No._____

IN THE SUPREME COURT OF THE UNITED STATES

TREMANE WOOD, Petitioner

vs.

MIKE CARPENTER, Interim Warden, Oklahoma State Penitentiary, Respondent.

CAPITAL CASE

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

PETITION FOR A WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTIONS PRESENTED

Tremane Wood was one of four defendants charged with crimes related to the death of Ronnie Wipf, which occurred in Oklahoma City, Oklahoma on January 1, 2002. Mr. Wood was the only one sentenced to death.

Mr. Wood was represented at trial by court-appointed counsel who did little to investigate his case and who failed to present mitigating evidence to Mr. Wood's penalty-phase jury. Lead counsel, John Albert, struggled with substance abuse and faced disciplinary action in connection with his representation of two other capital defendants around the time that he represented Mr. Wood. Those cases were ultimately overturned because of Albert's ineffectiveness. As a result of Albert's and co-counsel's myriad inadequacies, Mr. Wood was sentenced to death.

On federal habeas review, the Tenth Circuit Court of Appeals affirmed the district court's denial of habeas relief under 28 U.S.C. § 2254(d). It did so by ignoring evidence in the record before the state court, by analyzing reasons for denying relief not contained in the last-reasoned state court decision, and by contravening this Court's decisions in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. The questions presented by this case are the following:

1. Does a circuit court contravene this Court's decisions in *Strickland v. Washington*, 466 U.S. 668 (1984), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Porter v. McCollum*, 558 U.S. 30 (2009), where it determines that the state court reasonably ignored new and more detailed mitigating evidence presented in support of a penalty-phase ineffective-assistance-of-trial-counsel claim simply because that evidence relates to the same general themes for which only weak factual support was presented at trial?

2. Does a circuit court contravene this Court's decision in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), where it fails to examine the actual reasoning provided in the state court's last-reasoned opinion denying a federal constitutional claim and instead examines, and holds reasonable under 28 U.S.C. § 2254(d), hypothetical reasoning not provided by the state court?

3. Does a circuit court contravene this Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011), where it fails to consider under 28 U.S.C. § 2254(d)(1) evidence in the record before the state court that adjudicated a federal constitutional claim?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption, *supra*. The petitioner is not a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tremane Wood, an Oklahoma death-row prisoner, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, which affirmed the district court's denial of habeas relief along with his requests for discovery and an evidentiary hearing.

OPINIONS BELOW

The Tenth Circuit's original opinion affirming the district court's denial of habeas relief is included in Appendix A. The Tenth Circuit's amended opinion and order granting and denying in part Mr. Wood's request for panel rehearing and denying his request for en banc consideration is included at Appendix B.

STATEMENT OF JURISDICTION

On August 9, 2018, the Tenth Circuit affirmed the district court's denial of habeas relief. (App. A.) On August 23, 2018, Mr. Wood moved for panel and en banc reconsideration based upon factual and legal errors contained in its opinion. Pet. for Reh'g, *Wood v. Carpenter*, No. 16-6001 (10th Cir. Aug. 23, 2018). On November 1, 2018, the Tenth Circuit granted and denied in part Mr. Wood's request for panel rehearing, and denied his request for en banc consideration, while continuing to affirm the district court's denial of habeas relief. (App. B.)

On January 3, 2019, Justice Sotomayor granted Mr. Wood's request for an extension of time to file his petition for a writ of certiorari (alternatively hereafter, "Petition") pursuant to Rule 13(5) of this Court's Rule, and extended the filing deadline to March 29, 2019. Mr. Wood now timely files this Petition wherein he asks

that this Court review the Tenth Circuit's judgment and order affirming the district court's denial of habeas relief from his unconstitutional sentence of death. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL & STATUTORY PROVISIONS

U.S. Const. amend. VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. XIV § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d)(1)-(2)

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Petitioner Tremane Wood and his co-defendant and older brother, Zjaiton "Jake" Wood, were both found guilty of the felony murder of Ronnie Wipf in separate trials. Zjaiton confessed to stabbing Wipf, but only Mr. Wood was sentenced to death.

I. The crime

On December 31, 2001, Ronnie Wipf and Arnold Kleinsasser, celebrated New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (Tr. 3/31/04 at 119-20.) While there, the men met and socialized with two young women, Brandy Warden (Mr. Wood's ex-girlfriend) and Lanita Bateman (Zjaiton's girlfriend). (Tr. 4/1/04 at 24-25, 142.) When the brewery closed for the night, Warden and Bateman agreed, after speaking with Zjaiton and Mr. Wood, to accompany Wipf and Kleinsasser to a motel. (Tr. 4/1/04 at 148-149; Tr. 3/31/04 at 122.)

Once inside the motel room, the four agreed on $210 in exchange for sex. (Tr. 3/31/04 at 125.) Bateman pretended to place a call to her mother, but instead, she called Zjaiton. (Tr. 3/31/04 at 129, 169.) Soon thereafter, Zjaiton and Mr. Wood arrived at the motel room, and Zjaiton began to bang on the door. (Tr. 3/31/04 at 130, 168-70; Tr. 4/1/04 at 164-68.) The brothers ran into the motel room wearing ski masks, and Bateman and Warden ran out. (Tr. 4/1/04 at 166-68.) Zjaiton approached Kleinsasser with a gun; Mr. Wood, meanwhile, approached Wipf with a knife, and Wipf began to put up a fight. (Tr. 3/31/04 at 133-37.) Zjaiton left Kleinsasser in order to assist Mr. Wood. (Tr. 3/31/04 at 138.) Mr. Wood in turn left the struggle with Wipf to demand more money from Kleinsasser; when Mr. Wood returned to the fight between Wipf and Zjaiton, Kleinsasser fled the room. (Tr. 3/31/04 at 173-174.) Wipf died from a

single stab wound to the chest. (Tr. 4/2/04 at 11.) Kleinsasser was unable to identify who had stabbed Wipf. (Tr. 3/31/04 at 174.) Zjaiton testified that he took the knife and stabbed Wipf in the chest. (Tr. 4/2/04 at 94.)

Mr. Wood, along with Zjaiton, Warden, and Bateman, were charged with first-degree felony murder, robbery with firearms, and conspiracy to commit a felony (robbery). (OR1 at 79.) The State sought death against both Mr. Wood and his older brother. (OR1 at 72; Tr. 8/14/02 at 442.)

II. Procedural history

According to the prosecutor, Zjaiton "is really the worst of the two [brothers], considering the evidence that we know about and that *but for Mr. Zjaiton Wood*, *Termane* [sic] *would not have acted in the manner he did*."[1] But Mr. Wood, represented by a court-appointed solo practitioner struggling with substance abuse, was sentenced to death; Zjaiton, who was represented by the Oklahoma Indigent Defense System (OIDS), a statewide public defense office with attorneys specializing in capital cases, was sentenced to life without parole. (Tr. 10/2/02 at 3, 10; OR1 at 85; Tr. 3/2/06 at 403.)

A. Trial

Zjaiton, as OIDS's client, had at least three attorneys and two investigators on his case. (Tr. 3/2/06 at 397.) Mr. Wood had two attorneys and no investigator. (E.H. Tr. 2/27/06 at 241-42.) Lead attorney, John Albert, admitted that while representing Mr. Wood, he had one "hundred" cases, which he recognized was "too many," and that

[1] *See* Dist Ct. ECF No. 35-4, Ex. 28A at 25 (*State v. Zjaiton Wood*, CF-02-46, Tr. 9/20/04).

after Mr. Wood's trial, Albert "quit doing death penalties." (E.H. Tr. 2/27/06 at 247.) His co-counsel, Lance Phillips, admitted he had minimal involvement in the case. (E.H. Tr. 3/2/06 at 431-32.) Lead counsel for Zjaiton, on the other hand, handled only about four cases at the time. (E.H. Tr. 2/27/06 at 247.)

In addition to having an unreasonable caseload, Albert abused alcohol when he went to trial in Mr. Wood's case. He would drink "beer during business hours on a daily basis." (PC Notice of Suppl. Authority at 4, 11/19/07; *see also* Dist. Ct. ECF No. 35-1, Ex. 3 ¶ 5, Decl. of John Albert.)

Mr. Wood's and Zjaiton's trial counsel had very different approaches to representing capital defendants. (*See, e.g.*, E.H. Tr. 2/27/06 at 257-58 (Albert testifying that he did not think it necessary to file many motions, unlike Zjaiton's counsel); *id.* at 247 (Albert suggesting that he did not have time to prepare his case "[a]ccording to the way OIDS does it [tries capital cases]").) Zjaiton's counsel filed many motions and argued on Zjaiton's behalf at virtually every pretrial hearing. (*See, e.g.*, Tr. 2/5/03 at 49; Tr. 4/16/03 at 51-55; Tr. 4/30/03 at 3; Tr. 7/16/03 at 11-35 Tr. 9/3/03 at 84-106.) Mr. Wood's counsel, meanwhile, joined a motion or two, but filed only one independent motion. (OR1 at 362-63.) They also rarely made arguments or questioned witnesses on Mr. Wood's behalf at any pretrial hearings. (*See, e.g.*, Tr. 2/5/03 at 62; Tr. 3/19/03 at 29-30; Tr. 4/16/03 at 61; Tr. 4/30/03 at 31; Tr. 5/28/03 at 4; 7/16/03 at 8, 43; Tr. 9/3/03 at 106, 108.)

Albert said that he took "responsibility for the case" as lead counsel. (E.H. Tr. 2/27/06 at 241.) Phillips prepared the only independent motion that the defense filed

in pretrial proceedings. (E.H. Tr. 2/27/06 at 431.) As far as mitigation, Phillips never spoke to any investigator about Mr. Wood's case. (E.H. Tr. 2/27/06 at 432.) Phillips did not even know whether they had an investigator. (E.H. Tr. 2/27/06 at 432.) He also never interviewed anyone for mitigation; he spoke to Mr. Wood's mother, Linda Wood, his other brother, Andre Wood, and Linda's girlfriend, Andre Taylor, only briefly at one or two pretrial conferences. (E.H. Tr. 2/27/06 at 430-31.) He never reviewed any of the mitigation records. (E.H. Tr. 2/27/06 at 432.)

Albert admitted that they never hired any investigator for Mr. Wood's case. (E.H. Tr. 2/27/06 at 242.) Albert believed that, if needed, he could use the investigator working on Zjaiton's team, Jack Stringer (E.H. Tr. 2/27/06 at 241, 253.) But Stringer was never contacted by Albert and never performed any investigation for Mr. Wood. (E.H. Tr. 2/27/06 at 229-30.) Zjaiton's lead counsel confirmed that no one from Zjaiton's team ever attempted to get Mr. Wood's records, interview witnesses on Mr. Wood's behalf, or otherwise investigate his case. (E.H. Tr. 3/2/06 at 399-401.) Had Albert asked Stringer to investigate for Mr. Wood, Stringer would have had to decline due to the obvious conflict of interest. (E.H. Tr. 2/27/06 at 229-30.)

With Phillips performing no mitigation investigation and no investigator working on Mr. Wood's case, Albert was left to prepare the mitigation case. "[I]n [his] opinion," however, "this was a first-stage case." (E.H. Tr. 2/27/06 at 241.) In other words, Albert believed mitigation did not matter. Zjaiton's counsel, on the other hand, as part of a motion for a continuance, submitted an affidavit to the court from an investigator about the thorough mitigation investigation required including,

"obtaining a thorough background history on [the] client through interviews with him and family members and requesting background records such as work, school, medical, juvenile, and psychological records, etc." (OR1 at 256.)

Albert's belief that Mr. Wood's was a first-stage case was unreasonable because of the felony-murder charge: as a principal participant in the felony, Mr. Wood would be exposed to the death penalty regardless of whether he stabbed the victim. Given the evidence, the most important part of this case was the sentencing phase, and as Zjaiton's counsel recognized, there were many avenues of mitigation that needed to be investigated. Mr. Wood and Zjaiton had an older brother, Andre. (Tr. 4/5/04 at 56-57, 66, 92-93.) Their mother, Linda, divorced their father, Raymond Gross, in 1988 when Mr. Wood was about 8 years old. (E.H. Tr. 2/23/06 at 112, 120.) And despite Albert's baseless belief that there were no records of abuse, there were serious claims that Gross was physically and emotionally abusive to his wife and kids. (E.H. Tr. 2/23/06 at 113-120; 157-63.) Both Mr. Wood and Zjaiton also had several interactions with juvenile agencies, such as foster homes, juvenile boot camps, and other juvenile programs for troubled youth. (*See, e.g.*, E.H. Tr. 2/27/06 at 185; E.H. Tr. 2/23/06 at 77, 91.)

In preparation for the penalty phase, however, Albert spoke only to Linda, Andre, and Zjaiton Wood because, according to Albert, those were the individuals who Mr. Wood identified as possible mitigating witnesses. (E.H. Tr. 2/27/06 at 253-54.) Albert admitted that he never spoke to any of Mr. Wood's friends, foster family members, or juvenile officers or other various agency case workers assigned to Mr.

Wood or his family. (E.H. Tr. 2/27/06 at 254.) Albert did not formally interview the family; he talked to them only when he saw them in the courtroom. (E.H. Tr. 2/27/06 at 243.) In fact, he admitted that he spoke with his client only in court because he did not "like to go" to the jail for visits. (E.H. Tr. 2/27/06 at 252.) Essentially, Albert did no work outside the courtroom in preparation for the penalty phase.

Unsurprisingly, the penalty phase, which included both the State's aggravation evidence and Albert's sparse mitigation presentation, started and concluded in *one afternoon*. (Tr. 4/2/04 at 218 (ordering the jury to report at 1:00 p.m. on Monday for the penalty phase); Tr. 4/5/04 at 159 (noting that jury retired for deliberations at 5:57 p.m.).) The entire defense presentation consisted of only three witnesses: Mr. Wood's mother (Linda Wood), his mother's then-girlfriend (Andre Taylor), and a psychologist (Ray Hand, Ph.D.). (OR1 at 355-56; Tr. 4/5/04 at 12-13, 33-102.) On April 2, 2004, Mr. Wood was convicted of first-degree felony murder, robbery with firearms, and conspiracy to commit a felony (robbery) and, on May 7, 2004, was formally sentenced to death. (OR1 at 79, 614-16, 618, 734-36.)

B. Direct appeal, postconviction, and federal habeas proceedings

On direct appeal, Mr. Wood filed an application under Rule 3.11 of Oklahoma's Rules of the Court of Criminal Appeals (OCCA), seeking an evidentiary hearing on the issue of ineffective assistance of trial counsel at sentencing. (DA2 Application 6/28/05.) The OCCA issued an order remanding his case to the state trial court for a

hearing on that claim. (DA2 Order 11/16/05.) The OCCA ordered the trial court to make findings of fact and conclusions of law focusing on

> (1) whether the evidence identified in the Application was reasonably available to trial counsel in preparation for trial, (2) what, if any, of the records contained in the exhibits were reviewed by trial counsel or the defense expert, (3) what effect any evidence that was available but not used might have had on the trial proceedings, (4) whether trial counsel's failure to investigate and/or use the evidence was sound trial strategy, and (5) whether the failure to use the evidence undermines confidence in the outcome of the trial.

(OR2 at 2.)

Following that hearing, the state trial court issued its findings and concluded that Mr. Wood should be denied relief on his ineffective-assistance-of-trial-counsel claim. (OR2 at 230-44.) The OCCA affirmed his convictions and sentence on April 30, 2007. *Wood v. State*, 158 P.3d 467 (Okla. Crim. App. 2007).

While his direct appeal was pending, Mr. Wood filed an application for postconviction relief. (PC Original Appl. 12/26/06; PC Am. Appl. 4/25/07.) In that application, Mr. Wood alleged, inter alia, that his appellate counsel were ineffective. The OCCA denied his application without a hearing. (PC Op., 6/30/10.)

Mr. Wood filed his habeas petition under 28 U.S.C. § 2254 in the United States District Court for the Western District of Oklahoma on June 30, 2011. (ECF No. 35.) The district court denied Mr. Wood relief. (*See* B-13.) Mr. Wood appealed to the Tenth Circuit. After granting certificates of appealability, including on claims of ineffective assistance of trial and appellate counsel (B-13 to B-14), the Tenth Circuit ultimately affirmed the district court's decision denying relief (B-7).

REASONS FOR GRANTING CERTIORARI

I. The Tenth Circuit contravened this Court's decisions in *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny where it determined that the state court reasonably ignored new and more detailed mitigating evidence presented in support of Mr. Wood's penalty-phase ineffective-assistance-of-trial-counsel claim simply because that evidence related to the same general themes for which only weak factual support was presented at trial.

A. *Strickland*'s prejudice inquiry requires courts to consider the totality of the mitigating evidence that Mr. Wood's trial counsel neglected to investigate and present to his penalty-phase jury.

In *Strickland*, this Court articulated the prejudice standard governing ineffective-assistance-of-trial-counsel claims as follows: "[w]hen a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695. "In making this determination," this Court added further, "a court hearing an ineffectiveness claim *must consider the totality of the evidence* before the judge or jury." *Id.* (emphasis added). Subsequently, in *(Terry) Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court explained that if a reviewing court, after "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence," concludes that "*the available mitigating evidence, taken as a whole*, might well have influenced the jury's appraisal of [a defendant's] moral culpability," then a defendant is entitled to relief. *Wiggins*, 539 U.S. at 534, 538 (emphasis added); *see also Williams*, 529 U.S. at 397-98 (finding that "the entire postconviction record, viewed as a whole and cumulative of mitigation

evidence presented originally, raised a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented and explained the significance of all the available evidence").

This Court again made it clear in *Rompilla v. Beard*, 545 U.S. 374 (2009), and in *Porter v. McCollum*, 558 U.S. 30 (2009), that the prejudice inquiry for penalty-phase ineffective-assistance claims requires consideration of the totality of the mitigating evidence undiscovered by trial counsel. *Rompilla*, 545 U.S. at 393; *Porter*, 558 U.S. at 30. In both cases, capital habeas petitioners claimed that they were denied their Sixth Amendment right to the effective assistance of counsel due to trial counsel's failure to investigate, discover, and present available mitigating evidence about the petitioners' life histories. *Rompilla*, 545 U.S. at 377; *Porter*, 558 U.S. at 30. This Court granted habeas relief in both cases only after considering the previously presented and newly discovered mitigating evidence in its entirety. *Rompilla*, 545 U.S. at 393 ("The undiscovered mitigating evidence, *taken as a whole*, might well have influenced the jury's appraisal of [petitioner's] culpability." (emphasis added)); *see also Porter*, 558 U.S. at 41 (granting relief after "consider[ing] the totality of the available mitigating evidence").

The prejudice inquiry for a claim of trial counsel's penalty-phase ineffectiveness considers mitigating evidence as a whole, and asks whether, in its absence, it can be said that a "sentencing proceeding was not fundamentally unfair." *Strickland*, 466 U.S. at 700.

B. The Tenth Circuit contravened *Strickland* and its progeny by ruling that the OCCA's failure to consider the weight of all the mitigating evidence presented at trial and postconviction was reasonable under 28 U.S.C. § 2254(d).

The evidence in the record before the state court demonstrated that Mr. Wood's lead trial attorney, John Albert, conducted an anemic mitigation investigation that occurred almost exclusively within the confines of the courtroom. *See* Opening Br. at 14-37, *Wood v. Carpenter*, No. 16-6001 (10th Cir. May 3, 2017) [hereinafter "Opening Br."]; Reply Br. at 15-19, *Wood v. Carpenter*, No. 16-6001 (10th Cir. Aug. 17, 2017) [hereinafter "Reply Br."]. As in *Williams*, *Wiggins*, *Rompilla*, and *Porter*, a wealth of mitigating evidence about Mr. Wood's character and background was never presented to his jury. *See id.* The jurors were to decide Mr. Wood's fate with a penalty phase that spanned less than five hours. (*Compare* Tr. 4/2/04 at 218 (ordering the jury to report at 1 p.m. on Monday for the penalty phase), *with* Tr. 4/5/04 at 159 (noting that jurors retired for penalty-phase deliberations at 5:57 p.m.).) "[T]he justice of [Mr. Wood's] sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance," rendering his "sentencing proceeding . . . fundamentally unfair." *Strickland*, 466 U.S. at 700.

1. Trial counsel's penalty-phase presentation was brief, shallow, and successfully discredited by the State.

Only three witnesses testified at Mr. Wood's penalty phase, and not a single one provided credible testimony about the horrific abuse and resulting trauma that Mr. Wood witnessed and endured as a youth. (OR1 at 355-56; Tr. 4/5/04 at 12-13, 33-102.) Indeed, the cursory, superficial, uncorroborated, and highly equivocal nature of

the testimony provided by these witnesses reflects trial counsel's utter failure to prepare them to testify, as well as his failure to adequately investigate and present a plethora of compelling and readily available mitigating evidence on Mr. Wood's behalf.

Albert's lack of investigation and preparation for Mr. Wood's penalty phase is evidenced by his own remarks. In his penalty-phase opening statement, Albert informed the jury that Mr. Wood looked up to his big brother, Zjaiton, "for whatever reason." (Tr. 4/5/04 at 14.) He went on to add that "[f]or some reason, [Mr. Wood] never quit listening to Zjaiton." (Tr. 4/5/04 at 14.) Had Albert adequately investigated, he would have learned that Zjaiton—who was heavily involved in gang activity—exerted a powerful influence over young Mr. Wood during his most formative years as a child. (*See* E.H. Tr. 2/23/06 at 123-24.) Zjaiton's destructive influence, counsel would also have understood, was made possible by the void created in Mr. Wood's life by his parents' absence (E.H. Tr. 2/23/06 at 93-95, 104, 121-25, 167-69, 174-75; E.H. Tr. 2/27/06 at 187-88), his father's pervasive abuse (E.H. Tr. 2/23/06 at 112-21, 132-35, 141-46,157-63, 171-72; E.H. Tr. 2/27/06 at 187, 331-33, 341-42), and by the lack of healthy adult role models in his life (E.H. Tr. 2/23/06 at 52, 54-55, 58-60, 78, 122-26, 163-65, 172-73; E.H. Tr. 2/27/06 at 187-90, 192, 233, 334-37).

In the absence of an adequate investigation by trial counsel, Mr. Wood's jury was left with a shallow, incomplete, and, significantly, uncorroborated view of his character and background. Andre Taylor, the then-girlfriend of Mr. Wood's mother, was the first witness called by trial counsel to testify during the penalty phase, and

her testimony was cursory and superficial, constituting just three pages of transcript. (Tr. 4/5/04 at 33-36.) While Albert promised the jury that Taylor "will tell you about Tremane Wood," "is going to tell you that people liked him," that "[h]e was good with his kids," and "good with other people's kids," and that "he is not a bad person" (Tr. 4/5/04 at 12), Her brief testimony consisted primarily of one-word, "yes," responses to a few generalized questions posed by trial counsel, including whether she loved Mr. Wood (Tr. 4/5/04 at 36), thought that he was a good father (Tr. 4/5/04 at 34), and whether she would keep in touch with him in prison (Tr. 4/5/04 at 35). Whereas Albert had also promised Mr. Wood's jury that it would hear from Taylor that "people liked [Mr. Wood]" (Tr. 4/5/04 at 12), that he was "good with other people's kids" (Tr. 4/5/04 at 12), and that "he is not a bad person" (Tr. 4/5/04 at 12), he failed to ask her a *single* question on these subjects (Tr. 4/5/04 at 33-36).

The testimony of the second and penultimate mitigation witness, psychologist Ray Hand, Ph.D., was similarly cursory, superficial, and, at many times, outright harmful. His direct testimony constituted just 25 pages of transcript. (Tr. 4/5/04 at 38-63.) While Dr. Hand acknowledged reviewing "some records" (Tr. 4/5/04 at 64), he conceded on cross-examination that he did not receive from trial counsel or review any records from the Central Oklahoma Juvenile Facility where Mr. Wood was housed for 274 days as a youth (Tr. 4/5/04 at 73-74).

Significantly, the vast majority of Dr. Hand's testimony was highly generalized, non-specific to Mr. Wood, and equivocal. This was a direct result of trial counsel's failure to adequately investigate Mr. Wood's social history and provide it to

Dr. Hand for his consideration, evaluation, and presentation to the jury. For example, Dr. Hand reduced what was, in fact, pervasive abuse and trauma to simply "negativism between the parents" (Tr. 4/5/04 at 52), and to mere "allegations going back and forth" (Tr. 4/5/04 at 52; *see also* Tr. 4/5/04 at 53 (referring once again to "allegations going back and forth" between Mr. Wood's parents).).

Trial counsel was on notice of the need to provide Dr. Hand with information to corroborate Linda's allegations of abuse in light of the fact that DHS records indicated that her allegations were unfounded. (Tr. 4/5/04 at 69.) Readily available witnesses could have provided critical corroboration of abuse had trial counsel bothered to interview them, and had he asked that they testify on the matter. (E.H. Tr. 2/23/06 at 157-73; E.H. Tr. 2/27/06 at 329-43.) Yet, trial counsel provided no corroboration whatsoever for the abuse that Mr. Wood witnessed and endured as a child, which left Mr. Wood with a poorly informed expert and his mother's impeached word to make this case to his jury. (Tr. 4/5/04 at 101.)

Trial counsel's failure to adequately investigate and present to the jury information about Mr. Wood's background and character is further apparent in the highly dubious nature of Dr. Hand's testimony:

- "*I wonder*, *I can't prove this*, but *I wonder* if some of the roots of [Mr. Wood's] paranoia . . . got started here at a very earlier age with this lack of trust and the chaos that I saw here in this family." (Tr. 4/5/04 at 53) (emphasis added.)
- ". . . *I'm not sure* – you know, [Mr. Wood] has been responsive to treatment . . . " (Tr. 4/5/04 at 60) (emphasis added.)
- "I don't know." (Tr. 4/5/04 at 67 (in response to a question about programs that Mr. Wood completed while previously in prison).)

- "I don't know the details of all of it." (Tr. 4/5/04 at 70 (in response to prosecutor's question about Mr. Wood's juvenile history).)

- I didn't see the specifics of it." (Tr. 4/5/04 at 71 (in response to prosecutor's question about whether he reviewed Mr. Wood's juvenile records).)

- "I don't know what it was. I don't know the specific details." (Tr. 4/5/04 at 72 (in response to prosecutor's question about Mr. Wood's juvenile cases).)

- Incorrectly stating, "I don't think [Linda Wood] was a teen mother." (Tr. 4/5/04 at 80 (and responding "[n]o" to the prosecutor's question about whether he was aware of Linda's age when Mr. Wood was born).)

- "I don't recall the specifics of that." (Tr. 4/5/04 at 85 (in a question about whether Mr. Wood attended Vo-Tech while in prison).)

The final witness called by trial counsel to testify on Mr. Wood's behalf at the penalty phase was his mother, Linda Wood. (Tr. 4/5/04 at 88.) Her direct examination constituted just 12 pages of transcript. (Tr. 4/5/04 at 88-100.) The testimony that Albert elicited from Linda concerning the abuse that she experienced at the hands of Mr. Wood's father, Raymond Gross, was brief and utterly lacking in detail. (Tr. 4/5/04 at 91-93.) For instance, Albert asked Linda whether Mr. Wood "had seen a lot of violence in the home?" to which she, in conclusory fashion, replied "[a] lot of violence." (Tr. 4/5/04 at 93.) Rather than asking Linda follow up questions about specific instances of violence, Albert instead ended the inquiry there and moved on to an entirely different topic: "How many kids do you have?" he asked. (Tr. 4/5/04 at 93.) The subject of abuse did not come up again in his questioning of Linda.

Linda's cross examination reveals trial counsel's complete failure to prepare her to testify. She did not know, for instance, that DHS had found her allegations of abuse against her ex-husband to be unfounded (Tr. 4/5/04 at 69, 101), and she stated

that she had no memory of Mr. Wood's juvenile offenses (Tr. 4/5/04 at 102). Rather than rehabilitate Linda or corroborate her testimony—either by calling readily available witnesses or by conducting a redirect of Linda to elicit corroborating details concerning familial abuse—Albert instead informed the court that, "[w]e rest, your Honor." (Tr. 4/5/04 at 102.)

In urging jurors to sentence Mr. Wood to death, the State used trial counsel's poorly developed and shallow mitigation presentation to its advantage. The prosecutor concluded his penalty-phase closing argument by urging jurors that death was the appropriate verdict because the mitigation case presented by Mr. Wood was "weak" and "looks like a big blame party." (Tr. 4/5/04 at 156, 158.)

2. An evidentiary hearing in state court revealed new and compelling mitigating evidence.

A three-day evidentiary hearing on Mr. Wood's penalty-phase ineffective-assistance claim during state direct appeal proceedings revealed significant mitigating evidence that the jurors who sentenced Mr. Wood to death never learned about. Jurors never learned, for example, that Mr. Wood's father not only abused Mr. Wood's mother, but abused his three sons as well. Opening Br. 24-25. Jurors also never learned that the abuse endured by Mr. Wood's mother, and which the State successfully discredited at Mr. Wood's trial, was credible and corroborated by both of Mr. Wood's brothers—neither of whom testified at the penalty phase of Mr. Wood's trial. *Id.* And significantly, Mr. Wood's jurors never learned that he was diagnosed

with Post-traumatic Stress Disorder (PTSD) and other mental illnesses that predated his incarceration. (C-3, C-5 to C-6.)

Mr. Wood called 23 witnesses at the hearing. (OR2 at 231-32.) Several witnesses testified in support of the records that were available to but never requested by trial counsel. (E.H. Tr. 2/23/06 at 10, 46-47.) Ten witnesses testified about Mr. Wood's life history, including with specific details about his chaotic and abusive childhood. These witnesses included: Mr. Wood's mother, father, and two brothers; Mr. Wood's foster parent; and social workers who worked with the Wood family while Mr. Wood was growing up. (E.H. Tr. 2/23/06; E.H. Tr. 2/27/06.) Mr. Wood's mother was the only person among the ten witnesses called to testify at the hearing who had previously testified at his penalty phase.

Mr. Wood's mother and brothers detailed the environment in which Mr. Wood was born. (E.H. Tr. 2/23/06 at 111-48, 157-73; E.H. Tr. 2/27/06 at 329-43.) Linda explained that her relationship with Mr. Wood's father, Raymond Gross, began in 1974. (E.H. Tr. 2/23/06 at 112.) At that time, Linda was just 16 years old. Gross was 30 and married to another woman. (E.H. Tr. 2/23/06 at 112.) The following year, Linda became pregnant with their first child, Andre Wood. (E.H. Tr. 2/23/06 at 113.) Gross separated from his wife and moved in with Linda. (E.H. Tr. 2/23/06 at 113.) Gross became jealous and possessive of Linda, and that behavior persisted throughout their relationship. (E.H. Tr. 2/23/06 at 113-20.) Gross proceeded to cut off Linda's access to the world: he dictated how long she could be out, what she could wear, and who she could spend time with; he prohibited her from having friends; and

he alienated her from her family. (E.H. Tr. 2/23/06 at 113.) He accused her of having affairs and became obsessed with the idea that she was cheating on him. (E.H. Tr. 2/23/06 at 114.) On one occasion, Gross came home to find her sleeping on the couch. Mr. Wood and his brothers were asleep on the floor in front of the television. (E.H. Tr. 2/23/06 at 116.) Gross dragged Linda by her ponytail into a glass window, and then continued to beat her with his fists in front of their children. (E.H. Tr. 2/23/06 at 116.) Linda has two artificial front teeth as a result of Gross knocking her teeth out. (E.H. Tr. 2/23/06 at 119.) Mr. Wood witnessed that beating when he was between four and six years old. (E.H. Tr. 2/23/06 at 120.)

Linda had no formal education and very few job skills. (E.H. Tr. 2/23/06 at 121.) After her divorce from Gross in May 1988, at which time Mr. Wood was eight years old, Linda was awarded sole custody of her children. (E.H. Tr. 2/23/06 at 120.) To make ends meet, she worked two jobs—one from 5 a.m. to 1 p.m., and the other from 2 p.m. until 10 p.m. (E.H. Tr. 2/23/06 at 122.) She also pursued a bachelor's degree, which required her to juggle school in addition to two jobs. (E.H. Tr. 2/23/06 at 121.) Linda left Andre, barely a teenager, in charge of the home while she was gone. (E.H. Tr. 2/23/06 at 122.) Zjaiton, the middle son, however, exerted the most influence over Mr. Wood. (E.H. Tr. 2/23/06 at 123.) Mr. Wood "idolized" Zjaiton and wanted to be just like him. Unfortunately, the model that Zjaiton set for Mr. Wood included gang involvement, obsession with weapons, and explosive anger. (E.H. Tr. 2/23/06 at 124.) Zjaiton was physically larger than Mr. Wood, and he learned early on that he could get his way by bullying and threatening others. (E.H. Tr. 2/23/06 at 124.) Growing

up, Zjaiton manipulated Mr. Wood into doing what he wanted because Mr. Wood feared losing his love and approval. (E.H. Tr. 2/23/06 at 124-25.) None of this testimony was presented at Mr. Wood's trial.

Linda testified that she was never interviewed by Mr. Wood's trial counsel, but she had been interviewed on one occasion with her son, Andre, by Dr. Hand for about 30 minutes. (E.H. Tr. 2/23/06 at 128.) Andre confirmed this. (E.H. Tr. 2/23/06 at 166-67.) Indeed, he testified that he never spoke to trial counsel until the day of trial, when they spoke for five minutes in the courthouse hallway. (E.H. Tr. 2/23/06 at 166.)

Andre, whom trial counsel never asked to testify at Mr. Wood's sentencing proceeding, confirmed his mother's account of Gross's physical and mental abuse at the evidentiary hearing. (E.H. Tr. 2/23/06 at 157-63.) Andre testified that Gross was "[v]ery, very mean" and abusive to Linda as well as to all three boys. (E.H. Tr. 2/23/06 at 157-58.) The boys' father would make all three of his sons watch as he beat their mother. (E.H. Tr. 2/23/06 at 158.) Sometimes, he would beat their mother "just because he had a bad day at work." (E.H. Tr. 2/23/06 at 158.) Andre often thought that his father "was going to kill" his mother, and he was surprised that she survived the "beatings that most grown men couldn't walk away from." (E.H. Tr. 2/23/06 at 159.) Gross would also force his children to watch the abuse, and if they refused to watch, he would tell them that he would "'beat [their] ass just like [he] beat hers." (*See* E.H. Tr. 2/23/06 at 160, 162.) When Andre was six or seven years old, Gross brought him into a room where he had tied Linda up and made Andre say goodbye to her because, he told Andre, it was the last time that Andre would see his mother

alive. (E.H. Tr. 2/23/06 at 159.) Andre confirmed the difficulty of reporting his father's abuse to law enforcement because Gross was a police officer, and at one time was the "chief of police in the town [the family] lived in." (E.H. Tr. 2/23/06 at 162.)

Andre had "been slapped, punched, thrown into walls, and slammed against stuff" by his father. (E.H. Tr. 2/23/06 at 160.) Sometimes, his mother would step in "and take an ass-kicking" to save him from a beating. (E.H. Tr. 2/23/06 at 160.) Gross's abuse was not limited to Linda and Andre. He would also whip his sons to the extreme. (E.H. Tr. 2/23/06 at 158.) He once beat Mr. Wood so hard with "a leather strap that you would sharpen a razor on," that he left bruises and welts all over Mr. Wood's legs and back—all because Mr. Wood did not want to say grace at the dinner table. (E.H. Tr. 2/23/06 at 161.)

Andre testified that the boys raised one another and that, although Andre was supposed "to be the adult figure" at 12 or 13 years of age, it was difficult to overcome Zjaiton's connection with Mr. Wood. (E.H. Tr. 2/23/06 at 168.) Zjaiton "had a powerful influence on [Mr. Wood] growing up," Andre testified (E.H. Tr. 2/23/06 at 168), and "was [Mr. Wood's] idol" (E.H. Tr. 2/23/06 at 164).

Consistent with Linda's and Andre's testimony, Zjaiton testified that "there was a lot of physical and mental abuse" in the home. (E.H. Tr. 2/27/06 at 331.) Gross was abusive to Linda and to his sons. (E.H. Tr. 2/27/06 at 331.) Small infractions would trigger beatings by Gross, including if someone left the television volume on too loud or if he lost money gambling. (E.H. Tr. 2/27/06 at 331.) Gross would carry out his beatings with his police holster, or with whatever object lay around. (E.H. Tr.

2/27/06 at 332.) Zjaiton also confirmed Linda's testimony that Gross controlled her whereabouts and disliked her going out. (E.H. Tr. 2/27/06 at 332.)

Zjaiton verified that following his parents' divorce, Linda worked and went to school, often leaving the boys on their own. (E.H. Tr. 2/27/06 at 333.) They struggled financially. They were evicted seven or eight times. (E.H. Tr. 2/27/06 at 334.) Zjaiton became involved in gangs, where he searched for the father figure and the familial cohesiveness that he lacked. (E.H. Tr. 2/27/06 at 334-35.) Zjaiton testified that he was "vindictive, cruel," and "anti-authority," and he wanted his younger brother, Mr. Wood, to be "just like" him. (E.H. Tr. 2/27/06 at 335-37.)

From early on, Zjaiton groomed Mr. Wood to follow in his footsteps. (E.H. Tr. 2/27/06 at 335.) Zjaiton testified that Mr. Wood, unlike himself, was naturally caring and generous, and was an honest student with some athletic talent. (E.H. Tr. 2/27/06 at 338.) In an effort to try and rid Mr. Wood of these natural qualities, Zjaiton subjected Mr. Wood to physical force and to manipulation. He instilled in Mr. Wood from an early age that failing to comply with his wishes was equivalent to disloyalty—to him and to their family. (E.H. Tr. 2/27/06 at 337.) Finally, Zjaiton testified that had he not pressured Mr. Wood over the years to take part in illegal activities, Mr. Wood would not be on death row, convicted of murder. (E.H. Tr. 2/27/06 at 338.)

Gross also testified at the evidentiary hearing. Gross admitted that his marriage to Linda was "pretty rocky," and that he once handcuffed Linda to his car for allegedly having sex with his nephew. (E.H. Tr. 2/23/06 at 17-19.) Gross testified that he took Mr. Wood and Zjaiton with him when he looked for Linda and handcuffed

her to the car. (E.H. Tr. 2/23/06 at 19.) Gross also admitted that the boys witnessed him "push" Linda. (E.H. Tr. 2/23/06 at 18.) He denied ever dragging Linda while she was handcuffed, and he denied other instances of abuse, including that he knocked out Linda's teeth or poured gas on her and lit her on fire. (E.H. Tr. 2/23/06 at 24.) As for the boys, Gross admitted whipping them, but denied beating them "sadistically." (E.H. Tr. 2/23/06 at 24-25.) Gross, like the other family members, confirmed that Zjaiton had a "pretty strong influence on" Mr. Wood, who would do anything Zjaiton asked of him including walking ten blocks on his kneecaps. (E.H. Tr. 2/23/06 at 22.)

In addition to Mr. Wood's family, various child welfare and juvenile system workers who interacted closely with the Wood family throughout Mr. Wood's youth testified. They provided insight into Mr. Wood's dysfunctional and abusive home, as well as into his positive character traits that shined in structured environments.

Sandra Marshall, a juvenile services employee, worked with Mr. Wood's family in various roles and agencies from the time that Mr. Wood was in junior high school until he was 18 years old. (E.H. Tr. 2/27/06 at 185.) Marshall testified that she would visit with Mr. Wood regularly (weekly or monthly) in his home and in her office. (E.H. Tr. 2/27/06 at 186, 194-95.) She noted the Wood household lacked adult supervision and the boys assumed parenting roles. (E.H. Tr. 2/27/06 at 187-90.) Marshall testified that Mr. Wood "did very well" when he was placed in an environment outside of his home. (E.H. Tr. 2/27/06 at 192.) When at home, Mr. Wood unfortunately viewed Zjaiton as his father figure and would follow Zjaiton's lead. (E.H. Tr. 2/27/06 at 192.)

Another juvenile services worker, Matthew Netherton, worked with Mr. Wood in a mentoring role for a total of about two years. (E.H. Tr. 2/23/06 at 90-91.) Netherton testified that he had a "very positive, very good" relationship with Mr. Wood. (E.H. Tr. 2/23/06 at 90-91.) Netherton testified that Linda had three boys with many needs; yet they were left "to fend for themselves" because she worked all the time. (E.H. Tr. 2/23/06 at 94.) Netherton testified that he was "scared to death" of Mr. Wood's older brother, Zjaiton. (E.H. Tr. 2/23/06 at 95.) Mr. Wood, however, was always polite to Netherton and "made [him] feel comfortable." (E.H. Tr. 2/23/06 at 91.) Netherton testified that Mr. Wood was a positive influence on others. For instance, Mr. Wood helped with a Special Olympics event and did a wonderful job, needing no direction. (E.H. Tr. 2/23/06 at 98.) Netherton testified that there were "numerous" other examples throughout his work with Mr. Wood during which Mr. Wood showed "outstanding" character. (E.H. Tr. 2/23/06 at 99.)

Jan Davis was a foster parent to Mr. Wood in 1994 for approximately nine months. (E.H. Tr. 2/23/06 at 77.) Davis recalled that Mr. Wood "idolize[d] his brother" Zjaiton, who was not with him at the foster home. (E.H. Tr. 2/23/06 at 78.) Mr. Wood talked about Zjaiton "all the time" and "[t]hought [Zjaiton] was the greatest thing around," Davis recalled. (E.H. Tr. 2/23/06 at 78.) With Mr. Wood away from his chaotic family and Zjaiton's influence, he was a positive influence within the foster family. Davis recalled Mr. Wood as polite and mannerly and a peacemaker among the foster kids. (E.H. Tr. 2/23/06 at 79.)

Appellate counsel also called some of Mr. Wood's friends from various times in his life who testified about Mr. Wood's positive attributes and further confirmed that Zjaiton exerted a powerful influence over him. (E.H. Tr. 2/23/06 at 50-57, 148-51; E.H. Tr. 2/27/06 at 231-34.)

All ten of these mitigation witnesses testified that, had trial counsel contacted them and asked them, they would have been willing to testify at Mr. Wood's sentencing proceeding. (E.H. Tr. 2/23/06 at 23, 56, 81-82, 97, 129, 151-52, 167; E.H. Tr. 2/27/06 at 192-93, 235, 338.)

In addition to the lay witnesses, Mr. Wood's appellate counsel called one expert, Kate Allen, L.C.S.W., Ph.D., to testify. (E.H. Tr. 2/27/06 at 199.) Although the trial court erroneously prevented Dr. Allen from testifying, as discussed in Section II, *infra*, appellate counsel entered her report into the record. (E.H. Tr. 2/27/06 at 220, 224.)[2] Appellate counsel proffered that Dr. Allen, had she been allowed to testify, would have explained: (1) Mr. Wood's early childhood development and experiences, including the roles played by his mother, father, and Zjaiton in parenting him; (2) Mr. Wood's PTSD and impaired attachment; (3) the absence of positive interventions in

[2] The state court never considered any of Dr. Allen's expert opinions, including that Mr. Wood suffered from PTSD, when denying this claim because it erroneously concluded that she was unqualified as a mental-health expert. As discussed in Section III of this brief, Mr. Wood argued before the Tenth Circuit that it was unreasonable for the state court to disregard her report in rejecting this claim since it was submitted into the record and preserved for appeal. Opening Br. 76-82; Reply Br. 31-42. The Tenth Circuit determined that it was reasonable for the OCCA to disregard Dr. Allen's report because appellate counsel never raised the issue in its supplemental brief to the OCCA following the evidentiary hearing. (B-21 to B-22.) Mr. Wood alternatively raised a claim that appellate counsel were ineffective for failing to challenge the exclusion of Dr. Allen's report and testimony in their supplemental brief on direct appeal, and that the OCCA's determination otherwise was unreasonable, which is outlined in Section II of this brief.

his life; (4) the impact of being biracial in a predominantly white, rural town; and (5) the Department of Justice risk factors. (E.H. Tr. 2/27/06 at 204-05.)

3. The state-court erroneously relied upon the similarity of mitigation themes presented at the evidentiary hearing and at trial to find that Mr. Wood was not prejudiced by trial counsel's failures, and the Tenth Circuit erred in finding that determination to be reasonable.

Ultimately, the OCCA concluded that *none* of the evidence marshalled at the hearing was new, and denied Mr. Wood's claim to relief. *Wood v. State*, 158 P.3d 467, 481 (Okla. Crim. App. 2007). Key to that court's determination that Mr. Wood failed to establish prejudice on his ineffective-assistance claim was its view of the new mitigating evidence that trial counsel failed to uncover and present as irrelevant because that evidence "cover[ed] [ ] areas" touched on at Mr. Wood's trial. *Id.*

Unlike the OCCA, the Tenth Circuit recognized that some of the evidence introduced at Mr. Wood's evidentiary hearing was new—including that Mr. Wood and his brothers had been abused by their father. (B-20 to B-24.) But because "this evidence still related to the same *themes* counsel developed at trial[,]" the court concluded that it was "thus cumulative of the evidence trial counsel actually presented during the sentencing stage[,]" and the OCCA's conclusion that Mr. Wood suffered no prejudice from trial counsel's failures was therefore objectively reasonable. (B-20.) Such a conclusion cannot be squared with this Court's well-established precedent.

The OCCA and the Tenth Circuit disregarded the constitutional analysis required by *Strickland*, *Wiggins*, *Rompilla*, and *Porter*. The prejudice inquiry for a

claim of ineffectiveness requires that "a court hearing an ineffectiveness claim must consider the totality of the *evidence* before the judge or jury." *Strickland*, 466 U.S. at 695 (emphasis added); *Wiggins*, 539 U.S. at 534 ("In assessing prejudice, we must reweigh the evidence in aggravation against the totality of available mitigating evidence."); *Rompilla*, 545 U.S. at 393 ("[T]he undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Rompilla's] culpability, and the likelihood of a different result *if the evidence* had gone in is sufficient to undermine confidence in the outcome actually reached at sentencing" (emphasis added) (citation and internal quotation marks omitted)); *Porter*, 558 U.S. at 41 (explaining that in order to assess whether there is a "reasonable probability of a different outcome," courts must "consider the totality of the available mitigating evidence"). As *Strickland* and its progeny make clear, the prejudice inquiry turns on whether "there is [ ] a reasonable probability that [ ] omitted *evidence* would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." *Strickland*, 466 U.S. at 700 (emphasis added).

Disregarding these principles, the Tenth Circuit instead deemed reasonable the OCCA's prejudice determination under 28 U.S.C. § 2254(d)(1) by replicating the OCCA's error—that is, the Tenth Circuit found no prejudice to Mr. Wood from trial counsel's omissions based upon the alleged similarity of the mitigation "themes" presented both at the trial and evidentiary hearing, disregarding the weight of the evidence. (B-20.) The Tenth Circuit should have instead considered "the totality of

the available mitigating evidence," *Porter*, 558 U.S. at 41, and asked whether a reasonable probability exists that the omitted *evidence* would have led a single juror to weigh the balance of aggravating and mitigating circumstances in favor of life, *Strickland*, 466 U.S. at 700.

Similarly in *Wiggins*, this Court faulted trial counsel for only touching on the theme of Wiggins's "difficult life," *id.* at 526, where "counsel never followed up on that suggestion *with details* of Wiggins' history" *id.* at 526 (emphasis added). Key to this Court's holding that 28 U.S.C. § 2254(d)'s limitations on habeas relief were overcome, and to its ultimate grant of relief, was the determination that details about Wiggins's life subsequently developed in postconviction proceedings shed light on "the nature and the extent" of the abuse that he suffered. *Id.* at 535. The same is true in Mr. Wood's case, but the OCCA and the Tenth Circuit concluded otherwise in outright disregard of the requisite constitutional analysis.

Rompilla reemphasized that merely scratching the surface of a capital defendant's life history with mitigation themes while omitting substantial evidence to support them is ineffective. Trial counsel in *Rompilla* did more than trial counsel did in this case: they conducted "interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts[.]" 545 U.S. at 381. This Court nonetheless found that Rompilla's counsel performed ineffectively because "the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [Rompilla's] culpability . . . and the likelihood of a

different result if the evidence had gone in is sufficient to undermine confidence in the" verdict. *Id.* at 393.

In Mr. Wood's case, as in *Porter*, *Wiggins*, and *Rompilla*, there is a reasonable probability of a different penalty-phase outcome had the postconviction mitigating evidence been presented at trial. Notwithstanding the limited mitigating evidence that trial counsel did put forward, Mr. Wood's jurors deliberated for longer than the penalty-phase presentation by both parties lasted, and did not reach a verdict until nearly midnight. (Tr. 4/5/07 at 163-64.) Even then, one of the jurors was still reluctant to vote for death. (*See* Tr. 4/5/04 at 165.) Thus, "there is [ ] [a] reasonable probability that the omitted evidence would have changed the [jury's] conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." *Strickland*, 466 U.S. at 700. The Tenth Circuit erred by finding that the state court was reasonable in reaching the opposite conclusion through contravention of this Court's precedent. Accordingly, this Court should issue a writ of certiorari on this question.

II. The Tenth Circuit contravened this Court's decision in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), by failing to examine the actual reasoning provided in the state court's last-reasoned opinion denying a claim of ineffective-assistance-of-appellate-counsel and by instead examining reasoning not provided by the state court.

The Tenth Circuit contravened *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), by ignoring the OCCA's actual reasoning for denying Mr. Wood's ineffective-assistance-of-appellate-counsel claim.

A. During the evidentiary hearing on Mr. Wood's claim of ineffective assistance of trial counsel, the trial court improperly excluded Mr. Wood's only expert witness, Dr. Allen.

As discussed above in Section I, during the evidentiary hearing held on Mr. Wood's ineffective-assistance-of-trial-counsel claim during state direct appeal proceedings, Mr. Wood's appellate counsel called one expert, Kate Allen, L.C.S.W., Ph.D., to testify. (E.H. Tr. 2/27/06 at 199.) Counsel offered Dr. Allen's testimony and report to demonstrate trial counsel were ineffective in investigating, developing, and presenting mitigation at Mr. Wood's trial.

Although Dr. Hand testified at trial about psychological issues, he was not well prepared and was not provided all the relevant records about Mr. Wood's life history. *See* Reply Br. at 16. As a result, Dr. Hand provided vague information to the jury about in Mr. Wood's background and character. *See* Section I, *supra*. Appellate counsel called Dr. Allen to show that a mental-health expert provided with all the relevant records and otherwise properly prepared to testify would have been able to provide the jury with mitigating information that had the reasonable probability of convincing at least one juror to vote for life.

At the time of the hearing, Dr. Allen held a master's degree in clinical social work and a doctoral degree in family sociology, and had over 35 years of experience as a clinical social worker, a professor, and an expert witness in civil and criminal cases. (E.H. Tr. 2/27/06 at 200.) She prepared a report analyzing

> how [Mr. Wood's] childhood development, experiences in his family and community, and his neuro-psychiatric diagnoses contributed to his adult functioning capacity and his journey to the murder that occurred on 1-01-02. As well, it will delineate the enduring positive qualities of the

> defendant's character and personality. This analysis, had it been offered in this case, is critical to a jury's duty to deliberate on the role of both aggravating and mitigating factors in the penalty phase of their decisions.

(*See* C-1; *see also* E.H. Tr. 2/27/06 at 204-05.) Dr. Allen's intended testimony was "prototypical mitigation evidence" (E.H. Tr. 2/27/06 at 208) that would help demonstrate trial counsel's ineffectiveness in investigating, preparing, and presenting mitigation at trial (E.H. Tr. 2/27/06 at 219).

Before Dr. Allen was able testify, however, the State objected. The State argued that Dr. Allen should not be permitted to testify regarding "any psychological considerations or conclusions" because she was unqualified, despite being a licensed, clinical social worker (LCSW), to diagnose Mr. Wood. (E.H. Tr. 2/27/06 at 203.)

The trial court allowed Mr. Wood's counsel to examine Dr. Allen regarding her experience and qualifications. She testified that she had a master's degree in clinical social work, which along with her license, allows her to diagnose individuals with mental-health issues. (E.H. Tr. 2/27/06 at 213.) Dr. Allen explained that psychologists, psychiatrists, and LCSWs can *all* conduct clinical evaluations and reach a psychiatric diagnosis. (E.H. Tr. 2/27/06 at 213.) She had personally conducted upwards of 800 psychological evaluations. (E.H. Tr. 2/27/06 at 214.) Dr. Allen had also taught courses on conducting clinical interviews to graduate students in psychology and psychiatry. (E.H. Tr. 2/27/06 at 214.) Moreover, in all the times she had previously testified, a court never ruled she was unqualified to make psychological diagnoses. (E.H. Tr. 2/27/06 at 214.)

Despite lacking any evidence or law contradicting Dr. Allen's testimony about her qualifications, the state trial court found she was unqualified to provide the expert opinions she planned to give. (E.H. Tr. 2/27/06 at 221.) The court also found that, because she was unqualified to provide her expert opinion, her non-expert testimony would be "duplicitous [sic] of previous testimony" and therefore would also be excluded. (E.H. Tr. 2/27/06 at 221.) Nonetheless, Mr.Wood's appellate counsel entered her report into the record so the trial court's ruling could "be fully reviewed." (E.H. Tr. 2/27/06 at 220.)

The trial court's ruling—prohibiting Dr. Allen from testifying and refusing to consider her report because she was not qualified to perform psychological evaluations or make diagnoses—was clearly erroneous under Oklahoma law. In Oklahoma, an LCSW "render[s] services to individuals, families, or groups of individuals that involve the evaluation, diagnosis, treatment, and prevention of emotional disorders and mental illness . . . [and] provid[es] services of a psychosocial nature." Okla. Admin. Code § 675:10-1-5(a)(1) (2006).

Had she testified, Dr. Allen would have demonstrated what a well-prepared mental-health expert would have been able to present to Mr. Wood's jury. Trial counsel's expert, Dr. Hand, received only a fraction of the available records from Mr. Wood's childhood. (*See* Reply Br. at 16 (explaining Dr. Hand had approximately 200 pages of records when there were at least 1,200 from just one juvenile agency).) No one from the trial team, including Dr. Hand, interviewed those who interacted with Mr. Wood on a close basis outside the family. (E.H. Tr. 2/23/06 at 128, 166-67.) Dr.

Allen, however, reviewed the records trial counsel failed to uncover, 17 affidavits from mitigation witnesses, and interviewed the appellate mitigation investigator (who interviewed all the mitigating witnesses), Mr. Wood, his mother, his father, his two brothers, and Mr. Wood's juvenile case worker. (E.H. Tr. 2/27/06 at 201-02; C-1.)

With only a portion of the available records and no information from those outside the family who knew Mr. Wood well as a child, Dr. Hand had only a partial picture of Mr. Wood's life history. Because appellate counsel conducted a more thorough investigation, Dr. Allen's report demonstrates that she had a far more comprehensive understanding of Mr. Wood and his childhood. She would have presented a vastly more impactful expert opinion as the following comparison of Dr. Hand's trial testimony and Dr. Allen's report demonstrates.

For example, trial counsel never elicited testimony from Dr. Hand about mental-health diagnoses. (Tr. 4/5/04 at 38-63.) Dr. Allen, however, concluded that Mr. Wood suffered from attachment disorder, depression, anxiety, and PTSD. (C-3, C-6.)

Trial counsel also never elicited testimony from Dr. Hand about how Mr. Wood became vulnerable to gang recruitment. Dr. Allen's report included a thorough analysis of why Mr. Wood succumbed to gang influence. She recognized that Mr. Wood's "parents allowed the criminal gang—first brought to him through his mentally ill and extremely violent older brother, [Zjaiton] to take over his upbringing at around age 11." (C-1.) Gang life provided Mr. Wood with missing "emotional and financial support" and "protection." (C-2, C-4.)

Dr. Hand was never asked to explain how domestic violence that Mr. Wood witnessed and endured affected his development. In contrast, in her report, Dr. Allen thoroughly explained the effects of violence on Mr. Wood, stating that "extreme domestic violence [was] a central characteristic" of his childhood, causing him to feel terror, anger, and helplessness. (C-2.) She also concluded that Mr. Wood's "documented depression, dependency, PTSD and generalized anxiety were combined with psychological evaluations reporting neurological immaturity, a very common consequence of an early violent environment and impaired attachment." (C-2.)

On the issue of racial discrimination that Mr. Wood faced growing up, at trial Dr. Hand merely stated that "bi-racial kids face some conflict that others don't." (Tr. 4/5/04 at 81.) Dr. Allen, however, detailed how "being biracial—and light skinned—has had a significant impact on who he was and how he would respond to expectations and conditions of acceptance and rejection by others." (C-6.)

By forbidding Dr. Allen from testifying, the state court contravened *Lockett v. Ohio*, 438 U.S. 586, 608 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982), cases which clearly establish that the sentencer must not be precluded from considering relevant mitigating evidence. Dr. Allen's expert opinions constituted "prototypical" mitigating evidence that a sentencer, as a matter of law, must be allowed to consider.

B. Appellate counsel failed to challenge the trial court's exclusion of Dr. Allen's testimony and report in their supplemental brief.

One month after the hearing, the trial court issued its factual findings and rejected Mr. Wood's ineffective-assistance-of-trial-counsel claim. (OR2 at 230-44.) The

claim returned to the OCCA for its review, and the parties were permitted to submit supplemental briefs responding to the trial court's findings. (OR2 at 2.) Appellate counsel failed to include in their brief any argument challenging the exclusion of Dr. Allen as a witness. (DA2 Supp. Br. of Appellant, 5/1/06; PC Op. at 3, 6/30/2010.) The OCCA affirmed the trial court's ruling, denying the claim without mention of Dr. Allen or her report. *Wood v. State*, 158 P. 3d 467 (Okla. Crim. App. 2007).

In state postconviction proceedings, Mr. Wood claimed that the trial court erred in precluding Dr. Allen's testimony, but the OCCA ruled that the claim was waived because "Wood chose not to raise any claim in his supplemental brief about the judge's ruling excluding his expert's testimony." (PC Op. at 3, 6/30/2010.)

Mr. Wood also claimed that appellate counsel's failure to raise the issue in its supplemental brief constituted ineffective assistance of appellate counsel. The OCCA denied that claim too, finding that counsel's failure to raise the issue in the supplemental brief was not deficient or prejudicial. (PC Op. at 14, 6/30/10.) In its prejudice inquiry, the OCCA held that appellate counsel's failure to challenge the exclusion of Dr. Allen's testimony was not prejudicial because they "did provide [the OCCA] with [her] findings by admitting [her] report below." (PC Op. at 14, 6/30/10.)

C. The Tenth Circuit contravened *Wilson* in finding the OCCA's denial of the appellate-ineffectiveness claim reasonable.

In his federal habeas proceedings, Mr. Wood claimed that the OCCA's denial of his ineffective-assistance-of-appellate-counsel claim was unreasonable under § 2254(d)(1) and (2). The Tenth Circuit ruled that the OCCA "denied relief because counsel did not perform deficiently and Wood was not prejudiced," but the Tenth

Circuit declined to reach the deficiency prong. (B-27.) Instead, the Tenth Circuit addressed only the OCCA's prejudice analysis, holding that

> [i]t was reasonable for the OCCA to conclude appellate counsel's failure to challenge the exclusion of Dr. Allen's testimony in the supplemental brief caused Wood no prejudice. This is because Dr. Allen's testimony would have been substantially cumulative of other evidence already presented at both the hearing and at trial. . . . It was therefore not objectively unreasonable for the OCCA to find Dr. Allen's largely cumulative testimony would likely not have affected the proceeding's outcome.

(B-27 to B-28.)

Contrary to the Tenth Circuit's opinion, however, the OCCA did not reason in its prejudice analysis that Dr. Allen's testimony would be "largely cumulative." The OCCA held that appellate counsel's failure was not prejudicial because "appellate counsel *did* provide [the OCCA] with the expert's findings by admitting the expert's report below." (PC Op. at 14, 6/30/10 (emphasis added).)

Under AEDPA, federal courts must review the state court's actual reasoning for the claim at issue. *See Wilson*, 138 S. Ct. at 1192 ("[W]hen the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion . . . . a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable.").

The Tenth Circuit therefore ignored *Wilson* by evaluating different reasoning than the state court actually provided. Had the Tenth Circuit evaluated the OCCA's actual reasoning, it would have found unreasonable under § 2254(d) the OCCA's determination that appellate counsel's failure caused no harm because the report was admitted. Dr. Allen's report was admitted for the sole purpose of preserving the

challenge that was never raised in the supplemental brief, and it is uncontested that the report was never considered by the OCCA in ruling on the trial-ineffectiveness claim. Respondent conceded that the OCCA never reviewed Dr. Allen's report in denying Mr. Wood's ineffectiveness claim. *See, e.g.*, Resp't-Appellee Br. at 71, *Wood v. Carpenter*, No. 16-6001 (10th Cir. June 30, 2017). The Tenth Circuit itself held that the OCCA "could not consider" Dr. Allen's report on direct appeal because of the limited nature of its admission. (B-21.)[3] Since the Tenth Circuit concluded that the OCCA could not consider the report, it should have also concluded that the OCCA's finding that the admission of Dr. Allen's report cured any prejudice resulting from appellate counsel's failure was unreasonable because such a finding ignored the limitation imposed on the report's admission.

As a result of appellate counsel's failure to challenge Dr. Allen's exclusion in the supplemental brief, her expert opinions were never considered in evaluating Mr. Wood's trial-ineffectiveness claim. Because the trial court's exclusion was clearly contrary to law and Dr. Allen's testimony was a critical part of appellate counsel's evidence at the hearing, appellate counsel had every reason to contest that decision in its supplemental brief. But appellate counsel never raised the issue, not even in one sentence, and as a result, the OCCA never considered Dr. Allen's opinions.

"When considering a claim of ineffective assistance of appellate counsel for failure to raise an issue, [the court] look[s] to the merits of the omitted issue." *Neill*

[3] As will be discussed in Section III, *infra*, Mr. Wood alternatively argued that the OCCA unreasonably denied Mr. Wood's trial-ineffectiveness claim by not considering Dr. Allen's report because it was in the record. The Tenth Circuit rejected that argument by holding the OCCA "could not consider" Dr. Allen's report because of its limited admission in the record. (B-21.)

v. Gibson, 278 F.3d 1044, 1057 (10th Cir. 2001) (citing *Hooks v. Ward*, 184 F.3d 1206, 1221 (10th Cir. 1999)). A petitioner alleging appellate ineffectiveness need not show that the claim would have automatically resulted in reversal. *Neill*, 278 F.3d at 1057, n.5. Rather, if there is a "reasonable probability that the omitted claim would have resulted in a reversal on appeal," a petitioner will be entitled to relief. *Id.*

Here, Dr. Allen's opinions, if considered on direct appeal, would have had a reasonable probability of changing the outcome of the appeal because they would have demonstrated that trial counsel were ineffective in preparing and presenting the testimony of their mental-health expert. Dr. Allen's opinions would have further demonstrated that, had trial counsel been effective in presenting a psychological expert, there was a reasonable probability at least one juror would have changed her sentencing verdict. *See Wiggins*, 539 U.S. at 537. Even without Dr. Allen's robust mental-health testimony, the jury deliberated until nearly midnight, and one juror stated that she was reluctant to vote for death but did not want to keep the jury any longer. (*See* Tr. 4/5/04 at 165.) Appellate counsel's failure to challenge the exclusion of Dr. Allen's opinions thus prejudiced Mr. Wood. Appellate counsel were therefore ineffective in failing to raise this issue in the supplemental brief to the OCCA.

D. Conclusion

By ignoring *Wilson* and failing to evaluate the state court's actual reasoning under AEDPA in this death-penalty case, the Tenth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. Accordingly, a writ of certiorari should issue on this question.

III. Alternatively, the Tenth Circuit contravened this Court's decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011), where it failed to consider under 28 U.S.C. § 2254(d)(1) evidence in the record before the state court that adjudicated Mr. Wood's trial-ineffectiveness claim.

This final question presented arises out of the inherent tension in the Tenth Circuit's rulings on Mr. Wood's ineffective-assistance-of-*trial*-counsel claim and his ineffective-assistance-of-*appellate*-counsel claim. Mr. Wood claimed that the OCCA decision denying his trial-ineffectiveness claim was unreasonable under § 2254(d) because the OCCA failed to consider Dr. Allen's report in evaluating that claim. The Tenth Circuit ruled that it was reasonable for the OCCA not to consider the report because the report was admitted only to preserve the challenge to the trial court's ruling, and thus the OCCA "could not consider this report as *evidence* of trial counsel's alleged ineffectiveness." (B-21.)

The Tenth Circuit's reasoning on that claim conflicts, however, with its ruling on Mr. Wood's appellate-ineffectiveness claim. (B-27.) As explained in Section II, *supra*, the OCCA determined that Mr. Wood suffered no prejudice due to his appellate counsel's failure to challenge the court's ruling regarding Dr. Allen because they "*did* provide [the OCCA] with [Dr. Allen's] findings by admitting [her] report." (PC Op. at 14, 6/30/10 (emphasis added)). The Tenth Circuit deemed the OCCA's decision regarding prejudice reasonable (albeit ignoring the actual reasoning).

The Tenth Circuit, when evaluating Mr. Wood's trial-ineffectiveness claim, ruled that the OCCA *could not* have considered Dr. Allen's report. But, when evaluating Mr. Wood's appellate-ineffectiveness claim, also implicitly found

reasonable the OCCA's determination that the report was admitted and available to the OCCA in adjudicating the trial-ineffectiveness claim. Both cannot be true.

In *Pinholster*, this Court held that the focus of a federal habeas court's review of a state court decision under § 2254(d)(1) is "on what a state court knew and did." *Id.* at 182. For that reason, "[i]f a [federal constitutional] claim has been adjudicated on the merits by a state court," then "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 181, 185. Here the Tenth Circuit's opinion suggests both that Dr. Allen's report was in the state-court record and not in the record. If this Court determines that the report was in the record, so appellate counsel's failure was harmless, then the Tenth Circuit's conclusion that it was reasonable for the OCCA to ignore the report in evaluating the trial-ineffectiveness claim (B-27) necessarily contravened *Pinholster*'s mandate to review a state-court decision based on the record before that court. For that reason as well, Mr. Wood asks that this Court grant his petition for a writ of certiorari.

CONCLUSION

For all the foregoing reasons, Mr. Wood's petition for writ of certiorari should be granted in this capital case.

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Respectfully submitted: March 29, 2019.

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