No. 08-9156
CAPITAL CASE

**In the SUPREME COURT of the UNITED STATES**

HOLLY WOOD,

Petitioner,

v.

RICHARD ALLEN, Commissioner, Alabama Department of Corrections, TROY KING, the Attorney General of Alabama, and GRANTT CULLIVER, Warden

Respondents.

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

# BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Troy King
*Attorney General*

Corey L. Maze
*Solicitor General*

Henry M. Johnson
*Assistant Attorney General*
Counsel of Record *

State of Alabama
Office of the Attorney General
500 Dexter Avenue
Montgomery, Alabama 36130-0152
Tel: (334) 353-9095
Fax: (334) 353-3637

April 13, 2009

**CAPITAL CASE**

## QUESTIONS PRESENTED FOR REVIEW (Rephrased)

1. Should this Court grant certiorari to review the Eleventh Circuit's straightforward application of the *Strickland* standard to Wood's splitless and fact-bound claim that his counsel were ineffective for failing to adequately investigate and present evidence of his low intelligence at the penalty phase of his trial?

2. Should this Court grant certiorari to review Wood's claim that the Eleventh Circuit misapplied 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254(e)(1) in denying relief on his claim of ineffective assistance of counsel where that claim was not raised or addressed in the lower court, is unworthy of certiorari review, and is, in any event, clearly without merit?

3. Should this Court grant certiorari to review the Eleventh Circuit's straightforward application of this Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002), to Wood's splitless and fact-bound claim that he is entitled to penalty phase relief because of his alleged mental retardation?

4. Should this Court grant certiorari to review Wood's claim that the Eleventh Circuit erred in holding that his *Batson* claims are procedurally defaulted where the underlying *Batson* claims are unworthy of certiorari review and clearly are without merit?

## PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties in the courts below.

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## OPINIONS BELOW

On October 20, 1994, a Pike County, Alabama jury found Holly Wood guilty of the capital offense of the murder of Ruby Gosha during the course of a burglary in the first degree, in violation of section 13A-5-40(a)(4) of the Code of Alabama. (Vol. 5, Court reporter's transcript, p. 955.) Following the jury's recommendation, the trial court sentenced Wood to death on December 9, 1994. (Vol. 12, Clerk's record, pp. 999-1011.) The Alabama Court of Criminal Appeals and the Supreme Court of Alabama affirmed Wood's capital murder conviction and death sentence. *Wood v. State*, 715 So. 2d 812 (Ala. Crim. App. 1996), *aff'd*, 715 So. 2d 819 (Ala. 1998). Thereafter, this Court denied Wood's petition for writ of certiorari. *Wood v. Alabama*, 525 U.S. 1042, 119 S. Ct. 594 (1998).

Wood subsequently filed a petition for post-conviction relief, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. (Vol. 18, Clerk's record, pp. 48-213.) After holding an evidentiary hearing on Wood's twice amended Rule 32 petition, the Rule 32 circuit court entered an order denying all relief on the claims in his Rule 32 petition. (Vol. 24, Clerk's supplemental record, pp. 9-81.) See Pet. App. D.

On April 25, 2003, the Alabama Court of Criminal Appeals remanded Wood's case to the Rule 32 circuit court with instructions to hold an evidentiary hearing on the following claims: (1) whether Wood's alleged mental retardation renders him ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002); and, (2) whether his counsel were ineffective for failing to develop and present evidence of his alleged mental retardation at the penalty phase of his trial. *Wood v. State*, 891 So. 2d 398, 410-411 (Ala. Crim. App. 2003). Pursuant to the directive of the Alabama Court of Criminal Appeals, the Rule 32 circuit court held an evidentiary hearing on those two claims. On September 24, 2003, the court entered a

comprehensive and thorough order denying relief on those claims. (Vol. 41, Clerk's record, pp. 2390-2446.) See Pet. App. E.[1]

On January 6, 2004, the Alabama Court of Criminal Appeals affirmed the Rule 32 circuit court's denial of Wood's twice amended Rule 32 petition. *Wood*, 891 So. 2d at 411-421. On May 21, 2004, the Supreme Court of Alabama denied Wood's petition for writ of certiorari.

On May 26, 2004, Wood filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Alabama. On November 20, 2006, the district court entered a Memorandum Opinion and Order granting Wood's habeas petition "as to Claim A(1)(e) that Trial Counsel Was Ineffective for Failing to Investigate and Present Evidence of Mr. Wood's Mental Retardation and Mental Disability" and denying relief on the remaining claims in his petition. *Wood v. Allen*, 465 F.Supp.2d 1211, 1245 (M.D. Ala. 2006). See Pet. App. B at 151a-152a. On September 16, 2008, the Eleventh Circuit Court of Appeals affirmed the district court's denial of relief on Wood's *Atkins* and *Batson* claims but reversed the district court's holding that Wood's trial counsel were ineffective at the penalty phase of his trial for failing to investigate and present evidence of his low intelligence. *Wood v. Allen*, 542 F.3d 1281, 1314 (11th Cir. 2008). See Pet. App. A at 72a. On November 12, 2008, the Eleventh Circuit Court of Appeals denied Wood's petition for rehearing and his petition for rehearing *en banc*. See Pet. App. C.

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[1] Although he included the Rule 32 circuit court's 2003 opinion as Appendix E in his appendices, Wood deleted eight pages of that opinion and failed to inform this Court or Respondents that he omitted those pages. As can be seen by reviewing the page numbers on the bottom right-hand side of the circuit court's opinion that Wood identifies as Appendix E, the opinion is 57-pages in length, but Wood failed to include pages 19, 27-30, 39, and 53-54 of the court's opinion in his filing with this Court. Because the missing pages contain findings of fact that were made by the circuit court in reviewing his claim that his counsel were ineffective for failing to present evidence of his low intelligence at the penalty phase of his trial and his *Atkins* claim, Respondents will file an appendix that contains the Rule 32 circuit court's 2003 opinion in its entirety simultaneously with the filing of this brief.

## STATEMENT OF JURISDICTION

The statement of jurisdiction contained on page 2 of Wood's petition for writ of certiorari is correct. Wood, however, has not articulated any basis for this Court to invoke its jurisdiction under Supreme Court Rule 10.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statement of constitutional provisions and statutes involved in this case, which is contained on pages 2-3 of Wood's petition for writ of certiorari, is correct.

## STATEMENT OF THE CASE

### A. The State Court Proceedings

On September 1, 1993, Holly Wood broke into Annie Gosha's residence in Troy, Alabama. Once inside her home, Wood hurried to the bedroom where Ruby Gosha, Annie's daughter and Wood's ex-girlfriend, was sleeping. Wood placed a shotgun to the right side of Ruby's head and fired one shot. After he killed Ruby, Wood quietly snuck out of Annie's house through the backdoor.

A Pike County grand jury returned an indictment against Wood for this murder on November 16, 1993. The indictment charged Wood with the capital offense of the murder of Ruby Gosha during the course of a burglary in the first degree, in violation of section 13A-5-40(a)(4) of the Code of Alabama. (Vol. 7, Clerk's record, pp. 114-115.) Wood was convicted of the capital murder of Ruby Gosha on October 20, 1994. (Vol. 5, Court reporter's transcript, p. 955.) After a sentencing hearing before the jury, the jurors recommended by a vote of ten to two that Wood should be sentenced to death. (Vol. 6, Court reporter's transcript, p. 1087.) On December 9, 1994, the trial court followed the jury's recommendation and sentenced Wood to death. (Vol. 12, Clerk's record, pp. 999-1011.)

On direct appeal, the Alabama Court of Criminal Appeals and the Supreme Court of Alabama affirmed Wood's capital murder conviction and death sentence. *Wood v. State*, 715 So. 2d 812 (Ala. Crim. App. 1996), *aff'd*, 715 So. 2d 819 (Ala. 1998). This Court denied Wood's petition for writ of certiorari. *Wood v. Alabama*, 525 U.S. 1042, 119 S. Ct. 594 (1998).

On December 1, 1999, Wood filed his petition for post-conviction relief, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. (Vol. 18, Clerk's record, pp. 48-213.) On September 18, 2000 and August 22, 2001, the Rule 32 circuit court held a hearing on the claims in Wood's twice amended Rule 32 petition and subsequently denied all relief on his claims on November 27, 2001. (Vol. 24, Clerk's supplemental record, pp. 9-81.) See Pet. App. D.

On April 25, 2003, the Alabama Court of Criminal Appeals remanded Wood's case to the circuit court with instructions to hold an evidentiary hearing on his claims that his alleged mental retardation renders him ineligible for the death penalty and that his counsel were ineffective for failing to present evidence of his alleged mental retardation at the penalty phase of his trial. *Wood v. State*, 891 So. 2d 398, 410-411 (Ala. Crim. App. 2003). Pursuant to the court's directive, the circuit court held an evidentiary hearing on those claims on August 4, 2003.

On September 24, 2003, the Rule 32 circuit court entered a detailed order denying relief on Wood's claims. (Vol. 41, Clerk's record, pp. 2390-2446.) See Pet. App. E. On January 6, 2004, the Alabama Court of Criminal Appeals affirmed the Rule 32 circuit court's denial of Wood's twice amended Rule 32 petition. *Wood*, 891 So. 2d at 411-421. On May 21, 2004, the Supreme Court of Alabama denied Wood's petition for writ of certiorari.

**B. The Federal Habeas Proceedings**

On May 26, 2004, Wood filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Alabama. On November 20, 2006, the district court

granted Wood's habeas petition "as to Claim A(1)(e) that Trial Counsel Was Ineffective for Failing to Investigate and Present Evidence of Mr. Wood's Mental Retardation and Mental Disability" and denied relief on the remaining claims in his petition. *Wood v. Allen*, 465 F.Supp.2d 1211, 1245 (M.D. Ala. 2006). See Pet. App. B. at 151a-152a. On December 7, 2006, Respondents filed their notice of appeal. On December 20, 2006, Wood moved the district court to issue a certificate of appealability as to his *Atkins* and *Batson* claims and filed his notice of cross-appeal. Two days later, the court granted Wood's request for a certificate of appealability as to those two issues.

On September 16, 2008, the Eleventh Circuit Court of Appeals affirmed the district court's denial of relief on Wood's *Atkins* and *Batson* claims but reversed the district court's holding that Wood's counsel were ineffective at the penalty phase of his trial for failing to investigate and present evidence of his low intelligence. *Wood v. Allen*, 542 F.3d 1281, 1314 (11th Cir. 2008). See Pet. App. A at 72a. On November 12, 2008, the Eleventh Circuit denied his petition for rehearing and petition for rehearing *en banc*. See Pet. App. C.

### C. Statement of the Facts

#### 1. The Facts of the Crime

On the evening of September 1, 1993, Holly Wood unlawfully entered Annie Gosha's home in Troy, Alabama through the unlocked backdoor. (Vol. 3, Court reporter's transcript, p. 433.) Once inside the residence, Wood rushed to the bedroom where Ruby Gosha was sleeping. *Id.* at 495. While Ruby was asleep in her bed, he placed a shotgun to the right side of her head and fired one shot, killing her. *Id.* Wood then quickly left the residence. *Id.* at 433, 440-441.

Annie Gosha testified that Ruby lived with Wood in Enterprise while they were dating and that Wood is the father of one of her children. *Id.* at 416. After she ended her relationship

with Wood, Ruby and her children moved to Troy to live with Annie, her mother. *Id.* at 415-416. At approximately 5:00 p.m. on September 1, 1993, Wood arrived uninvited at Annie's house. *Id.* at 418, 434. Wood brought with him cigarettes to give to Ruby and Pampers for their child. *Id.* at 418. Ruby and Wood began arguing immediately after he arrived at Annie's house. *Id.* Ruby told him to "go on and leave her alone, to take his cigarettes and Pampers and give them to somebody else, because it was over between them." *Id.* Annie told Wood to leave her property and never return. *Id.* at 419. As he was leaving, Wood told Ruby that he would "get her some day." *Id.* at 420.

Approximately two weeks earlier, Wood "slipped up behind [Ruby] and cut her on the arm" while she was sitting in her automobile. *Id.* at 421-422. Ruby received a serious cut on her wrist and lost the functioning in two of her fingers as a result of this assault. *Id.* at 421-423. Calvin Salter, Wood's cousin, testified that Wood told him that he had intended to stab Ruby in the heart but stabbed her only on her wrist because her arm was in the way. *Id.* at 504.

Salter further testified that Wood stopped by his (Salter's) mother's house in Luverne between 7:00 p.m. and 8:00 p.m. on September 1, 1993. *Id.* at 462. Wood was driving his father's pickup truck at the time. *Id.* at 464. Wood asked Salter if he would travel with him to Troy, and Salter agreed. *Id.* at 462-463. After making one stop, Wood and Salter drove to Troy, with Salter driving. *Id.* at 464.

Later that evening, Wood and Salter drove past the Gosha residence and stopped the truck on a nearby street. *Id.* at 485-486. Wood got out of the truck and asked Salter to circle the block. *Id.* at 486. Complying with Wood's request, Salter drove the truck around the block and parked it by a wall. *Id.* Wood returned to the truck a few minutes later. *Id.* Soon thereafter, they observed a red Grand Prix automobile drive past them, and Wood asked Salter to follow

that vehicle because it was owned by a man named Amp. *Id.* at 487. Wood informed Salter that he would kill Ruby if he caught her and Amp together. *Id.* at 488.

After Amp's vehicle drove past Annie's house, Wood told Salter to turn around and drive back toward her residence. *Id.* at 489-490. When they were near the house, Wood asked Salter to stop the truck. *Id.* at 490. Wood removed a 12-gauge shotgun from the gun rack of the truck, placed it down one of his pant legs, and covered it with his shirt. *Id.* Wood then walked toward Annie's house. *Id.* Salter drove the truck to a nearby apartment complex and parked it next to a telephone booth. *Id.* at 492. While he was waiting for Wood to return, Salter placed a telephone call to his girlfriend and briefly spoke with her. *Id.* at 493.

After finishing his call, Salter started to walk back to the truck, but as he was walking, Wood, who was standing in the street behind the Gosha house, called out to him. *Id.* at 492-493. Salter walked over to him, and Wood told him that he did not see Ruby in the house but that he was going to return to the Gosha residence anyway. *Id.* at 493. Wood walked toward the Gosha residence again, and Salter returned to the telephone booth to place another call. *Id.* at 493-494. Salter testified that he heard a gunshot as he was hanging up the telephone and decided to return to the truck. *Id.* When he arrived at the truck, Wood was sitting in the passenger's seat. *Id.* at 495. Wood told Salter that they should drive back to Luverne. *Id.*

As they were driving back to Luverne, Wood told Salter that he shot Ruby while she was asleep in her bed. *Id.* Salter testified that Wood stated, "I shot that bitch in the head, and blowed [sic] her brains out and all she did was wiggle." *Id.* After telling Salter that he shot Ruby, Wood began to throw 12-gauge shotgun shells out of the car window. *Id.* Wood told Salter that he knew that he had killed Ruby and expected that law enforcement officers would be searching for him. *Id.*

When they arrived in Luverne, Salter and Wood drove to Wood's father's residence. *Id.* They decided to sleep in a shed near Wood's father's home. *Id.* at 499-500. Before they went to sleep, Wood removed the shotgun from the truck, and he and Salter buried the gun under some leaves in a nearby wooded area. *Id.* at 498-499. Troy Police Officer Donald Brown testified that Salter led him to a wooded area near the shed where they retrieved the shotgun under some leaves. (Vol. 4, Court reporter's transcript, p. 659.)

Later that night, Luverne Police Officer Clifton Wells located a vehicle parked at Wood's father's house that matched a description that he had received from a "be-on-the-lookout" bulletin from the Troy Police Department. *Id.* at 608-610. After Wood's father informed him that Wood was in the shed next to his house, Officer Wells found Wood, took him into custody, and transported him to the Luverne Police Department. *Id.* at 612-615.

Troy Police Officer Lewis Fannin subsequently drove Wood from the Luverne Police Department to the Troy Police Department. *Id.* at 712. Officer Fannin testified that Wood became "increasingly belligerent" while they were driving to Troy and suddenly exclaimed, "You mother fuckers must think I am crazy. What do I look [like] going in somebody's house shooting them in the head while they are asleep?" *Id.* at 713. Officer Fannin testified that neither he nor anyone else had informed Wood that Ruby Gosha was shot in the head or that she had been shot while she was asleep before he made that statement. *Id.*

**2. Facts from the Rule 32 Evidentiary Hearing**

The Rule 32 circuit court held an evidentiary hearing on Wood's twice amended Rule 32 petition on September 18, 2000 and August 22, 2001.

Mr. Cary Dozier, Wood's lead counsel, has been practicing law since 1976. (Vol. 16, Court reporter's transcript (9/18/00), p. 13.) By the time of Wood's trial, Dozier had acquired a

vast amount of trial experience, handling more than a thousand felony jury trials and prosecuting more than one hundred felony and misdemeanor cases. *Id.* at 21-22. In addition, Dozier had handled capital murder cases before he was appointed to represent Wood. *Id.* at 21.

To prepare for Wood's capital murder trial, Dozier met with Wood at least twice and spoke with him on the telephone many times. *Id.* at 19-20. Dozier stated that he had a "very good working relationship" with Wood, and he recalled that Wood cooperated with him and his co-counsel (Frank Ralph and Kenneth Trotter) by providing them with information. *Id.* at 26. He testified that he and his co-counsel followed up on the information that Wood provided to them and that he "had no problems with Wood whatsoever." *Id.* at 26-27.

Dozier categorically denied that he and Frank Ralph asked Kenneth Trotter to be "in charge" of Wood's penalty phase defense. *Id.* at 53. Instead, Dozier testified that all three attorneys participated in the investigation, preparation, and presentation of Wood's penalty phase defense. *Id.* at 16, 53. Dozier testified that he interviewed several witnesses, including Wood's father, in preparing for the penalty phase of the trial. *Id.* at 54. Dozier recalled that Wood's family members were cooperative and provided them with information about Wood's childhood and life that was useful at the penalty phase of the trial. *Id.* at 55.

To assist them in preparing their guilt and penalty phase defense of Wood, Dozier hired an investigator, Pete Taylor, who was "highly recommended" to him by another investigator. *Id.* at 33. Dozier recalled that he asked Taylor to search for evidence that they could use at the penalty phase of the trial. *Id.* at 26, 54.

Moreover, Dozier obtained the notebook on representing capital murder defendants that was prepared by Bryan Stevenson and other attorneys associated with the Capital Resource Center and used that notebook in preparing his defense of Wood. *Id.* at 23. Dozier recalled that

the information in the notebook assisted him and his co-counsel in preparing for the penalty phase of Wood's trial. *Id.*

Because they were concerned about his competency to stand trial and his mental state at the time of the crime, Wood's trial counsel filed a motion for a psychological evaluation. *Id.* at 30-31. Dr. Karl Kirkland evaluated Wood and prepared an expert report summarizing his findings and conclusions based on his evaluation of Wood. *Id.* at 47. Dozier testified that they followed up on the information that was contained in Dr. Kirkland's report. *Id.*

Mr. Frank Ralph testified that he has been a member of the Alabama State Bar Association for over thirty years. *Id.* at 86-87. By the time of Wood's trial, Ralph had handled approximately 50 felony jury trials and hundreds of non-jury trials. *Id.* Ralph testified that Dozier was Wood's lead attorney. *Id.* at 78, 88. With regard to his own trial preparation, Ralph testified that he obtained and studied the notebook that was prepared by the Capital Resource Center. *Id.* at 88. Ralph also actively participated in the investigation and preparation of Wood's penalty phase defense. *Id.* at 99. In particular, Ralph interviewed two of Wood's sisters or one of his sisters and his father and reviewed Dr. Kirkland's report. *Id.* at 92, 102, 104.

Ms. Maeola Wood testified that she is Wood's sister. *Id.* at 149, 153. She recalled that he could be "rebellious." *Id.* at 167. For example, she testified, "He didn't want to participate in school work. If they was having agriculture or something and they tell him he going to have to do something, he'll wear his best clothes and be rebellious when he get there." *Id.*

Ms. Janet Penn testified that she was one of Wood's special education teachers. (Vol. 17, Court reporter's transcript (9/18/00), pp. 210-211.) She recalled that he was an "average" student. *Id.* at 212. When asked how he interacted with other students, she testified, "[H]e got along with some and didn't with others, pretty much like the other kids did." *Id.* at 214.

Mr. Kenneth Trotter was appointed to assist Dozier and Ralph in defending Wood. (Vol. 17, Court reporter's transcript (8/22/01), pp. 6, 14.) Trotter testified that Dozier was Wood's "principal attorney," and he further testified that Dozier was responsible for overseeing all phases of Wood's trial. *Id.* at 12-13. Trotter recalled that Dozier was the "ultimate decision maker" with regard to the defense team's strategies for defending Wood at each phase of the trial. *Id.* at 17, 20, 30.

Dozier asked Trotter to assist him and Ralph in preparing for the penalty phase of Wood's trial. *Id.* at 12. To that end, Trotter interviewed Wood and his family members, among other things. *Id.* at 16-17, 36. Trotter testified as follows regarding that aspect of his mitigation investigation:

> I talked to a lot of Holly's family. I can't recall the ones that I spoke with. But we actually met here at the courthouse. And I spoke to a lot of family members, and I don't recall again specifically which ones of the family I spoke with. But based on that is how I identified the witnesses that we used at the penalty phase.
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> *****
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> I can't recall when we would have been at the courthouse. I know that there were a number of occasions that Holly would be brought to the courthouse and his family would be here. And on some of those occasions at some point in time, I interviewed the family. We all met in one of the rooms here at the courthouse.

*Id.* at 36-37.

When he was asked about the substance of his conversations with Wood's family members, Trotter explained that he spoke with them because he was:

> Just trying to get information about Holly's upbringing, background, his childhood, what it had been like growing up in Holly's home, characteristics about Holly, anything that we could use to humanize Holly to make him seem more real to the jury; something that would make him seem more like a human being, somebody that would be worth saving even if that would mean he would spend his life in prison, something that would humanize him to the jury so that

they would have a reason to give him life in prison as opposed to the death penalty.

*Id.* at 37.

Mr. Pete Taylor testified that he was employed as an Alabama Bureau of Investigation agent for 22 years and handled numerous capital cases in that capacity. *Id.* at 94. Taylor searched for evidence that could be presented on behalf of Wood at the penalty phase of the trial. *Id.* at 95. Among other things, Taylor interviewed Wood, Wood's father, and several of Wood's sisters, including Johnnie Pearl Wood and Susan Wood Caldwell. *Id.* at 89-91.

Ms. Johnnie Pearl Wood is Wood's oldest sister. *Id.* at 107. She testified that their mother never abused her or her siblings. *Id.* at 111, 129-130. She and her siblings lived with Nellzena, their half-sister, after their mother died. *Id.* at 115. Nellzena punished Wood when he misbehaved by making him "clean the back yard and ... do work outside." *Id.*

### 3. Facts from the Rule 32 Evidentiary Hearing on Remand

On August 4, 2003, the Rule 32 circuit court held an evidentiary hearing on Wood's claim that his alleged mental retardation renders him ineligible for the death penalty and his claim that his counsel were ineffective for failing to develop and present evidence of his alleged mental retardation at the penalty phase of his trial.

Ms. Hilda Maddox testified that she was one of Wood's special education teachers at Luverne High School. (Vol. 28, Court reporter's transcript (8/4/03), pp. 33-34.) She testified that Wood attended class regularly and was "very clean" and "very neat." *Id.* at 44. She recalled that he typically completed his assignments and earned average grades. *Id.* at 36, 43-44.

Ms. Janet Penn also taught Wood at Luverne High School. *Id.* at 51. She testified that Wood was fully capable of following her instructions, that his behavior was appropriate, and that he fit in with the other students in her class. *Id.* at 59-60.

Mr. Melvin Wright testified that he is currently employed as the casting supervisor at the Sanders Lead Company in Troy. *Id.* at 62. He testified that he hired Wood to work at that company in the early-1980's, and he recalled that Wood worked there for a year and a half or two years. *Id.* at 62-63, 65. He testified that Wood was trained to pan, draw, and stack lead and to operate the machinery and equipment, including a forklift. *Id.* at 63, 70. He described their work environment as "hazardous," and he explained that Wood could have had his "arm broken or cut off or anything" if he was not alert and paying attention to his work. *Id.* at 69. He testified that Wood was dependable and hard-working, and he characterized Wood as an "employee who did his job, came to work on time when he was scheduled to come, and got along with everyone." *Id.* at 64-65.

Dr. Karen Salekin, a clinical psychologist, testified that she was retained by Wood's counsel to determine whether he is mentally retarded. *Id.* at 78-80. To assess Wood's adaptive functioning, Dr. Salekin administered the American Association on Mental Retardation Adaptive Functioning Scales ("AAMR test") to Johnnie Pearl Wood. *Id.* at 97. On cross-examination, she agreed that the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, (DSM-IV) states that examiners should obtain information from multiple reliable sources in assessing a subject's adaptive functioning. *Id.* at 119. She testified, however, that Johnnie Pearl Wood was "the only reliable independent source" that she could find to ask about Wood's adaptive functioning. *Id.* Dr. Salekin also conceded that she "only had minimal information" about Wood's employment history. *Id.* at 113. Her overall conclusion was that Wood is mildly mentally retarded. *Id.* at 104

Ms. Barbara Siler testified that she dated Wood for approximately three years. *Id.* at 139. During that time period, she lived with her mother in Troy, and Wood lived in Luverne. *Id.* at

140. Wood drove to Troy to visit her on weekends and sometimes during the week. *Id.* She recalled three of his automobiles and testified that he "kept his cars detailed" and was very proud of them. *Id.* at 142. She testified that Wood's appearance always was nice and that he cared very much about his hair and how he dressed. *Id.* at 141. Wood was working as a delivery truck driver for Coca Cola when she met him, and she recalled that he also worked for a funeral home company and for the Sanders Lead Company. *Id.* at 141-142. During their relationship, Wood always had money, and he was the one who would go into the lobby to obtain a room for them when they stayed at motels. *Id.* at 142-144. Siler testified that she was able to read and understand his letters to her, which were written in cursive handwriting. *Id.* at 149.

After dating Wood for about a year and a half, Siler decided to end their relationship because he was abusive and had a bad temper. *Id.* at 144-146. When Wood learned that she intended to end their relationship, he drove to her mother's house to confront her. *Id.* at 147. Wood sent a friend to the door of her mother's house to tell her to come outside because he knew that her mother would not allow him to enter the house. *Id.* at 147-148. Siler answered the door and told his friend that she would not come outside. *Id.* at 148. Later that evening, Siler was sitting on a couch in her mother's home when she noticed that Wood was standing at a window, pointing a gun at her. *Id.* As she jumped up, Wood shot her. *Id.* at 148-149.

Dr. Harry McClaren, a clinical and forensic psychologist, testified that he was retained by the State to determine whether Wood is mentally retarded. *Id.* at 156. Unlike Dr. Salekin, Dr. McClaren and his associate, Dr. Gregory Prichard, assessed Wood's adaptive functioning by interviewing a large number of people who know or knew him, including his sisters, former school teachers, former work supervisor, corrections officers, and a friend of the family. *Id.* at 170-171, 177. In addition, they administered an adaptive functioning test – either the Scales of

Independent Behavior, Revised Edition, ("SIB-R test") or the Vineland Adaptive Behavior Scales ("Vineland test") – to most of those individuals. *Id.* at 167, 187. When he was asked why he and Dr. Prichard interviewed so many people and administered so many adaptive functioning tests, Dr. McClaren stated that, "it's better to interview as many people as you can that know the person well because different people will see different parts of a person's behavior." *Id.* at 171.

Based on his interview of Wood and the various individuals who know Wood, his review of the results of the tests that he and Dr. Prichard administered, and his review of various records, Dr. McClaren concluded that Wood does not have significant deficits in adaptive functioning and that Wood "functions at a higher level than a mentally retarded person." *Id.* at 184-186. Accordingly, Dr. McClaren testified that Wood is not mentally retarded. *Id.*

Dr. Prichard, a clinical and forensic psychologist, testified that there are three accepted instruments for assessing adaptive functioning – the Vineland test, the SIB-R test, and the AAMR test. (Vol. 29, Court reporter's transcript (8/4/03), p. 216.) Those tests are administered to individuals who know the subject well enough to provide an estimate of his or her adaptive functioning. Dr. Prichard explained that the mean score on the those tests is 100 and that a score of 70 or below indicates that the subject might be mentally retarded. *Id.* at 226.

Dr. Prichard testified that they administered the Vineland test to Hilda Maddox, Janet Penn, Barbara Siler, Maeola Wood, and Johnnie Pearl Wood. *Id.* at 223. Maddox's responses generated a score of 68 on the Vineland test, and Penn's responses generated a score of 77. (Vol. 29, Clerk's record, pp. 17, 33.) Siler's responses generated a score of 68. (Vol. 29, Court reporter's transcript (8/4/03), p. 227.) Dr. Prichard testified that Siler likely underestimated Wood's communication and socialization skills because of the abuse that she suffered at his hands. *Id.* at 228.

Drs. McClaren and Prichard also administered the SIB-R to three Alabama corrections officers – Officers Ryans, Cargill, and Witherspoon. (Vol. 28, Court reporter's transcript (8/4/03), p. 177.) Ryans's responses generated a score in the 90's. *Id.* at 178. Cargill's responses generated a score of 103, and Witherspoon's responses generated a score of 117. (Vol. 29, Court reporter's transcript, p. 229.) Dr. Prichard testified that it was important to obtain scores from those officers because they know and interact with Wood at the present time and can, therefore, speak to his present adaptive functioning, unlike Hilda Maddox and Janet Penn who have not interacted with him in decades. *Id.* at 230.

Johnnie Pearl Wood's responses generated a score of 41 on the Vineland test, and Maeola Wood's responses generated a score of 55 on that test. *Id.* at 224, 226. Dr. Prichard testified that a score of 41 would mean that Wood requires "constant to frequent supervision" and is functioning at the level of a five or six year old. *Id.* at 224. He also explained that a score of 55 would mean that Wood needs "a lot of supervision to just do the normal things, normal simple things." *Id.* at 226. When he was asked whether their assessment of his adaptive functioning is consistent with his observations of Wood and the other information that he learned about Wood, Dr. Prichard testified as follows:

> It's absolutely not consistent with operating a front-end loader, with driving your own car and maintaining your own cars, with taking trips to Florida, with catching a bus going to Florida, with managing your own money, with taking absolutely wonderful care of his clothes according to everybody, his hair, his fingernails, maintaining a relationship with a woman for three and a half years where he had to travel from Luverne to Troy, purchasing motel rooms, to do that, earning a living and doing pretty darn well, I would say that all of those things you have to pay attention to. And is that kind of history consistent with mental retardation? Certainly not in my experience.

*Id.* at 233. He further testified that, "as I progressed into my assessment, it became extremely apparent that [their scores] were not consistent with his functioning in the community." *Id.*

Dr. Prichard found that Wood's adaptive functioning skills are sufficient for independent functioning, testifying that Wood "functioned independently by and large from the age of sixteen or seventeen on; personal and social sufficiency, independent functioning in virtually every area of his life, [with] nobody holding his hand to do things." *Id.* at 233-234. Dr. Prichard concluded that Wood's adaptive functioning skills "are probably on the borderline – high borderline range, potentially in some areas even average." *Id.* at 234. For that reason, Dr. Prichard agreed with Dr. McClaren that Wood is not mentally retarded. *Id.* at 233-234.

## REASONS FOR DENYING THE PETITION

It is worth noting at the outset that Wood does not allege – let alone prove – any traditional ground for certiorari. Wood does not, for instance, argue that the Eleventh Circuit's decision below conflicts with the decisions of other courts of appeal, *see*, Sup. Ct. R. 10(a), or that this case presents a novel and important question of federal law, *see*, Sup. Ct. R. 10(c). At bottom, Wood requests that this Court engage in a fact-bound review of his particular case. This Court should deny his petition for writ of certiorari.

### I. This Court Should Decline To Review Wood's Splitless And Meritless Claim That His Counsel's Failure To Investigate And Present Evidence Of His Low Intelligence At The Penalty Phase Of His Trial Constitutes Ineffective Assistance.

Wood contends that his trial counsel were ineffective for failing to adequately investigate and present evidence of his low intelligence at the penalty phase of his trial. Wood further alleges that he was prejudiced by his counsel's failure to present such evidence to the jury. Certiorari should be denied as to this claim for at least two reasons.

#### A. Certiorari Should Be Denied Because The Underlying Issue Is Not Worthy Of This Court's Review.

Wood's claim is simply a request for this Court to review the fact-bound determination of the Eleventh Circuit. Wood does not assert that there is a split in the circuits regarding his

ineffective assistance of counsel claim or that this case presents a novel and important question of federal law. Instead, Wood is asking this Court for nothing more that a review of the factual determination of the Eleventh Circuit. As Supreme Court Rule 10 states, "[a] petition for a writ of certiorari [will] rarely [be] granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Because Wood has failed to articulate a "compelling reason" under Rule 10 for this Court to grant certiorari to review this claim, this Court should deny the writ.

**B. Certiorari Should Be Denied Because The Claim Is Without Merit.**

Wood's claim that his counsel were ineffective for failing to adequately investigate and present evidence of his low intelligence at the penalty phase of his trial was raised in the state post-conviction proceedings and was rejected by both the Rule 32 circuit court and the Alabama Court of Criminal Appeals. (Vol. 41, Clerk's record, pp. 2425-2446.) See Resp. App. at 36- 57.[2] *Wood*, 891 So. 2d at 411-413. Here, there is no dispute that the state courts, in reaching that decision, applied the proper rule of law – *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) – to the facts of his claim and that the Eleventh Circuit applied the correct rule of law – the Anti-Terrorism and Effective Death Penalty Act (AEDPA) – in reviewing the state courts' decision.

To obtain relief on his claim, Wood must show that the Rule 32 circuit court's decision, which was adopted by the Alabama Court of Criminal Appeals, is contrary to or involves an unreasonable application of federal law as determined by this Court or that the decision is based

[2] Because Wood deleted eight pages of the Rule 32 circuit court's 2003 opinion before he filed that opinion with this Court as Petitioner's Appendix E, Respondents will refer to their appendix, which contains the Rule 32 circuit court's 2003 opinion in its entirety, in addressing that opinion. When citing to the Rule 32 circuit court's 2003 opinion, Respondents will refer to the page numbers that are located on the bottom right-hand side of the opinion.

on an unreasonable determination of the facts that were presented during the state court proceedings. 28 U.S.C. § 2254(d)(1) and (2). In determining that Wood failed to satisfy his burden of proving ineffective assistance of counsel, the Rule 32 circuit court made findings of fact, which are presumed correct unless they are rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The state court's credibility determinations constitute factual findings that are presumed correct. *Bottoson v. Moore*, 234 F.3d 526, 534 (11th Cir. 2000). As the Eleventh Circuit correctly found, Wood has failed to satisfy his burden of proof. *Wood*, 542 F.3d at 1302-1314. See Pet. App. A at 14a-72a.

### 1. The Eleventh Circuit's Application Of The Performance Prong Was Straightforward And Does Not Conflict With Any Decision Of This Court.

Wood contends that his counsel's performance was deficient because they failed to present the evidence that was in their possession regarding his low intelligence at the penalty phase of his trial and because they failed to further investigate his low intelligence. Pet. at 18-25. Wood is mistaken. This Court should decline to review this claim because the Eleventh Circuit correctly held that Wood failed to satisfy his burden of proving that the state courts' decision finding that his counsel were not deficient in those regards was contrary to or involved an unreasonable application of federal law or was based on an unreasonable determination of the facts that were presented during the state court proceedings.

On September 24, 2003, the Rule 32 circuit court denied relief on this claim. (Vol. 41, Clerk's record, pp. 2425-2446.) See Resp. App. at 36-57. In holding that Wood's counsel were not deficient for failing to present evidence regarding his low intelligence or for failing to further investigate his intelligence, the court found as follows:

> On this record, this Court finds that Wood has failed to establish deficient performance with respect to this claim. His counsel thoroughly reviewed Dr.

> Kirkland's report and determined that nothing in that report merited further investigation. Based on their investigation and the detailed information that they had in their possession, Wood's counsel made a reasonable judgment that another mental evaluation was not necessary. Because "[e]very counsel is faced with a zero-sum calculation on time, resources, and defenses to pursue at trial," this Court recognizes that "counsel does not enjoy the benefit of unlimited time and resources." *Chandler*, 218 F.3d at 1314 n.14.[3] This Court finds that reasonable counsel could have decided against seeking another mental health evaluation, in order to prepare other, more promising, defenses for trial.
>
> Moreover, it appears that Wood's trial counsel decided that calling Dr. Kirkland to testify was not in Wood's best interest. Wood did not, however, ask Mr. Dozier, Mr. Ralph, or Mr. Trotter about this matter. The record is, therefore, silent as to why they did not call Dr. Kirkland as a witness. A silent record creates a presumption that trial counsel exercised sound professional judgment. *Chandler*, 218 F.3d at 1314 n.15. In addition, Wood had the burden of proving that the failure to call Dr. Kirkland was unreasonable. Ala. R. Crim. P. 32.3. Despite this burden, Wood did not call Dr. Kirkland as a witness at any of his Rule 32 evidentiary hearings or present any other testimony concerning this matter.
>
> *****
>
> Because their decision was based on a thorough review of Dr. Kirkland's report, the failure of Wood's counsel to "create" a mental retardation issue at his capital murder trial is understandable and reasonable. Moreover, as noted in this Court's original Final Order, Mr. Dozier and Mr. Ralph were very experienced attorneys, and their decision not to raise a mental retardation issue at Wood's trial is, therefore, due great deference. For all of these reasons, Wood cannot establish deficient performance with respect to this claim.

*Id.* at 2440-2442. See Resp. App. at 51-53. As the Eleventh Circuit correctly found, the state courts' findings of fact were "amply" supported by the evidence. *Wood*, 542 F.3d at 1302-1309. See Pet. App. A at 46a-61a. The state courts' adjudication of this claim was, therefore, in no way an unreasonable application of federal law under *Strickland* or an unreasonable determination of the facts that were presented in state court.

Wood's trial counsel – Cary Dozier, Frank Ralph, and Kenneth Trotter – conducted a reasonable penalty phase investigation and obtained a wealth of evidence that they presented on

[3] *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000) (*en banc*).

his behalf at the penalty phase of his trial. Although they did not present any evidence regarding his low intelligence, Wood's counsel were well aware that his intelligence is impaired, and they made a reasonable strategic decision not to present that evidence. In particular, his counsel moved the trial court to order a psychological evaluation of Wood, and the court granted their request. (Vol. 7, Clerk's record, pp. 216-218, 234-238.) Dr. Kirkland, a psychologist, evaluated Wood and prepared a thorough expert report summarizing his findings. *Id.* at 240-246. In his report, Dr. Kirkland concluded, among other things, that Wood "is functioning, at most, in the borderline range of intellectual functioning." *Id.* at 243.

Moreover, Wood's counsel consulted with Dr. Kirkland on multiple occasions about his findings. Dozier testified that they had "a lot of correspondence" with Dr. Kirkland, and he further testified that he and his co-counsel reviewed Dr. Kirkland's report and followed up on the information contained in that report. (Vol. 16, Court reporter's transcript (9/18/00), pp. 16, 31.) Dr. Kirkland's report confirms that he spoke with Dozier about his evaluation of Wood. (Vol. 7, Clerk's record, p. 241.) Ralph also testified that he spent time reviewing Dr. Kirkland's report. (Vol. 16, Court reporter's transcript (9/18/00), pp. 115-116.) Likewise, Trotter testified that he reviewed Dr. Kirkland's report, and he recalled that he and Dr. Kirkland talked about the report on May 10, 1994. (Vol. 17, Court reporter's transcript (8/22/01), pp. 18-20.) Thus, Wood's counsel investigated and obtained evidence about his intellectual functioning, and as a result of their investigation, they were well aware of Dr. Kirkland's finding regarding his low intelligence.

Wood misrepresents his counsel's testimony at the hearing on his Rule 32 petition and disregards the evidence in the record that supports the state courts' finding that they conducted a thorough penalty phase investigation. In light of Wood's misrepresentations, Respondents will highlight the actions that his counsel took in conducting their penalty phase investigation.

Wood alleges that Dozier and Ralph did not participate in "any investigation for the penalty phase" and, instead, left Trotter to investigate and prepare for the penalty phase of Wood's trial "on his own." Pet. at 3-4. Nothing could be further from the truth. When he was asked whether he and Ralph participated in investigating and preparing for the penalty phase of the trial, Dozier responded, "Of course, we participated." (Vol. 16, Court reporter's transcript (9/18/00), p. 15.) When he was asked whether Trotter handled the penalty phase, Dozier responded, "Some of it. Not all of it." *Id.* Dozier testified that each of the attorneys participated in the investigation, preparation, and presentation of Wood's penalty phase defense, and he denied that Trotter was placed "in charge" of the penalty phase. *Id.* at 16, 53. With regard to his own preparation for the penalty phase, Dozier testified that he obtained information from Wood, interviewed several witnesses, including Wood's father, and asked Pete Taylor to search for evidence that they could use at the penalty phase of the trial. *Id.* at 16, 54-56. Dozier also reviewed Dr. Kirkland's report and consulted with him about his findings. *Id.* at 31, 54.

Ralph participated in the investigation and preparation of the penalty phase as well. *Id.* at 99. In fact, when he was asked whether it is fair to say that he "had no involvement in the preparation for or investigation of the penalty phase," Ralph responded, "Well, I don't think that's entirely correct." *Id.* With regard to his own preparation for the penalty phase of Wood's trial, Ralph recalled that he interviewed two of Wood's sisters or one of his sisters and his father. *Id.* at 100. In addition, Ralph studied Dr. Kirkland's report and reviewed the reports that were prepared by their investigator, Pete Taylor. *Id.* at 92, 104.

Wood also disparages Trotter's investigation and preparation for the penalty phase of the trial by falsely alleging that his "investigation consisted of little more than interviews with [his] family at the courthouse the day before the sentencing hearing[.]" Pet. at 24. On June 28, 1994,

Trotter called Susan Wood, one of Wood's sisters, and spoke with her for about thirty minutes. (Vol. 17, Court reporter's transcript (8/22/01), p. 21; Clerk's record, p. 9.) Even assuming that his call to Susan Wood was the first time that he contacted one of Wood's family members, Trotter's first contact with Wood's family occurred over three months before his trial, not during the recess between the guilt and penalty phases of his trial.

Trotter went to great lengths to obtain mitigation evidence and prepare for the penalty phase of Wood's trial. Trotter obtained useful information from Wood and their investigator, Pete Taylor. (Vol. 17, Court reporter's transcript (8/22/01), pp. 16-17.) In addition, Trotter interviewed potential penalty phase witnesses, including members of Wood's family. *Id.* at 36. With regard to that aspect of his mitigation investigation, Trotter testified as follows: "I know that there were a number of occasions that Holly would be brought to the courthouse and his family would be here. And on some of those occasions ... I interviewed the family." *Id.* at 36-37. Trotter specifically asked Wood's family members about "Holly's upbringing, background, his childhood, what it had been like growing up in Holly's home, characteristics about Holly, anything that we could use to humanize Holly to make him seem more real to the jury." *Id.* at 37. Trotter asked them for information about his family's "living conditions and circumstances," and he questioned them about the death of Wood's brother, Samuel. *Id.* at 38.

He also spoke with officials at Luverne High School in an effort "to get information about what kind of student Holly had been, anything that might be helpful to the defense." (Vol. 17, Court reporter's transcript (8/22/01), p. 23.) Trotter asked them to provide him with Wood's academic records, and when they failed to respond to his request, Trotter went so far as to issue a subpoena for the records. *Id.* Trotter never received the records, however, because the school was unable to comply with his subpoena. *Id.* Likewise, Wood's Rule 32 counsel attempted

to obtain Wood's academic records from Luverne High School but were informed by school officials that his records has been lost or destroyed. *Wood*, 542 F.3d at 1293, n.14. See Pet. App. A at 25a ("No academic or other records from Wood's high school days were even produced at the Rule 32 hearings.").

Wood's Rule 32 counsel called all three of his trial counsel at the first Rule 32 evidentiary hearing but inexplicably failed to ask them why they decided not to present evidence of his low intelligence at his trial. Likewise, his counsel were not asked why they decided not to call Dr. Kirkland as a witness or introduce his report into evidence at the penalty phase of his trial. For that reason, the record is silent as to their reasons for choosing not to present that evidence. There is a strong presumption that counsel's performance was within the "wide range of reasonable professional assistance." *Grayson v. Thompson*, 257 F.3d 1194, 1216 (11th Cir. 2001). "An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [because] 'where the record is incomplete or unclear about [counsel's] actions, [the court] will presume that he did what he should have done, and that he exercised reasonable professional judgment.'" *Chandler*, 218 F.3d at 1315, n.15. Because the record is silent as to his trial counsel's reasons for deciding against presenting evidence of his low intelligence, the state courts' were correct in presuming that they acted reasonably in making that decision.

Although Wood's trial counsel were not asked about and did not testify as to their reasons for not presenting evidence about his low intelligence at the penalty phase of his trial, a fair reading of the record suggests that such evidence would have been inconsistent with and would have undermined the testimony of three of the witnesses whom they called at that phase of his trial. The record reflects that Wood's counsel's primary penalty phase strategy was to humanize him by emphasizing his important role in his family and by showing the jury that his

family members would be devastated if he was sentenced to death. To that end, they called Wood's father and two of his sisters, each of whom expressed their love for Wood and testified as to his important role in their family. (Vol. 6, Court reporter's transcript, pp. 1001-1046.)

Johnnie Pearl Wood, in particular, testified at length about the death of their mother, their life with various caretakers, and the problems that she and her siblings faced after the death of their mother, including constant poverty and the tragic death of their brother, Samuel. *Id.* at 1003-1015. She further testified about Wood's role in their family, explaining to the jury that he did everything that he could to take care of her and their siblings, including dropping out of school so that he could take a job to earn money to support the family and buying a car, pursuant to an installment purchase agreement, so that he could provide their family with a means of transportation. *Id.* at 1009-1010, 1014-1015. She testified that Wood was the "leader" in their home, and she went so far as to testify that, "if it hadn't been for him ... providing for us, I don't know where we would have been at." *Id.* In short, the picture that emerged from Johnnie Pearl's testimony was that their family was very poor and faced one tragedy after another – their mother and brother dying, constantly being moved from one home to another, and their father's inability to assist them financially because he had another family to support – but they survived as a family and persevered because of Wood's leadership. *Id.*

Although their primary penalty phase strategy was to humanize Wood by presenting evidence to show the jurors how important he is to his family and by focusing their attention on the impact that a death sentence would have on his family, his counsel also decided to present evidence showing that he was using alcohol on the day of the crime. To that end, his counsel called Ms. Diane Boutwell, an employee of the Alabama Board of Pardons and Paroles, as their fourth witness at the penalty phase of the trial. *Id.* at 1037-1046. She testified that the Alabama

Uniform Arrest Report that was prepared after Wood's arrest for the murder of Ruby Gosha reflects that his condition at the time of arrest was noted as "drinking," indicating that he was perceived by the arresting officers to have been drinking alcohol before his arrest. *Id.* at 1043. At the request of Wood's counsel, the report was admitted into evidence. *Id.* at 1040.

Despite Wood's contentions to the contrary, the compelling testimony of his family members would have been severely undermined if his trial counsel had then presented evidence of his low intelligence. As the Eleventh Circuit correctly found, such evidence, at a minimum, would have caused the jurors to question the veracity of Johnnie Pearl Wood's testimony that Wood was the leader in their home who did everything that he could to take care of her and their siblings, including dropping out of school at the young age of fifteen so that he could take a job to earn money to support the family and buying a car, pursuant to an installment purchase plan, so that he could provide the family with a means of transportation. *Wood*, 542 F.3d at 1306. See Pet. App. A at 53a ("Additionally, presenting evidence of Wood's mental deficiencies, special education classes, and third-grade reading level might have suggested Wood left school for those reasons and not only because he had to work and support his five sisters financially."). His counsel's decision not to present that evidence was, therefore, reasonable and strategic.

The record further reflects that Wood's trial counsel made a reasonable and strategic decision not to call Dr. Kirkland as a witness or introduce his report into evidence. Presumably, they made that decision, at least in part, because Dr. Kirkland twice stated in his report that Wood denied using alcohol on the day of the crime, noting that he "denies using any alcohol or drugs on the day of the offense" and that he "was quite willing to discuss the lack of drugs or alcohol on the day of the offense." (Vol. 7, Clerk's record, pp. 242, 245.) Because Wood told Dr. Kirkland that he did not consume alcohol on the day of the crime, his counsel would have

fatally undermined their argument that the jury should consider the evidence of his alcohol use on the day of the crime if they had introduced Dr. Kirkland's report into evidence. Likewise, if they had called Dr. Kirkland as a witness, there can be no doubt that the prosecutor would have asked him on cross-examination whether Wood denied using alcohol on the day of the crime. Thus, Wood's counsel made a reasonable and strategic decision not to call Dr. Kirkland as a witness or introduce his report into evidence at the penalty phase of his trial to prevent the prosecution from eliciting Wood's harmful statement to Dr. Kirkland.

Dr. Kirkland's report contains other information that would have been harmful to Wood. In particular, Dr. Kirkland's report states that Wood was arrested seventeen times between 1981 and 1984 and lists each offense for which he was arrested. (Vol. 7, Clerk's record, p. 242.) Dr. Kirkland also devoted a paragraph in his report to Wood's 1984 assault conviction, noting that Wood shot his ex-girlfriend, Barbara Siler, "through the window of her apartment after seeing her with another man" and that he was sentenced to fifteen years in prison after being convicted of that offense. *Id.* Although Wood's counsel could have moved for the admission of portions of Dr. Kirkland's report, there can be no question that the prosecutor would have moved that the entire report be admitted into evidence. Plainly, as the Eleventh Circuit found, Wood's counsel made the reasonable and strategic decision not to call Dr. Kirkland as a witness or introduce his report, or portions thereof, into evidence at the penalty phase of his trial to prevent the prosecutor from eliciting information that would have been harmful to him. *Wood,* 542 F.3d at 1305-1306. See Pet. App. A at 52a-53a.

As the Eleventh Circuit correctly held, Wood has failed to satisfy his burden of proving that the state courts' decision that his counsel were not deficient for failing to introduce evidence of his low intelligence or for failing to obtain additional information to confirm what they

already knew well – that Wood's intellectual functioning is impaired – is contrary to or involves an unreasonable application of federal law as determined by this Court or that the decision is based on an unreasonable determination of the facts that were presented during the state court proceedings. *Wood*, 542 F.3d at 1302-1309. See Pet. App. A at 46a-61a. This Court should, therefore, deny the writ.

### 2. The Eleventh Circuit's Application Of The Prejudice Prong Was Straightforward And Does Not Conflict With Any Decision Of This Court.

Wood contends that he was prejudiced by his counsel's failure to present evidence of his low intelligence at the penalty phase of his trial. Pet. at 25-27. He is mistaken.

In particular, Wood alleges that he was prejudiced by his counsel's failure to present evidence of his low intelligence because he contends that such evidence is inherently mitigating. Wood fails to recognize, however, that his counsel would have enabled the prosecution to present harmful rebuttal evidence "that would have tipped the scales even more toward a death sentence" if they had presented evidence of his low intelligence. *Wood*, 542 F.3d at 1311. See Pet. App. A at 64a. If his counsel had called Dr. Kirkland or attempted to admit portions of his report into evidence, they would have opened the door for the prosecution to elicit harmful evidence, including Wood's statement to Dr. Kirkland that he did not consume alcohol on the day of the crime, information about his extensive arrest record and 1984 assault conviction for shooting Siler, and evidence reflecting that he "was highly functional, had full appreciation for the criminality of his conduct, and was indeed morally culpable." *Wood*, 542 F.3d at 1312. See Pet. App. A at 66a. Because his counsel would have opened the door for the presentation of harmful evidence if they had presented evidence of his low intelligence, Wood cannot satisfy his

burden of proving that the state courts' decision was an unreasonable application of federal law under *Strickland* or an unreasonable determination of the facts.

Moreover, in sentencing Wood to death, the trial court found the existence of three aggravating circumstances: (1) the capital offense was committed by a person under sentence of imprisonment; (2) the defendant was previously convicted of a felony involving the use of violence to the person; and, (3) the capital offense was committed while the defendant was engaged in the commission of or an attempt to commit or flight after committing burglary in the first degree. (Vol. 12, Clerk's record, pp. 1008-1009.) The court held that the three aggravating circumstances "far outweigh" the mitigating circumstances and concluded that the "aggravating circumstances outweigh the mitigating circumstances in all regards and that they are sufficient in both quantity and quality to more than uphold the jury's verdict recommending death in this case." *Id.* at 1010.

In light of the brutal nature of his crime and the specific findings of the court that sentenced him to death, the state courts' finding that there is no reasonable probability that the presentation of evidence regarding Wood's low intelligence, including the evidence that was presented during his Rule 32 proceeding, would have altered the balance of the aggravating and mitigating circumstances that led to the imposition of the death penalty was in no way an unreasonable application of federal law under *Strickland* or an unreasonable determination of the facts that were presented in state court. Evidence of Wood's low intelligence would not have altered, diminished, or undermined the three aggravating circumstances. Likewise, such evidence would not have refuted or called into question the facts surrounding the crime. Again, Wood brutally murdered Ruby Gosha while she was asleep in her bed in her mother's house and then callously bragged about the crime to his cousin, Calvin Salter, telling him that, "I shot that

bitch in the head and blowed [sic] her brains out and all she did was wiggle." (Vol. 3, Court reporter's transcript, p. 495.) This Court should, therefore, deny the writ.

## II. This Court Should Decline To Review Wood's Claim That The Eleventh Circuit Misapplied 28 U.S.C. § 2254(d)(2) And 28 U.S.C. § 2254(e)(1) In Denying Relief On His Claim Of Ineffective Assistance Of Counsel ("IAC") Because That Claim Was Not Raised Below, Is Unworthy Of Certiorari Review, And Is Meritless.

Wood contends that this Court should grant certiorari to resolve an alleged circuit split regarding the interplay between 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254(e)(1), and he further asserts that the Eleventh Circuit misapplied those statutes in denying relief on his IAC claim. Certiorari should be denied as to this claim for at least three reasons.

### A. Certiorari Should Be Denied Because This Claim Was Not Raised In Or Addressed By The Lower Court.

Wood did not argue in his rehearing brief to the Eleventh Circuit that its opinion was erroneous because the court somehow misapplied 28 U.S.C. §§ 2254(d)(2) and 2254(e)(1) in resolving his IAC claim. In fact, Wood did not once cite either of those statutes in his rehearing brief. This Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See, e.g., Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646, 112 S. Ct. 1644, 1649 (1992). This case presents no reason to deviate from that rule. For that reason alone, the writ should be denied as to this claim.

### B. Certiorari Should Be Denied Because The Underlying Issue Is Not Worthy Of This Court's Review.

Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. *See Faye v. Noia*, 372 U.S. 391, 436, 83 S. Ct. 822, 847 (1963); Rule 10, Rules of the Supreme Court of the United States. In addition, the demands on this Court's time mandate that it select for review only those truly important cases that will have a wide ranging impact. Wood has not alleged compelling grounds for this Court to

grant certiorari review of this claim. Moreover, the instant claim involves a simple application of established precedent to the facts of this case. For that reason, a decision in this case would be of such narrow scope and limited precedential value that it is not worthy of certiorari consideration. This Court should, therefore, deny the writ as to this claim.

### C. Certiorari Should Be Denied Because The Claim Is Without Merit.

Although his claim is cryptic in nature, Wood appears to be arguing that the Eleventh Circuit somehow misapplied 28 U.S.C. §§ 2254(d)(2) and 2254(e)(1) in resolving his IAC claim. Because the Eleventh Circuit properly applied the provisions of the AEDPA in analyzing his IAC claim, Wood's claim is without merit.

In *Miller-El v. Cockrell*, 537 U.S. 322, 341, 123 S. Ct. 1029, 1042 (2003), this Court held that the "AEDPA does not require [a] petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence." Instead, this Court explained that "[t]he clear and convincing evidence standard is found in § 2254(e)(1), but that sub-section pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable requirement and applies to the granting of habeas relief[.]" *Id.* at 341-342, 123 S. Ct. at 1042. This Court added that, "to the extent that the merits of this case will turn on the agreement or disagreement with a state-court factual finding, the clear and convincing evidence and objective unreasonableness standards will apply." *Id. See also Miller-El v. Dretke*, 545 U.S. 231, 240, 125 S. Ct. 2317, 2325 (2005) (" Miller-El may obtain relief only by showing the Texas conclusion to be "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Thus we presume the Texas court's factual findings to be sound unless Miller-El rebuts the "presumption of correctness by clear and convincing evidence."). Thus, habeas petitioners are not required to prove that a state court's

*decision* is objectively unreasonable by clear and convincing evidence, but they do bear the burden of rebutting state court *findings of fact* by clear and convincing evidence.

In an apparent attempt to create a controversy, Wood suggests that the Eleventh Circuit erred in noting that he failed to present "evidence, much less clear and convincing evidence, that counsel did not make such decisions about Dr. Kirkland's report and a mental health defense" in holding that *the state courts' decision* that his counsel were not deficient for deciding against presenting evidence of his low intelligence – either through Dr. Kirkland, his report, or other evidence – was not based on an unreasonable determination of the facts that were presented in state court. *Wood*, 542 F.3d at 1281, n.23. See Pet. App. A at 50a. Wood, however, fails to recognize that the Eleventh Circuit, in that footnote, did not cite 28 U.S.C. § 2254(e)(1) or hold that he was required to show by clear and convincing evidence that his counsel did not make a decision against presenting evidence of his low intelligence. *Id.* Instead, the court simply made the observation, which is amply supported by the record, that he failed to present any evidence to show that his counsel did not make a decision against presenting such evidence. *Id.*

Moreover, assuming, *arguendo*, that the footnote in question is interpreted as a holding by the Eleventh Circuit that Wood failed to satisfy his burden of rebutting *the state courts' finding of fact* that his counsel made a decision not to present evidence of his low intelligence, that holding would be entirely consistent with 28 U.S.C. § 2254(e)(1), which provides that state court findings of fact are presumed correct unless rebutted by clear and convincing evidence. Either way, the Eleventh Circuit correctly applied the AEDPA, as interpreted by this Court, in resolving Wood's IAC claim. This Court should, therefore, deny the writ.

## III. This Court Should Decline To Review Wood's Splitless And Meritless Claim That The Eleventh Circuit Improperly Rejected His *Atkins* Claim.

Wood contends that the Eleventh Circuit erred in concluding that he failed to satisfy his burden of proving that the state courts' decision that he is not mentally retarded is contrary to or involves an unreasonable application of federal law as determined by this Court or that the decision is based on an unreasonable determination of the facts that were presented during the state court proceedings. Certiorari should be denied as to this claim for at least two reasons.

### A. Certiorari Should Be Denied Because The Underlying Issue Is Not Worthy Of This Court's Review.

Wood's claim is simply a request for this Court to review the fact-bound determination of the Eleventh Circuit. Wood does not assert that there is a split in the circuits regarding his claim that he is mentally retarded and, therefore, ineligible for the death penalty pursuant to this Court's decision in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002), or that this case presents a novel and important question of federal law. Instead, Wood is asking this Court for nothing more that a review of the factual determination of the Eleventh Circuit. As Supreme Court Rule 10 states, "[a] petition for a writ of certiorari [will] rarely [be] granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Because Wood has failed to articulate a "compelling reason" under Rule 10 for this Court to grant certiorari to review this claim, this Court should deny the writ.

### B. Certiorari Should Be Denied Because The Claim Is Without Merit.

Wood's *Atkins* claim was raised in the state post-conviction proceedings and was rejected by both the Rule 32 circuit court and the Alabama Court of Criminal Appeals. (Vol. 41, Clerk's record, pp. 2390-2425.) See Resp. App. at 1-36. *Wood*, 891 So. 2d at 411-413. Here, there is no dispute that the state courts, in reaching that result, applied the proper rule of law – *Atkins v.*

*Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002) – to the facts of his claim and that the Eleventh Circuit applied the correct rule of law – the AEDPA – in reviewing the state courts' decision. To obtain relief on his claim, Wood must show that the state courts' decision is contrary to or involves an unreasonable application of federal law as determined by this Court or that the decision is based on an unreasonable determination of the facts that were presented during the state court proceedings. 28 U.S.C. § 2254(d)(1) and (2). As the Eleventh Circuit correctly found, that he cannot do. *Wood*, 542 F.3d at 1285-1288. See Pet. App. A at 7a-14a.

In *Atkins*, 536 U.S. at 321, 122 S. Ct. at 2252, this Court held that the execution of mentally retarded capital offenders violates the Eighth Amendment's prohibition against cruel and unusual punishment. Instead of creating a national standard that courts should apply in determining whether a capital offender is mentally retarded, this Court left to the States "the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Id.* at 317, 122 S. Ct. at 2250. This Court did, however, observe that the States that barred the execution of said offenders prior to the Court's decision in *Atkins* had enacted statues that "generally conform to the clinical definitions" of mental retardation that have been promulgated by the American Association on Mental Retardation (AAMR)[4] and the American Psychiatric Association (APA). *Id.* at 317, n.22, 122 S. Ct. at 2250, n.22.

The AAMR's most recent definition of mental retardation[5] provides as follows: "Intellectual disability is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills."

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[4] The members of the American Association on Mental Retardation re-named their organization the American Association on Intellectual and Developmental Disabilities (AAIDD) in 2007. To avoid confusion, Respondents will refer to that organization as the AAMR.

[5] The AAMR recently decreed that the term, "mental retardation," should be replaced by the term, "intellectual disability." *See http://www.aamr.org/content_104.cfm?navID=22.*

*See http://www.aamr.org/content_100.cfm?navID=21* (last visited on April 8, 2009). That definition further provides that "[t]his disability originates before the age of 18." *Id.*

In *Ex parte Perkins*, 851 So. 2d 453, 455-456 (Ala. 2002), the Supreme Court of Alabama set forth the following standard for reviewing an *Atkins* claim: "[T]o be considered mentally retarded, [a defendant] must have significantly sub-average intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e. before the defendant reached age 18)." *Id.* at 456. Thus, Alabama courts apply the broad definition of mental retardation highlighted in *Atkins* – significantly sub-average general intellectual functioning accompanied by significant deficits in adaptive functioning, both of which must have manifested before the age of eighteen – in reviewing *Atkins* claims. Here, the state courts correctly applied that definition in finding that Wood failed to satisfy his burden of proving that he is mentally retarded. *Wood*, 542 F.3d at 1286. See Pet. App. A at 7a-8a.

Wood, however, contends that the state courts erroneously "focused on what [he] could do rather than whether he had limitations in adaptive functioning" in concluding that he is not mentally retarded because he does not have significant deficits in adaptive functioning. Pet. at 30. He is mistaken. The state courts reviewed the wealth of evidence pertaining to his adaptive functioning that was presented during the state court proceedings in its totality and correctly found that the evidence demonstrates conclusively that he does not have significant deficits in adaptive functioning. In reaching that result, the state courts properly credited the testimony of two psychologists, Dr. Harry McClaren and Dr. Gregory Prichard, who concluded that Wood functions adaptively at a higher level than that of a mentally retarded person and the testimony of

his former teachers, former employer, and former girlfriend, each of whom attested to his good adaptive functioning skills. *Wood*, 542 F.3d at 1286. See Pet. App. A at 9a.

In denying relief on Wood's *Atkins* claim, the Eleventh Circuit summarized the state courts' findings of fact regarding his adaptive functioning as follows:

> The Rule 32 court found Wood: (1) was able to obtain and maintain employment and had worked at several jobs for a lengthy amount of time, such as driving a forklift, driving motor vehicles, working in a factory, and operating heavy machinery and equipment in a dangerous work environment; (2) was able to function well independently and did not need the assistance of others to complete daily tasks; (3) managed his own money and always had money; (4) did not have problems communicating or getting his needs met verbally or through written language; (5) was able to plan and cook meals for himself and others; (6) could identify and resolve typical problems that might arise in everyday life (such as checking the fuse box if the lights went out in his house); (7) was always neat and clean in his appearance; (8) often drove himself out-of-state to visit relatives and for other reasons, and in fact was an automobile enthusiast who subscribed to Hot Rod magazine; (9) could form and maintain interpersonal relationships with others and had a girlfriend, Barbara Siler, for three years; and (10) devised and implemented a scheme to lure Siler out of her house to shoot her after she ended their relationship.

*Wood*, 542 F.3d at 1286. See Pet. App. A at 8a-9a. The state courts' findings of fact were based on the testimony of the aforementioned witnesses. *Id.* at 1286-1288. See Pet. App. A at 9a-13a.

Given the wealth of evidence in the record demonstrating that Wood does not have significant deficits in adaptive functioning, the Eleventh Circuit correctly held that the state courts' decision that he is not mentally retarded is not contrary to or an unreasonable application of *Atkins* or based on an unreasonable determination of the facts that were presented during the state court proceedings. This Court should, therefore, deny the writ.

## IV. This Court Should Decline To Review Wood's Claim That The Eleventh Circuit Erred In Holding That His *Batson* Claims Are Procedurally Defaulted Because The Underlying Claims Are Unworthy Of Review And Clearly Are Without Merit.

Wood contends that the Eleventh Circuit erred in holding that the claims that he raised in his petition for writ of habeas corpus pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct.

1712 (1986), are procedurally defaulted. Pet. at 32-34. Because Wood's two underlying *Batson* claims are unworthy of review and clearly are without merit, this Court should deny the writ.

### A. Certiorari Should Be Denied Because The Underlying Issues Are Not Worthy Of This Court's Review.

Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. *See Faye*, 372 U.S. at 436, 83 S. Ct. at 847; Rule 10, Rules of the Supreme Court of the United States. In addition, the demands on this Court's time mandate that it select for review only those truly important cases that will have a wide ranging impact. Wood has not alleged compelling grounds for this Court to grant certiorari review of his underlying *Batson* claims. Moreover, those claims involve a simple application of established precedent to the facts of this case. For that reason, a decision in this case would be of such narrow scope and limited precedential value that it is not worthy of certiorari consideration. This Court should, therefore, deny the writ.

### B. Certiorari Should Be Denied As To Wood's Meritless Claim That The Prosecutor's Reason For Striking Two Black Jurors Was Pretextual Because The Prosecutor Did Not Strike Similarly Situated White Jurors.

In the district court and the Eleventh Circuit, Wood raised the claim that the prosecutor's explanation that he struck two black jurors – Christine B. Jones and Joe Green – because they were against the death penalty and did not believe in an "eye for an eye" punishment was a pretext designed to mask purposeful discrimination because the prosecutor did not strike five white jurors – David Byrd, Rosa Green, Freddie Jordan, Cary Malden, and Bobby Shackelford – whom, he alleged, also were against the death penalty and did not believe in an "eye for an eye" punishment. Because that claim is refuted by the record, this Court should deny the writ.

On her jury questionnaire form, Ms. Jones stated that she is against the death penalty. (Vol. 10, Clerk's record, p. 771.) During voir dire, Mr. Green repeatedly stated that he is against

the death penalty, and he even went so far as to state that it his belief that it is "wrong" for "people in the military who are shipped overseas" to kill people in a time of war. (Vol. 2, Court reporter's transcript, pp. 251-252.) Unlike Mr. Green and Ms. Jones, white jurors Byrd, Green, Jordan, Malden, and Shackelford each stated on their jury questionnaires and during voir dire that they are not opposed to the death penalty. (Vol. 10, Clerk's record, pp. 671, 731; Vol. 11, Clerk's record, pp. 776, 791, 871.) In fact, Wood challenged Freddie Jordan and Cary Malden for cause because of their support for the death penalty. (Vol. 2, Court reporter's transcript, pp. 264, 266.) Because Wood's assertion that jurors Byrd, Green, Jordan, Malden, and Shackelford were against the death penalty is refuted by the record, this Court should deny the writ.

### C. Certiorari Should Be Denied As To Wood's Meritless Claim That The Prosecutor's Reasons For Striking Six Black Jurors Were Pretextual Because The Prosecutor Did Not Strike A Similarly Situated White Juror.

In the district court and the Eleventh Circuit, Wood raised the claim that the prosecutor's reasons for striking six black jurors – George Bowens, Azaline Brooks, Alvin Rodgers, Stanley Scott, Stevie Scott, and Marcus Thomas – were pretextual because the prosecutor did not strike a similarly situated white juror, Frank Dennis Paul. In particular, Wood argued that juror Paul was similarly situated to those black jurors because Paul's aunt was convicted of manslaughter, he expressed a reluctance to serve, and he stated that he did not believe in an "eye for an eye" punishment. This Court should deny the writ because that claim is refuted by the record.

Wood's characterization of juror Paul is not supported by the record. Although he initially stated that he did not want to serve on the jury because he had a job assignment in North Carolina, Paul remained silent when the members of his panel were asked whether any of them would have a problem with the trial lasting a week, even though other jurors (including Alvin Rodgers) stated that they would have trouble serving on the jury if the trial lasted that long.

(Vol. 1, Court reporter's transcript, pp. 111-112; Vol. 2, Court reporter's transcript, pp. 305-306.) Moreover, Paul did not indicate on his jury questionnaire that he did not want to serve on the jury. (Vol. 11, Clerk's record, pp. 812-816.) In addition, he admitted on his jury questionnaire that his aunt was convicted of manslaughter, but he noted that her conviction was for third degree manslaughter. *Id.* at 815. Finally, Paul did not state that he does not believe in an "eye for an eye" punishment. Instead, he stated that whether he believes in that form of punishment "depends on the circumstances." (Vol. 2, Court reporter's transcript, p. 299.)

Unlike juror Paul, jurors Bowens, Brooks, Rodgers, and Thomas made it clear that they did not want to serve on the jury. Bowens told the court that he was a student and could not serve on the jury because he would miss his classes. *Id.* at 208. Similarly, Thomas told the court that he was a student and could not serve on the jury because he would miss tests that were scheduled for the week of the trial. *Id.* at 348-349. Rodgers told the court that he did not want to serve on the jury, stating, "I need to be at work because I got child support to pay." *Id.* at 306. Finally, Brooks told the court that she did not want to serve on the jury because she would miss a dental appointment. (Vol. 1, Court reporter's transcript, p. 103.) Thus, those jurors clearly are distinguishable from juror Paul because each of them was insistent that they could not serve on the jury, unlike Paul, who was not.

In addition, Stanley Scott and Stevie Scott are distinguishable from juror Paul. The prosecutor's reasons for striking Stanley Scott were that he had prosecuted him for a bad check and that Scott currently was a defendant in a child support case. (Vol. 2, Court reporter's transcript, p. 363.) The prosecutor's reason for striking Stevie Scott was that he had prosecuted his brother, Willie Scott, in a drug case. *Id.* at 364, 388. As the trial court stated, "[a] venire person's involvement in or connection with criminal activity may serve as a race neutral reason

for the strike of that venire person. And that extends even to close relatives and friends of the juror. Also extends to family members who have been prosecuted for criminal activity." *Id.* at 379. The trial court correctly found that the prosecutor's proffered reasons for striking Stanley Scott and Stevie Scott were race-neutral. *Id.* at 387-388. Thus, they are distinguishable from juror Paul because, unlike Paul (who simply indicated that one of his aunts had been convicted of third degree manslaughter), juror Stanley Scott had been prosecuted by the Pike County District Attorney's Office for a bad check and was a defendant in another case and juror Stevie Scott's brother had been prosecuted by the Pike County District Attorney's Office.

Because his *Batson* claims are refuted by the record, Wood cannot show that the state courts' denial of relief on those claims was an unreasonable application of federal law or was based on an unreasonable determination of the facts. This Court should, therefore, deny the writ.

**CONCLUSION**

For the foregoing reasons, this Court should deny Wood's petition for writ of certiorari.

Respectfully Submitted,

Troy King
*Attorney General*

Corey L. Maze
*Solicitor General*

Henry M. Johnson
*Assistant Attorney General*
Counsel of Record *

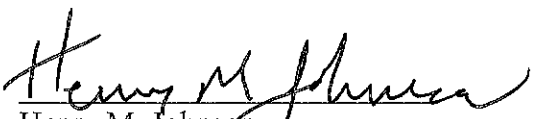
State of Alabama
Office of the Attorney General
500 Dexter Avenue
Montgomery, Alabama 36130-0152
Tel: (334) 353-9095
Fax: (334) 353-3637

April 13, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that on this, the 13th day of April, 2009, a copy of the foregoing was served on the attorney for Holly Wood by placing the same in the United States Mail, first class postage prepaid and addressed as follows:

Mr. Kerry Alan Scanlon, Esq.
Kaye Scholer LLP
901 15th Street, N.W.
Washington, D.C. 20005



Henry M. Johnson
*Assistant Attorney General*
Counsel of Record *

State of Alabama
Office of the Attorney General
500 Dexter Avenue
Montgomery, Alabama 36130-0152
Tel: (334) 353-9095
Fax: (334) 353-3637

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