No. 17-512

In The
Supreme Court of the United States

ROBERT EARL BUTTS,

Petitioner,

v.

ERIC SELLERS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. In analyzing a claim under *Strickland v. Washington,* 466 U.S. 668 (1984), "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances" and prevailing norms are guides to determine what is reasonable. Does a court unreasonably apply *Strickland* when it finds that counsel is not per se deficient for not following the recommendations of advocacy groups to hire a specialist to conduct a mitigation investigation, but instead reviews whether the investigation conducted by trial counsel was objectively reasonable?

2. *Strickland* holds that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," 466 U.S. at 690-91, but the courts must still review whether "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. When a court concludes the investigation of counsel was reasonable, and the strategic decision resulting therefrom was reasonable, does a court violate *Strickland* by holding it cannot second guess this reasonable strategic choice?

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The decision of the Georgia Supreme Court in the criminal direct appeal is published at 273 Ga. 760, 546 S.E.2d 472 (2001) and appears at Res.App.-1. This Court's denial of certiorari review following the direct appeal is published at 534 U.S. 1086 (2002) and appears at Res.App.-27. The state habeas court's decision denying relief is unpublished but appears at Pet.App.-247.[1] The decision of the Georgia Supreme Court denying Butts's application for certificate of probable cause to appeal the state habeas court's decision is unpublished but appears at Pet.App.-246. The decision of the federal district court denying Butts's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is unpublished but appears at Pet.App.-103. The opinion of the Eleventh Circuit Court of Appeals is published at 834 F.3d 1227 (11th Cir. 2016) and appears at Pet.App.-1.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

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[1] Respondent's Appendix is denoted as "Res.App." and Petitioner's Appendix is denoted as "Pet.App."

The Fourteenth Amendment of the United States Constitution provides in relevant part:

> No State . . . shall 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) provides:

> 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.

INTRODUCTION

Petitioner Robert Butts presents two questions arising out of the Eleventh Circuit Court of Appeals' denial under 28 U.S.C. § 2254(d) of his claim that he received ineffective assistance of counsel at the sentencing phase of his death-penalty trial.

The first question presented rests on the contention that there is a split in the circuits on whether "prevailing professional norms," which *Strickland* noted were "guides" to determining what constitutes reasonable performance, refers to local, state or national norms. Butts argues that *Strickland* directs national norms as set forth by two advocacy groups should be utilized and trial counsel's failure to follow those norms and hire a mitigation specialist is in contravention of this Court's precedent. This issue does not warrant review as there is no circuit split on this question because: the circuits each follow this Court's instruction that *no* particular set of rules prescribes the "prevailing professional norms" against which attorney performance is judged under *Strickland*; all such sets of rules are merely evidence that helps courts determine whether counsel's conduct fell within the wide range of reasonable professional assistance; and the court of appeals correctly determined that the state court did not unreasonably apply *Strickland* in concluding that counsel's performance was reasonable.

The second question presented rests on the false premise that the court of appeals deemed counsel's strategic decisions "wholly immune" from challenge under *Strickland*. Petition-31. This claim is not worthy of certiorari review as the Eleventh Circuit did not refuse to review counsel's decision as alleged by Butts. The court extensively reviewed counsel's investigation and the reasoning behind counsel's decision to focus on residual doubt; and then, in accordance with *Strickland*, determined counsel's strategic decision was

reasonable. This review is conducted by every circuit and there is no split.

Although he does not include it as a third question presented, Butts also contends that the state habeas court's prejudice analysis was an unreasonable application of this Court's precedent "in at least four respects." As a plea for mere error correction, that argument does not warrant this Court's review.

STATEMENT

1. *Butts's crimes*. On the evening of March 28, 1996, Petitioner Robert Butts and Marion Wilson "drove in Butts's automobile to a local Wal-Mart store and began searching for a victim." Pet.App.-248. Both men entered the store, with Butts "wearing a coat, under which he likely concealed the murder weapon." *Id.* The two men followed Donovan Parks through the checkout line and out to his car. Pet.App.-248-49. Butts asked Parks for a ride. Pet.App.-249. "Parks moved items in his automobile to make room for Butts and Wilson, Butts sat in the front passenger seat and Wilson sat in the back seat behind Parks." *Id.* Witnesses to whom Butts later confessed testified that "Butts revealed the shot gun a short distance away, and Parks was ordered to stop the automobile." *Id.* Wilson dragged Parks from the car, and he was ordered to lie face down on the road. *Id.* "Butts then fired one fatal shot to the back of Parks's head with the shotgun." *Id.*

Wilson and Butts then sought out a "chop shop" to dispose of Parks's car. Pet.App.-249. After that endeavor failed, the men purchased gasoline and set the car on fire. *Id.* They then walked to a public telephone and Butts phoned his uncle "and arranged for a ride for himself and Wilson back to Walmart to retrieve Butts's automobile." *Id.*

In a search of Wilson's residence, the police discovered a sawed-off shotgun and the type of ammunition used to kill Parks. Pet.App.-250. Wilson's girlfriend testified at trial that Butts had given the shotgun to Wilson "to hold temporarily." *Id.* Two inmates who had previously been incarcerated with Butts told law enforcement that Butts "had admitted to being the triggerman in the murder." *Id.*

2. *Trial and direct appeal.* Butts was represented at trial by experienced death-penalty litigator, Robert Westin,[2] co-counsel Cassandra Montford-Ford, and paralegal Cathy Crawford, who had worked on "at least four capital cases" prior to Butts's case. Pet.App.-34-35, 37, 274. In the guilt phase, counsel presented a defense focused on establishing residual doubt and argued that Butts was merely present at the murder. Pet.App.-54-55, 61-62, 275-80. Counsel presented testimony that there was potentially a third person at the murder scene and Butts testified that he did not

[2] At the time of trial, Westin had practiced in the circuit where Butts's case was tried for 17 years. Pet.App.-35. Prior to Butts's case, he "had handled 16 to 18 murder cases" and "been second-chair in five capital cases, and none of those five defendants were sentenced to death." *Id.*

participate in the murder. Pet.App.-55, 144, 329. "There was no physical evidence to link [Butts] to the murder weapon, which was found in co-defendant Wilson's home, so [counsel] attempted to portray [Butts] as 'an unwilling and unknowing participant in this matter.'" Pet.App.-276. Butts was convicted of malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. Pet.App.-248.

During sentencing, continuing the residual-doubt theme, trial counsel presented a Georgia Bureau of Investigation Agent who testified that he administered a polygraph to Wilson, and it was his opinion, based upon the results of that polygraph, that Wilson was the shooter of Parks. Pet.App.-297. Trial counsel also introduced evidence that Butts "lacked a violent criminal history," and in closing, counsel argued that Butts was "led into the crime" by Wilson, a violent person with an "extensive criminal history," who was "well known by law enforcement to be a member of the Folks gang." Pet.App.-297-98. The trial court, based on the jury's binding recommendation, sentenced Butts to death. *Id.*

For the motion for new trial, Butts was represented by new counsel. Pet.App.-18. In those proceedings, Butts's new counsel raised claims of ineffective assistance of trial counsel, and the claims were presented during an evidentiary hearing at which Westin testified. Pet.App.-18, 31, n.9. The trial court denied the ineffective-assistance claims and Butts appealed to the Georgia Supreme Court. As part of that appeal,

Butts alleged that trial counsel were ineffective for not presenting family members to testify in mitigation. Pet.App.-2. The court rejected that claim, stating:

> Butts's trial counsel testified in a hearing held on remand that they contacted Butts's family members in the hope that some of them would testify on Butts's behalf during the sentencing phase. Counsel testified that Butts's mother refused to testify. Counsel further testified that, although they refused to testify even when counsel "begged them" to do so, Butts's grandmother and aunt had assisted them in preparing for trial. Counsel testified that "outside of [Butts's] aunt and grandma, there was nobody that could say a kind word about him." In light of this testimony and the absence of evidence to the contrary, we conclude that Butts's trial counsel did not render ineffective assistance.

Res.App.-18-19. This Court denied certiorari review. Res.App.-27.

3. *State habeas proceedings.* In the state habeas proceedings filed in 2002, represented by new counsel, Butts again alleged that trial counsel were ineffective in investigating and presenting mitigation at trial. He also alleged that appellate counsel was ineffective for not establishing trial counsel's ineffectiveness in this regard. Following a three-day hearing, Pet.App.-251, the court concluded that Butts's claims of trial counsel ineffectiveness were procedurally barred. Pet.App.-253, 258. The court then turned to appellate counsel's effectiveness. Applying *Strickland*, the court denied

relief, concluding that Butts had established appellate counsel were deficient in presenting the ineffective assistance of trial counsel claim, but that he had failed to show any resulting prejudice. Pet.App.-271-74.

The state habeas court assessed whether appellate counsel's failure to raise Butts's claim for ineffective assistance of trial counsel prejudiced Butts by anaylyzing the merits of that claim. Starting with the question whether trial counsel rendered deficient performance, the court found that trial counsel "spent a great deal of time with [Butts]" learning about his background, "including his prior employment history, education and family background." Pet.App.-282.[3] The court also found that the defense team spoke to a number of Butts's family members, including his mother, aunt, grandmother, brothers, younger sister, and uncle, but the family "didn't have anything positive to say" about Butts or refused to testify. Pet.App.-285-87.

As found by the state habeas court, trial counsel also obtained "all of [Butts's] medical records, school records, criminal history (including juvenile court records), Department of Family and Children Services (DFCS) records, employment records, all of his past and present jail records and spoke with the jailer." Pet.App.-283. Counsel also acquired "numerous documents concerning [Butts], [Butts's] family and co-defendant Marion Wilson." *Id.* "Additionally, trial

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[3] As an initial matter, the state habeas court found "all three members of the defense team participated in a reasonable investigation of [Butts's] background. . . ." Pet.App.-282.

counsel had obtained [Butts's] family's DFCS and [Department of Human Resources] records pertaining to Dominique, [Butts's] father's Central State Hospital records, [Butts's] school records, and Oconee Center Records on [Butts's mother], Laura Butts." Pet.App.-284.

Through their record gathering, "the defense team was aware that [Butts's] father had mental health problems, that [Butts's] mother had substance abuse problems, that Dominique had 'behavioral' problems, and that [Butts's] home life was dysfunctional." Pet.App.-284. They also learned from these records Butts: did "pretty well in school until he reached age sixteen"; was disciplined for fighting at school; had fought with other inmates in jail and set fires in institutions where he was incarcerated; and had shoes taken from him after he had written gang signs on them and worn them to a pre-trial hearing. Pet.App.-59, 289-90.

The state habeas court also reviewed the pre-trial mental health evaluations trial counsel had obtained of Butts. Pet.App.-290-92. The court found the court-appointed psychologist opined Butts had a personality disorder characterized by poor judgment, impulse control and a disregard for social norms; and the independent psychologist found Butts was antisocial, impulsive and "socially alienated." Pet.App.-291-92.

The state habeas court found "trial counsel's investigation into [Butts's] background was reasonable and thorough," and they were aware of the same evidence Butts presented as mitigation in the state

habeas proceeding. The court accordingly concluded that appellate counsel could not have established deficient performance on the part of trial counsel. Pet.App.-295, 307-13.

Turning to the reasonableness of counsel's decision to focus on residual doubt as their mitigation theory, the state habeas court found this determination was made "after a thorough investigation." Pet.App.-280. The state habeas court also credited Westin's testimony that, "based on their investigation the defense team determined that [Butts] had a 'tough upbringing' as 'do a lot of kids,' but he did not think [Butts's] 'upbringing was extremely different from anybody else's, many other young men.'" Pet.App.-288. The court also considered: Westin's experience and his belief that this type of testimony did not "play as well as it did at one time" with the jurors in the Ocmulgee Judicial Circuit, Pet.App.-281, 310; and the fact that trial counsel had no medium through which to present testimony from Butts's family as counsel "'couldn't have drug them up there with wild horses' to testify for [Butts]." *Id.* *See also* Pet.App.-285-86, 294-95 (mother "was a non-participant in this case;" Butts's grandmother and aunt would not testify; "were scared to death of him"; "said he was a cold-blooded killer"). As for employers, Butts "had been fired from five jobs for fighting with a co-employee," the boss, or "even a customer." Pet.App.-289-90. The court noted that "[s]uch 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *Id.* (quoting *Strickland*, 466 U.S. at 690).

Attempting to establish prejudice in the state habeas proceedings, Butts presented mitigation expert Jan Vogelsang. Pet.App.-298. Butts alleged that he could establish both prongs of *Strickland* based on appellate counsel not presenting a similar witness who could have testified "at trial or at the motion for new trial to 'the four most significant influences' on his life," which he claimed were: his "mentally ill father, his 'drug addicted and chronically absent mother,' his 'profoundly disturbed younger brother,' and the use and sale of drugs by some of the boyfriends of [Butts's] mother." Pet.App.-299. The state habeas court assessed Vogelsang's testimony and found that Butts could not establish prejudice from counsel not presenting like testimony.

The state habeas court noted Vogelsang's failure to speak with either psychologist who evaluated Butts prior to trial or the social worker that worked with Butts's brother Dominque who "had an enormous amount of contact with the family." Pet.App.-300. The court also found that much of Vogelsang's presentation concerned Butts's father, although he had "no role" in Butts's life. Pet.App.-301.[4] Additionally, the court held that much of Vogelsang's testimony was contradicted by the record. Specifically, although Vogelsang testified that Butts's "home life caused him to do poorly in school," the court found the records show that he performed well in school and "had no significant

[4] Ms. Butts testified that she had lived with Butts's father, but neither "she nor her children had contact with him" after Butts was 11 months old. Pet.App.-73.

problems" until age 16, when he started "hanging out with the wrong crowd." Pet.App.-306. Similarly, the court concluded that the record refuted Vogelsang's conclusions that the children were left alone without adult supervision and Butts was left to parent Dominque, whom she described as "severely mentally handicapped," although his diagnosis was Attention Deficient and Hyperactivity Disorder (ADHD). Pet.App.-301. The state habeas court found Butts's grandmother, aunt and Harold Burton (who was consistently present in the home for 8-10 years) looked after and provided for the children, not Butts. Pet.App.-302-03. The court also credited the social worker's testimony that she was aware Mrs. Butts was abusing drugs and leaving her children, but she confirmed "[t]hese kids were taken care of by other family members including their uncle and grandmother." Pet.App.-303-04. The state habeas court found, "[w]hat [Butts] established [ ] was that trial counsel were well-aware of the evidence, and potential theories, which were presented by Petitioner's current habeas attorneys." Pet.App.-307.

As to prejudice, the court concluded that, even if the same evidence presented in the state habeas hearing had been presented at trial or the motion for new trial, "there [was] not a reasonable probability that the result of the trial or appeal would have been different. . . ." Pet.App.-313.

The state habeas court also addressed Butts's claim that trial counsel were per se deficient for determining not to hire a mitigation specialist. The state

court rejected this claim holding that Butts's ineffectiveness claim should not be analyzed by a per se deficiency analysis, but by the well-established *Strickland* standard. Pet.App.-298-99, n.9. The Georgia Supreme Court denied Butts's application to appeal in a summary order. Pet.App.-246.

4. *Federal habeas proceedings.* Applying 28 U.S.C. § 2254 and *Strickland*, the district court held that, as the state habeas court had concluded that trial counsel's failure to investigate and present Butts's dysfunctional family life and background as mitigation was procedurally defaulted, the claim could not be reviewed unless Butts could establish cause and prejudice. Pet.App.-116. However, the federal habeas court noted that Butts had alleged ineffective assistance of appellate counsel to overcome this default. Pet.App.-116-17.

Looking to the state habeas court's opinion on the effectiveness of appellate counsel, the district court agreed with Butts that appellate counsel had been deficient in not conducting an independent mitigation investigation. Pet.App.-119. Turning to the second prong, the federal habeas court found the state habeas court's determination that Butts had failed to establish prejudice was not contrary to, or an unreasonable application of, *Strickland*. Pet.App.-190-91.

"[I]n the context of considering whether the state habeas court reasonably concluded no prejudice resulted from appellate counsel's deficient performance when litigating the ineffectiveness of trial counsel," the

district court had to review trial counsel's performance. Pet.App.-122. After recounting trial counsel's investigation, the district court determined that "the state habeas court's finding that trial counsel's pretrial mitigation investigation was sufficient was reasonable and cannot be upset by this Court." Pet.App.-138-39. In assessing the state habeas court's finding as to prejudice, the district court reviewed all the evidence presented in the state habeas proceeding. Pet.App.-161-74. "After a thorough review of the record, the Court [was] unable to say that no reasonable jurist could agree with the state habeas court's prejudice determination." Pet.App.-182. The court concluded "the state habeas court's determinations were not contrary to and did not involve an unreasonable application of *Strickland*, nor were they based on any unreasonable factual determinations." Pet.App.-190-91.

As to trial counsel's strategy, the district court reviewed the evidence of Butts's background known to counsel, and concluded "trial counsel conducted a thorough investigation into Butts's life history." Pet.App.-157. The court concluded, "counsel's reliance on particular lines of defense to the exclusion of others – whether or not he investigated those other defenses – is a matter of strategy and is not ineffective unless the petitioner can prove the chosen course, in itself, was unreasonable. Butts has not made such a showing." Pet.App.-160.

The district court then turned to prejudice and reviewed the evidence and the state habeas court's findings and holding. Pet.App.-161-81. The district court

held, "the [state habeas] court determined that had the jury heard all of the new evidence, there is no reasonable probability they would have given Butts a different sentence. After a thorough review of the record, the Court is unable to say that no reasonable jurist could agree with the state habeas court's prejudice determination." Pet.App.-182.

The district court addressed separately Butts's claim that trial counsel's failure to a hire a mitigation specialist was per se deficient performance based on the 1989 American Bar Association ("ABA") Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("Guidelines") and capital case training manual ("Manual") published by the Southern Center for Human Rights. Pet.App.-139. The district court rejected this argument holding that "[t]he Guidelines and Manual "are 'only guides' to what reasonableness means, not its definition." Pet.App.-140 (citing *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (quoting *Strickland*, 466 U.S. at 688)). The district court noted that Butts had failed to cite to any "Supreme Court precedent holding that trial counsel must retain a mitigation expert." Pet.App.-140.

5. *The court of appeals' decision.*[5] In reviewing whether "any fair-minded jurist could agree with the

[5] The court of appeals noted that their opinion in *Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016), *cert. granted*, Feb. 27, 2017 (argued Oct. 30, 2017), held that the Georgia Supreme Court's summary denial was the last opinion of the state court, but held here that "[b]ecause it does not matter to the result, and to avoid any further complications if the United States Supreme Court disagrees with our *Wilson* decision, we have decided this

state trial court's decision denying Butts relief," the court adopted the relevant portions of the "exceptionally thorough and persuasive order" of the district court as its own. Pet.App.-6. The court rejected Butts's claim that trial counsel's performance was per se deficient as it "did not follow in lock step the recommendations" of the ABA Guidelines and the Southern Center Manual. The court reiterated that *Strickland* mandates that counsel must perform reasonably under "prevailing professional norms," but that the ABA and the Southern Center do not establish the norms. Pet.App.-9.

In distinguishing *Wiggins v. Smith*, 539 U.S. 510 (2003), in which counsel had conducted almost no background investigation, the court of appeals found "the defense team undertook an exhaustive investigation" into Butts's background and concluded Butts had failed to establish deficient performance on the part of trial counsel. Pet.App.-12.

Addressing trial counsel's strategic decision to rely on residual doubt in mitigation, the court of appeals concluded that it could not and would not second guess trial counsel's reasonable strategic decision, which was based on a reasonable investigation. Pet.App.-13.

The court of appeals affirmed the district court's denial of habeas relief. Pet.App.-14.

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appeal on the same basis that the district court did: by using the more state-trial-court focused approach in applying § 2254(d)." Pet.App.-4.

REASONS FOR DENYING THE PETITION

I. Butts's argument that *Strickland* requires judging attorney performance solely against "national" standards as mandated by the ABA does not warrant further review.

In his first claim, Butts asserts that there is a split among the federal circuit courts as to whether the "prevailing professional norms" referenced in *Strickland* refers to national, state or local norms. He argues certiorari review should be granted to clarify this Court's meaning. That question does not warrant further review. There is no circuit split on this question; any such split would not determine the outcome here; and the court of appeals correctly determined that the state court did not unreasonably apply *Strickland* in concluding that counsel's performance was reasonable with respect to the decision not to use a mitigation expert or otherwise.

A. There is no split among the circuits.[6]

Butts argues that there is a split in the circuits over whether courts should assess *Strickland* reasonableness under local, state or national norms. He alleges that the Eleventh Circuit relied on local norms of the Ocmulgee Judicial Circuit, where Butts was tried, in

[6] Because the district court "issued an exceptionally thorough and persuasive order explaining why Butts did not meet [the § 2254 standard]," the Eleventh Circuit "adopt[ed] and incorporate[d]" "the relevant parts of that order" as their own and attached that portion of the order as an appendix to its holding. Pet.App.-6, n.2.

assessing the reasonableness of counsel's performance in contrast to other circuits that use national norms. Pet.App.-23. Butts has failed to show that the circuits are split on how to apply the deficiency prong of *Strickland*, which includes an assessment of reasonableness under "prevailing professional norms." *Strickland*, 466 U.S. at 688. Butts has merely shown that courts look to local, state and national standards depending on the record before that court when it conducts its fact-specific *Strickland* analysis. Butts has not shown that any circuit prevents or mandates the use of local, state or national standards. As there is no split, there is no issue worthy of certiorari review.

To prove a claim for ineffective assistance of counsel under *Strickland*, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Demonstrating deficient performance requires showing that counsel was not reasonably effective "under prevailing professional norms." 466 U.S. at 688.

This Court has declined to prescribe any particular set of rules as the "prevailing professional norms" for judging the reasonableness of attorney performance. The Court explained in *Strickland* that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides." *Id.* at 688. This is because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by

defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89. Also, making "[a]ny such set of rules" controlling "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions" and "could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." *Id.* at 689.

For these reasons, this Court has already rebuffed at least one court of appeals' attempt to prescribe a particular set of rules as controlling standards for attorney performance. In *Van Hook*, the Court chastised the Sixth Circuit for "treat[ing] the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel must fully comply." 558 U.S. 4, 8-9 (2009) (per curiam). "*Strickland*," the Court pointed out, "stressed that 'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition." *Id.* at 8. Although both "states" "are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, . . . the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Id.* at 9 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000)).

Accordingly, this Court has looked to a variety of standards – national, state, and local – as potential evidence of prevailing professional norms. For example,

in *Wiggins*, this Court judged counsel's decision not to obtain a social history report against both the ABA standards for capital defense work and the "standard practice in Maryland in capital cases at the time of Wiggins' trial." 539 U.S. at 524. In *Cullen v. Pinholster*, this Court looked to both state and local professional norms prevailing in Los Angeles at the time of Pinholster's 1984 trial. 563 U.S. 170, 196 (2011); *see also Flores-Ortega*, 528 U.S. at 479 (looking to California state law to review ineffectiveness claim).

In *Wiggins*, reiterating its holding in *Strickland*, this Court again directed: "In assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen "'from counsel's perspective at the time.'" 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 688, 689). Conducting the fact-specific inquiry into the reasonableness of counsel's investigation from his perspective at the time of representation, a fair analysis often cannot turn solely on national norms. In short, the various national, state, and local standards are all permissible "evidence of what reasonably diligent attorneys would do." *Van Hook*, 558 U.S. at 9. The circuits are in accord.

The cases Butts cites as evidence of a split do not show otherwise. Rather, consistent with cases like *Strickland*, *Flores-Ortega*, and *Van Hook*, his cases

show that circuits have looked to various sets of standards – national, state, and local – and sometimes more than one set in the same case, as evidence that aids the overarching determination whether counsel's performance was reasonable. *See* Petition-20-23 (citing, *e.g.*, *Heard v. Addison*, 728 F.3d 1170, 1180-81 (10th Cir. 2013) (reviewing "counsel's local practice environment and the resources available to her, insofar as those reflect the 'prevailing professional norms' in her state"); *Marshall v. Cathel*, 428 F.3d 452, 467 (3d Cir. 2005) (taking into account "national guidelines, state specific standards, and [trial counsel's] own testimony regarding his previous capital experience" in determining reasonableness of performance); *Viscotti v. Martel*, 862 F.3d 749, 772, n.14 (9th Cir. 2016) (assessing state norms in concluding counsel's performance was not unreasonable)). Decisions showing that courts have looked to different sets of standards as evidence for assessing reasonableness in different cases do not demonstrate a split; to the contrary, they show that the circuits are properly following this Court's lead by declining to treat any particular set of standards as prescriptive or required. Butts fails to identify a single circuit that has either mandated judging attorney performance against a particular set of guidelines (like ABA guidelines) to the exclusion of other standards (like local professional norms) or held that one set of standards trumps other conflicting standards.

Butts highlights the Third Circuit as one that judges attorney performance against the ABA guidelines, but that circuit too has expressly relied on

multiple standards as evidence of the prevailing professional norms. *See Marshall*, 428 F.3d at 467 (looking to ABA guidelines as well as state and local norms). Moreover, for his characterization of the Third Circuit's position, Butts relies on *Outten v. Kearney*, 464 F.3d 401 (3d Cir. 2006), but the Third Circuit decided *Outten* prior to this Court's decision in *Van Hook*, which repudiated the Sixth Circuit's more blatant attempt to treat ABA guidelines as more than mere evidence of what reasonableness means, *see Van Hook*, 558 U.S. at 8.[7] Since *Van Hook*, the Third Circuit has properly treated ABA guidelines as "informative, albeit not dispositive." *Showers v. Beard*, 635 F.3d 625, 633 (3d Cir. 2011).

The court of appeals' decision below is in accord with the other circuits. Like those circuits, the court of appeals declined to treat Butts's proffered standards – the 1989 ABA Guidelines and the Southern Center for Human Rights Defense Manual – as "establish[ing]"

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[7] Butts's citation to the Sixth Circuit's decision in *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003), must be dismissed for the same reasons. There, the Sixth Circuit misread *Wiggins* "for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases." *Id.* at 486. *Van Hook* disabused the Sixth Circuit of that notion, and Butts cites no Sixth Circuit case post-*Van Hook* that repeats it. Moreover, like the other circuits, the Sixth Circuit has also relied on state standards in assessing attorney performance. *See Williams v. Anderson*, 460 F.3d 789, 800 (6th Cir. 2006) (finding counsel's performance was objectively unreasonable relying, in part, on the Ohio Rules of Court, Code of Professional Responsibility, Canon 6).

the prevailing professional norms and rejected Butts's argument "that trial counsel's performance was automatically deficient because they did not follow in lock step" those recommendations. Pet.App.-8-9. Instead, the court followed this Court's instructions to view such standards only as guides for determining whether the lawyer's "decisions fall within the 'wide range of professionally competent assistance.'" Pet.App.-11 (quoting *Buck v. Davis*, 137 S. Ct. 759, 775 (2017)). The court concluded that standard was met in this case where counsel "undertook an exhaustive investigation into [Butts's] childhood and upbringing" and "the records show[ed]" that "mitigation experts were not routinely used in capital cases in the judicial circuit where this case was tried." Pet.App.-12. Butts has failed to show that the court of appeals' holding or reasoning conflicts with that of any other circuit.

B. The Eleventh Circuit's analysis was not contrary to established Federal law.

Butts contends that counsel's performance fell below the standards set out in the 1989 ABA guidelines because counsel did not hire a mitigation expert.[8]

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[8] Butts also cites the Southern Center Manual, but introduced into the record only a two-page excerpt and a questionnaire from that manual. Res.App.28-31. There is no indication from those portions that counsel's performance with respect to these areas fell short of its standards. *See also* Pet.App.-8-9 (court of appeals explaining that the manual "**recommended considering** '[t]he use of social workers and other experts to present the case in mitigation.'" (emphasis added)). The Warden was unable to locate a copy of the full manual.

However, as the well-established law does not mandate the hiring of a mitigation specialist for the effectiveness of counsel, the state court's holding could not be contrary to, or an unreasonable application of, established federal precedent. 28 U.S.C. § 2254. This Court should deny certiorari review.

There is no support in the law for the per se deficiency requirement Butts is attempting to create. The Eleventh Circuit, through the district court order, held: "Butts cites no Supreme Court precedent holding that trial counsel must retain a mitigation expert." Pet.App.-51. The Eleventh Circuit found Butts's reliance on *Wiggins* "misplaced," explaining that this Court "did not find counsel's failure to utilize a social worker per se ineffective; rather, it was that such failure rendered counsel's performance deficient under the relevant professional standards." *Id.* (quoting *Newland v. Hall*, 527 F.3d 1162, 1206 (11th Cir. 2008) (citing *Wiggins*, 539 U.S. at 524-25)). This Court has also rejected similar per se deficiency arguments. *See Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000) ("We reject this per se rule as inconsistent with *Strickland*'s holding that 'the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.' ").

The state habeas court, in rejecting Butts's argument, concluded that Butts's ineffectiveness claim was not analyzed by a per se deficiency analysis, but by the well-established *Strickland* standard. *Id.* Reviewing the claim under this proper standard, the state habeas court extensively examined the

investigation conducted by the defense team and concluded Butts had failed to show deficient performance. Pet.App.-281-96. The state court concluded that "trial counsel's investigation into [Butts's] background was reasonable and thorough. . . ." Pet.App.-295. That conclusion was not contrary to or an unreasonable application of *Strickland*.

Properly applying § 2254 and *Strickland*, the Eleventh Circuit found that the state habeas court's *Strickland* analysis was not contrary to, or an unreasonable application of, this Court's precedent as counsel's investigation was objectively reasonable. Pet.App.-14. Adding "a few points," Pet.App.-6, to the district court's order, the court of appeals held that even though "mitigation experts were not routinely used in capital cases in the judicial circuit where this case was tried" at the time of Butts's trial, "an exhaustive investigation" was still conducted into Butts's background. Pet.App.-12. This analysis is in direct accordance with the longstanding precedent of this Court. Further review is not warranted.

C. Even the alleged split is not implicated in this case.

Finally, even if there were a split regarding the set of standards that should serve as prevailing professional norms, it would be irrelevant in this case because Butts has failed to show that the question whether his counsel was deficient turns on which set of standards applies.

Butts primarily contends that counsel's performance fell below the standards set out in the 1989 ABA guidelines because counsel did not hire a mitigation expert. But those guidelines do not require hiring a mitigation expert; they state only that "counsel should secure the assistance of experts *where it is necessary or appropriate for* . . . presentation of mitigation." 1989 ABA Guidelines, Guideline 11.4.1.D.7. Moreover, with respect to the mitigation investigation, those guidelines contemplate "*counsel* . . . interviewing potential witnesses" and suggest that "*[a]lternatively*, counsel should have an investigator or mitigation specialist conduct the interviews." *Id.* at 11.4.1.D.3.[9] Because applying Butts's preferred set of standards would not make a difference in this case, it is not be a suitable vehicle for resolving a split regarding which set of standards control even if there were one.

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[9] Butts also contends that trial counsel rendered deficient performance because they allegedly did not conform to the ABA guidelines requiring counsel to make "efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence" and to introduce "humanizing mitigation during the penalty phase" of trial. Petition-26-27. Yet, the portion of counsel's testimony and the federal court's language he relies upon only concern trial counsel not hiring a mitigation specialist and the Warden has only addressed that argument. Notably, however, the state habeas court concluded "trial counsel's investigation into [Butts's] background was reasonable and thorough." Pet.App.-295. The court of appeals agreed: "We do not often see cases in which a defense team investigated mitigating circumstance evidence more thoroughly than this team did." Pet.App.-8-9. Also, the state habeas court concluded, and the court of appeals confirmed, that counsel had sound strategic reasons for focusing on residual doubt at sentencing. *See* section II.

II. The question whether the court of appeals applied the wrong standard for reviewing counsel's strategic decisions does not warrant this Court's review.

Butts's second argument contends that the court of appeals created a circuit conflict regarding whether counsel's strategic decisions are "wholly immune" from challenge under *Strickland*. Petition-31. This argument fails at its premise: The court of appeals did not hold that counsel's decision to present a residual doubt theory is ever "wholly immune" from review. Instead, the court of appeals determined – correctly – that the state court did not unreasonably apply *Strickland* in concluding that trial counsel's decision to pursue a residual doubt strategy at sentencing *in this case*, made after a thorough investigation into mitigating circumstances, was a reasonable one. Certiorari review of that determination is unwarranted.

A. The court of appeals did not create a circuit split because it did not hold that strategic decisions are "wholly immune" from review under *Strickland*.

To show deficient performance under *Strickland*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (quoting *Strickland*, 466 U.S. at 688). That standard applies to counsel's strategic choices too. *Strickland*, 466 U.S. at 690. If counsel has thoroughly investigated the law and facts relevant to a strategic choice,

however, *Strickland* makes clear that the bar for successfully challenging that choice is high: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690.

In reviewing trial counsel's strategic decision to focus on residual doubt as their mitigation theory, the court of appeals straightforwardly applied these standards; it did not deem all strategic decisions "wholly immune" from review. The adopted district court order reviewed counsel's decisions under this Court's well-established standard. Pet.App.-53-72. That order described at length Westin's testimony explaining counsel's mitigation investigation and his reasons for choosing a residual-doubt strategy over presenting the mitigation evidence they found regarding Butts's background. For example, the court noted that "Westin did not think Butts's 'upbringing was extremely different from anybody else's, many other young men,' " and that he "felt that jurors in the Ocmulgee Judicial Circuit were not as sympathetic to the fact that someone had a bad childhood as they may have been at one time." Pet.App.-53. The district court also quoted Westin's state habeas testimony in which he explained that they had "made the 'conscious decision' to use residual doubt" as their mitigation theory because "[m]ost of [the evidence the defense team uncovered in their investigation] really wasn't positive," Pet.App.-61, and that they had concluded that using a relatively weak dysfunctional-childhood strategy would undermine the "point that he wasn't the killer." Pet.App.-62. And

the court pointed out that Westin provided other reasons for choosing residual doubt too: "They were unable to locate family members who would testify for Butts, there was no physical evidence linking Butts to the murder weapon, Wilson was older than Butts and was a gang leader, and Wilson had already been found guilty of murdering Parks and was on death row." Pet.App.-67.

After recounting these various factors on which trial counsel relied to choose a residual-doubt strategy, the district court concluded that Butts had not shown that this decision was "outside the wide range of reasonable professional assistance." Pet.App.-69. Relying on this Court's precedent, the court explained that "[s]uch decisions, when 'made after thorough investigation of law and facts relevant to plausible options[,] are virtually unchallengeable. . . .'" *Id.* (quoting *Strickland*, 466 U.S. at 690). The court further reasoned that "Westin's 'sense of the jury's reaction to testimony or evidence is a sound basis on which to make strategic decisions.'" *Id.* And the court concluded that Butts had failed to show "'that the approach taken by defense counsel would not have been used by professionally competent counsel.'" *Id.* The order adopted by the court of appeals reflects a fulsome review of counsel's mitigation investigation and the strategic decision that followed, not a belief that such decisions are "wholly immune" from review.

Nor does the court of appeals' additional analysis of counsel's strategic decision to use a residual-doubt strategy suggest that the court deems strategic

decisions "wholly immune" from review. Butts points to the court's statement that "[w]e cannot and will not second guess trial counsel's strategic decision to focus on residual doubt instead of mitigation evidence, especially where that decision was made after a thorough investigation into mitigating circumstances." Petition-31. But as the court made clear, that statement follows directly from *Strickland* itself, which explains that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Further, the court pointed out that it had already "held a number of times" that the residual-doubt strategy "can be an effective strategy at the sentencing stage of a capital case." Pet.App.-12. Thus, placed in context, the court's statement that it could not second guess trial counsel's strategic decision was not a statement that strategic decisions are immune from review; it was a conclusion that this particular strategic decision was reasonable because (1) this kind of strategy is often effective, and (2) counsel made a thorough investigation of the law and facts relevant to that decision before making it in this case.

Because the court of appeals did not hold that strategic decisions are "wholly immune" from review, Butts's attempt to manufacture a split fails. He cites various court of appeals' decisions taking the uncontroversial position that counsel's strategic decisions are still subject to *Strickland*'s requirement that they be objectively reasonable. Pet.App.-29-30. But as just discussed, the court of appeals' decision comports with

that position. Indeed, in a recent case, the Eleventh Circuit granted habeas relief under § 2254 based on a determination that a particular strategic decision was unreasonable. *See DeBruce v. Commissioner*, 758 F.3d 1263, 1274 (11th Cir. 2014) (" . . . no lawyer could reasonably have made a strategic decision to forego the pursuit of mitigation evidence based on the results of the pre-trial report governing competency to stand trial . . . ").[10] Nor do any of the decisions Butts cites appear to depart from *Strickland*'s guidance for reviewing strategic decisions made after thorough investigation of the law and facts relevant to the decision, 466 U.S. at 690, which the court of appeals expressly applied. Accordingly, Butts has not shown that the court of appeals' decision creates a conflict among circuits, and certiorari review is therefore unwarranted.[11]

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[10] All federal circuit courts appear to assess the reasonableness of counsel's strategic decisions under "objective standard of reasonableness" set by this Court in *Strickland*. *See United States v. Rivera-Ruperto*, 852 F.3d 1, 8 (1st Cir. 2017); *United States v. Delva*, 858 F.3d 135, 157 (2d Cir. 2017); *Vickers v. Superintendent Graterford Sci.*, 858 F.3d 841, 852 (3d Cir. 2017); *Bell v. Evatt*, 72 F.3d 421, 430 (4th Cir. 1995); *Scheanette v. Quarterman*, 482 F.3d 815, 820 (5th Cir. 2007); *Jackson v. Bradshaw*, 681 F.3d 753, 760 (6th Cir. 2012); *Harris v. Cotton*, 365 F.3d 552, 556 (7th Cir. 2004); *Williams v. United States*, 452 F.3d 1009, 1013 (8th Cir. 2006); *Mitchell v. United States*, 790 F.3d 881, 886 (9th Cir. 2015); *Bullock v. Carver*, 297 F.3d 1036, 1044 (10th Cir. 2002); *Lindsey v. Smith*, 820 F.2d 1137, 1152 (11th Cir. 1987).

[11] Butts also alleges a conflict between the First Circuit and "[s]everal state courts" on the basis that the former has "adopted a 'patently unreasonable' test" for strategic decisions, while the latter have "enforced a 'manifestly unreasonable' standard."

B. The court of appeals' decision regarding counsel's strategic decision to present a residual-doubt strategy was correct.

Certiorari is also unwarranted because the court of appeals correctly determined that the state court did not unreasonably apply *Strickland* by concluding that counsel's strategic decision to present a residual-doubt theory at sentencing was reasonable. The relevant question is whether counsel's choices were reasonable, and to carry that burden the "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (quoting *Strickland*, 466 U.S. at 688). And *Strickland* explains that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." 466 U.S. at 690.

The state habeas court extensively assessed the investigation conducted by trial counsel, Pet.App.-281-95, and then held that, armed with this information, trial counsel made a reasonable strategic decision not to press Butts's dysfunctional background as mitigation at trial. Pet.App.-307-12. The state habeas court credited trial counsel's concern that this type of evidence would "give[] up the point that he wasn't the killer." Pet.App.-281. The court held that "[t]his concern, which formed the partial basis of trial counsel's decision to present family/background

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Petition-31. He fails to explain, however, why those similar-sounding standards would be meaningfully different standards.

evidence in mitigation" was reasonable. Pet.App.-308. Additionally, the court found "Mr. Westin's experience in the Ocmulgee Judicial Circuit" and the "circumstantial evidence presented in the guilt phase" also supported the reasonableness of the mitigation theory and counsel were not deficient. Pet.App.-308-09. Applying this Court's precedent, the court held that "[s]uch 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *Id.* (quoting *Strickland*, 466 U.S. at 690). The court of appeals correctly determined that this conclusion was not an unreasonable application of *Strickland*. Review is accordingly unwarranted.

III. The State court properly found Butts failed to establish *Strickland* prejudice.

In his third argument, Butts alleges that the state habeas court's determination that he was not prejudiced by trial counsel's mitigation investigation was based on an unreasonable application of this Court's precedent and an unreasonable determination of the facts, so the court of appeals erred by concluding otherwise. As a plea for mere error correction, that decision does not warrant further review. In any event, there is no error to correct. The court of appeals, relying on the extensive review conducted by the state habeas court as set forth above and properly applying *Strickland*, correctly held that the state habeas court's findings were supported by a reasonable determination of the facts and were not contrary to, or an unreasonable application of, any precedent of this Court.

A. The state court reviewed the totality of the evidence and reweighed it against the aggravating evidence.

Butts argues that in assessing the prejudice prong of *Strickland* the state habeas court unreasonably applied *Porter v. McCollum*, 558 U.S. 30 (2009), because the court failed to "consider what effect the totality of the new mitigation evidence might have had on the jury." Petition-35. He also claims that the state court's analysis was an unreasonable application of *Porter*, *Williams v. Taylor*, 529 U.S. 362 (2000) and *Wiggins*, because the court allegedly failed to "reweigh the newly-offered mitigation evidence against the original aggravating evidence." *Id.*

The court of appeals, through the adoption of the district court order, correctly rejected this argument because it is not supported by the record. The court explained that, "[c]ontrary to Butts's assertion, the state habeas court did not fail to 'reweigh the evidence in aggravation against the totality of available mitigating evidence.'" Pet.App.-86 (quoting *Wiggins*, 539 U.S. at 534). The district court order pointed out that the state habeas court "provided a detailed analysis of the evidence presented at the state habeas evidentiary hearing," including that "Laura was frequently absent from her children's lives and used drugs; Butts, Sr. was mentally ill and had no role in Butts's life, and Butts's younger brother Dominique had behavioral problems." Pet.App.-86. The order also recognized the state habeas court reviewed the testimony of Butts's former teachers, Pet.App.-92, numerous records concerning

Butts and his family, and the testimony of Vogelsang, finding much of her "testimony was undermined or contradicted in several respects." Pet.App.-86-93. The district court order concluded:

> . . . the state habeas court did not fail to analyze the effect of the new mitigating evidence and reweigh it against the evidence in aggravation. Nothing in the state habeas court's opinion indicates it "discount[ed] entirely the effect" that the new evidence, including Vogelsang's testimony, would have had on the jury. *Porter*, 558 U.S. at 43. Instead, the court determined that had the jury heard all of the new evidence, there is no reasonable probability they would have given Butts a different sentence. After a thorough review of the record, the Court is unable to say that no reasonable jurist could agree with the state habeas court's prejudice determination.

Pet.App.-93. Therefore, there was no prejudice resulting from appellate counsel's deficient performance and the determinations by the state court denying this claim "were not contrary to and did not involve an unreasonable application of *Strickland*, nor were they based on any unreasonable factual determinations." Pet.App.-101-02.

Contrary to Butts's arguments, the state habeas court, as acknowledged by the court of appeals, clearly considered the aggravating evidence. *See* Pet.App.-289-94. It also clearly considered Butts's background, his mother's absence, her behavior and drug usage, his father's mental health issues and Dominique's

behavioral issues, but found it undermined by the record and not compelling. *See* Pet.App.-284, 287-88, 299-306. The holdings of the court of appeals rejecting Butts's challenge to the state habeas court's prejudice analysis are firmly supported by the record and provide no basis for certiorari review.

B. The state court's findings are supported by the facts.

Butts also argues that the state habeas court based its finding that trial counsel were not deficient on an unreasonable determination of the facts. The court of appeals, adopting the district court order, rejected this claim, holding that one specific fact-finding relied on by the state habeas court was erroneous, but the state habeas court's conclusion was still fairly supported by the remaining determination of facts. Pet.App.-66-68.

In concluding that trial counsel made a strategic decision to focus on residual doubt as their mitigation theory, the state habeas court quoted Westin's testimony from the motion for new trial hearing. In that hearing, Westin testified that "Wilson's criminal record was part of the reason he chose to use residual doubt, and he 'brought in Mr. Wilson's prior record; . . . [and] read from the sentencing phase of Mr. Wilson's trial, that he had shot at least two people that [Mr. Westin] recall[ed]; shot a dog.'" Pet.App.-66. The district court order noted that this was incorrect, because "trial counsel did not present Wilson's record to the jury,"

id., but the court concluded that "the state habeas court's factual finding that Westin made the strategic decision to pursue residual doubt remains supported." Pet.App.-67. So, although the state habeas court recited one erroneous fact, the court's decision did not rest on an unreasonable determination of the facts under § 2254(d)(2).

The district court order explained that other evidence amply supported the state habeas court's conclusion that the decision was strategic. This included Westin's testimony that they chose residual doubt based on the defense team's inability to "locate family members who would testify for Butts"; the lack of any "physical evidence linking Butts to the murder weapon"; and that Wilson was older than Butts, was a gang leader, and Wilson had already been found guilty of murdering Parks and was on death row. Pet.App.-67. The court of appeals and the district court also each noted that trial counsel had argued, without any objection from the prosecution, that Wilson was well-known to law enforcement to be a member of the FOLKS gang, a violent person, and had a "very extensive criminal history." Pet.App.-60, 66, 297-98. So, while Wilson's criminal history was not read into the record, the fact that he had an extensive criminal history, was violent and in a gang, was clearly put before jury by trial counsel and still a relevant basis for trial counsel's strategic decision.

The district court order concluded that "the state habeas court's ultimate conclusion that Westin made the strategic choice to use residual doubt rests on

sufficient factual bases apart from any unreasonable finding regarding what Westin ultimately presented at the sentencing hearing." Pet.App.-67. The reasonableness of the state habeas court's holding is supported by the record and provides no basis for certiorari review.

C. Courts are not required to give detailed explanations to ease federal habeas review.

Finally, Butts argues that the state habeas court conducted a "truncated prejudice inquiry" because it never explained why the new evidence did not establish prejudice. Petition-36-37. To the contrary, as noted by the district court, the state habeas court "provided a detailed analysis of the evidence presented in the state habeas hearing" and found Butts had failed to establish *Strickland* prejudice. Pet.App.-86-93. The court of appeals concluded, even if every detail and fact is not parsed out in the state court order, it is not entitled to less deference. Pet.App.-45.

Relying on this Court's precedent, the district court order held that even if every fact is not explained or addressed by the state court, the state court decision must be "given the benefit of the doubt." Pet.App.-45 (citing *Lee v. Comm'r Ala. Dep't of Corr.*, 726 F.3d 1172, 1212 (11th Cir. 2013) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). *See also La Vallee v. Delle Rose*, 410 U.S. 690, 694, 1205 (1973). Additionally, this Court has held that when "determining whether a state court's decision resulted from an unreasonable legal or

factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011).

The record is clear that in this case, the state habeas court conducted an extensive analysis of the record in denying relief. Regardless of whether the state habeas court made a point-by-point comparison of aggravating and mitigating evidence, or even addressed specific parts of the allegedly mitigating evidence, its findings are entitled to deference and not contrary to, or an unreasonable application of, Supreme Court precedent or based on an unreasonable determination of the facts. Certiorari review should be denied.

CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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