CAPITAL CASE

No. 08-9156

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Respondents argue that Petitioner "does not allege . . . any traditional ground for certiorari" and that Mr. Wood is requesting "that this Court engage in a fact-bound review." Brief of Respondents in Opposition to the Petition for Writ of Certiorari, *Wood v. Allen,* No. 08-9156 (Sup. Ct. filed Apr. 13, 2009) ("Resp. Br.") at 17. To the contrary, what is distinctly "fact-bound" is Respondents' opposition brief, which completely ignores, *inter alia*, (1) important differences in how the circuits have applied two key provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA") and (2) an important question of federal law regarding the application of medical science to a crucial issue in capital cases -- the mental retardation of the defendant. Moreover, the "facts" on which the Respondents' brief focuses almost entirely are highly selective, incomplete, and misleading. In short, Respondents have offered nothing to undercut Petitioner's showing that

this case raises important federal issues in the states' application of the death penalty. *See* Petition for Writ of Certiorari, *Wood v. Allen,* No. 08-9156 (Sup. Ct. filed Mar. 12, 2009) ("Petition" or "Pet.").

I. MR. WOOD'S INEFFECTIVE ASSISTANCE CLAIM CONCERNS A SPLIT AMONG THE CIRCUITS ON AN IMPORTANT FEDERAL LEGAL ISSUE THAT IS RIPE FOR REVIEW

A. RESPONDENTS DO NOT ADDRESS THE CIRCUIT SPLIT REGARDING THE APPLICATION OF AEDPA

In contending that Mr. "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," Respondents ignore one of Petitioner's primary points -- that this Court should grant review to resolve a conflict in the circuits regarding the interaction of AEDPA sections 2254(d)(2) and 2254(e)(1). Resp. Br. at 17-18; *see also* Pet. at 13-17. Relying upon their reading of *Miller-El v. Cockrell*, 537 U.S. 322 (2003), Respondents contend that the interplay between sections 2254(d)(2) and (e)(1) is clear and straightforward: "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." Resp. Br. at 31-32 (emphasis in original).

But the Eleventh Circuit in this case did not clearly separate its determination under section 2254(d)(2) of whether there was "an unreasonable determination of the facts" from the "clear and convincing evidence" requirement of section 2254(e)(1). In fact, when the Eleventh Circuit held -- mistakenly in our view -- that "Wood has wholly failed to show the state courts made an unreasonable determination of the facts," it noted in support of this conclusion that "Wood has not presented evidence, much less clear and convincing evidence," that his trial counsel did not make a strategic decision to forego the presentation of mental impairment

evidence. Pet. App. 6a, 50a n.23. Most importantly, Petitioner's position is that the "clear and convincing evidence" requirement of section 2254(e)(1) is not relevant at all in this case where the challenge to the state court decision is not based on evidence outside the state court record. *See* Pet. at 14-16.

Petitioner's construction of the language in sections 2254(d)(2) and (e)(1) is consistent with the rulings of the Ninth and Third Circuits. *See Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004), *cert. denied*, 544 U.S. 1063 (2005); *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004), *cert. denied*, 543 U.S. 1038 (2004). In those Circuits, federal court review of state court habeas decisions which are not based on evidence outside the state court record is focused on "§ 2254(d)(2)'s reasonableness determination [based] on a *consideration of the totality of the 'evidence presented in the state-court proceeding.'*" *Lambert*, 387 F.3d at 235 (emphasis added). There is no requirement on the defendant to show "clear and convincing evidence" and section 2254(e)(1) does not come into play.

In considering "the totality of the evidence," a judge "must acknowledge significant portions of the record, particularly where they are inconsistent with the judge's findings." *Taylor*, 366 F.3d at 1007. As the Ninth Circuit explained:

> The process of explaining and reconciling seemingly inconsistent parts of the record lays bare the judicial thinking process, enabling a reviewing court to judge the rationality of the fact-finder's reasoning. On occasion, an effort to explain what turns out to be un-explainable will cause the finder of fact to change his mind. By contrast, failure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached.

Id. at 1007-08. As a result, the "[f]ailure to consider key aspects of the record is a defect in the fact-finding process," which results in a state court decision that is based on "an 'unreasonable determination of the facts'" in light of the state court record. *Id.* at 1008.

The Eleventh Circuit majority did not apply this standard. Instead, it applied section 2254(e)(1) and conflated its "clear and convincing evidence" requirement with the section 2254(d)(2) analysis by determining that the state court decision was reasonable because "there is evidence to support the state courts' findings" and that Wood failed to present "clear and convincing evidence" against those findings. Pet. App. 50a n.23. In doing so, the Eleventh Circuit failed to evaluate the reasonableness of the state court decision in light of the totality of the evidence as required by section 2254(d)(2), including the following critical evidence contradicting the state court decision:

- On the morning of the penalty phase, Mr. Wood's trial counsel, Kenneth Trotter, unambiguously explained that counsel would not be presenting mental health mitigation evidence to the jury because they had failed to do an adequate investigation -- not based on a strategic decision after a reasonable investigation. As Mr. Trotter told the trial judge, potential mental health mitigation referred to in the Competency Report four months prior "*needs further assessment*" and "*[n]o further investigation has been done, psychologically, of those points.*" (Vol. 5 at 967) (emphasis added).
- Prior to the sentencing hearing before the trial court, in light of material received from the Department of Corrections only on the morning of the penalty phase, Mr. Trotter wrote to his co-counsel reiterating that "we should request an independent psychological evaluation -- even if that means asking for a postponement of the sentencing hearing." (Vol. 18 at 27-28.) But his co-counsel rejected that idea solely based on their conclusion "that the judge would never grant a continuance or they

didn't think [t]he Judge would grant a continuance." (Vol. 17, Aug. 22, 2001 Tr. at 47-48.)

- At the sentencing hearing before the trial court, Mr. Trotter submitted the Competency Report and referred specifically to its findings "that Holly cannot use abstraction skills much beyond the low average range of intellect, and that he is at most functioning in the borderline range of intellectual functioning" as facts that would "mitigate any aggravating circumstance in this case." (Vol. 6 at 1108.)

All of this direct evidence contemporaneous with Mr. Wood's trial plainly contradicts the state court decision, which denied Mr. Wood's ineffective assistance claim on the stated ground that his trial counsel made a purported decision not to present mental health mitigation after a reasonable investigation. *See Wiggins v. Smith*, 539 U.S. 510, 526 (2003) ("The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment"). As in *Taylor*, "no rational fact-finder would simply ignore" this critical evidence as the state court did in this case. 366 F.3d at 1006. To further paraphrase *Taylor*, "[a] decision on which turns whether [a man will be executed] merits closer judicial attention from the state courts." *Id.* at 1007.

Respondents fail to address the conflict between the Eleventh Circuit majority and *Taylor*. Respondents contend that the Eleventh Circuit majority "simply made the observation, which is amply supported by the record, that [Mr. Wood] failed to present *any* evidence to show that his counsel did not make a decision against presenting such [mental health mitigation] evidence." Resp. Br. at 32 (emphasis added). But that "observation" can only be reconciled with the state court record if the analysis is limited only to the evidence addressed in the state

court decision, which is precisely what the Eleventh Circuit majority improperly did (and Respondents do). Pet. App. 74a ("the majority altogether disregards direct and specific evidence" contrary to the state court decision).

Tellingly, Respondents, like the Eleventh Circuit majority and the state court, do not address any of the critical evidence described above and in the Petition, or make any attempt to reconcile the state court decision with that evidence. Nor do Respondents address the testimony of Mr. Dozier -- to whom the state court attributed the purported decision not to pursue mental health mitigation evidence -- that he did not recall making any such decision, and, in fact, would have presented mental health mitigation evidence if any were available. Pet. at 18 (citing Vol. 16, Sept. 18, 2000 Tr. at 56-57, 61). That evidence also cannot be reconciled with the state court's decision that Mr. Dozier decided not to pursue and present such evidence. Respondents' failure to address or reconcile this contrary evidence is not surprising in light of the fact that the state court decisions at issue are taken verbatim from orders drafted by Respondents.

Instead, Respondents simply repeat the limited analysis of the record in which the Eleventh Circuit and the state court engaged without explaining in the context of the entire record how any of it bears on a purported decision of counsel not to pursue and present mental health mitigation at the penalty phase of Mr. Wood's trial. For example, Respondents contend that counsel retained an investigator (*see* Resp. Br. at 22-23) even though the investigator's own testimony and memoranda that he prepared demonstrate that his activities had nothing to do with potential mitigation evidence, much less mental health mitigation. Pet. at 24 (citing Vol. 17, Aug. 22, 2001 Tr. at 90-91, 93; Vol. 18 at 40-47). Similarly, Respondents contend that Mr. "Trotter went so far as to issue a subpoena for [Mr. Wood's academic] records" (Resp. Br. at 23)

even though Mr. Trotter never sought to enforce that subpoena nor made any effort to speak with Mr. Wood's teachers about his experience in special education classes. Pet. at 24 (citing Vol. 16, Sept. 18, 2000 Tr. at 128, 148; Vol. 17, Sept. 18, 2000 Tr. at 215; Vol. 28, Aug. 4, 2003 Tr. at 39-40, 55).

Likewise, Respondents speculate on reasons why counsel might have decided not to submit the Competency Report or call its author as a witness. *See* Resp. Br. at 26. But this speculation misses the point for several reasons. First, the Competency Report was prepared for the specific purpose of assessing Mr. Wood's competency to stand trial -- not for the purpose of obtaining mitigation evidence. Pet. at 23 (citing Vol. 7 at 240). Second, had counsel done further investigation, which they admitted they did not do, they would have found that mental health mitigation evidence was available from other sources, including Mr. Wood's teachers and an independent psychologist. Pet. at 26. Third, counsel in fact submitted the Competency Report to the trial court at the sentencing hearing. Pet. at 20.

Moreover, Respondents' speculation that his family members' testimony at the penalty phase "would have been severely undermined if his trial counsel had then presented evidence of his low intelligence" (Resp. Br. at 26) is unsupported by the record and evidences a misunderstanding of the mental health mitigation evidence at issue.[1] "Persons with mild mental

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[1] Respondents characterize Mr. Trotter's penalty phase presentation as "compelling" (Resp. Br. at 26) and claim that Mr. Wood's sister, Johnnie Pearl Wood "testified at length," citing to 12 pages of transcript (Resp. Br. at 25). But even Mr. Trotter's co-counsel, Mr. Ralph, did not share that view. "I don't think that Mr. Trotter -- and it's no disrespect to Mr. Trotter -- brought out enough of Mr. Wood's background through enough witnesses of the type of upbringing that he had had. . . . I felt like there were more circumstances in his background that were potentially mitigating that were not explored from what I had had the opportunity to see and observe and in the brief conversations that we had." (Vol. 16, Sept. 18, 2000 Tr. at 80-81.) Notwithstanding his belief, Mr. Ralph made no effort to supplement Mr. Trotter's penalty phase presentation.

retardation function in all adult roles -- they are members of families, have friends, work, marry, and have children." George S. Baroff & J. Gregory Olley, *Mental Retardation: Nature, Cause, and Management* 43 (3d ed. 1999).

In sum, Respondents do not address the Ninth and Third Circuit precedent cited in the Petition, much less make any attempt to explain the Eleventh Circuit majority's holding in light of the state court's undisputed failure to address critical evidence, which directly contradicts the state court's decision. This Court should grant certiorari to resolve the conflict among the Courts of Appeals and to set forth "a comprehensive interpretation of AEDPA's factual review scheme," which has "yet to emerge from the federal courts" despite this Court's "pronouncements in *Miller-El* and *Wiggins*." *Lambert*, 387 F.3d at 235.

B. THE ELEVENTH CIRCUIT'S MISAPPLICATION OF AEDPA IS RIPE FOR REVIEW

Respondents contend that the Court should not grant certiorari because Mr. Wood did not argue in his petition for rehearing "to the Eleventh Circuit that its opinion was erroneous because the court somehow misapplied [AEDPA] in resolving his IAC claim." Resp. Br. at 30. Respondents' contention has no merit.

"Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). For that reason, "[a] litigant seeking review in this Court of a claim properly raised in the lower courts . . . generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Id.* at 535.

Mr. Wood plainly raised and presented his claims in the lower courts that he was entitled to habeas relief because the state court adjudication of his ineffective assistance claim

resulted in both an unreasonable application of the law and an unreasonable determination of the facts under sections 2254(d)(1) and (d)(2). Moreover, in his petition for rehearing and rehearing *en banc*, Mr. Wood *did* argue that, in reversing the district court's grant of relief under AEDPA, the Eleventh Circuit majority overlooked direct and contemporaneous evidence from the time of trial that contradicted and rendered unreasonable the state court's decision denying his ineffective assistance claim on the stated ground that trial counsel made a purported strategic decision not to present mental health mitigation evidence. That was sufficient to preserve the issue for review by this Court.

Respondents rely on *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). *See* Resp. Br. at 30. In that case, the Court declined to consider an issue raised by a litigant "for the first time in his opening brief on the merits" because "a brief on the merits should not 'raise additional questions or change the substance of the questions already presented' in the petition." *Id.* at 645. That principle plainly has no application here.

II. CONTRARY TO RESPONDENTS' ASSERTIONS, MR. WOOD'S *ATKINS* CLAIM RAISES A NOVEL AND IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT

In their opposition brief, Respondents fail to acknowledge Mr. Wood's central *Atkins* claim: that certiorari review is necessary in order to reinforce that mental retardation determinations must be based upon scientifically accepted standards to comply with *Atkins v. Virginia*, 536 U.S. 304 (2002). *See* Pet. at 27-32. Instead of addressing Mr. Wood's argument, Respondents claim that Mr. Wood has not asserted "that this case presents a novel and important question of federal law" and that Mr. Wood "is asking this Court for nothing more that [sic] a review of the factual determination of the Eleventh Circuit." Resp. Br. at 33. Respondents are incorrect.

In fact, the Petition presents a novel and important question of federal law, namely whether a state court unreasonably applies *Atkins* when it focuses on an individual's relative strengths in adaptive functioning instead of that person's limitations, which is inconsistent with the established clinical definitions of mental retardation. *See* Pet. at 27-32.

In *Atkins*, the Court held that executing mentally retarded individuals violated the Eighth Amendment's prohibition against cruel and unusual punishments based largely on the emergence of a national consensus against executing mentally retarded individuals. *Atkins*, 536 U.S. at 316. In reaching its decision, the Court recognized the clinical definitions of mental retardation established by the American Association of Mental Retardation ("AAMR") and the American Psychiatric Association ("APA"), which "require not only subaverage intellectual functioning, but also significant *limitations* in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *See id.* at 318 (emphasis added); *see also id.* at 308 n.3; *id.* at 318 (focusing on the "deficiencies" and "impairments" of mentally retarded offenders and finding that those limitations "by definition" make them less culpable). Relying on its approach in *Ford v. Wainwright*, however, the Court declined to establish a legal standard for determining whether an individual is ineligible for the death penalty by reason of mental retardation. While recognizing the authoritative standing of the AAMR's and APA's clinically accepted definitions of mental retardation, the Court tasked the states with "developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.* at 317 (citing 477 U.S. 399, 405 (1986)) (internal quotations omitted).

Since *Atkins*, many courts, including the Eleventh Circuit and Alabama state courts, have applied standards that conflict with the clinical definitions of mental retardation by focusing on individuals' strengths in adaptive functioning instead of their limitations. *See* Pet. at

29-31 (describing cases throughout the country that impermissibly focus on strengths rather than limitations in adaptive functioning). Indeed, Respondents focus solely on strengths in their opposition brief when they attempt to justify the Eleventh Circuit's holding by quoting a litany of activities in which Mr. Wood supposedly has relative strengths. *See* Resp. Br. at 36. But Respondents do not dispute or even address the authorities cited in the Petition that demonstrate that this non-clinical approach poses the danger that people with mental retardation will go undiagnosed because "[w]ithin an individual, limitations often co-exist with strengths." American Association of Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 8 (9th ed. 1992). The clinical definitions of mental retardation stress that, although mentally retarded individuals may have strengths in some adaptive skill areas or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation, such strengths do not preclude a diagnosis of mental retardation. *Id.*

For that reason, "the adaptive prong must remain focused on the individual's limitations, rather than any skills he or she may also possess." James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. 18 n.29 (Jan./Feb. 2003). Courts that focus on relative strengths without considering an individual's limitations in adaptive functioning fail to apply the clinically accepted definitions of mental retardation that were endorsed by the Court in *Atkins*. This runs the risk that persons whom *Atkins* was intended to protect, including Holly Wood, will be wrongfully executed.

The Court should grant certiorari to clarify that states must apply clinically accepted definitions of mental retardation when making such determinations. *See* Pet. at 31-32. Without the Court's clarification, courts will continue to make mental retardation determinations

based on prejudicial stereotypes and individuals' relative strengths in adaptive functioning that, to laypersons, seem to conflict with a diagnosis of mental retardation. This non-clinical approach, which fails to protect mentally retarded individuals from the Eighth Amendment's ban on cruel and unusual punishments, should be prohibited by the Court.

In his Petition, Mr. Wood explained that the Court has struck down competency standards under similar circumstances. *See* Pet. at 32. In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court granted certiorari to clarify the minimum due process afforded individuals for determining whether he or she is competent to be executed, consistent with the strictures of the Eighth Amendment and the Court's decision in *Ford v. Wainwright*, 477 U.S. 399 (1986). Previously, in *Ford*, the Court had declined to "set forth 'the precise limits that due process imposes in this area,'" instead leaving it to the states to "'determine what process best balances the various interests at stake.'" *Panetti*, 551 U.S. at 680 (quoting *Ford*, 477 U.S. at 427). Notwithstanding the states' delegated authority to develop appropriate procedural standards for making competency determinations, the Court reviewed the procedures afforded in *Panetti* and held that the state court provided inadequate due process and that the federal appellate court "employed an improperly restrictive test when it considered petitioner's claim of incompetency on the merits." *Id.* at 671. According to the Court, these errors constituted an unreasonable application of clearly established Supreme Court law (*i.e., Ford*) to which no deference is due under 28 U.S.C. § 2254. *Id.* at 679. As in *Panetti*, this Court should grant certiorari in order to clarify that mental retardation determinations under *Atkins* must be based on the clinically accepted definitions of mental retardation, and that the failure to do so constitutes an unreasonable application of *Atkins*.

III. RESPONDENTS IGNORE THE CONFLICT BETWEEN THE ELEVENTH CIRCUIT'S HOLDING THAT MR. WOOD'S *BATSON* CLAIM WAS PROCEDURALLY BARRED AND THE HOLDINGS OF OTHER COURTS OF APPEALS

Respondents do not dispute that the Eleventh Circuit's holding -- that Mr. Wood's *Batson v. Kentucky*, 476 U.S. 79 (1986), claim was procedurally barred -- directly conflicts with decisions of the Ninth and Fifth Circuits applying *Miller-El v. Dretke*, 545 U.S. 231, 241 n.2 (2005). *See* Pet. at 34 (citing *Reed v. Quarterman*, No. 05-70046, 2009 WL 58903, at *5, *8 (5th Cir. Jan. 12, 2009)[2]; *Boyd v. Newland*, 467 F.3d 1139 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007)). Nor do Respondents make any attempt to justify the Eleventh Circuit's holding that Mr. Wood's *Batson* claim was procedurally barred because his trial counsel "did not make any sub-argument comparing black venire members who were struck with white members who were not struck." Pet. App. 14a.

Instead, Respondents address the merits of Mr. Wood's *Batson* claim, which neither the Eleventh Circuit nor the district court addressed in light of their rulings that the claim was procedurally barred. This Court should grant certiorari to resolve a conflict among the Courts of Appeals and determine whether Mr. Wood was improperly deprived of his opportunity to have a federal court address the merits of his *Batson* claim after full briefing.

In any event, Respondents' brief merely confirms that the State violated *Batson* at Mr. Wood's trial. Respondents contend that, unlike black prospective juror Christine B. Jones, who the State struck on the stated ground that "she does not believe in an eye for an eye or in capital punishment" (Vol. 2 at 362), white prospective jurors who gave similar responses "each stated on their jury questionnaires and during voir dire that they are not opposed to the death

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[2] Subsequently published at *Reed v. Quarterman*, 555 F.3d 364, 370, 373 (5th Cir. 2009).

penalty." Resp. Br. at 38. But just like Ms. Jones, white panelists Rosa Green and Bobby Shackelford, who eventually became the foreman of the jury, both stated during voir dire that they did not believe in an "eye for an eye" punishment. (Vol. 2 at 251, 300.) Moreover, when asked during voir dire, whether there were no circumstances in which she believed in "an eye for an eye," black panelist Ms. Jones stated: "Well, I couldn't say under no circumstances." (Vol. 2 at 249.) Although the State claimed that it struck black panelist Jones on the ground that she did not believe in an "eye for an eye," the State did not even pursue the issue with Ms. Green and Mr. Shackelford who gave the same answer during voir dire.

Respondents also attempt to justify the State's striking of four prospective black jurors on the ground that they indicated that they did not want to serve. (Vol. 2 at 360-61, 363-65, 372.) Respondents argue that although prospective white juror Frank Paul "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." Resp. Br. at 38.

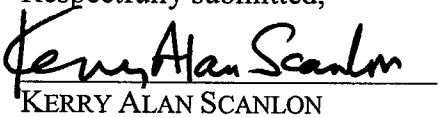
But Mr. Paul was at least equally insistent as the struck black panelists that he could not serve on the jury. Thus, when the trial judge inquired whether any of the prospective jurors had "a reason why you should be excused from jury service during the present term of court because of undue hardship, extreme inconvenience or public necessity" (Vol. 1 at 105), Mr. Paul stated that his job responsibilities required him to be in North Carolina and "I *desperately need to get back up there as quickly as possible. I came in last night just for today.*" (Vol. 1 at 111-12) (emphasis added).

In light of his desperate need to return to North Carolina, Mr. Paul was just as, if not more, insistent about his desire not to serve as the struck black panelists. Two of the struck black panelists stated that they were students and did not want to miss classes, another stated that he needed to work to pay child support, and another cited a dental appointment. (Vol. 2 at 360-61, 363-65.) *See Snyder v. Louisiana*, 128 S. Ct. 1203, 1211 (2008) ("The implausibility of this explanation [that a black juror was struck because of his reluctance to serve] is reinforced by the prosecutor's acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Mr. Brooks'."). Moreover, Respondents do not even attempt to justify the prosecutor's strike of three black panelists on the ground that they had relatives who had been convicted of or accused of crimes, which respondents admit also was true of Mr. Paul. *See* Resp. Br. at 39.[3]

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: April 23, 2009

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[3] In this regard, Respondents only attempt to distinguish the circumstances surrounding the strikes of two other prospective black jurors, Stanley Scott and Stevie Scott, from those surrounding Mr. Paul. But even if Respondents argument regarding those two jurors ultimately were accepted, that would not negate the *Batson* violation in this case because "'the Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Snyder*, 128 S. Ct. at 1208 (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994), *cert. denied*, 513 U.S. 891 (1994)).

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CERTIFICATE OF COMPLIANCE

I, Kerry Alan Scanlon, a member of the Bar of this court, certify under penalty of perjury that, in accordance with Supreme Court Rule 33.2(b), the Reply Brief In Support Of Petition For A Writ Of Certiorari contains 15 pages, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kerry Alan Scanlon, a member of the Bar of this Court, certify under penalty of perjury that, pursuant to Supreme Court Rule 29.3, on April 23, 2009, a copy of the Reply Brief In Support Of Petition For A Writ Of Certiorari was mailed via Federal Express for overnight delivery to:

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All parties required to be served have been served.

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April 23, 2009

Honorable William K. Suter, Clerk
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: ***Wood v. Allen, Comm'r, Alabama Department of Corrections, et al.*, Case No. 08-9156**

Dear Mr. Suter:

Please find enclosed for filing in the above-captioned matter an original and eleven (11) copies of Petitioner Holly Wood's Reply Brief In Support Of Petition For A Writ Of Certiorari, along with a Certificate of Compliance and a Certificate of Service. Please date-stamp and return one copy of each document in the self-addressed, stamped envelope.

Please contact me at (202) 682-3660 if you have any questions. Thank you for your assistance in this matter.

Respectfully submitted,

Kerry Alan Scanlon

Kerry Alan Scanlon

Enc.
cc: Henry M. Johnson