No. 15-1379

IN THE

Supreme Court of the United States

JOHN GARY HARDWICK, JR.,
Petitioner,
v.
JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

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

PETITIONER'S BRIEF IN OPPOSITION TO RESPONDENT'S CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Following state post-conviction proceedings that even the Florida Supreme Court recognized were deficient, Mr. Hardwick sought federal habeas relief in a petition that was filed before the enactment of the AEDPA. After the District Court denied relief, the Eleventh Circuit found that the state court proceedings were not full and fair, and that many of the state court's findings were not fairly supported by the record, thus overcoming the presumption of correctness that would otherwise apply to state court factual findings. Accordingly, the Eleventh Circuit remanded for an evidentiary hearing. The State did not request certiorari review of that decision.

Following the remand, the District Court held three days of evidentiary hearings. Both parties had the opportunity to call witnesses at the hearing. The District Court also considered the record of the state court proceedings, including affidavits originally presented to the state courts. The State objected to consideration of the affidavits because the affiants were not subject to cross-examination, but it made no effort to subpoena the witnesses for the purpose of cross-examining them. After considering the entire record, the District Court made fair, thorough and extensive findings of fact, including credibility findings, which ultimately resulted in its conclusion that Mr. Hardwick was deprived of the effective assistance of counsel at the penalty phase proceeding. The Eleventh Circuit affirmed. The State did not initially seek review of that decision, but filed a

conditional cross-petition for writ of certiorari only after Mr. Hardwick sought certiorari review of a claim challenging the constitutionality of his conviction.

The questions presented are:

1. Did the Eleventh Circuit err in its application of pre-AEDPA 28 U.S.C. § 2254(d)?

2. Did the Eleventh Circuit err in ruling that the District Court's findings of fact and conclusions of law were not clearly erroneous?

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COUNTERSTATEMENT OF THE CASE[1]

A. State Court Proceedings

Prior to trial, there was a breakdown in the relationship between trial counsel Frank Tassone and Mr. Hardwick over counsel's insistence on pursuing the "Banana Man" defense, as opposed to a defense of voluntary intoxication. Pet. 4-7. The trial court excluded that defense, and thereafter counsel "provided no defense at the guilt or penalty phase." *Hardwick v. Crosby*, 320 F.3d 1127, 1130 (11th Cir. 2003) (Pet. App. A-7); *see also id.* at 1192 n.219 (noting counsel's "failure to call defense witnesses Hardwick desired or to provide Hardwick *any defense* at the guilt or sentencing phase") (emphasis in original).

Mr. Hardwick was convicted of first degree murder. At capital sentencing, Mr. Tassone presented no mitigating evidence. The prosecutor argued that there was no evidence of any statutory mitigating factors; Mr. Tassone discussed the process of weighing aggravators and mitigators but had no mitigation to argue. The jury recommended death by a 7-5 vote. R. 1011. The trial court sentenced Mr. Hardwick to death after "finding no statutory or nonstatutory mitigating factors and five aggravating circumstances: (1) prior violent felony convictions, (2) the murder was committed during a kidnapping, (3) the murder was for pecuniary gain,

[1] We do not repeat matters already set forth in the original certiorari petition. As in that petition, the transcript of the district court evidentiary hearing is cited as "EH"; exhibits introduced at the hearing are cited as "Pet. Ex." and "Resp. Ex."; the record on appeal of Mr. Hardwick's state court trial and sentencing proceedings is cited as "R"; and the state post-conviction record is cited as "PC-R." Herein, we refer to the certiorari petition as "Pet."; to the appendix to that petition as "Pet. App."; to the conditional cross-petition as "Cross-Pet."; and to the appendix to the cross-petition as "Cross-Pet. App."

(4) the murder was heinous, atrocious and cruel, and (5) the murder was cold, calculated and premeditated." *Hardwick v. State*, 521 So. 2d 1071, 1073 (Fla. 1988) (Pet. App. A-1).

On direct appeal, the Florida Supreme Court held that two of the five aggravating circumstances found by the trial judge (kidnapping, killing for pecuniary gain) were not supported by the evidence. The court deemed the error harmless, however, because of the three remaining "valid aggravating factors remaining in this case and the absence of any mitigating factors." *Hardwick v. State*, 521 So. 2d at 1077.

Following the signing of a death warrant, Mr. Hardwick filed an emergency motion for stay of execution and motion for relief under Fla. R. Crim. P. 3.850. The trial court denied Mr. Hardwick's request for an extension of time and held a hearing under warrant on February 22, 1990, following which it denied the Rule 3.850 motion. The Florida Supreme Court found that hearing (at which Mr. Tassone testified) to be deficient, because counsel had inadequate time to prepare and the hearing lasted until early morning on February 23. *See Hardwick v. Crosby*, 320 F.3d at 1153-55 n.130. The Florida Supreme Court stayed the execution and remanded for a complete evidentiary hearing. *Id.* at 1153. Together, the evidence from the hearings "included the testimony of Tassone, ... psychiatric experts, members of Hardwick's family, and other witnesses, as well as affidavits and diagnostic reports from the expert witnesses," and voluminous records documenting Mr. Hardwick's life history. *Id.* at 1154-55.

The state post-conviction record contains extensive, largely unrebutted mitigating evidence that was available to Mr. Tassone but that he did not investigate or present. As summarized in *Hardwick v. Crosby*, 320 F.3d at 1131-42, this evidence included: (a) evidence of massive drug and alcohol use and impairment at the time of the offense; (b) lay witness accounts of Mr. Hardwick's history of trauma, substance abuse and addiction, and mental disturbance; (c) institutional and other records documenting Mr. Hardwick's history of trauma, substance abuse and addiction, and mental disturbance; (d) consistent mental health mitigating evidence from three mental health experts; and (e) evidence undercutting the validity and weight of a prior conviction used in aggravation.

The state post-conviction court nevertheless denied relief. The Florida Supreme Court affirmed, ruling that Mr. Hardwick had failed to establish deficient performance. *Hardwick v. Dugger*, 648 So. 2d 100, 104 (Fla. 1995) (Pet. App. A-3).

B. Federal Habeas Proceedings

On March 20, 1995, Mr. Hardwick filed a Petition for Writ of Habeas Corpus in the District Court. On February 25, 1997, the District Court denied the habeas petition. Pet. App. A-4. Mr. Hardwick appealed to the Eleventh Circuit.

On January 31, 2003, the Eleventh Circuit affirmed in part and reversed in part the District Court's denial of relief, and remanded to the District Court for an evidentiary hearing on the claim that trial counsel was ineffective at the penalty phase of the trial. The Eleventh Circuit correctly noted that in this pre-AEDPA case, state court findings of historical fact "generally are accorded a presumption of correctness," but that "this presumption does not obtain if any of the eight

exceptions in former § 2254(d) apply." *Hardwick v. Crosby*, 320 F.3d at 1158. However, under pre-AEDPA standards, a "federal habeas court owes no deference to a state court's determination of mixed questions of constitutional law and fact," including its rulings on ineffective assistance of counsel claims. *Id.* at 1159 n. 142.

Applying those standards, the Eleventh Circuit ruled that findings based on "the first part of the 3.850 proceeding" (in which Mr. Tassone testified) were not entitled to a presumption of correctness because Mr. Hardwick did not receive "'a full, fair and adequate hearing.'" *Hardwick v. Crosby*, 320 F.3d at 1158-59 n.141 (quoting 28 U.S.C. § 2254(d)(6) (1994)) (discussing the unfairness of that proceeding, which the Florida Supreme Court "found ... to have been deficient"). The Eleventh Circuit also found that "some factual issues decided by the state court were 'not fairly supported by the record.'" *Id.* (quoting 28 U.S.C. § 2254(d)(8) (1994)).

The Eleventh Circuit carefully reviewed the findings on which the state courts' denial of post-conviction relief was based. *Hardwick v. Crosby*, 320 F.3d at 1182-86. It found that the state court's assertion that "none of Hardwick's siblings were involved in drugs and crime [was] factually incorrect, based on the record evidence," *id.* at 1183 n.207, and therefore not entitled to a presumption of correctness; that the state court's reliance on Mr. Hardwick's competency and sanity at the time of the offense was "inappropriate legally in penalty-phase analysis, where mitigation evidence was Hardwick's only defense against the death penalty," *id.*; and that the state court's acceptance of Mr. Tassone's testimony that he

discussed possible mitigation testimony with Dr. Barnard was not entitled to a presumption of correctness because "Hardwick did not receive a full and fair hearing and ... the state judge's factual findings are not consistent with the record evidence." *Id.*; *see also id.* at 1171 n.171 (state court improperly relied on Mr. Tassone's 3.850 testimony).

The Eleventh Circuit also found that the state court's treatment of Mr. Hardwick's mother's testimony was not supported by the record:

> [T]he state judge's decision not only to disregard Hardwick's mother's denial of saying that she was unwilling to testify and that she thought her son deserved the death penalty but also her entire testimony as to his abusive and deprived childhood is unjustifiable. ... Hardwick's mother was critical to understanding his childhood as mitigating evidence. This credibility choice by the state judge regarding Nell Lawrence's testimony is inconsistent with the record evidence of Hardwick's mother's actions, such as attending his trial daily, and their care and concern for each other, demonstrated by such examples as Hardwick's going to her home to wish her a Merry Christmas, even in a very drunk and drugged state, and her visiting him regularly in prison.

Hardwick v. Crosby, 320 F.3d at 1184 n.207.

Accordingly, the Eleventh Circuit concluded that any presumption of correctness as to the state court's findings and legal conclusions had been overcome:

> Based on unreasonable credibility choices and a myopic view of the lack of mitigation evidence presented at the penalty phase to uphold Tassone's conduct of the sentencing proceedings, the state judge's findings and consequent legal conclusions relating to the penalty phase are untenable because they are contrary to the evidence.

Hardwick v. Crosby, 320 F.3d at 1184 n.207.

The Eleventh Circuit painstakingly reviewed the evidence from the trial and state post-conviction proceedings. *See Hardwick v. Crosby*, 320 F.3d at 1131-57.

Because this is a pre-AEDPA case, Mr. Hardwick was entitled to a federal court evidentiary hearing if he "allege[d] facts, which, if proved, would entitle him to federal habeas relief." *Id.* at 1182 n.207. Mr. Hardwick easily met that standard. As the Eleventh Circuit noted, "Tassone presented no mitigating evidence at the sentencing proceeding," *id.* at 1167, although significant statutory and non-statutory mitigating evidence was available.

First, the "most significant statutory factor was Hardwick's cognitive ability to conform his conduct to the requirements of the law." *Hardwick v. Crosby*, 320 F.3d at 1167. Mr. Tassone's failure to "present the record evidence of Hardwick's drunk and drugged condition ... kept from the judge and jury knowledge that, at the time of the murder, Hardwick could have lacked the judgment to conform his conduct to the requirements of the law." *Id.*

Second, with respect to nonstatutory mitigating factors,

> Tassone failed to recognize Hardwick's dysfunctional family life and the mental and physical abuse that he endured during his childhood and teen years. ... Hardwick's family background was a mitigating factor because it was formative in Hardwick's development as a young man; yet Tassone failed to present this evidence to the judge and jury at the sentencing phase.
>
> He also did not obtain social services and juvenile records that showed that Hardwick's father was an abusive alcoholic who had dislocated Hardwick's shoulder when he was a child, among other physical and emotional abuses.

Hardwick v. Crosby, 320 F.3d at 1173.

Moreover, the "reasons given by Tassone and the state for not calling family members and other individuals as mitigating witnesses are not substantiated by the record in our plenary review." *Hardwick v. Crosby*, 320 F.3d at 1175.

(1) The state's argument that Mr. Hardwick was the only sibling who had serious behavioral problems "is inaccurate." *Hardwick v. Crosby*, 320 F.3d at 1176. Rather, many of Mr. Hardwick's siblings experienced drug and alcohol problems, and several of them had a history of serious crimes and violent behavior. *Id.* Accordingly, trial counsel's failure to present "testimony concerning the drug, alcohol, violent, and criminal behavior that infected many of Nell Lawrence's children" prevented the jurors from considering the "significant evidence of Hardwick's unstable, dysfunctional, and physically and emotionally abusive background." *Id.* at 1177.

(2) Contrary to Mr. Tassone's testimony, Mr. Hardwick's "mother and brother Jeff attended the trial each day and repeatedly offered to testify." *Hardwick v. Crosby*, 320 F.3d at 1177. While there was a conflict between the testimony of Mr. Tassone and that of Nell Lawrence and Jeff Hardwick, the Eleventh Circuit's "plenary review of the record ... has revealed that the *actions* of Hardwick's mother speak louder than Tassone's representation of her *hearsay statements* ...." *Id.* at 1178 n.202 (emphasis in original).

(3) Aside from the conflict about the willingness of Nell Lawrence and Jeff Hardwick to testify, Mr. Tassone's mitigation investigation was inadequate:

> The only potential witnesses that Tassone interviewed were Hardwick's mother, brother Jeff, and his wife, who would have been privileged not to testify at her husband's murder trial. Based on Hardwick's mother and brother's testimony at the 3.850 hearing, Tassone did not understand the mitigating testimony that these two willing family members, who also saw Hardwick drunk and drugged at 3:00 P.M. the afternoon before the murder, would have given, despite his experience with capital cases. He also did not appear to

> understand the value of mitigating testimony from other family members. Yet, the most essential purpose of the sentencing proceeding was for defense counsel to present the jury with background mitigating information to enable the jurors to render an individualized sentence based on the particular circumstances of Hardwick's life and the murder....
>
> Therefore, Tassone's investigation for the sentencing phase in this capital case appears deficient.

Hardwick v. Crosby, 320 F.3d at 1180-81 (citation omitted).

(4) Counsel's assertion that Mr. Hardwick instructed him not to call any mitigation witnesses was unconvincing. Well before the sentencing phase, the attorney/client relationship "had become unworkable such that Tassone requested to be removed as counsel." *Hardwick v. Crosby*, 320 F.3d at 1189 n.214. The trial judge denied that request and "informed Hardwick that Tassone's decisions as to conducting his trial would override any calling of witnesses or presentation of other evidence that Hardwick wanted produced on his behalf." *Id.* By the sentencing phase, "the attorney/client relationship was destroyed, and Tassone's decision to provide no defense to Hardwick at sentencing by presenting no mitigating evidence was [Tassone's] own decision ...." *Id.*

Accordingly, the Eleventh Circuit held that Mr. Hardwick had established that he was entitled to an evidentiary hearing on the ineffective assistance claim, and the Eleventh Circuit remanded the case to the District Court to conduct an evidentiary hearing. The State did not seek certiorari review of the Eleventh Circuit's decision to remand for an evidentiary hearing.

The District Court conducted a three-day evidentiary hearing in February 2009. The District Court heard the testimony of numerous witnesses, including a

defense mental health expert, a State mental health expert, and Mr. Tassone. The District Court made detailed findings of fact on the relevant issues, which the State unaccountably ignored in its cross-petition.

Significantly, the District Court found that a "professionally reasonable mitigation investigation in Hardwick's case would have included a thorough investigation and development of information about Hardwick's life history," but that "Tassone failed to conduct the life history investigation required by the Sixth Amendment." *Hardwick v. Secretary of the Florida DOC*, No. 3:95-cv-250, *Order*, 48-49 (M.D. Fla. Jan. 6, 2011) (Pet. App. A-8) (hereafter "DCO").

The District Court found that attorneys Finnell, McGuinness and Sheppard, local attorneys and experts in death penalty litigation, all testified that the "prevailing professional norms" at the time and place of trial required competent capital defense counsel "to develop a thorough life history," which included conducting interviews of the defendant's relatives and obtaining available records. DCO, 48-49.[2]

Mr. Hardwick "was cooperative" at the time of attorney Finnell's preliminary intake interview, and "provided detailed information that would have led Finnell to further investigation." DCO, 50. Mr. Tassone "had the benefit of attorney Finnell's

[2] Under *Strickland v. Washington*, 466 U.S. 668 (1984), the reasonableness of attorney performance is measured in terms of "prevailing professional norms." *Id.* at 688. *See also Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (finding that counsel's failure to investigate "fell short of the professional standards that prevailed in Maryland in 1989"); *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) ("[t]his case ... looks to norms of adequate investigation in preparing for the sentencing phase of a capital trial").

preliminary interview notes," which included notations about Mr. Hardwick's schools; "a comprehensive list of Hardwick's family members"; that he "had been in boys' homes since he was five years old"; that he had been involved in drugs since he was eleven or twelve years old"; and his psychiatric history, including "a diagnosis of schizophrenia ... and a list of Hardwick's medications (Thorazine, Sinequan and Elavil)." *Id.* at 51. Based on that history, Finnell would have obtained Mr. Hardwick's school, foster care and medical records, and would have contacted former teachers and foster care persons, as she would have explained if contacted by Mr. Tassone. Mr. Tassone, however, did not "attempt[] to contact her for a briefing on the case." *Id.*

The "only potential witnesses [Tassone] interviewed were Hardwick's mother (Nell Lawrence), brother Jeff Hardwick ... and Hardwick's wife [Darlene]." DCO, 51-52. Because Darlene was young and emotionally unstable, Mr. Tassone did not consider calling her as a witness; "[o]ther than Hardwick's mother and brother, Tassone did not ask any other family members to testify on Hardwick's behalf in the penalty phase." *Id.* at 52.

Mr. Tassone "admitted that he had no pretrial contact with Jeff Hardwick," and that he only spoke to Jeff in Ms. Lawrence's presence during trial. DCO, 53. The District Court found that "prevailing professional norms" required that "investigation for both the guilt and penalty phases should have begun immediately and before trial ...." *Id.* Such "[l]ast minute conversations" with a crucial witness "about issues as sensitive as Hardwick's dysfunctional upbringing, especially in the

presence of one of the dysfunctional parents, are unlikely to elicit helpful information for the penalty phase." *Id.*

The District Court noted that Mr. Tassone's testimony that Jeff and Ms. Lawrence were unwilling to testify directly contradicted the post-conviction testimony of those witnesses that they were willing to testify at trial, but were not asked to do so by Mr. Tassone. DCO, 54. The District Court found based on the record as a whole that the testimony of Nell Lawrence and Jeff Hardwick was credible, *id.* at 54-55, citing the following record support:

- Ms. Lawrence hired an attorney to represent Mr. Hardwick with respect to the 1978 North Carolina assault charge. DCO, 55.
- Even though intoxicated, Mr. Hardwick visited Ms. Lawrence to wish her Merry Christmas on December 23. DCO, 55-56.
- Ms. Lawrence attended Mr. Hardwick's trial. DCO, 56.
- Ms. Lawrence's testimony that she was willing to testify is corroborated by Jeff Hardwick's testimony. DCO, 54; *id.* at 56.
- Ms. Lawrence and Jeff both testified that Mr. Tassone asked them only about potential good character testimony. DCO, 56). Limiting the inquiry in that fashion "shows [Tassone's] misunderstanding of mitigation law and a deficient pursuit of mitigating evidence." *Id.*
- Shortly after imposition of the death sentence, Ms. Lawrence cooperated with a post-sentence investigation and described Mr. Hardwick as a "kind and loving boy" who could only have committed the offense "if ... he was not in his right mind." DCO, 57. As the District Court found, "These are not the words of a mother who thinks her son deserves to die and will not help him by testifying about mitigating circumstances." *Id.*
- Ms. Lawrence repeatedly visited Mr. Hardwick in jail, both pretrial and during trial. She had contact visits with Mr. Hardwick, and "was concerned about [Hardwick's] welfare." DCO, 58.
- Ms. Lawrence continued to visit Mr. Hardwick in prison after he was convicted. DCO, 58.

Accordingly, the District Court found *that Nell Lawrence and Jeff Hardwick were available and willing to testify on Hardwick's behalf.* DCO, 58-59. Further, the District Court found as follows:

> Nell Lawrence and Jeff Hardwick were concerned for Hardwick's welfare and would have testified about mitigating circumstances if Tassone had completely informed and advised them as to what sort of information would have been helpful to Hardwick's plight and if Tassone had asked them to testify as to proper mitigating circumstances, such as the dysfunctional family life and alcohol/drug addiction.

Id. at 60 (footnote omitted).

As the District Court found, Mr. Tassone did not contact any of the other members of Mr. Hardwick's large family. DCO, 51-52. Mr. Tassone's failure to do so was professionally unreasonable. *Id.* at 61-62.

With respect to alcohol and drug use around the time of the offense, the District Court found that counsel could have presented evidence of intoxication from, at a minimum, Nell Lawrence, Jeff Hardwick, Connie Wright, and Mary Braddy. DCO, 62-63. Furthermore, the District Court found that "there was extensive and powerful evidence within Hardwick's life history of his personal trauma, substance abuse and addiction, mental disturbance and dysfunctional upbringing.... Such information was readily available from Hardwick's family members." DCO, 64; *see id.* at 64-70 (summarizing the evidence).

The District Court found that prevailing professional norms in 1985 and 1986 required capital counsel "to gather records in order to develop the client's social history." DCO, 71. A "multitude of records" were available to counsel; those records "describe a life of neglect and trauma and the early onset and development of

substance abuse." *Id.* Attorney Tassone "could not think of any tactical reason for not obtaining a client's historical records in a death penalty case." *Id.* The lay witness accounts and historical records are consistent with each other and would have been developed and presented by professionally reasonable counsel. *Id.* at 71-72.

Professionally reasonable counsel would also have gathered the historical records and witness accounts, "provided that information to a mental health expert," and "asked the expert to evaluate Hardwick for mental health related mitigation and for mental health information that could undermine the aggravation...." DCO, 72. The District Court found, however, that the pretrial expert, Dr. Barnard, "evaluated Hardwick solely for competency and sanity, not for mitigation, and that Tassone did not specifically discuss mitigation with Dr. Barnard." *Id.*

Dr. Barnard did not receive any background or other information from Mr. Tassone; his report was based solely on Mr. Hardwick's self-report and documents provided by the prosecutor. DCO, 74. Nevertheless, the District Court found that Dr. Barnard's report "contains information about Hardwick's traumatic life history, the early onset and development of Hardwick's substance abuse, suicide attempts and his consumption of significant quantities of Quaaludes, marijuana, beer and liquor at the time leading up to the offense." *Id.* Dr. Barnard "would have found and provided [statutory and nonstatutory] mitigating circumstances to Tassone and the jury if Tassone had asked him to do so." *Id.* at 75.

Furthermore, the District Court found that "the 1990 post conviction mental health expert testimony [from Drs. Barnard, Dee and Levin] was available at the time of Hardwick's 1986 trial." DCO, 76. The District Court noted that experts such as Dr. Harry Krop, Dr. Miller and Dr. Barnard were all "available experts for mitigation evaluations in capital cases during that time frame." *Id.* at 77 n.21.

Mr. Tassone "presented no statutory or nonstatutory mitigating evidence at the sentencing proceeding." DCO, 78. Although all of the mental health experts who testified in the state post-conviction hearing agreed that Mr. Hardwick's substantially impaired capacity at the time of the offense would have qualified as a statutory mitigating factor, "the judge and jury heard none of this testimony at either the guilt or penalty phase." *Id.* at 80. The District Court found that Mr. Tassone could also have pursued two other statutory mitigating factors based on the evidence as to Mr. Hardwick's impaired mental state at the time of the offense. *Id.* at 80-81.

With respect to nonstatutory mitigating circumstances, the District Court found that "there was an abundance of compelling mitigating evidence concerning Hardwick's turbulent family history, dysfunctional upbringing, mental/physical abuse and early alcohol/drug use and addiction." DCO, 81.

The District Court found that at the time and place of trial, capital counsel had a "duty to thoroughly investigate the aggravating circumstances, including prior convictions used in aggravation." DCO, 83. The District Court found that the evidence presented at the post-conviction hearing, and available at trial had counsel

conducted a reasonable investigation, reduces the weight of the three aggravating circumstances that remained after the Florida Supreme Court struck two of the aggravating circumstances. *Id.* at 84-89.

The District Court found that counsel's failure to investigate and present mitigating evidence was not a reasonable "tactical" decision, given counsel's failure to conduct a reasonable investigation in the first instance. DCO, 89. In addition to relying on counsel's failure to conduct a reasonable investigation, the District Court also rejected other purported "tactical" reasons for counsel's failure to present mitigation.

Mr. Tassone claimed that alcohol/drug abuse was not a mitigating factor because Mr. Hardwick was supposedly acting as a drug enforcer. EH3 111-12. Because the jury had already heard that evidence, however, the District Court found that "it was critically important for the jury to hear that Hardwick was not a cold-blooded enforcer of the drug community, but rather was suffering from a long-term and historically-documented alcohol and drug addiction." DCO, 90.

On cross-examination, the State suggested that Mr. Tassone might have made a "tactical" decision "not to present mitigating evidence because Dr. Barnard had diagnosed Hardwick with an antisocial personality disorder." DCO, 90-91. In fact, witnesses at the hearing testified both that in some circumstances (such as where the disorder stems from an abusive history) that disorder can be mitigating, and that Mr. Hardwick does not have the features of that disorder. *Id.* at 91-92.

Accordingly, the District Court found no reasonable basis for counsel's failure to present mental health expert testimony. *Id.* at 92.

The District Court noted that Mr. Tassone testified that Mr. Hardwick did not want to call any witnesses at the penalty phase. DCO, 93. The District Court rejected this testimony as a basis for Mr. Tassone's failure to present any mitigating evidence, for several reasons.

First, because the "attorney-client relationship had become unworkable and strained," DCO, 96, and given Mr. Hardwick's known mental impairments, counsel "had an 'expanded' duty to advise and guide Hardwick and present options for Hardwick's fight for a life sentence." *Id.*

Second, Mr. Hardwick was not opposed to a life sentence; rather, "Hardwick wanted a life sentence, not a death sentence." DCO, 96. In support of that finding, the District Court found as facts:

- "Tassone admitted that Hardwick did not want to be sentenced to death." DCO, 96.
- "Hardwick ... never objected to or interfered with his lawyers' attempts to secure a life sentence," including pretrial motions and arguments to the jury for life. DCO, 96-97.
- "Hardwick has never objected to any other counsels' attempts to secure a life sentence," on direct appeal and thereafter. DCO, 97.
- Throughout the case, the record "shows that Hardwick has been cooperative and very willing to reveal to others the mitigating information of his life history." DCO, 97-98.

Third, the only penalty phase witnesses counsel suggested to Mr. Hardwick were Jeff and Ms. Lawrence: "Tassone never suggested to Hardwick that a penalty phase defense could be presented" through other family members, life history

records, a mental health expert, or witnesses to Mr. Hardwick's "drug and alcohol use and intoxication around the time of the offense." DCO, 99. Indeed, Mr. Tassone himself regretted his failure to obtain Mr. Hardwick's life history records and use them as mitigation evidence. *Id.* at 100.

The District Court found that trial counsel could have presented a powerful mitigation case with the historical records and a mental health expert alone. DCO, 100-01. Mr. Tassone was "required to fully advise Hardwick on the importance of such a presentation ..., as any reasonably competent lawyer would have done." *Id.* at 101. Accordingly, "Given the considerable quantity of mitigating evidence that exists in this record that could have rendered a legitimate defense for Hardwick at sentencing, Tassone's performance was indeed deficient." *Id.* at 101-02.

With respect to deficient performance, the District Court concluded as follows:

> Tassone's representation did not meet Sixth Amendment standards because he failed to reasonably investigate and prepare for the capital sentencing proceeding and had no reasonable tactic or strategy for failing to present any mitigation in Hardwick's case.
>
> ... [U]nder the prevailing professional norms at the time of [Hardwick's] trial, counsel had an obligation to conduct a thorough investigation of the defendant's background.... The investigation conducted by Tassone did not satisfy those norms.

DCO, 102-04 (citations and quotation marks omitted) (brackets in original).

With respect to the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), the District Court found that "there is a strong probability" that presentation of an actual mitigation case "would have resulted in a sentence of life instead of death," especially given the "seven to five vote [for death] with none of

Hardwick's background and substance dependency revealed" to the jury. DCO, 106-07. Moreover, two of the aggravating factors found by the sentencing judge were found invalid on direct appeal, and the "available mitigating evidence would have weakened the remaining aggravating circumstances." *Id.* at 108-09. "Thus, with utilization of the powerful available mitigating evidence, there is a reasonable probability that the advisory jury and the sentencing judge would have struck a different balance and spared Hardwick's life." *Id.* at 109-10.

Furthermore, the District Court found that if Mr. Tassone had conducted an adequate investigation and provided the results to Mr. Hardwick, Mr. Hardwick would have allowed the presentation of mitigating evidence:

> Hardwick's actions, including his continued efforts to seek a life sentence, show that he would have permitted Tassone to introduce *some* mitigation evidence if Tassone had investigated "the many red flags" ..., had presented [Hardwick] with potential avenues of mitigation and had explained that mental health evidence could be presented to challenge the aggravating factors. Based on his actions, Hardwick would not have precluded Tassone's presentation of *some* mitigation evidence.

Id. at 109 n.33 (emphasis in original).

On appeal following the remand, the Eleventh Circuit affirmed the District Court's findings and conclusions. *Hardwick v. Secretary, Florida DOC*, 803 F.3d 541 (11th Cir. 2015) (Pet. App. A-9).

With respect to deficient performance, the Eleventh Circuit focused on a case-specific analysis of the District Court's finding that trial counsel "failed to conduct a professionally reasonable mitigation investigation under the circumstances." 803 F.3d at 552. For numerous reasons, it was incumbent on Mr. Hardwick's counsel to

conduct such an investigation: counsel believed Mr. Hardwick would be convicted of first degree murder and that the State would seek the death penalty; counsel was aware of potential sources of mitigation from prior counsel's notes, from speaking to Mr. Hardwick and his mother; and from Dr. Barnard's report. *Id.* at 552-53. "The District Court found that despite his awareness of this information, Hardwick's attorney did not conduct a life-history investigation or follow up on any leads," and concluded that these circumstances "led ineluctably to the finding that counsel's performance was deficient." *Id.* at 553-54.

The Eleventh Circuit agreed that counsel's performance was deficient under this Court's decisions in *Williams v. Taylor*, 529 U.S. 362 (2000), and *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam). *Hardwick v. Secretary*, 803 F.3d at 554. It rejected the State's arguments to the contrary because "the District Court made fact findings that undermine all of the State's arguments," *id.* at 555, and because the critical issue was not the "reasonableness of counsel's decision whether to present mitigation evidence," but rather "'whether the investigation supporting counsel's decision not to introduce mitigating evidence of [Hardwick's] background *was itself reasonable*.'" *Id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003)) (brackets in *Hardwick*) (emphasis in *Wiggins*).

With respect to prejudice, the Eleventh Circuit ruled that the District Court's finding that a professionally reasonable investigation would have produced evidence of the statutory mitigating circumstance of substantially impaired capacity was "amply supported by the record." *Hardwick v. Secretary* 803 F.3d at 556. After

thoroughly reviewing the record, the Eleventh Circuit also agreed with the District Court's conclusion that "'Hardwick's turbulent family history, dysfunctional upbringing, mental/physical abuse and early alcohol/drug use and addiction' constituted compelling mitigating circumstances that would have supported a life sentence." *Id.* at 558.

Again, the Eleventh Circuit rejected the State's arguments to the contrary. The Eleventh Circuit acknowledged that there were serious aggravating factors, but nevertheless was convinced – like the District Court – that there was a reasonable probability of a different sentence if the "strong and extensive mitigation evidence hidden beneath the surface of this case" had been presented, *Hardwick v. Secretary* 803 F.3d at 560, in part because the mitigating evidence "would have had the dual effect of substantially strengthening the mitigation case and appreciably weakening the aggravation case." *Id.* at 561. Furthermore, given that the State's evidence and argument at trial was that Mr. Hardwick was a "hardened drug dealer who executed [the decedent] for stealing a large quantity of drugs from him," the Eleventh Circuit agreed with the District Court that any "potentially harmful aspects" of the mitigating evidence "were insufficient to outweigh its beneficial effect." *Id.* at 562.

Finally, the Eleventh Circuit rejected the State's argument that Mr. Hardwick could not show prejudice in light of *Schriro v. Landrigan*, 550 U.S. 465 (2007). In *Landrigan* – a case in which the defendant repeatedly told the trial court that he did not want to put on any mitigating evidence, despite having been

informed of potential mitigation by trial counsel – this Court held that Landrigan could not establish that he was prejudiced by any deficient performance on the part of trial counsel. *Id.* at 477. But the Eleventh Circuit held that *Landrigan* does not apply to this case. The District Court – "the relevant factfinder here," *Hardwick v. Secretary* 803 F.3d at 563 – found that if counsel had investigated and explained the available mitigation to Mr. Hardwick, he would have permitted counsel to present mitigating evidence. Given the record, including "Mr. Hardwick's continued efforts to seek a life sentence," that finding of fact was not clearly erroneous. *Id.*

REASONS FOR DENYING THE WRIT

In essence, the State complains that the Eleventh Circuit committed errors in its 2003 decision remanding the case for an evidentiary hearing. For several reasons, the State's complaint is unworthy of this Court's review.

First, the State's petition comes too late, and is transparently filed for tactical reasons only. The State could have sought review of the 2003 decision at that time, but decided not to. The State could have timely sought review of the Eleventh Circuit's 2015 decision, but it decided not to. If there were actually an error that called out for this Court's review, the State would have sought such review on one or both occasions. Only after Mr. Hardwick sought certiorari review of the denial of a guilt phase claim did the State seek review of the 2003 decision.

Second, reviewing the state court's complaint would affect virtually no other cases. Although the State contends that the same deference rules that applied to this pre-AEDPA case apply post-AEDPA, that is untrue. Because after twenty years of AEDPA there are virtually no other pre-AEDPA cases remaining, reviewing

the Eleventh Circuit's application of the pre-AEDPA statute could not affect more than a handful of other cases.

Third, while the State contends that in 2003 the Eleventh Circuit misapplied *Strickland* by allowing the District Court to consider affidavits submitted by the defense as substantive evidence, the District Court held an evidentiary hearing following that ruling. If the State had wanted to subject the affiants to cross-examination, it could have done so at the evidentiary hearing. Having failed to make any attempt to do so, the State's current complaint is meritless.

Finally, the lower courts conducted extraordinarily thorough and thoughtful review of the ineffective assistance of counsel claim in this case. The Eleventh Circuit committed no error in its initial decision, the District Court carried out its duty to hear and consider the facts, and the Eleventh Circuit correctly ruled that the District Court had committed no error, and certainly no clear error. The State's complaint is only with the result of those proceedings, not with any error in them.

I. THE ELEVENTH CIRCUIT PROPERLY APPLIED THE PRE-AEDPA HABEAS STATUTE.

Under the pre-AEDPA habeas statute, former 28 U.S.C. § 2254(d) (1994), set out in full in Cross-Pet. at 2-4, a presumption of correctness was applied to state court fact findings, *unless* the applicant showed that one of eight exceptions applied. "As is clear from the statutory text …, if any one of the eight enumerated exceptions ... applies then the state court's factfinding is not presumed correct." *Jefferson v.*

Upton, 560 U.S. 284, 291 (2010) (quotation marks omitted) (citations omitted).[3] Only if none of those exceptions applies are the state court factfindings presumed correct, subject to a showing "by convincing evidence that the factual determination by the State court was erroneous." § 2254(d) (1994). Under the current statute, the presumption of correctness applies without exception, and can only be overcome by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (2012).

Here, the Eleventh Circuit found that two of the exceptions applied, and therefore that the § 2254(d) (1994) presumption of correctness did *not* apply. *Hardwick v. Crosby*, 320 F.3d at 1158-59 n.141, 1183 n.207. Therefore, the Eleventh Circuit had no occasion to decide and did not decide whether Mr. Hardwick could overcome the presumption of correctness. Thus, the State's assertion that the "same principles of deference continue to apply even after the adoption of the present federal habeas statute," Cross-Pet. at 17, is wrong. The Eleventh Circuit never applied the presumption of correctness; reviewing its application of the § 2254(d) (1994) exceptions could have no effect on any decision applying the current federal habeas statute.

The State's assertion that the Eleventh Circuit erred with respect to the § 2254(d) (1994) exceptions "because the state court's determinations were not clearly erroneous," Cross-Pet. at 19, *see also* Cross-Pet. at 21, is likewise wrong. As this Court has made clear, under § 2254(d) (1994), a federal court was required to

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[3] In *Jefferson*, this Court found that the Eleventh Circuit had erroneously failed to consider whether any of the first seven exceptions applied, and therefore reversed and remanded. *Id.* at 292-94.

determine first "whether the state court's factual findings warrant a presumption of correctness." *Jefferson*, 560 U.S. at 294. That is exactly what the Eleventh Circuit did here. Once it found that the state court fact findings did *not* warrant a presumption of correctness, it had no reason to and did not decide whether Mr. Hardwick could overcome such a presumption. *See Hardwick v. Secretary*, 803 F.3d at 550-51 ("As a result of our [2003] decision, there is no presumption of correctness as to [the state court findings] and the District Court was free to make its own findings of fact based on the record before it."). Furthermore, because the Eleventh Circuit did not apply the presumption of correctness, the State's first question presented, which asks whether the Eleventh Circuit correctly applied the clearly erroneous standard under *Anderson v. Bessemer City*, 470 U.S. 564 (1985), is entirely inapposite.

Because the State cannot show any error in the Eleventh Circuit's application of the § 2254(d) (1994) exceptions, it follows that the Eleventh Circuit did not err in remanding for an evidentiary hearing, nor did the District Court err in holding an evidentiary hearing. The State, however, does not argue that there was any error in holding the evidentiary hearing and also utterly ignores the fact that the hearing took place, the findings that the District Court made, and the significance of those findings. As the Eleventh Circuit made clear in its 2015 decision, those findings "undermine all of the State's arguments." *Hardwick v. Secretary*, 803 F.3d at 555.

The State's first and primary argument is that the Eleventh Circuit improperly failed to heed the state court's findings crediting attorney Tassone's

testimony where it conflicted with those of Mr. Hardwick's mother and brother. *See* Cross-Pet. at 19-25. Having properly held that the presumption of correctness did not apply and remanded for a hearing, however, the Eleventh Circuit was required both to consider the District Court's findings based on that hearing, and to affirm them unless clearly erroneous. *See* Fed. R. Civ. P. 52(a)(6) (findings of fact "must not be set aside unless clearly erroneous," giving "due regard" to the hearing "court's opportunity to judge the witnesses' credibility"); *Amadeo v. Zant*, 486 U.S. 214, 223 (1988).

Here, the District Court *rejected* Mr. Tassone's testimony that Mr. Hardwick's mother and brother Jeff refused to testify, based on (i) their consistent post-conviction testimony that they were willing and available to testify, but that Mr. Tassone discussed only good character mitigation with them and did not call them as witnesses; (ii) Ms. Lawrence's actions pre-and post-trial, which were inconsistent with the picture of her painted by Mr. Tassone; and (iii) the District Court's in-person assessment of Mr. Tassone's credibility. DCO, 54-60. The Eleventh Circuit correctly credited the District Court's findings, undermining the State's entire "credibility" argument.

The State attempts to spin off related issues regarding a purported "waiver" by Mr. Hardwick of presentation of mitigation, or an instruction to counsel not to present mitigation. Cross-Pet. at ii. Again, the State simply ignores the District Court's fact findings.

The District Court *found as facts* that Mr. Hardwick did *not* express in court or to counsel any desire to receive the death penalty – to the contrary, he wanted to receive a life sentence, DCO, 96; did nothing to obstruct or interfere with trial counsel's motions and arguments for a life sentence, *id.* at 96-97; was cooperative and willing to reveal mitigating facts about his life history, *id.* at 97-98; did not know of any evidence that counsel intended to offer besides the testimony of Ms. Lawrence and his brother Jeff, *id.* at 99; and that the trial court had ruled that all decisions as to witnesses were to be made by counsel, not Mr. Hardwick. *Id.* at 93-94. Moreover, based on those findings the District Court also found that Mr. Hardwick "would have permitted Tassone to introduce *some* mitigation evidence if Tassone had investigated 'the many red flags' ..., had presented [Hardwick] with potential avenues of mitigation and had explained that mental health evidence could be presented to challenge the aggravating factors." *Id.* at 109 n.33.

The Eleventh Circuit ruled that those findings of fact were not clearly erroneous, and that based on those findings there was no issue regarding this Court's decision in *Landrigan*. *Hardwick v. Secretary*, 803 F.3d at 563. The State has shown nothing to the contrary.

The State also complains about the Eleventh Circuit's 2003 ruling that part of the state court proceeding was not "full and fair." Cross-Pet. at 25-29. Aside from the fact that this belated complaint is about a ruling that cannot affect any current cases, the State cannot show that there was any error or even that any error had a significant effect on the Eleventh Circuit's ultimate 2015 decision.

Relying in significant part on the Florida Supreme Court's finding that the under-warrant hearing at which attorney Tassone testified in state court was deficient, the Eleventh Circuit in 2003 found that the state court proceedings were not full and fair. *Hardwick v. Crosby*, 320 F.3d at 1158-59 n.141. That ruling was consistent with this Court's decisions applying former § 2254(d). *See Jefferson*, 560 U.S. at 292-94 (remanding for consideration of Jefferson's "arguments that the state court's *process* was deficient," in that the "state court's 'factfinding procedure,' 'hearing,' and 'proceeding' were not 'full, fair, and adequate.'") (quoting § 2254(d)) (emphasis in original).

But even if there were any error in the Eleventh Circuit's "full and fair" ruling (there was not), the State ignores the fact that the Eleventh Circuit also rejected application of a presumption of correctness based on its ruling under § 2254(d)(8) that the state court findings were not "fairly supported by the record." *See Hardwick v. Crosby*, 320 F.3d at 1182-86 n.207 (detailing ways in which state court findings were contradicted by the record). Because the State has made no attempt to challenge that ruling, the State's complaint about a putative error in the "full and fair" ruling could not even affect the outcome of this case, let alone any other case.

II. THE ELEVENTH CIRCUIT PROPERLY APPLIED *STRICKLAND*.

The State's complaint about the Eleventh Circuit's application of *Strickland* is primarily based on the fact that the Eleventh Circuit instructed the District Court to consider certain affidavits on remand. *See Hardwick v. Crosby*, 320 F.3d at 1185-86 n.207. This is a remarkably meritless and peculiar complaint.

The Eleventh Circuit twice painstakingly reviewed the entire record of the case, considering and applying *Strickland* and this Court's subsequent *Strickland* decisions, including *Williams v. Taylor*, *Wiggins*, and *Porter*. *See, e.g.*, *Hardwick v. Secretary*, 803 F.3d at 554 (discussing *Williams*, *Wiggins*, and *Porter*); *Hardwick v. Crosby*, 320 F.3d at 1165-66 (discussing *Strickland* and *Williams*). After determining that the presumption of correctness did not apply and that remand for an evidentiary hearing was necessary, the Eleventh Circuit remanded the case, instructing the District Court to "consider the various affidavits that we requested from the state [post-conviction] proceeding, but which were not part of the record before the habeas judge, when he made his [initial] habeas determination." *Hardwick v. Crosby*, 320 F.3d at 1185-86 n.207.

Thus, all that the Eleventh Circuit did was to instruct the District Court to consider the *entire* state court record, in addition to the evidence developed at the evidentiary hearing. The State's attempt to construct a certworthy issue by framing this mundane ruling as a misapplication of *Strickland* goes nowhere.

Rule 7(b) of the Rules Governing Section 2254 Cases in the United States District Courts expressly provides that "Affidavits may … be submitted and

considered as part of the record." Because all that the Eleventh Circuit did was instruct the District Court to comply with Rule 7(b), there was no error.

The State's complaint is also belated. If the State really thought that the Eleventh Circuit's 2003 instructions to the District Court contravened *Strickland*, it could have and should have sought this Court's review of the question long ago.

Moreover, the State knew of the Eleventh Circuit's ruling in 2003 and knew the identity of the affiants in question well before that. The District Court conducted the evidentiary hearing in 2009, and the State had the opportunity to call witnesses at that hearing.[4] The State had every opportunity to investigate the affiants, interview them, seek to depose them, and to call them as witnesses at the evidentiary hearing. *See* Advisory Committee Note to Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts (contemplating that witnesses may be subpoenaed to federal habeas evidentiary hearings pursuant to local practice); Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts (Federal Rules of Civil Procedure apply where not inconsistent with the habeas statute and rules); Fed. R. Civ. P. 45 (governing issuance of subpoenas). The State, however, made no effort to interview the affiants or call them as witnesses for cross-examination. In these circumstances, the State's complaint that the District Court considered the affidavits – as part of its extraordinarily thorough review of the entire record – is without merit.

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[4] The State called as a witness psychiatrist Ernest Carl Miller, M.D., who had evaluated Mr. Hardwick for clemency proceedings in 1988, and who confirmed the validity and availability of the mental health mitigating evidence presented by the defense at the state court and federal court evidentiary hearings. EH3 139-81.

CONCLUSION

For the reasons set forth herein, this Court should deny Respondent's conditional cross-petition for a writ of certiorari.

Respectfully submitted,

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JUNE 3, 2016