**No. (Capital Case)**

# *In The Supreme Court of the United States*

**JAMAAL HOWARD,** ***PETITIONER***

***V.***

**BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,** ***RESPONDENT***

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

**PETITION FOR A WRIT OF CERTIORARI**

*in forma pauperis*

DON BAILEY
ATTORNEY FOR PETITIONER
309 N. WILLOW
SHERMAN, TEXAS 75090
(903) 892-9185

**CAPITAL CASE**

## QUESTIONS PRESENTED

1. Did the Fifth Circuit err in considering the totality of three different trials, and excusing the District Court's erroneous conclusion regarding the proper standard, in considering the claim that Mr. Howard receive the ineffective assistance of counsel when his attorney failed to conduct a reasonable investigation of his life history and to have a mental health evaluation conducted in light of that history?
2. Did the Fifth Circuit err in considering the totality of three different trials and the District Court's erroneous legal conclusion when they denied Mr. Howard's claim that he was denied his Sixth & Fourteenth Amendment rights to effective assistance of counsel when his attorney failed to investigate Mr. Howard's psychosocial history thoroughly and failed to seek timely and relevant evaluations of the mental condition of Mr. Howard regarding: a. his competence to stand trial and whether his waiver of Miranda rights and subsequent confession were knowing and intelligent?

## PARTIES TO THE PROCEEDINGS BELOW

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## PETITION FOR A WRIT OF CERTIORARI

Jamaal Howard petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, denying a motion for certificate of appealability, is reported at *Howard v. Davis,* 959 F.3d 168 (5th Cir. 2020) and is attached as Appendix 1. The unpublished opinion of the District Court granting summary judgment is attached as Appendix 2.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 11, 2020.[1] The court of appeals had jurisdiction pursuant to 28 U.S.C. § 2254 and § 1291. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution allows that "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence."

## STATEMENT OF THE CASE

On May 12, 2000, Jamaal Howard, a young black young man with a history of mental health and intellectual impairment issues, killed a person in the course of committing robbery in Hardin County, Texas. Mr. Howard was subsequently convicted

[1] Pursuant to the Supreme Court's March 19, 2020, COVID order, this petition is submitted within 150 days of the Judgment of the Fifth Circuit.

by an all-white jury and given the death penalty. He spent the next four years in and out of prison psychiatric hospitals and remains heavily medicated to this date for mental issues.

### A. PROCEDURAL HISTORY

On June 13, 2000, a Hardin County Grand Jury indicted Mr. Howard for the capital murder of Vickie Swartout during the course of committing robbery. (ROA. 1313) Mr. Howard's family hired Tyrone Moncriffe, an attorney from Houston, to represent Mr. Howard. (ROA. 1315) Mr. Moncriffe never filed any document or pleading bringing up the three most important matters in this case, that is, competency, mental deficiency and insanity. In fact, as noted below, it was the state that moved for a competency trial after they had rested and Mr. Moncriffe first introduced the issue during the opening witness of the defense case. In fact, as noted below, it was the state that moved for a competency trial after they had rested and Mr. Moncriffe first introduced the issue during the opening witness of the defense case. Mr. Moncriffe did not bring up insanity until March 15, 2001, halfway through individual voir dire, in an oral notice to the Court that he was changing the plea to not guilty by reason of insanity. (ROA. 2672) Mr. Moncriffe never had Mr. Howard examined specifically for insanity by anyone. Mr. Moncriffe moved orally for a competency evaluation on March 5, 2001, the day before jury selection was to start. (ROA. 1690-1691)

The state rested after just over one day of testimony on guilt-innocence. (ROA. 4280) At the conclusion of Dr. Duncan's testimony, the prosecutor, Mr. Roach moved for a competency trial. Something Mr. Howard's attorney never did. At 11:10 a.m. on the second day of trial, the court stood in recess to determine competency. (ROA. 4307-4309) Thus, pursuant to Tex. Code of Crim. Proc. Art. 46.02 § 2(b) the court sent the jury home to have a competency trial.

On April 11, 2001, the first competency trial commenced. (ROA.4935) After hearing the witnesses, including Dr. Fason, the jury notified the court that they were deadlocked. The court instructed the jury to continue to deliberate and one hour and forty minutes later the jury again said they were deadlocked and the court declared a mistrial. (ROA. 5158-5159) The court ordered a new jury panel to be summoned for the following Monday, April, 16th. (ROA. 5161)

The second competency trial proceeded in much the same manner as the first with the exception that Mr. Howard's attorney failed to call his one expert witness, Dr. Fason. The all white jury found Mr. Howard competent in 47 minutes of deliberation on the second competency trial. (ROA. 5464-5465)

The punishment hearing consisted largely of state witnesses with a few of Mr. Howard's family and friends testifying about his mental issues. Dr. Fason also testified. Mr. Howard was given the death penalty.

Mr. Howard's direct appeal asserted nine potential errors. (ROA. 1203-1265) The State responded on December 13, 2002. (ROA. 1267-1303) The Texas Court of Criminal Appeals affirmed the conviction with two justices dissenting.[2] *Howard v. State*, 153 S.W.3d 382 (Tex. Crim. App. 2004) On February 27, 2006, the Supreme Court denied a petition for certiorari. *Howard v. Texas,* 546 U.S. 1214 (2006) (ROA. 6336)

On April 24, 2003, the application for writ of habeas corpus was submitted for Mr. Howard. (ROA. 6043-6145) Among the claims presented were intellectual disability (ROA. 6045-6061) and claims of ineffective assistance of counsel in presenting competency and insanity (ROA. 6070-6073) There were also claims that Mr. Howard received the ineffective

[2] There was no dissenting opinion so the basis of the dissent is unknown.

assistance of counsel due to the lack of presentation of mitigating evidence including the prior gunshot wound and the proper development of that issue as well as the failure to present evidence regarding intellectual disability. (ROA. 6116-6120) Nine years then passed in which the original state Judge (Plunk) was replaced with Judge Thomas. No evidentiary hearing was allowed.

On June 15, 2012, the trial court[3] signed off on the State's proposed findings and conclusions and forwarded to the Texas Court of Criminal Appeals without a hearing on the claims. (ROA. 6295-6313) On December 12, 2012, the Texas Court of Criminal Appeals denied the application for writ of habeas corpus. *Ex Parte Howard,* No, WR-77906-01, 2012 WL 6200668 (Tex. Crim. App. Dec. 12, 2012) (ROA. 6020)

**B. FACTUAL HISTORY**

The facts are that Mr. Howard's attorney did little to prepare for the issues that were important to the trial, that is intellectual disability, competency and insanity. When Mr. Moncriffe called Dr. Duncan as his first witness, during guilt innocence, this came to the forefront when Mr. Moncriffe confirmed with Dr. Duncan that they had never met or spoken prior to the current day of testimony, even though Dr. Duncan had been appointed to examine Mr. Howard for competency. (ROA. 4281-4283) Dr. Duncan conducted what he termed an extensive examination of Mr. Howard in mid-March to determine mental functioning, emotional functioning, concentration, memory and so forth. Dr. Duncan's stated that Mr. Howard's cognitive functioning was inconsistent because sometimes he could give coherent responses and other times his responses were unintelligible, mumbling in a low tone, that required repeated questioning. Mr. Howard would give inappropriate affect responses by suddenly smile or

[3] The habeas judge was Judge Thomas, the trial judge was Judge Plunk.

chuckle for no known reason. This concerned Dr. Duncan because he was left wondering what Mr. Howard was responding too. (ROA.4284-4288) Dr. Duncan concluded that Mr. Howard's mental state was declining. Dr. Duncan also found Mr. Howard's mental competency questionable whether he could reasonably assist his attorney in his defense. (ROA. 4302-4305) Dr. Duncan stated that he had evaluated and examined Mr. Howard pursuant to a court order. Consistent with previous testimony, Dr. Duncan talked about Mr. Howard's inappropriate affect and functioning that was not consistent. With regards to intellectual functioning Dr. Duncan gave Mr. Howard a series of exercises to help estimate his intellectual functioning that resulted in a borderline to mildly impaired range. Dr. Duncan explained that would be "at a borderline mentally retarded range. To give you an idea of what that would be like, it would be about at a maybe 11, 12 year old level." (ROA.5000-5005) Based on the assessment and evaluation, Dr. Duncan had questions about Mr. Howard's ability to stand trial and the potential of schizophrenia or other organic factors being present resulting in Mr. Howard's erratic behavior.

Dr. Duncan further explained about intellectual impairment that he had given the verbal portions of the Wechsler adult intelligence scale (WAIS) to come to a conclusion that Mr. Howard was in the 65-70 range in intellectual functioning. The prosecutor brought out that Mr. Howard could pass school achievement tests when he was in the tenth or eleventh grade. Dr. Duncan stated that would indicate that there had been a deterioration or some slide in their ability. (ROA. 5006-5016)

Dr. Fred Fason, a psychiatrist, stated, in the first competency trial, that with regards to competency, Mr. Howard did not know what it meant that he could get the death penalty. Mr. Howard was laughing inappropriately and stated that by telling a staff member a more negative version of events regarding the crime he felt it could help him. Dr. Fason concluded after three

interviews with Mr. Howard and the other testing and investigation, that he lacked a rational understanding of the charges against him and the consequences if convicted. (ROA. 5041-5045) What is evidence of ineffective assistance of counsel is that Counsel noted he was changing Mr. Howard's plea to not guilty by reason of insanity shortly before trial. However, during guilt innocence, Counsel did not present his one expert on mental illness, Dr. Fason. Thus, the opportunity to develop the issue was never pursued except through court appointed experts and the State's expert, Dr. Gripon.

Dr. Duncan, (ROA. 5268-5304), Shirley Howard, (ROA. 5305-5324) Joann Farrell, (ROA. 5334-5339) testified for the defense in the second competency trial. Sandra Johnson testified that she had known Mr. Howard all his life and she noticed that before the incident Mr. Howard would be dirty and would not seem to recognize her. Ms. Johnson noted that even in court, Mr. Howard did not seem to recognize her. (ROA. 5339-5349)

During guilt-innocence, Mr. Howard's lawyer did not present any experts regarding insanity, something he had brought out by asserting a claim shortly before trial that he was changing the plea to not guilty by reason of insanity. He called Dr. Duncan about competency, but that was quickly turned into the first competency trial, with a different jury. Dr. Fason and Dr. Duncan testified during the first competency trial, which resulted in a hung jury. The second competency trial Dr. Fason was not called and no explanation has ever been provided. Thus, at the conclusion of the guilt-innocence stage, Mr. Howard's attorney had brought up the issue of insanity, but had failed to provide the jury with the means by which they could agree.

What was presented at punishment, was that Shirley Harrison, a jailer in the Hardin County Jail, noted that Mr. Howard would do what he was told in the jail and she had never had a problem with him. (ROA. 4669-4670) Tyre Thomas, another jailer, testified that he known Mr.

Howard since childhood. Mr. Thomas again noted that Mr. Howard was different now in that he talked to himself, had mood swings and did not pay attention to his personal hygiene. Mr. Howard had to be told to brush his teeth and take a bath but he would comply when told too. Mr. Howard did not give Mr. Thomas any problems in jail. (ROA. 4671-4673)

During punishment, Dr. Fred Fason, the defense psychiatrist, stated that in examining Mr. Howard he saw a confused, not very bright person who was impenetrable. Dr. Fason could not find out what Mr. Howard was thinking. What little information Mr. Howard would eventually volunteer did not make any sense. Mr. Howard could not complete the MMPI-2 because he did not understand basic words like mechanics and appetite. Dr. Fason noted that Mr. Howard intellectual functioning had declined dramatically after second grade, dropping over sixty percentile points in match in a matter of seven years. (ROA. 4716-4726) During interviews, Mr. Howard would provide answers that did not make sense in conjunction with the question asked. Mr. Howard would also started laughing at inappropriate junctures in the interview. Dr. Fason concluded this inappropriate affect was one of the cardinal signs of schizophrenia. Dr. Fason's diagnosis of Mr. Howard was schizophrenia. (ROA. 4727-4736)

There were numerous witnesses that testified about Mr. Howard's declining mental health and his practice of talking to invisible people, poor hygiene and inappropriate behavior. However, Counsel for Mr. Howard did not develop the issues before the jury as noted above.

During the state habeas proceedings, among the exhibits submitted were several medical references that Mr. Howard had previously had a gunshot wound to his head. (ROA. 6149-6150, 6169)[4]. There were also notes from a Dr. Guilette and notes from the jail which pointed to

[4] This case was tried pre-Atkins, although appellate counsel cited *Atkins v. Virginia,* 536 U.S. 304 (2002), as supplemental authority regarding a claim submitted of intellectual disability on direct appeal. (ROA. 1305) The Texas Court of Criminal Appeals rejected the claim under *Ex parte Briseno,* 135 S.W. 3d, 1, 5 (Tex. Crim. App.

mental illness on the day of arrest that were not presented by Counsel. (ROA. 6072) Additionally, State Habeas Counsel presented records from the Jester IV unit, after Mr. Howard was admitted to that psychiatric prison unit on several occasions. On August 1, 2001, Mr. Howard was brought from the Polunsky unit after he was "urinating on the walls, was withdrawn and mute, and appeared to be deteriorating with very poor personal hygiene." Mr. Howard was given Haldol, Cogentin and Zooloft and his condition improved with a diagnosis of brief psychotic disorder. Mr. Howard was discharged on February 13, 2002, after five and a half months. (ROA. 6189-6190) Mr. Howard returned on July 15, 2002 to Jester IV as outpatient because he was not taking his medication. His diagnosis was schizophrenia, chronic. (ROA. 6193-6194) Mr. Howard stayed at Jester IV until he was discharged on September 4, 2002. Mr. Howard was now having rapid decompensation of mental illness by behavior problems, disruptive behavior and self-mutilation. No test were given but the record shows he had depression and schizophrenia. Mr. Howard's Haldol was increased from 5 mg to 15 mg with Prozac and Benadryl.[5](ROA. 6191-6192) Mr. Howard returned to Jester IV on October 8-10, 2002. The report states that Mr. Howard has undifferentiated schizophrenia and psychomotor retardation. Mr. Howard continued to deny hallucinations and delusions but was taking Haldol, and had been previously treated with Haldol D and Cogentin. Mr. Howard could not provide much history, was disheveled and had "poverty of thought." The result of the examination was that the Haldol D was increased to the maximum dosage. (ROA. 6182-6185) Mr. Howard remains the same as his was the day of the crime, a mentally ill individual with likely intellectual disabilities based on the testimony of Dr. Fason, Dr. Gripon and Dr. Duncan.

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2004)( The *Briseno* holding was specifically rejected in *Moore v. Texas*, 581 U.S. ___, 137 S.Ct. 1019 (2017) (ROA. 1196-1198)

[5] There was an early prison diagnosis, likely carried over from Dr. Gripon, of antisocial personality disorder. This diagnosis faded and schizophrenia was the consistent diagnosis thereafter by every Doctor that examined him.

## REASONS FOR GRANTING THE WRIT

The Fifth Circuit found that Mr. Howard's counsel had argued at both opening and closing regarding mental health and had "looped"in experts as needed. *Howard v. Davis,* 959 F.3d 168 at 172. Given that arguments are never evidence, what the Fifth Circuit should have focused on is what actually occurred during the presentation of evidence. Mr. Howard's attorney had raised insanity and competency. He presented no evidence during guilt innocence from his one mental health expert on insanity. He used Dr. Fason during the first competency trial, which resulted in a hung jury, and then failed to call him for the second competency jury, which found Mr. Howard competent. He called Dr. Fason for punishment, even though Dr. Fason had told him he needed to get a mitigation expert to present punishment issues. These issues were never developed in state court and the findings of the state court are not entitled to any presumption because there was no fact finding, just simply the signing of the state's proposed findings and conclusions by a Judge who had no knowledge of the trial.

During the District Court's determination, the Court came to the erroneous conclusion regarding the professional norms for the development of mitigating evidence. The District Court determined that the requirements set out for counsel to investigate mitigation evidence in *Wiggins v. Smith,* 539 U.S. 510 (2003) was not a prevailing standard at the time of Mr. Howard's trial in 2001. The District Court further stated that many of the standards that are applicable "today were not available" in 2001. (ROA. 1656) This argument is simply not true based on two principles. First, there is no evolving standards of competence in regards to the representation of counsel. The standards of representation have changed little since 1984 when *Strickland v. Washington,* 466 U.S. 668 (1984) was decided. Second even if there were some evolving standards, in Wiggins the Supreme Court determined that Counsel was ineffective under the

prevailing standards of 1989, when the trial took place, for not properly conducting a mitigation investigation. Additionally, the District Court asserts that the American Bar Association Guidelines of 1989, are merely guidelines and the District Court refused to apply them in considering the present claim. (ROA. 1088) The Supreme Court has held since Strickland that the ABA guidelines are "standards to which we have long referred as 'guides to determining what is reasonable'. *Strickland* at 688." *Wiggins v. Smith*, 539 U.S. at 524. Thus, the most prevalent proof in ineffectiveness was when Mr. Moncriffe did not hire or seek appointment of an expert to examine Mr. Howard and gather a life history for mitigation purposes, despite being told he needed to do so by his own expert Dr. Fason. (ROA. 6147) Further, as noted above in the proceedings, the record is replete with a picture of a bumbling attorney who was doing the bare minimum to get through a trial that could not end soon enough for him because he had only received 35,000 dollars to represent someone who had severe mental issues. Prejudice resulted in that a complete picture of Mr. Howard's mental illness and life history was not presented that would likely have resulted in a life sentence.

*Ineffective Assistance of Counsel in General*

The Supreme Court has long recognized that the right to the effective assistance of counsel under the Sixth Amendment means "the giving of effective aid in the preparation and trial of the case." *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55 (1932). The standard for judging the performance of counsel is the same for appointed versus retained counsel. *Cuyler v. Sullivan,* 466 U.S. 335, 334, 100 S.Ct. 1708, 1716 (1980).

The prevailing test for determining if a person received the effective assistance of counsel in a criminal proceeding is that set out in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984), and the companion case of *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039 (1984).

Thus, in order to prove the ineffective assistance of counsel, the *Strickland* Court held that: 1) to establish ineffective assistance requiring reversal of a conviction, a defendant must show both a) that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment, and b) that the "deficient performance prejudiced the defense"; 2) the "proper standard for [measuring] attorney performance is that of reasonably effective assistance," as guided by "prevailing professional norms" and consideration of "all the circumstances" relevant to counsel's performance; 3) more specific guidelines in applying that standard are "not appropriate"; and (4) the proper standard for measuring prejudice is where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would be different." *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064.
Justice O'Connor in explaining this broad non-specific approach to reviewing claims of ineffectiveness noted that counsel must "consult with the defendant on important decisions and …keep [him] informed of important developments." *Id.* at 688-90, 104 S.Ct. at 2064-66. Thus, the court must look at the attorney's performance to determine "whether in light of all the circumstances, the identified acts or omissions [of counsel] were outside the range of professionally competent assistance." It is the defendant's burden to overcome the presumption that counsel's conduct was trial strategy. *Id.* at 689, 104 S.Ct. at 2065; *See also United States v. Clark,* 741 F.2d 699 (5th Cir. 1984).

The Fifth Circuit's response to the District Court's failure to apply the correct standard was to simply allege the issue was not properly briefed. *Howard v. Davis,* 959 F.3d 168, 173. However, as set out above and in the motion for a certificate of appealability the issue was properly briefed but the Fifth Circuit refused to consider it. Mr. Howard's attorney failed to present evidence regarding the head injury due to a gunshot wound, failed to hire a mitigation

expert as was suggested to him by his own psychological expert, and spent more time trying to get more money from the Court for himself than he did in any way investigating Mr. Howard's mitigation issues.

*Ineffectiveness of Counsel in Investigating and Presenting a Mitigation Case*

As noted in the federal amended petition, the questioning and presentation of witnesses at punishment by Mr. Moncriffe demonstrated a lack of investigation and understanding of what to present. Mr. Moncriffe asked several family members and friends if they knew Mr. Howard and then did nothing more than ask them if both families were hurting because of this.

The District Court repeatedly relied upon the state court findings and conclusions on State habeas, and did so in reviewing the current claim. (ROA. 1085-1086) As noted above, these findings and conclusions were prepared by the State for a different Judge eleven years after the trial and were signed off by the new Judge without a hearing. When reviewing these findings in light of the record present in 2012, there is no reason why a Judge would conclude in the manner it did if they had reviewed, or at least cursory glanced at, the record. The State court found in 2012 that Mr. Moncriffe presented evidence concerning mental illness and mental retardation. The State Court found that Mr. Howard was not mentally ill. A finding that has been clearly rebutted in the state habeas presentation regarding repeated findings. The finding that trial counsel was not deficient and he provided the effective assistance of counsel is clearly erroneous given the record.[6]

[6] This finding is strange and could be the result that the Judge that made the finding did not preside over the trial. Mental retardation, or intellectual disability, was not an issue at the trial of Mr. Howard and *Atkins* was never brought out as a preventing factor until the direct appeal.

The Supreme Court has repeated in unqualified language for more than 30 years, the foundational rule that the Eighth Amendment requires in death penalty cases the admission of any mitigating evidence "that might serve 'as abasis for a sentence less than death.' "*Skipper v. South Carolina,*476 U.S. 1, 5,106 S.Ct.1669, 90 L.Ed.2d 1 (1986)(quoting *Lockett v. Ohio,*438 U.S.586, 604,98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)). Over that period, the Supreme Court has never invoked some evolving standards of competence or suggested that this relatively simple Eighth Amendment mitigation rule, stated in many cases,[7] should be subject to "harmless error" analysis. The reason for this rule is that a mandatory death penalty that leaves out consideration of mitigation is unconstitutional. Each juror at the mitigation phase of the proceeding must have the discretion to spare the defendant's life. The line of cases insists that the jurors should make that judgment based on considering all mitigating factors weighed against the aggravating factors. Each juror at the mitigation phase of the proceeding must have the discretion to spare the defendant's life. *Woodson v.North Carolina,*428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).[8] The *Lockett* line of cases insists that the jurors should make that judgment based on considering all mitigating factors weighed against the aggravating factors.

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[7] *Abdul–Kabir v. Quarterman,*550 U.S. 233, 264–65, 127 S.Ct. 1654, 167 L.Ed.2d 585(2007); *Smith v. Texas,*543 U.S. 37, 45–48, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004); *Tennard v. Dretke,*542 U.S. 274, 286–88, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004); *Penry v. Johnson,*532 U.S. 782, 804, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001); *Penry v. Lynaugh,*492 U.S. 302, 317, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); *Hitchcock v. Dugger,*481 U.S. 393, 398–99, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina,*476 U.S. 1, 4, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Eddings v. Oklahoma,*455 U.S. 104, 110–12, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Bell v.Ohio,*438 U.S. 637, 642, 98S.Ct. 2977, 57 L.Ed.2d 1010 (1978)

[8] The Court in *Woodson* explained the mitigation requirement as follows: "In *Furman*, members of the Court acknowledge what cannot fairly be denied that death is a punishment different from all other sanctions in kind rather than degree. A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as

The presentation of what could have been presented at mitigation is set out in the Federal Amended Petition. (ROA.477-514) Additionally, State habeas counsel pointed out numerous issues that Mr. Moncriffe did not explore including the head injury, attributed to being shot, in 1997, and mental illness. (ROA. 1084-1085) It is clear that Mr. Moncriffe's theory on punishment was to ask each witness if both families were suffering and at one time Mr. Howard wasa good kid.

That strategy, and the lack of investigation that went into that strategy was clearly deficient and resulted in prejudice to Mr. Howard. Mr. Howard is now on medication that controls his schizophrenia within the TDCJ. Had Mr. Moncriffe presented that picture, along with how a prior gunshot could have impacted Mr. Howard at the age of 17, the results could have certainly been different. There was no strategy or adequate preparation that Mr. Moncriffe can rely upon given the record in this case. Mr. Howard received the ineffective assistance of counsel at punishment and the District Court's determination on this matter is clearly wrong. A certificate of appeal should issue.

*Ineffective Assistance Regarding Competence and Statement to Police*

As a preliminary matter, the District Court found that this issue was properly exhausted before the State Courts. (ROA. 1129) Judge Thomas, the state judge who had taken over from Judge Plunk, signed off on the Prosecution prepared findings of facts and conclusion of law, eleven years after the trial. Those findings and conclusions are set out by the District Court in the memorandum denying relief. (ROA. 1130-1131) Those findings, which include that counsel was

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members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson,*428 U.S. at 303–04, 96 S.Ct. 2978(internal citations omitted).

not ineffective, are not entitled to a presumption of correctness because they are simply wrong. Mr. Moncriffe did not even consider competence until Dr. Fason urged him to get a psychologist to review Mr. Howard for competence based upon what Dr. Fason saw. Mr. Moncriffe did ask for an examination but did not review the material or talk to the appointed expert, Dr. Duncan, until the state had rested on guilt-innocence. With regards to the statement, Mr. Moncriffe never attempted to challenge the statement in any form, including that Mr. Howard was not competent to give a knowing and voluntary waiver of rights. Thus, the state court findings are inapposite to what is contained in the record.

Mr. Howard was denied his Sixth & Fourteenth Amendment rights to effective assistance of counsel when his attorney failed to investigate Mr. Howard's psychosocial history thoroughly and failed to seek timely and relevant evaluations of the mental condition of Mr. Howard regarding his competence to stand trial and whether his waiver of *Miranda* rights and subsequent confession were knowing and intelligent.

As set out above in the facts section, Mr. Moncriffe orally requested that an expert examine Mr. Howard only after Dr. Fason told him he needed to on March 5, 2001, despite an obvious history of mental illness and not being able to properly communicate. Dr. Duncan examined Mr. Howard and returned his report to the Court asserting that Mr. Howard was likely not competent. Mr. Moncriffe did not discuss this report with Dr. Duncan until the day he began opening his case on guilt innocence**. It was the State who finally had to ask the Court to conduct a competency hearing**, for which Mr. Moncriffe was woefully unprepared. What is set out in the record is a case where an attorney knew there was an issue of incompetency but did nothing beyond asking the Court to figure it out by appointing an expert. Likewise, Mr. Howard's lack of competence impacted his ability to give a knowing and intelligent waiver for

purposes of *Miranda.* The statement that was gathered was used to demonstrate that Mr. Howard was calculating and had no remorse, something that was highlighted time and again by the prosecution in seeking a death penalty.

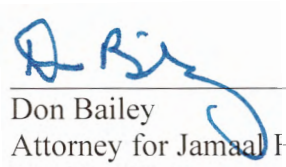
"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." *Strickland v. Washington,* 466 U.S. at 491. Trial counsel provides deficient performance if he fails to investigate a defendant's medical history when he has reason to believe that the defendant suffers from mental health problems. *See Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir.1990) ("It must be a very rare circumstance indeed where a decision not to investigate would be 'reasonable' after counsel has notice of the client's history of mental health problems."); *Profitt v. Waldron,* 831 F.2d 1245, 1248-49 (5th Cir.1987)(holding that counsel has duty to investigate mental health history of defendant who has been committed to a mental institution); *Beavers v. Balkcom,* 636 F.2d 114, 116 (5th Cir.1981) (holding that counsel has duty to obtain medical records and speak with treating physicians). Further, seeking the aid of a court-appointed psychiatrist, in some circumstances, does not excuse the absence of further investigation. *See Profitt,*831 F.2d at 1249 (finding that relying on opinion of court-appointed psychiatrist was not sufficient when counsel knew that defendant had escaped from a mental institution).

In this case, the record is clear that Mr. Moncriffe did nothing regarding competency and the knowing and voluntary waiver of rights in regards to the statement.There was adequate knowledge on the part of Mr. Moncriffe, through Dr. Fason and family, that there were serious questions about competency in this case ,and he did not follow up on that. It was the State that finally had to bring out the issue. Thus, deficient performance was present and prejudice resulted and this case should be remanded for a new trial.

## CONCLUSION

For the foregoing the reasons the Court should grant the petition. The Fifth Circuit's determination on these issues is contrary to opinions by this Court. A writ of certiorari should be granted and the case remanded to the Fifth Circuit for further proceedings.

RESPECTFULLY SUBMITTED.



Don Bailey
Attorney for Jamaal Howard
SBN 01520480
309 N. Willow
903-892-9185
903-891-8304 Fax