a federal court should turn to §2254(e)(1) if it decides that §2254(d)(2) bars relief in view of the state record as it stands and the question becomes whether the petitioner can succeed by offering supplementary evidence in federal court. By hypothesis, the federal court has concluded that the state court's decision on the merits was based on a reasonable determination of the facts in light of the record in state court. The state findings are therefore entitled to respect—which, again, can take the form of the §2254(e)(1) presumption of accuracy and the demanding "clear and convincing evidence" standard for new evidence in rebuttal.

The quite different approach reflected in the decision below makes little sense. The Eleventh Circuit court appears to have read §2254(e)(1) in isolation from §2254(d)(2) and conceived that all

state court findings of fact must be presumed correct—no questions asked. That approach reads the §2254(d)(2) inquiry into the reasonableness of the state court's factual determinations out of the equation. Once the §2254(e)(1) presumption is triggered, it can be rebutted only with clear and convincing evidence. If a petitioner meets that elevated standard on the basis of the extant state court record, he also demonstrates that the state court's decision rested on an unreasonable determination of the facts—thus obviating an independent examination of reasonableness under §2254(d)(2). If the petitioner cannot disprove state factual determinations on the basis of clear and convincing evidence that was before the state court, and must adduce new evidence in federal court, then again §2254(d)(2) becomes superfluous inasmuch as §2254(d)(2) is addressed exclusively to what the state court did with the evidence it had at the time.

To summarize, in a case like this one, in which a petitioner contends that the extant state record demonstrates an entitlement to habeas relief, a federal habeas court must initially consider familiar ways in which the state court may have reached an unreasonable determination of the facts, working with the evidence before it. If the federal court concludes that the state court's decision *was* based on an unreasonable determination of the facts in light of the evidence the state court received, §2254(d)(2) does not mandate deference to the state court's judgment. The federal court will then adjudicate the merits of the claim *de novo*. *E.g.*, *Miller-El v. Dretke*, 545 U.S. at 266 (ultimately

ordering that judgment for the petitioner should be entered); *cf. Cone v. Bell*, ___ U.S. ___, 129 S.Ct. 1769, 1784 (2009) (treating the merits of a claim *de novo* because a state court had not triggered §2254(d) by adjudicating the merits previously). If the federal habeas court concludes that the state court's decision was *not* based on an unreasonable determination of the facts in view of the state court record, that conclusion will be dispositive—if the petitioner has no supplementary evidence to offer in federal court.

In this case, the state court decision rejecting petitioner's Sixth Amendment claim was based on an unreasonable determination of the facts within the meaning of §2254(d)(2). Accordingly, the circuit court should not have ruled that habeas relief is foreclosed and, instead, should have addressed the merits of the claim independently.

This coordinated understanding of §2254(d)(2) and §2254(e)(1) does not marginalize the presumption of correctness in §2254(e)(1). The presumption functions as an important brake on federal judicial authority in cases in which petitioners can succeed only by introducing new evidence in federal court. It is true that federal hearings are rare and that §2254(e)(2) bars hearings when petitioners failed to develop facts in state court. See *Michael Williams*, 529 U.S. at 429-30. But federal hearings are held in some instances, and when they are the presumption ensures that federal courts will extend deference to state factual determinations made (reasonably) on the basis of the state court record.

In the interest of completeness, it bears mention that if a federal habeas court receives additional evidence and finds additional facts, the court may rely on those findings in reaching judgments on the merits of the petitioner's claim and on the availability of federal habeas relief. This is the territory in which §2254(e)(1) operates, and, of course, §2254(e)(1) does not limit a federal court's attention to the existing state record. Thus the federal court may expand the body of evidence beyond what was available to the state court. This Court has recognized lower court decisions holding that §2254(d)(2) does not restrict a federal court to the evidence in state court if the federal court makes additional factual determinations consistent with §2254(e)(1) and (2). *Holland v. Jackson*, 542 U.S. 649, 653 (2004) (*per curiam*).[8]

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[8] *Cf. Wiggins*, 539 U.S. at 531 (addressing a factual issue *de novo* when the state court had made no finding regarding the issue to which a federal habeas court might defer). This interpretation of §2254(d)(2) is not inconsistent with *Schriro v. Landrigan*, 550 U.S. 465 (2007), where this Court recognized that the limits on habeas relief imposed by §2254(d) inform a federal court's decision on whether to hold a federal hearing in the first place. The Court explained in *Landrigan* that a district court has discretion to deny a hearing if the facts a petitioner seeks to prove would not entitle him to relief. But the Court did not suggest that §2254(d)(2)'s reference to the evidence in state court routinely makes it futile for federal courts to gather additional evidence. A federal hearing was unnecessary in *Landrigan* itself—not because it is useless to expand the state record in any case, but because, in that instance, the state court had concluded that the prisoner would not have permitted his attorney to introduce evidence going to the facts the prisoner later sought to demonstrate. Since that state court conclusion was not an unreasonable determination of the facts within the

IV. THE COURT OF APPEALS ERRONEOUSLY HELD THAT FEDERAL RELIEF IS BARRED IN VIEW OF STATE FACTUAL DETERMINATIONS THAT DID NOT FORM THE BASIS OF THE STATE COURT'S DECISION ON THE MERITS

The court of appeals made yet another vital mistake by failing to appreciate that §2254(d)(2) is concerned exclusively with state factual determinations on which the state court "based" its "decision" on the merits of a petitioner's legal claim. The state court may reasonably have determined factual issues that were not material to its decision. But immaterial facts have no significance. Section 2254(d)(2) permits the award of federal habeas relief if the state court actually grounded its decision on unreasonable factual determinations.

The circuit court ascribed various factual determinations to the state court, concluded that those findings were reasonable, and then jumped to the conclusion that §2254(d)(2) must foreclose federal relief. Yet the factual determinations that mattered, that is, the factual determinations that were actually essential to the state court's decision, were contradicted by overwhelming evidence presented in state court. Since those crucial determinations were unreasonable, §2254(d)(2) does not defeat federal habeas relief in this case.

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meaning of §2254(d)(2), the federal district court had no obligation to hold its own hearing to examine evidence that would not have changed the result. *Landrigan*, 550 U.S. at 481.

Perhaps the most vivid examples are the state court findings that defense counsel made strategic decisions not to call Dr. Kirkland as a witness and not to introduce his report into evidence. The court of appeals concluded that those findings were reasonable, because of the risk that damaging information about the petitioner's criminal history would come out. The petitioner disputes the evidence that counsel genuinely made any such strategic decisions. Yet even assuming *arguendo* that the state court findings in these respects were reasonable, it makes no difference. The state court's decision on the merits of Wood's Sixth Amendment claim was not "based" (and could not have been based) on findings regarding Dr. Kirkland and his report.

As the district court explained, Dr. Kirkland interviewed Wood regarding matters relevant to the guilt phase of state proceedings—specifically, to determine whether Wood was competent to stand trial and whether he could form the mental state required for capital murder. Kirkland's report focused on those matters. *Wood*, 465 F.Supp.2d at 1240. Wood's Sixth Amendment claim, however, is that counsel did not develop evidence of mental retardation as a basis for avoiding a death sentence at the penalty phase.[9] Wood's argument is not that

[9] Despite implications to the contrary in the Eleventh Circuit's opinion, the petitioner has never claimed that his attorneys were ineffective for failing to call Dr. Kirkland as a witness or failing to introduce his report into evidence. *See* J.A. 235-39 (Second Amended Petition 228-36 stating the Sixth Amendment claim solely as the contention that counsel were ineffective for failing to develop further evidence of mental retardation); Post

failing to use Kirkland himself or his report amounted to ineffective assistance, but that defense counsel were ineffective in failing to pursue and present other evidence that might well have produced a life sentence. Wood relies on Kirkland's report only insofar as it alerted counsel to the possible existence of that different evidence. The state factual determinations that matter for purposes of §2254(d)(2) in this case are the findings on which the state court grounded its decision that counsel made an informed, strategic decision not to develop and offer evidence of mental retardation to the sentencing jury. The district court correctly concluded that the state findings on those points were unreasonable, given the powerful evidence in the record looking the other way.

The focus in §2254(d)(2) on the material facts can work against some applicants for federal habeas relief. If a state court reached unreasonable factual determinations that did not form the basis of the state court's decision, §2254(d)(2) may still forestall the federal habeas remedy—provided that the state decision was independently based on a reasonable determination of *material* facts.[10] If, for example, a

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Hearing Brief on Rule 32 Petition at 76 (stating that "Trial Counsel's Performance was Deficient for Failing to Develop Evidence of Mr. Wood's Mental Retardation and Mental Disability"); *id.* at 76-82 (developing the claim in these terms only). Thus, any state findings concerning counsel's reasons for not introducing Dr. Kirkland's testimony and report—reasonable or not—were immaterial to whether counsel made a strategic decision to forgo a thorough investigation of the petitioner's mental retardation for sentencing purposes.

[10] If §2254(d)(2) does bar federal relief with respect to the state

state court unreasonably determined the facts underlying a conclusion that a suspect was not in custody for purposes of *Miranda* at the time he was interrogated, §2254(d)(2) may nonetheless foreclose federal relief if the state court actually based its decision rejecting a *Miranda* claim on reasonable determinations of other facts—e.g., facts fortifying conclusions that the suspect was informed of his rights and freely waived them.[11]

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record alone, §2254(e)(1) mandates the presumption in favor of the state court's reasonable findings, if and when the petitioner offers additional evidence in federal court. The petitioner then can succeed by proving that the state findings were erroneous (even if they were reasonable in light of the more limited evidence the state court received).

[11] Judge Chertoff recognized this point (in substance) in *Lambert v. Blackwell*, *supra*. He explained that even if a district court makes "subsidiary decisions" sustaining a petitioner's challenges to specific state factual determinations, "the *remaining record* might still uphold the state court's decision under the overarching standard of (d)(2)." 387 F.3d at 236 n.19 (emphasis added). Judge Chertoff contemplated that a petitioner's attack on state findings of subsidiary facts would be analyzed under §2254(e)(1), that is, by presuming them to be correct but rebuttable by clear and convincing evidence. Yet the point he was making is stronger once it is understood that §2254(d)(2) provides the exclusive analysis for cases in which the only evidence is what was developed in state court. Even *unreasonably* erroneous state factual determinations make no difference if the state court's decision on the merits of a claim rested independently on other, reasonably-determined, material facts.

V. THE ABSENCE OF EXPRESS CONDITIONS ON THE PRESUMPTION IN §2254(e)(1) DOES NOT FORECLOSE AN EXAMINATION OF A STATE COURT'S FACT-FINDING ARRANGEMENTS PURSUANT TO §2254(d)(2)

There are two related arguments for the notion that §2254(e)(1) forces a federal habeas court to presume that all state factual determinations were correct without question. One is that no conditions requiring regular process and sufficient evidence are expressly stated and that it must be inferred from legislative silence that Congress meant to establish a blanket presumption without regard for the infirmities of state fact-finding arrangements. The other is that the version of §2254(e)(1) that was in place prior to AEDPA contained express conditions and that it must be inferred from the failure to carry those conditions forward explicitly that Congress meant to abandon all conditions. Neither of these arguments is sound.

Both arguments depend on canons of statutory construction that provide only rough guidance toward identifying the genuine meaning of what Congress has done, and that can be refuted by contrary indications. *Cf. Clay v. United States*, 537 U.S. 522 (2003) (declining to take the omission of an explicit reference to the definition of finality to imply a rejection of that definition).

Other statutes governing federal court adjudication in the wake of state court action contain no express conditions, but nonetheless contemplate that federal courts will hold state court results up to

familiar conventions of regularity. The Full Faith and Credit Statute, 28 U.S.C. §1738, generally requires a federal court to give a previous judgment in state court the preclusive effect the judgment would have under state law. That statute does not explicitly say that the state judgment must have been reached in any particular way, but this Court has "repeatedly recognized" that "collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Allen v. McCurry*, 449 U.S. 90, 95 (1980), *citing Montana v. United States*, 440 U.S. 147, 153 (1979).[12]

The classic precedent is *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1874), where it was argued that Congress had conferred jurisdiction on this Court to overturn state court decisions on state law issues merely by enacting a jurisdictional provision that omitted an express limitation to federal issues. The Court rejected any such inference both because it conflicted with other aspects of the same Act and because it would have generated extraordinary consequences that could not be ascribed to Congress by negative implication.

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[12] In a like manner, this Court does not read 28 U.S.C. §1257 always to foreclose this Court's jurisdiction to review state court judgments based on independent state grounds. State-law decisions lacking "fair or substantial support" are inadequate to cut off appellate review. *Ward v. Bd. of County Commr's of Love County*, 253 U.S. 17, 22 (1920).

In this instance, the notion that §2254(e)(1) implicitly bars a federal court from looking behind a state determination of fact is squarely contradicted by §2254(d)(2), which explicitly requires the court to investigate state findings to determine whether they were reasonable. So far from *forbidding* a federal court to judge whether state findings were reasonable, these statutes *require* the court to make that very judgment. When Congress omitted the express conditions on the presumption of correctness that prior law contained, it did not vanquish a federal court's ordinary responsibility to ensure that federal adjudication proceeds on the basis of facts that were forged in a procedurally adequate way and were anchored in sufficient evidence. Congress simultaneously enacted §2254(d)(2), which expressly directs a federal court's attention to the *bona fides* of state fact-finding.[13]

And small wonder. The conditions in the prior statute were demonstrably verbose and unclear. There was considerable confusion, for example, about the relationship between the standards for invoking the presumption and the criteria for holding federal hearings. *See* Hart & Wechsler, The Federal Courts

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[13] Judge Chertoff suggested in *Lambert v. Blackwell*, *supra*, that the effect of a blanket presumption may be mitigated by taking irregularities in state fact-finding process into account in determining whether the state court's factual determinations were reasonable within the meaning of §2254(d)(2). 387 F.3d at 239. The far simpler and straightforward answer is that the presumption is triggered only with respect to state findings found to be reasonable in light of the evidence in state court—an approach Judge Chertoff also acknowledged. *See* note 2, *supra*.

and the Federal System 1564 (3d ed. 1988). By dropping express statutory conditions from §2254(e)(1), and substituting the "reasonableness" standard in §2254(d)(2), Congress merely streamlined the statutory mandate that a federal habeas court can give effect to state factual determinations only if they were generated reasonably.

This understanding of §2254(d)(2) and §2254(e)(1) as a package not only conforms to the express language in each of these complementary provisions, but also avoids the perverse results that would follow from reading the presumption in §2254(e)(1) to thwart the inquiry into reasonableness in §2254(d)(2). Construing §2254(e)(1) to mandate a presumption in favor of state findings without question would be inconsistent with the whole thrust of AEDPA, of which §2254(e)(1) was a part. The core purpose of §2254(d) was to ensure that federal courts respect *reasonable* state court actions on federal questions. *Terry Williams v. Taylor*, 529 U.S. 362, 411 (2000).

Reading the §2254(e)(1) presumption to be unconditional would not only defeat Congress' purpose, it would unnecessarily put Congress at odds with the Suspension Clause. This Court confirmed in *Boumediene v. Bush*, ___ U.S. ___, 128 S.Ct. 2229 (2008), that the Suspension Clause "remains applicable and the writ relevant . . . even where the prisoner is detained after a criminal trial conducted in full accordance with the protections of the Bill of Rights." Id. at 2270. Speaking directly to existing statutes regarding federal attention to the facts

underlying petitioners' claims, the Court explained that limits on fact-finding in federal habeas proceedings may be appropriate "where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims" in state court. *Id*. at ___, 2273. If §2254(e)(1) were read to require federal courts to presume state factual determinations to be correct in the absence of a "full and fair opportunity" to develop the facts in state court, at the very least the Court would have to face the question whether such an extraordinary policy would be constitutional. To avoid that issue, the Court should construe the silence in §2254(e)(1) to allow federal courts to conduct the inquiry called for by §2254(d)(2).

CONCLUSION

In this case, the petitioner contends that he was denied effective assistance of counsel at the sentencing phase of state court proceedings and that §2254(d)(2) does not bar federal relief in light of the unfavorable judgment on that claim reached by the state courts in Alabama. The applicable analytic framework contemplated by AEDPA and this Court's precedents calls for an examination of the evidence presented in state court to decide whether the factual determinations on which the state court decision rested were unreasonable. The petitioner's brief amply shows that the state court decision *was* based on an unreasonable determination of the material facts. The Eleventh Circuit erroneously concluded otherwise, and its judgment that §2254(d)(2) forecloses federal habeas relief should be reversed.

Respectfully Submitted,

Larry Yackle
Counsel of Record
765 Commonwealth Ave.
Boston, MA 02215
(617) 353-2826

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

John Holdridge
Brian Stull
American Civil Liberties
Union Foundation
201 West Main Street
Suite 402
Durham, NC 27701
(919) 682-5659

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