No. 18-6409

In the
Supreme Court of the United States

Scotty Garnell Morrow,
Petitioner,
v.

GDCP Warden,
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. Whether the court of appeals' decision reviewing the Georgia Supreme Court's reasoned decision, which contained explicit and implicit fact-findings, and then relying upon portions of the record that support the state court's reasoning, without making independent fact-findings, conflicts with *Wilson v. Sellers*, ___, U.S. ___, 138 S. Ct. 1188 (2018).

2. Whether the Georgia Supreme Court unreasonably applied *Strickland v. Washington* when it determined that trial counsel were not deficient for failing to uncover evidence of alleged sexual abuse petitioner never mentioned during a thorough background investigation, and that failing to uncover that evidence did not prejudice petitioner given the balance of aggravating and mitigating evidence.

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OPINIONS BELOW

The decision of the Georgia Supreme Court in the criminal direct appeal is published at 272 Ga. 691, 532 S.E.2d 78 (2000).

The decision of the state habeas court granting relief as to sentence is not published, but is included in Petitioner's Appendix F. The decision of the Georgia Supreme Court reversing the grant of relief and reinstating Petitioner's death sentence is published at 289 Ga. 864, 717 S.E.2d 168 (2011) and is included in Petitioner's Appendix E.

The decision of the district court denying federal habeas relief is unpublished, but is included in Petitioner's Appendix D. The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of relief is published at 886 F.3d 1138 (11th Cir. 2018) and is included in Petitioner's Appendix A.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment in this case on March 27, 2018. On August 9, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 19, 2018, and the petition was timely filed. On October 30, 2018, Justice Thomas extended the time within which to file the brief in opposition to and including December 24, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

In all criminal prosecutions, the accused shall enjoy the right to a … have the Assistance of Counsel for his defence.

The Fourteenth Amendment, Section I, 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 … .

28 U.S.C. § 2254(d) provides:

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 Scotty Morrow seeks factbound error correction of his *Strickland* claim, which is not worthy of this Court's certiorari review.

Morrow tries, but fails, to manufacture a conflict with this Court's decision in *Wilson v. Sellers*, ___, U.S. ___, 138 S. Ct. 1188 (2018). He argues *Wilson* held that, instead of examining the state court's decision in the context of the entire record, a reviewing court may only uphold a state court's decision under § 2254(d) review based on the specific reasons provided in the state court decision. And he claims that the court of appeals failed to limit its review in that way. But *Wilson* did not hold that—it addressed only how to review an *unreasoned* state court decision, not a reasoned opinion—and even

if *Wilson* had included such a holding, the court of appeals in fact upheld the state court's decision based on that court's reasoning. The court of appeals examined the state appellate court's reasons and determined they were supported by the record and this Court's precedents. The court of appeals made no independent fact-findings and did not otherwise step outside the bounds of a proper § 2254(d) review.

Morrow's petition thus reduces to a request for this Court to conduct error correction of a factbound *Strickland* claim, and one that lacks merit. Trial counsel performed a reasonable background investigation, which included interviewing Morrow and his closest family members, and counsel obtained two mental health evaluations. Years later, after Morrow received a death sentence, Morrow and his family came forward with allegations of sexual and physical abuse that trial counsel, despite many interviews with petitioner and family, had not uncovered. No historical records showed or even suggested this abuse occurred or showed any history of mental health problems associated with the alleged abuse. Instead Morrow presented a ream of new affidavits from extended family members and acquaintances. Although some of the affiants suggested Morrow was sexually abused none provided first-hand accounts or testimony that Morrow had informed them of the alleged abuse. Regarding alleged physical abuse by Morrow's mother's boyfriend, the only first-hand account came from Morrow's sister whom trial counsel had spent considerable time interviewing. Contrary to Morrow's arguments, the Georgia Supreme Court, after reviewing the entire record, explicitly and implicitly rejected many of the fact findings of the lower state court, made its own fact-findings and reasonably concluded trial counsel did

not render deficient performance, and that Morrow was not prejudiced by counsel's performance.

Because Morrow has failed to show that the court of appeals' decision is not in accord with this Court's precedent, and that he is not requesting anything other than factbound error correction, his questions presented do not warrant this Court's review.

STATEMENT

A. Facts of the Crimes

In the month leading up to the crimes, numerous witnesses testified at trial that Morrow physically and sexually abused and threatened Barbara Ann Young's life. D14-27:6; D15-1:82-83; D15-2:78; D15-3:58.[1] On the day of the crimes, Young was at home with her two small children and her friends Tonya Woods and LaToya Horne. Pet. App. 147. After a phone conversation in which Young told Morrow to leave her alone, Morrow kicked-in Young's door and entered her home with a loaded gun. D14-27:12; D14-28:78-79.

Upon entering the kitchen, Morrow exchanged words with Woods and yelled "shut your mouth bitch." D14-27:120-123, 125. Morrow then drew his gun from his waistband and shot Woods in her lower "left abdomen, severing her spine and paralyzing her." Pet. App. 175. He then shot Horne in the left arm. D14-27:123; D15-3:147; Pet. App. 175. Morrow "possibly fired at Ms. Young as she fled from the kitchen" and ran down the hallway into her bedroom. Pet. App. 175; D14-27:124. Morrow caught Young after he "kicked open her bedroom door" where they "struggled." Pet. App. 175. A shot was

[1] "D" refers to the Electronic Court Filing (ECF) number, followed by the appropriate ECF page number.

fired that "likely" injured Young's back, and Morrow "likely "smashed [Young's] head into the bedroom's doorframe, leaving behind, skin, hair, and blood." *Id.* Young broke free from Morrow, but as she ran away, Morrow grabbed her hair from behind and shot Young in the back of the head while Young's five-year-old and eight-month-old sons watched from the closet where they were hiding. D14-28:57, 63, 70. Young's oldest son, Christopher Young, testified at trial that he watched Morrow reload his gun and fatally shoot his mother. *Id.* at 70.

Morrow then returned to the kitchen and shot Woods on the left side of her chin "and into her head at close range," causing her death. Pet. App. 175. He then shot Horne, who was lying on the floor, in her right arm and her face. *Id.* at 126-127; D14-28:63; D15-3:140. Morrow exited the home and cut the phone line. D14-27:132. Horne, "badly injured," "managed to walk from house to house down the street seeking someone to call for help before she eventually collapsed; she survived, but with permanent injuries, including deafness in one ear." Pet. App. 176.

B. Proceedings Below

1. Trial Proceedings

A Hall County grand jury indicted Morrow on March 6, 1995, for two counts of malice murder, two counts of felony murder, six counts of aggravated assault, aggravated battery, cruelty to a child, burglary, and possession of a firearm during the commission of felonies. D10-1:26-30. Morrow was represented by two experienced criminal attorneys, William Brownell and Harold Walker. Brownell, who served as lead counsel, had tried over one hundred felony cases and had been involved in as many as

eight to twelve death penalty cases as a prosecutor, two to six of which went through the sentencing phase of trial. D16-22:110-112; D16-28:15; D16-29:6-9. Co-counsel Walker had practiced law since 1979 and testified that, since 1988, approximately half of his practice was devoted to criminal defense. D16-24:52-53.

a. Background Investigation

As Morrow admitted, trial counsel met with Morrow "almost right away," and began to gather a "good factual background" about Morrow. D16-22:110-12, 114; D16-27:5; Pet. at 7. Trial counsel testified that he asked Morrow to provide guidance on where counsel could find the "good" and "bad things" in his life to help with his case. D16-24:85-86. During initial meetings, Morrow discussed growing up, schooling, his father being absent during his youth, his blackouts, his Job Corps time, his prior marriage, his desire to have a normal family, and his relationship with Young. D16-22:115-16; D16-24:55-77. To help develop evidence of Morrow's background, counsel also employed the services of an investigator, Gary Mugridge, and two mental health experts, Drs. Dave Davis and William Buchannan. D16-24:9-10; D16-29:100-05; D16-22:42.

Within a week of Morrow's arrest, trial counsel began regular conversations with Morrow's mother, Betty Bowles, about the case. D16-24:73; D16-30:57-61. Brownell's meeting notes with Bowles show that he had substantive conversations about Morrow's background. For example, Bowles reported that Morrow: was born premature; went to a psychiatrist when he was three or four-years-old; was beaten up at school when he was seven or eight-years-old; had blackouts and headaches; was on the wrestling team in

school but dropped out of school in ninth grade; and participated in Job Corps in Kentucky for three months when he was seventeen-years-old. D16-30:57-62; D16-31:22. Additionally, Bowles stated she worked long hours in the Northeast and had three jobs to support her children, however, her children had their basic needs met. D16-30:57-62; D16-31:22. Also, counsel learned Morrow's father abused Bowles, and that Bowles had been abused by her boyfriend, George May, in New Jersey. D16-22:135-36; D16-27:9.

Trial counsel also regularly discussed the case with Samantha Morrow, Morrow's sister, the source of much of Morrow's new allegations of abuse, and these discussions included information for the penalty phase of trial. D16-24:72; D16-27:5.

Investigator Mugridge also "frequently" spoke with Samantha and Bowles. D16-24:36-37, 86-87. Mugridge also interviewed, *e.g.*, extended family members, former girlfriends, friends of the family, co-workers, a clergy member from Morrow's church, and several acquaintances of Young. D17-9: 11-16, 19-21, 25-29, 31-36, 43, 45-46, 54-56, 59, 67.

Mugridge testified that he was well-aware that Morrow lived in New York and New Jersey and that Bowles and Samantha were Morrow's closest contacts for that time. D16-24:36-37. Mugridge located Lorna Broom, a former girlfriend of Morrow's from New Jersey, but Samantha told Mugridge not to contact her.[2] D16-24:45-46. Additionally, Mugridge tried to locate Morrow's alleged personal mentor, but the family only provided his first

[2] Notes in Mugridge's file indicated Morrow had an "altercation" with Broom and she was "cut up." D17-1:46.

name, could not provide a phone number or address for this individual, and Mugridge was therefore unable to locate him.[3] D16-24:18.

Mugridge also sought Morrow's school records, but he testified that he recalled that there was a problem in locating the records.[4] D16-24:42-43. Mugridge also tried to locate records from psychological testing that Bowles stated Morrow received as a young child, but the family could not provide the name of the psychologist who had performed the testing or where it was conducted.[5] D16-24:44-43; 49-50.

Trial counsel testified that they investigated the possibility that Morrow was physically abused as a child by interviewing Morrow, Morrow's mother, and Morrow's sister, whom trial counsel learned was the most forthcoming about how the children were disciplined. D16-29:62. The information supplied to trial counsel from Morrow, his mother and sister, indicated that, at most, Morrow was subject to "intense spankings." D16-29:67-68.

Regarding sexual abuse, trial counsel, Mugridge, and Buchannan all testified that neither Morrow, his mother nor sister provided information

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[3] Morrow alleges Mugridge "abandoned the effort" to find the mentor because the family simply could not provide a phone number, as shown above, that is an inaccurate portrayal of the record. Pet. at 11.

[4] Morrow alleges that Mugridge testified that obtaining the school records was "'not something that [counsel] had requested or wanted" of him. Pet. at 11 (brackets in original) (quoting D16-24:43). However, the portion of Mugridge's testimony that Morrow quotes is referring to the assumption Mugridge had that counsel did not request or want him to travel to the Northeast, not that counsel did not request or want him to obtain the school records—which Mugridge testified he had attempted to do. D16-24:43.

[5] Regarding background records, trial counsel recalled having trouble tracking down records but did not definitely testify that they did not obtain the records. D16-27:28, 41; D16-29:25, 96.

about sexual abuse. D16-22:97-98; D16-24:37, 108-09. Trial counsel testified that evidence of sexual abuse was "crucial" and was "the type of question that [he was] sure [he] would have asked of [Morrow's] family or of [Morrow] and probably go the answer, no. And that's why we didn't pursue it." D16-24:108-09.

b. Mental Health Investigation

(1) Dr. Dave Davis

Trial counsel hired Dr. Dave Davis, a psychiatrist, on March 16, 1995, within 90 days of Morrow's arrest. D16-29: 100-105. Davis requested and was provided the following information from trial counsel: Morrow's indictment; investigative reports, including statements from every witness; crime scene photos; a video tape of the crime scene; Morrow's statement to police; and an overview of the case. D16-29:94. Davis stated he reviewed the "extensive material provided" and interviewed Morrow. *Id.* at 100-101. During the interview Morrow provided information regarding his immediate relatives; family history of alcohol abuse; father's domestic violence; parents' divorce and subsequent move north with his mother and sister; drug use and alcoholism; history of violence (to include fights as an adolescent, an aggravated assault on a transvestite, and battering his ex-wife and a former girlfriend); educational history; criminal record; medical history; sexual history; and a description of the murders of Young and Woods. *Id.* at 100-105.

Morrow reported that his troubles stemmed from the fact that he was "abandoned by his father, grew up in a bad environment, had no male figures when he was growing up, and no paternal love." D16-29:103. He also stated

that he had always had a bad temper, and he believed that he had mental problems. *Id.* While Morrow openly discussed his sexual history and other personal information with Davis (*see, e.g.,* D16-29:103-04), there was no evidence in the report that Morrow informed Davis that he was sexually or physically abused while he lived in the Northeast. Also, as the Georgia Supreme Court found, Davis stated in his pre-trial psychiatric report that Morrow's "sexual history" was "unremarkable." Pet. App. 181.

Davis stated in his final report that Morrow was competent to stand trial and that he had a personality disorder, not otherwise specified, with anti-social, borderline, and avoidant features. D16-29:104-05. Davis concluded that Morrow's deprived early childhood resulted in his pattern of poor coping. *Id.* Additionally, Davis reported that Morrow's childhood lacked parental supervision, and that Morrow had a long history of being very angry, getting into fights, abusing alcohol and drugs, and had difficulty with long-term occupation. *Id.* Trial counsel made a strategic decision not to use Davis' report at trial because they believed that "a lot" of the information in the report was "harmful" and would be viewed "negatively" by the jury. D16-29:27-28.

(2) Dr. William Buchanan

Trial counsel later hired Dr. William Buchanan in March of 1999 to conduct another mental health evaluation of Morrow to help find "more mitigation information." D16-22:42; D16-24:70; D16-27:27-28; D16-29:29. Trial counsel requested Buchanan's assistance in getting Morrow to open up so that Morrow would appear more sympathetic in front of the jury. D16-29:29. Trial counsel provided Buchanan with information pertaining to

Morrow's background, a copy of their opening statement, and additional information over the phone as the investigation progressed. D16-22:48-51. Trial counsel testified that, "Dr. Buchanan was experienced as a forensic psychologist" and would identify what was relevant. D16-27:10. Although Buchanan never asked for Morrow's records, to meet with Morrow's family, or for any additional information, trial counsel testified that they would have provided Buchanan with any material he requested, as trial counsel had done on previous cases with Buchanan. D16-24:104; D16-27:28; D16-29:32-33. Buchanan admitted that he could not recall trial counsel not providing him with any materials he requested. D16-22:95.

After reviewing the material provided by trial counsel, Buchanan met with Morrow on four occasions on March 29, 1999, May 17, 1999, June 11, 1999, and June 14, 1999, for a total of six to eight hours. D16-22:44-46. In addition, psychological tests were administered to Morrow by Buchanan's psychometrist.[6] *Id.* at 5.

During his interviews, Morrow provided information about his parent's divorce, his own divorce, his birth in Georgia and subsequent move to New Jersey/New York, his school history, his work history, his relationship with Young and her children, and the unfiled rape/kidnapping complaint by Young against him. D17-35:27-32. Regarding Morrow's childhood in New Jersey, Morrow described an incident when he was twelve or thirteen when he picked up a baseball bat in an attempt to defend his mother from her boyfriend. *Id.*

[6] Buchanan had regular meetings with trial counsel about his evaluations and findings but did not write a formal report because trial counsel "anticipated calling him as a witness." D16-22:136; D16-27:29.

at 50. He also stated that his youngest son was seeing a psychiatrist as he had been molested in Florida when he was eight-years-old. *Id.* at 34. Morrow was candid about sensitive personal information, and he never told Buchanan that he was allegedly sexually abused. D16-22:98.

c. Presentation of Evidence

During the guilt-innocence phase, trial counsel presented three witnesses—a law-enforcement investigator, Morrow's sister, and Morrow. The investigator explained that "Young had not referred to the incident where Morrow kidnapped her and had sex with her as a 'rape' and that Morrow had beaten her with his fist rather than with a gun during that incident." Pet. App. 182. "Morrow's sister testified about Morrow's background in an effort to show Morrow's good character, his past good treatment of Ms. Young, and his distress at the time of the murders." *Id.* Morrow was the final witness during the guilt phase and "described his history with Ms. Young," explained "about his alleged past abuse of her that were more favorable to himself than the State's evidence," and admitted "he had reacted impulsively to Ms. Woods' insulting comment to him about Ms. Young's no longer wanting to be in a relationship with him." *Id.*

As the Georgia Supreme Court found, "trial counsel attempted to carry forward their theme about Morrow's good character" to the sentencing phase. *Id.* at 183. The reason for this strategy was based upon trial counsel's experience trying cases in the local community that juries often found mitigation testimony relating "further back in time" to the crimes to be less "relevant." D16-22:159. Trial counsel, after narrowing down their witness list to avoid cumulative testimony, presented fourteen witnesses in the

penalty phase, thirteen lay witnesses, and one mental health expert. D16-29:39-40. Trial counsel were able to elicit testimony from each witness that supported their mitigation theme that the crimes were "absolutely and totally out of character" for Morrow and that Morrow had qualities admired by his friends, family and co-workers. *Id.* at 48.

Trial counsel offered testimony from three of Morrow's family members: his sister, Samantha; his half-sister, Deborah Morrow; and his mother, Betty Bowles. Samantha testified that when Morrow was young their father was very abusive to their mother. D15-9:72-73. Bowles recalled that Morrow once witnessed his father stomp on her stomach, causing her to miscarry. D15-11:18. Samantha testified that when Morrow was three or four-years-old he tried to use a hammer to stop their father from abusing their mother. D15-9:72-73. Bowles testified that she thought Morrow was "very devastated" by the abuse he witnessed. D15-11:18.

Samantha testified that after Morrow's parents divorced, she and Morrow moved with their mother to Brooklyn, New York, where life was "pretty good" even though their mother worked three different jobs. D15-9: 74. Bowles testified that she worked to give her kids a "better life" so that they did not have to "want for anything." D15-11:21. However, Bowles testified that while living in Brooklyn she took Morrow to several psychiatrists to "get him help" because he "was a little slow in some things in school." D15-11:22. The mental health providers told her to "continue to try to encourage him." *Id.*

When Morrow was in the fourth grade, Morrow and his family moved to New Jersey. D15-9:75. Samantha described Morrow during this time as a good student who stayed out of trouble, was in the choir, and enjoyed

athletics. *Id.* at 76. Samantha recalled that "people would pick at [Morrow] in school and stuff," and that Samantha "would go on and fight the people that bothered him." *Id.*

In the ninth or tenth grade Morrow dropped out of school and joined the Job Corps. D15-9:76-77. Samantha testified that Morrow was very homesick while he was in the Job Corps and left the Corps when he turned 18 to return home. *Id.* at 77.

Shortly after returning to New Jersey, Morrow got married, moved to Georgia, welcomed his first son, and spent time with his father. D15-9:78-79. One year later, Morrow returned to New Jersey where he lived for several years and helped his mother take care of special needs foster children who lived in her home. *Id.* at 79-80; D15-11:26. Bowles testified that Morrow took classes to learn how to help care for these children and that Morrow often helped her get the children ready for school. D15-11:26.

Morrow and his entire family eventually returned to Georgia. D15-9:79. Bowles testified that after she returned to Georgia she took in ten different foster children, and Morrow helped her care for them in her home. D15-11:28-29.

Samantha, Deborah, and Bowles each provided testimony suggesting the crimes were out of character for Morrow. D15-9:68; D15-11:29, 33. Samantha also told the jury that Morrow felt remorse about the murders and had grown closer to God since the crimes had occurred. *Id.* at 88.

Trial counsel also presented Morrow's ex-wife, and the mother of his two sons, Claudette Jenkins. Claudette testified Morrow was not violent, although she did admit he slapped her once, and she described him as a loving father. D15-9:48-49. She explained that Morrow was a good father

and that her sons would not be able to handle Morrow receiving a death sentence. *Id.* at 56. Claudette's current husband, Kim Jenkins, also told the jury that Morrow was a "perfect father," and that Morrow's sons would need "severe counseling" if Morrow was sentenced to death. *Id.* at 62-64.

In addition, Morrow's ex-girlfriend, Fonda Jones, testified that she and Morrow had a good relationship and Morrow treated her children well. D15-11:11-12. Jones testified that Morrow never lost his temper or displayed violence. *Id.* at 15.

A family friend, members of the clergy, and a deputy sheriff from the jail, testified about Morrow's dedication to his faith, his reliability, and his good character. D15-8:128-30; D15-9:3-6, 19-23, 26-39. Additionally, three of Morrow's former coworkers testified that they did not witness either violence or anger from Morrow. D15-8:118, 122; D15-9:10.

Finally, Buchannan testified to articulate how Morrow felt at the time of the murders and to explain how Morrow's past affected him at the time of the crimes.[7] D16-22:138-40. Buchanan explained that Morrow was administered a battery of psychological tests which revealed he was of "average, low average intelligence"; suffered from paranoia, suspiciousness, mistrust, social alienation, persecutory ideas, and depression; had poor ability to delay gratification and to control impulses; was introverted, which made it difficult for him to display his emotions; and had difficulty coping and "dealing with

[7] Trial counsel testified that Morrow did not appear as sympathetic or remorseful as they had hoped when he testified during the guilt phase of trial, and thus, they also presented Buchanan to better explain Morrow's demeanor to the jury. D16-22:138-41.

the stresses of everyday life or stresses of relationships." *Id.* at 126-28, 133, 137.

With regard to Morrow's life history, Buchanan told the jury that Morrow's parents divorced when he was about three or four-years-old because of conflict and physical abuse from Morrow's father toward his mother. *Id.* at 138. Following the divorce, Morrow and his older sister lived with their mother in Georgia, New York, and New Jersey. *Id.* Morrow told Buchanan that when he was about twelve-years-old, his mother was involved in a physically abusive relationship with her boyfriend. *Id.* Buchanan testified that Morrow recalled picking-up a baseball bat to defend his mother and that her boyfriend laughed at Morrow. *Id.* Morrow also felt very helpless and unable to protect his mother from the abuse. *Id.*

Concerning Morrow's schooling in New York and New Jersey, Buchanan testified that Morrow was in special education classes for learning disabilities from the Fourth Grade until the Ninth Grade—which Buchanan confirmed with the tests administered to Morrow. *Id.* at 139-40. In the Ninth Grade Morrow dropped out of school because he felt that his learning disabilities prevented him from being able to do the work. *Id.* at 139.

Buchanan testified that Morrow was married at the age of nineteen, which ended in a separation two years later while his wife was pregnant with their second child. *Id.* at 140. Morrow became depressed and started drinking. *Id.* at 141. Buchanan testified that after two or three months, Morrow stopped drinking and tried to put his life back together. *Id.*

After explaining Morrow's test results and background to the jury, Buchanan testified that because of Morrow's history and personality type he was easily provoked by "negative" comments. D15-10:6. Buchanan stated

Morrow "will hear something negative and he's likely to exaggerate that negativity because of mistrust and paranoia about it." *Id.* Buchanan explained that the comments "You're no good, you're just being used," which Morrow testified Woods told him on the morning of the murders, were enough to trigger feelings of very high paranoia in Morrow. *Id.*

Furthermore, Buchanan related Morrow's detailed description of the murders to the jury. D15-9:144-46; D15-10:1. Buchanan explained that when a person goes through any traumatic event, they will often dissociate as a way of protecting themselves, and that this dissociation will cause them to be unable to display emotion. D15-10:4-5. Buchanan told the jury that on the videotaped confession obtained directly after the crime, Morrow appeared to be in a "state of shock" and was actually dissociating. *Id.* at 4. Buchanan also testified that Morrow appeared to be in a dissociated state during his guilt phase testimony, which explained to the jury why Morrow lacked emotion when he testified. *Id.* at 24. Even though he appeared unremorseful on the stand, Buchanan stated that Morrow showed "sadness, remorse," and "guilt" over the crimes during his testing and interview by Buchanan. *Id.* at 24-25.

d. Jury Determination

Morrow was convicted of "malice murder, felony murder, aggravated assault, aggravated battery, cruelty to a child, burglary, and possession of a firearm during the commission of a felony." *Morrow v. State*, 272 Ga. 691, 691, 532 S.E.2d 78, 82 (2000). The jury found ten statutory aggravating circumstances existed and recommended a sentence of death for each of Morrow's malice murder convictions, and the trial court then sentenced

Morrow to death. D11-6:1, 56-57. Morrow was also sentenced to consecutive sentences of twenty years for aggravated battery, twenty years for cruelty to a child, twenty years for burglary and five years for possession of a firearm during the commission of a felony. *Id.* at 66-69. The felony murder convictions were vacated by operation of law, and the aggravated assault convictions merged with other convictions thereby leaving only five statutory aggravating circumstances. *Morrow*, 272 Ga. at 691-92.

2. Direct Appeal Proceedings

Morrow appealed his convictions and sentences to the Georgia Supreme Court. The Georgia Supreme Court affirmed Morrow's convictions and sentences on June 12, 2000. *Morrow v. State*, 272 Ga. 691. Morrow's motion for reconsideration was denied on July 28, 2000. D16-8. Morrow filed a petition for writ of certiorari in the United States Supreme Court, which was denied on March 26, 2001. *Morrow v. Georgia*, 532 U.S. 944, 121 S. Ct. 1408 (2001).

3. State Habeas Corpus Proceedings

Morrow filed a state habeas corpus petition in the Superior Court of Butts County, Georgia, on October 30, 2001, and an amendment thereto on February 1, 2005. D16-11; D16-20.

a. Ineffective-Assistance Claim

An evidentiary hearing was conducted on April 25-26, 2005. D16-22 thru D19-19. During the hearing, extensive evidence was presented regarding trial counsel's sentencing phase investigation and presentation. Specifically, Morrow argued counsel were ineffective for failing to uncover and present evidence that, while living in the Northeast he was allegedly

physically abused and mistreated by his mother's boyfriend; bullied and degraded by his schoolmates; and sexually abused by an older youth named Earl Green.

In support, Morrow presented affidavits from family and friends and obtained a new mental-health evaluation. The only direct evidence presented during the state habeas proceeding that Morrow was sexually abused came from Morrow's self-report to his new mental health expert, Dr. James Hooper. D17-14:3. Contrary to Morrow's assertion, his new evidence did not "amply corroborate" his allegation of sexual abuse. Pet. 13-14. The only affiants that mentioned sexual abuse were an individual who lived in the home where Morrow stayed as a child, and the cousin of that individual (*see* D17-29:68-72), neither of whom stated they had any knowledge that Morrow was abused. Instead, one of the affiants stated Green tried to sexually assault him, the affiant. D17-29:71-72. And, contrary to Morrow's assertion, Green's criminal records do not contain evidence that he was arrested or convicted of a sexual offense. D17-30:5-119.

Morrow's other evidence consisted of affiants stating he wet the bed as an adolescent and school records showing he had "behavioral changes." Pet. at 14. The record showed that Morrow had learning disabilities growing up. D15-9:76-77, 138-40; D15-11:22. The remaining affidavits submitted by Morrow from his family and friends did not contain any testimony that Morrow informed them he was sexually abused or that they witnessed Morrow being abused.

Regarding physical abuse, during the state habeas proceedings, as stated above, trial counsel testified that they was aware of allegations of physical abuse, but that when he asked Morrow, Samantha, and Bowles

about these allegations, they mitigated the allegations of physical abuse and did not admit to anything other than "spankings." D16-29:64-65, 67. Walker testified that Samantha was the most forthcoming about Morrow's childhood, but Walker never testified that Samantha indicated that Morrow was abused or mistreated. D16-24:105. Although several of Morrow's affiants claimed Morrow was abused by his Mother's boyfriend, George May (D17-14:9; D17-29:19-20, 61, 66, 75, 96), Samantha provided the only eyewitness account to May's alleged abuse (D17-29:20).[8] And, in contradiction to Morrow's habeas affiants' testimony, May's son, Gregory May, gave affidavit testimony that his father never mistreated or abused Morrow. D18-11:105-106. Gregory stated that his father punished Morrow only if Morrow was "being bad in school, being late, lying, being disrespectful, or disobeying," but testified that his father never beat or abused Morrow. *Id.* at 105.

Additionally, Morrow produced no historical records containing evidence that he was sexually or physically abused, or any history of mental health issues associated with the alleged abuse. *See* D17-14:39-43; D17-15:1-3; D17-24:10-17; D17-25:1-41; D17-26:1-13; D17-26:14-15; D17-27:1-37; D17-28:2-76.

b. State Habeas Court's Decision

Post-hearing briefs were submitted by both parties over the course of the next year. D19-27 thru D20-2. Three years after the final post-hearing brief was submitted, Morrow filed a proposed final order—presumably pursuant to a verbal request from the state habeas court, because there was no written or transcribed record of the request. D20-3. Over a year later, on

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[8] It was unclear from the affidavit of Morrow's cousin, Troy Holloway, whether he witnessed May physically abuse Morrow. D17-29:96.

December 1, 2010, Morrow filed a supplemental proposed order.[9] D20-4. Two months later, on February 4, 2011, the state habeas court entered an order granting relief as to Morrow's sentence; specifically the court found trial counsel were ineffective during the sentencing phase in their investigation and presentation of mitigating evidence. D20-5:46-50. With the exception of a few words, the portion of the final order determining the ineffective-assistance claim was identical to the order provided by counsel for Morrow. *Compare* D20-3:3-57; D20-5:27-80.

c. Georgia Supreme Court Decision

Respondent appealed the grant of relief and Morrow cross-appealed. Following briefing and oral argument, the Georgia Supreme Court *unanimously* reinstated Morrow's death sentence in a reasoned opinion. Pet. App. 173-74. Contrary to Morrow's assertion, the Georgia Supreme Court explicitly and implicitly rejected the lower state court's fact-findings and made findings of its own.

The state appellate court "conclude[d] that trial counsel generally performed adequately and that the absence of trial counsel's professional deficiencies, both those we find to have existed and those we assume to have existed, would not in reasonable probability have resulted in a different outcome in either phase of Morrow's trial." Pet. App. 178. The court found "it [was] simply not correct that trial counsel ignored information from the years during Morrow's childhood when he lived in New York and New

[9] Although not part of the record in the federal habeas proceeding, there was a letter from state habeas counsel to the state habeas judge, which was served upon counsel for Respondent, acknowledging that the judge had requested the supplemental proposed order.

Jersey." *Id.* at 180. The court detailed the investigation by trial counsel, the individuals counsel and their investigator interviewed, the mental health evaluations that were completed, and the evidence presented at trial. *Id.* at 179-85.

The court then examined the new evidence that Morrow alleged trial counsel failed to uncover. Regarding the allegations of sexual abuse, the court rejected Morrow's ineffective-assistance claim for three reasons: 1) Morrow did not inform his defense team, to include his mental health expert, that he had been sexually abused; 2) the evidence Morrow alleged should have alerted trial counsel of the abuse was insubstantial; and 3) Morrow's evidence of sexual abuse was too weak to prove prejudice. *Id.* at 188-89.

In support, the court "note[d] that Morrow never reported any such rapes pre-trial to his counsel or to the mental health experts *who questioned him about his background, including his sexual history*." *Id.* at 188 (emphasis added). Importantly, the Georgia Supreme Court "disagree[d]" with the state habeas court's finding "that trial counsel should have been alerted to the alleged rapes simply because Morrow was known to wet the bed and to have some adjustment problems as a child." *Id.* Regarding prejudice, because the *only direct evidence* of the alleged sexual abuse was provided in state habeas through the hearsay testimony of Morrow's new mental health expert, the Georgia Supreme Court determined it would not have carried enough "weight" to change the jury's mind about the sentence. *Id.* at 188-89.

The state court also examined Morrow's allegations of physical abuse. The court determined that Morrow's evidence that he was bullied as a child was "less than compelling as alleged proof of trial counsel's failings and

resulting prejudice" and noted that there was testimony "presented at trial about how Morrow had been bullied often as a child and had been punished by his mother for not standing up for himself and for misbehaving." *Id.* at 187. The Georgia Supreme Court found trial counsel investigated George May and were not informed he was physically abusive to Morrow, and that Morrow's evidence in support was "inconsistent." *Id.* at 189, n.4.

Morrow sought a writ of certiorari ion his ineffective-assistance claim. The petition was denied on April 23, 2012. *Morrow v. Humphrey*, 566 U.S. 964, 132 S. Ct. 1972 (2012).

4. Federal Habeas Corpus Proceedings

Morrow filed his federal petition for writ of habeas corpus on March 8, 2012. The district court denied relief on July 28, 2016. D52:68. Morrow was granted a certificate of appealability "with respect to [his] claim that his trial counsel was ineffective in investigating and presenting the case in mitigation." *Id.* The court of appeals reviewed the record and held the Georgia Supreme Court's opinion did not violate § 2254(d)'s standards.

REASONS FOR DENYING THE PETITION

I. The court of appeals' decision does not conflict with *Wilson*.

Morrow seeks certiorari review of his ineffective-assistance claim on the basis that the court of appeals' decision allegedly conflicts with *Wilson*.[10]

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[10] Specifically, Morrow addresses his concerns regarding the court of appeals' decision of his claim that trial counsel were ineffective in their investigation and presentation of mitigating evidence during the sentencing phase regarding sexual and physical abuse that he allegedly suffered while living in the Northeast.

Morrow argues *Wilson* limits § 2254(d) review to *only* the reasons given by the state court and prevents a federal habeas court from relying on additional reasons that support the state court's denial of relief. This argument does not warrant certiorari review for two reasons. First, this Court did not so limit § 2254(d) review and, even if it did, the court of appeals did not provide reasons not found in the state appellate court's opinion. Second, the majority of Morrow's arguments are a request for error correction of his factbound *Strickland* claim. As the court of appeals correctly reviewed his ineffective-assistance claim, certiorari review is not warranted.

A. *Wilson* does not hold that § 2254(d) review is limited to the fact findings of the state court.

Morrow argues that the *Wilson* Court rejected the Eleventh Circuit's interpretation of *Harrington v. Richter* that the federal courts were "authorized" to supply any "findings or theories that *could have supported* the last state court's summary denial of habeas relief, even where there was a reasoned decision from a lower state court." Pet. at 20-21 (emphasis in original). In support, Morrow relies upon the Court's comment in *Wilson* that where the "last state court to decide a prisoner's federal claims explains its decision" "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson*, 138 S. Ct. at 1192. Taken together, Morrow argues *Wilson* holds a federal court is limited in § 2254(d) review to the specific reasons provided by a state court. Pet. at 21. Morrow's interpretation of *Wilson* is in error.

Morrow's expansive reading of *Wilson* creates a holding based upon a question not presented. This Court has repeatedly cautioned the federal courts of appeal from fashioning a holding from its precedent on a question

not presented to the Court. *See, e.g., Lopez v. Smith*, ___, U.S. ___, 135 S. Ct. 1, 4 (2014) (per curiam) (rejecting the Ninth Circuit's attempt to create a holding from the Court's precedent where "[n]one" of the Court's decision "address[ed]" the "specific question presented by this case"); *Nevada v. Jackson*, 569 U.S. 505, 512, 133 S. Ct. 1990, 1994 (2013) (per curiam) ("By framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.'") (quoting 28 U.S.C. § 2254(d)(1)). The question presented was whether a federal court should presume that a later summary state court ruling rested on the same grounds as a previous explained state court decision. *See Wilson*, 138 S. Ct. at 1192. The question presented was not whether a federal court was limited in § 2254(d) review to only the specific reasons provided by a state court in determining a federal claim. Likewise, Morrow is precluded from creating federal law from ambiguous dicta on an issue not contemplated by the *Wilson* Court.

Consequently, Morrow's cabined reading of *Wilson* does not withstand scrutiny and fails to provide an appropriate vehicle for certiorari review.

B. The court of appeals did not make fact findings.

Even if Morrow's interpretation of *Wilson* were accurate, the court of appeals did nothing to conflict with it. His overarching claim in support of his contrary position is that the court of appeals created and relied upon fact findings not contained in the Georgia Supreme Court's decision. In support of his erroneous assertion, Morrow makes two arguments. First, he states that the Georgia Supreme Court adopted the lower state habeas court's facts

"wholesale" and did not make any of its own because the court did not determine any of the lower's court's facts were clearly erroneous. Pet. at 22. Second, Morrow argues that the court of appeals erroneously determined that the Georgia Supreme Court made a specific fact-finding that Morrow denied being sexually abused. Each argument is either a misrepresentation of the court of appeals' decision, the Georgia Supreme Court's decision, or both. More to the point, Morrow's arguments, when stripped of their erroneous assertions, are an improper request for this Court to engage in factbound error correction.

1. The Georgia Supreme Court rejected fact findings of the lower court.

The Georgia Supreme Court, relying upon state law, noted it "adopt[ed]" the lower court's fact-findings unless they were "clearly erroneous." Pet. App. 176. The fact that the court did not go on to use the term "clearly erroneous" does not mean it did not reject any of the lower court's factual findings. Indeed, contrary to Morrow's argument, the Georgia Supreme Court explicitly disagreed with several fact-findings of the lower court. *See*, *e.g.*, *id.* at 188 ("*We disagree with the habeas court's suggestion* that trial counsel should have been alerted to the alleged rapes…") (emphasis added). Further, it is axiomatic that when an appellate court makes a determination that is not supported by a lower court's fact-finding, it has implicitly rejected the lower court's finding.

Morrow fails to cite to any precedent by this Court which requires an appellate court to specifically state each time it determines a factual finding to be clearly erroneous. Instead, the Georgia Supreme Court did what most appellate courts do; it pointed out the more erroneous fact-findings, and made

explicit and implicit factual determinations in its various legal determinations. And, contrary to Morrow's argument (Pet. at 26), the court of appeals has long held, in compliance with this Court's precedent, that implicit fact-findings of a state appellate court are entitled to § 2254(d) deference. *See Sumner v. Mata*, 449 U.S. 539, 545-46, 101 S. Ct. 764, 768 (1981); *Williams v. Johnson*, 845 F.2d 906, 909 (11th Cir. 1988); *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1217 (11th Cir. 2013).

2. The court of appeals did not make a fact-finding that Morrow denied being sexually abused.

Regarding trial counsel's investigation of sexual abuse, Morrow argues that the court of appeals "reasoned that the state court must have found that trial counsel expressly asked about childhood sexual abuse and that Morrow denied such a history." Pet. at 23. In support Morrow cites to a portion of the court of appeals' decision (Pet. App. 18-19), and a comment made by a member of the panel during oral argument (Pet. App. 72-73).

As an initial matter, a statement made by a judge during oral argument is not a determination or holding by the court that can amount to error, as Morrow suggests.

More importantly, the court of appeals did not make the determination Morrow contends it made. The court noted that the "Georgia Supreme Court found 'that Morrow never reported any such rapes pre-trial to his counsel or to the mental health experts who questioned him about his background, including his sexual history.'" Pet. App. 18 (quoting Pet. App. 188). The court then pointed out the testimony of trial counsel that counsel was aware that sexual abuse was "'crucial" and "that this was 'the type of question that

[he was] sure [he] would have asked of [Morrow's] family or of [Morrow].'"[11] *Id.* at 19 (brackets in original) (quoting D16-24:108-09). The court of appeals stated in the next sentence, "But Morrow and his family failed to mention the rape." Pet. App. 19. Finally, the court pointed out, as did the Georgia Supreme Court, that Morrow was evaluated by mental health experts prior to trial who "probed Morrow's family and sexual history but turned up no evidence of abuse." *Id.*

The court of appeals was not making fact findings. Instead, it was reiterating what the Georgia Supreme Court "found" and providing evidence from the record that supported the finding. Pet. App. 18. The state court found that Morrow did not inform counsel or his mental health experts about the alleged rapes despite being questioned about his background, to include his "sexual history." Pet. App. 188. The court of appeals then pointed out, in support of that finding, that counsel had testified that they would have asked about that issue and that the mental health experts also questioned Morrow about his "sexual history." Pet. App. 19. Contrary to Morrow's assertion, the court of appeals did not find that Morrow "denied" being sexually abused, it merely concluded, as did the state court, that "Morrow and his family failed to mention the rape." Pet. App. 19. In short, the court of appeals did not step out of the bounds of § 2254 review and Morrow's true request is for factbound error correction.

[11] Although not quoted by the court, the remainder of this portion of trial counsel's testimony was that they "probably got the answer, no" when they questioned Morrow and his family about this issue and therefore, did not "pursue" evidence of sexual abuse. *Id.* at 109.

3. Morrow's additional arguments are a transparent request for factbound error correction.

The remainder of Morrow's arguments seek factbound error correction and also misrepresent the record. Morrow argues, in further support of his disagreement with the court of appeals' decision that trial counsel did not perform deficiently, that "[i]t is undisputed that trial counsel *did not contact a single witness who knew Morrow in the Northeast* or requested any records." Pet. at 24 (emphasis added). As the Georgia Supreme Court reasonably found, "counsel met repeatedly with Morrow, his mother, and his sister, and the record makes clear that counsel discussed Morrow's childhood background with them extensively." Pet App. 179. Morrow's mother and sister knew Morrow when he lived in the Northeast as he resided with them. Thus, contrary to Morrow's statement, counsel contacted witnesses who knew him in the Northeast and notably, as correctly highlighted by the court of appeals, Morrow's mother and sister "provided the majority of the new evidence" during his state habeas proceeding.[12] *See* Pet. App. 20.

Morrow also refers to the court of appeals' statement that it "faile[d] to understand what else counsel could have done" to uncover evidence of sexual abuse as "risible" because trial counsel could have "*asked* Morrow" whether he was sexually abused. Pet. at 24 (emphasis in original); Pet. App. 19. But

[12] Morrow's statement is also a red herring. The first person Morrow informed of the alleged sexual abuse was a mental health expert during his state habeas proceedings. D17-14:3. There is no evidence in the record that Morrow informed anyone, including those who knew him in the Northeast, that he was sexually abused. Nor did the individuals from whom Morrow obtained affidavits in state habeas testify that they either had first-hand knowledge of the alleged abuse or that Morrow informed them of the abuse. And none of the records submitted in state habeas provide direct evidence that Morrow was sexually abused.

the paragraph preceding the court of appeals' statement that Morrow criticizes recounts trial counsel's testimony that counsel would have questioned Morrow and his family about this topic.[13] Pet. App. 19. It is a fair inference from this testimony that counsel in fact asked about sexual abuse. But in any event, any question whether the record supported the court of appeals' statement is a factbound one not worthy of certiorari review.

Moreover, Morrow's argument is contrary to this Court's precedent. This Court has held that "[i]t should go without saying that *the absence of evidence* cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 571 U.S. 12, 22-23, 134 S. Ct. 10, 17 (2013) (emphasis added) (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984)). And "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. Morrow points to no direct evidence that trial counsel did not ask him about the alleged abuse and the record

[13] Morrow also disagrees with the court of appeals giving "significance" to the Georgia Supreme Court's "statement" that Morrow did not inform his mental health experts about his sexual abuse despite being questioned about his "sexual history." Pet. at 24, n.12. This is not a "statement." It is a finding of fact by the state appellate court. *See* Pet. App. 18 ("the Georgia Supreme Court *found* 'that Morrow never reported …'") (emphasis added). As a finding of fact, Morrow had to show that the determination was unreasonable by clear and convincing evidence. 28 U.S.C. § 2254(d)(2), (e)(1). As admitted by Morrow, the report of Dr. Davis contains information regarding Morrow's sexual history, and also details Morrow's background from birth until the crimes. D16-29:100-05. Therefore, there was support in the record for the state court's determination and Morrow's argument is a request for this Court to perform factbound error review of his ineffective-assistance claim.

shows Morrow did not inform counsel of this alleged abuse. D16-24:108-09.

C. In reviewing the Georgia Supreme Court's prejudice determination, the court of appeals properly applied § 2254.

Continuing his flawed reading of the court of appeals' opinion, Morrow argues that two fact-findings by the lower state court were not rejected by the Georgia Supreme Court on appeal, which should have resulted in a different prejudice determination. Again, Morrow is requesting factbound error correction of the state court's opinion by way of an erroneous assertion that the court of appeals improperly applied § 2254. And again, Morrow makes misrepresentations of the record and the court of appeals' decision.

Morrow argues that the lower state habeas court determined that "Morrow was 'the victim of a series of rapes'" and this was allegedly the "*only* state court determination on this point." Pet. at 26 (emphasis in original) (quoting Pet. App. 240). In support, Morrow claims that it could not be "assume[d]" by the court of appeals that the Georgia Supreme Court "silent[ly]" rejected this fact finding. *Id.* However, the Georgia Supreme Court explicitly stated that Morrow's strongest evidence in support of the "alleged rapes" could not be "assume[d]" correct and thereby implicitly rejected the lower court's finding. Pet. App. 188-89. The Georgia Supreme Court examined the record and pointed out that the "only direct evidence of the alleged rapes"[14] was Morrow's "statement to a psychologist" during the

[14] Morrow also complains that the court of appeals "refers to Morrow's '*alleged* rapes' and '*alleged* rapist'" in contravention of appropriate deference to the lower court's finding. Pet brief at 26 (emphasis in original) (quoting Pet. App. 19, 25). Regarding the citation to "alleged rapes," the court of appeals was directly quoting the Georgia Supreme Court's opinion. Pet. App. 25. Otherwise, the court of appeals never referred to the rapes as "alleged."

state habeas proceedings. *Id.* at 188. The state appellate court then quoted prior state law holding that an expert was not "'permitted to serve merely as a conduit for hearsay'" therefore, the court would not "'assume the correctness of the facts alleged in the experts' affidavit[] but, instead, we consider the experts' testimony in light of the weaker [evidence] upon which that testimony, in part, relied.'" *Id.* at 188-89. (quoting *Whatley v. Terry*, 284 Ga. 555, 565, 668 S.E.2d 651, 659 (2008). Consequently, the state appellate court did reject the lower court's finding and substituted its own credibility determination, which was entitled to § 2254(d) deference. *See Sumner*, 449 U.S. at 545-46.

Morrow also argues that the court of appeals did not give § 2254 deference to the lower state court's finding that Morrow was beaten with a belt by his mother's boyfriend, George May. Pet. at 27. Although Morrow admits that the Georgia Supreme Court found the evidence of abuse was "inconsistent," he argues this was not a determination that the lower state court's finding was "clearly erroneous"—thus, the court of appeals was in error for stating he had to rebut the finding of "inconsistent" with clear and convincing evidence. *Id.* at 27-28. Again, Morrow is wrong because the state appellate court's finding of "inconsistent" is an implicit rejection of any

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See Pet. App. 3, 11, 12, 18, 19, 25. As for "alleged rapist" (Pet. App. 19), that was a proper characterization. The accused, Earl Green, was neither tried nor convicted of the crimes alleged by Morrow. Nor was there any evidence in the criminal records submitted by Morrow that Green was tried or convicted of any sexual crimes (*see* D17-30:5-119). *See United States v. Salerno*, 481 U.S. 739, 763, 107 S. Ct. 2095, 2110 (1987) ("Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is 'implicit in the concept of ordered liberty.'") (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 152 (1937)).

contrary fact-finding by the lower state court. Morrow has not shown the court of appeals improperly applied § 2254(d) in giving deference to the Georgia Supreme Court's finding that the evidence of physical abuse by Morrow's mother's boyfriend was "inconsistent."[15]

Additionally, Morrow implies the court of appeals should not have given § 2254(d) deference because the state court's decision was contrary to, or an unreasonable application of, this Court's precedent. In support, Morrow argues that "[e]ven assuming, *arguendo*, that there was some inconsistency, this Court has consistently rejected such an 'all-or-nothing' approach to mitigating evidence." Pet. at 27-28 (footnote omitted) (emphasis in original). But the state court only found the evidence was "inconsistent," it did not hold that it would have carried *no* weight with the jury. Morrow has not shown the court of appeals improperly applied § 2254(d)(1).

In sum, Morrow has failed to show the court of appeals did not properly apply § 2254(d) to the state appellate court's decision. Instead, Morrow requests that this Court grant certiorari review to evaluate the factual

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[15] Morrow argues there was "no inconsistency" and there was "ample evidence" to support the lower court's findings. Pet. at 27, n.16. There was inconsistent evidence. For example, Morrow informed Buchanan that May beat his mother and he stood up to May with a baseball bat, but inexplicably did not inform Buchanan that May ever abused him. D16-22:97-98; D17-35:50. Additionally, Samantha testified at trial that after Morrow's parents divorced, she and Morrow moved with their mother the Northeast where life was "pretty good." D15-9:74. Moreover, trial counsel testified they asked Morrow, Samantha, and Bowles about allegations of physical abuse, but they did not admit to anything other than "spankings." D16-29:64-65, 67. And, contrary to Morrow's contentions, May's son's affidavit was given in "rebuttal" by Respondent and he did testify that his father never mistreated or abused Morrow. D18-11:105-106. As for "ample evidence," the only eye-witness to this abuse was Morrow's sister, whose state habeas testimony was contradicted by her trial testimony. *See* D15-9:74.

determinations of the state appellate court—to which the court of appeals gave proper deference. Such factbound questions do not warrant further review.

II. The court of appeals properly applied this Court's precedent in conducting its § 2254 review of the Georgia Supreme Court's decision regarding Morrow's new evidence of sexual abuse.

A. The court of appeals correctly reviewed the state appellate court's decision regarding trial counsel's investigation of sexual abuse.

Turning *Strickland*'s presumption of effective assistance on its head, Morrow argues that both the court of appeals and the Georgia Supreme Court should have "attributed" to trial counsel "alone" the failure to uncover his alleged sexual abuse. Pet. at 36. Morrow reasons this is true because trial counsel did not hire a "mitigation specialist or social worker whose professional training would offer a greater ability to elicit such sensitive information." *Id.* at 37. The court of appeals properly rejected Morrow's argument, pointing out the investigation completed by counsel and Mugridge and that Morrow "underwent five psychological interviews." Pet. App. 22-23. In any event, Morrow's argument is yet another request for this Court to grant review to conduct error correction on a factbound *Strickland* issue.

Morrow alleges "counsel concede[d] that they [were] ill-equipped to conduct [] a sensitive investigation *and* [took] no steps to remedy that inadequacy." Pet. at 40. Again, Morrow misrepresents the record. Although trial counsel informed the trial court at the beginning of their representation that they needed a social worker to assist with the background investigation, the record shows they later strategically decided a social worker was unnecessary. As the Georgia Supreme Court correctly noted, "[c]ounsel

considered hiring a social worker but concluded that there was no need for one in the light of the preparation that they, their investigator, and their psychologist were doing." Pet. App. 181-82. Additionally, as the court of appeals pointed out, "counsel had no reason to doubt Morrow's honesty" because "Morrow shared intimate details about his sexual history and even revealed that his son had been molested." Pet. App. 19. The fact that Morrow later informed a mental health expert that he was sexually abused is not sufficient proof that trial counsel performed deficiently.[16] Finally, as the court of appeals correctly held, Morrow "fail[ed] to establish that contemporary 'prevailing professional norms' in Georgia dictated hiring a social worker for capital cases." Pet. App. 23 (quoting *Strickland*, 466 U.S. at 688).

Moreover, *Strickland* instructed long ago that counsel should be afforded the presumption of effective assistance. *Strickland*, 466 U.S. at 690 ("the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). Where, as here, trial counsel conducts a reasonable background investigation, to include two psychological evaluations of their client, Morrow has not rebutted the presumption as he

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[16] Morrow contends, relying upon the lower state court's finding, that trial counsel ignored "'glaring red flags'" that he was sexually abused. Pet. at 37 (quoting Pet. App. 240-41, 267). However, the Georgia Supreme Court "disagree[d] with the habeas court's suggestion that trial counsel should have been alerted to the alleged rapes simply because Morrow was known to wet the bed and to have some adjustment problems." Pet. App. 188. Morrow fails to show this was an unreasonable determination and invites this Court to conduct factbound error review of the state appellate court's opinion.

failed to reveal the alleged evidence of abuse. *Strickland*, 466 U.S. at 691 ("[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions").

B. The court of appeals correctly reviewed the state appellate court's decision regarding prejudice.

In determining prejudice, the Georgia Supreme Court rightfully examined the credibility of Morrow's new allegations of sexual abuse and, in compliance with *Strickland*, weighed *all of the evidence* and reasonably concluded Morrow failed to prove prejudice. Pet. App. 188-89, 194-95. The court of appeals determined the record supported the state appellate court's credibility determination and that the state court conducted a prejudice analysis in compliance with this Court's precedent. Pet. App. 24, 25. Morrow disagrees and argues that the court of appeals has routinely held that sexual abuse "is not mitigating," which resulted here in an improper application of this Court's precedent in examining the state appellate court's prejudice decision. Pet. at 35. The court of appeals has never held sexual abuse "is not mitigating," and Morrow's request for review is for mere factbound error correction of the prejudice determination made by the Georgia Supreme Court and deemed reasonable by the court of appeals. The request should be denied.

The *Strickland* Court instructed that the question of prejudice "is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Thus, prejudice is a balancing test with

aggravating evidence on one side and mitigating evidence on the other. *See*, *e.g.*, *Wong v. Belmontes*, 558 U.S. 15, 26, 130 S. Ct. 383, 390 (2009) (per curiam) ("the Court of Appeals repeatedly referred to the aggravating evidence the State presented as 'scant.' [] That characterization misses *Strickland*'s point that the reviewing court must consider all the evidence--the good and the bad--when evaluating prejudice.") (citation omitted). One side cannot be ignored in favor of the other, which is exactly what Morrow is advocating. Specifically, he argues that alleged mitigating evidence of sexual abuse automatically tips the scale in his favor—regardless of credibility, regardless of the aggravating evidence on the other side of the scale.

Morrow's first argument is a request for this Court to conduct a factbound error review of the credibility determination that was implicit in the Georgia Supreme Court's prejudice determination. Under Morrow's interpretation of this Court's precedent, an allegation of sexual abuse by a petitioner for the first time in a post-conviction proceeding must be considered by a state court to be of the highest mitigating value, regardless of credibility concerns. *See* Pet. at 30-40. This Court's precedents do not support that assertion, and that is not necessarily how a jury would view the evidence.[17] *See Strickland*, 466 U.S. at 696 ("in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules").

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[17] It would not have been unreasonable for a jury to be skeptical of newly alleged allegations of sexual abuse only supported by the statements of the person the jury had recently found guilty of murder and cruelty to children.

To be clear, the Georgia Supreme Court did not find the evidence lacked all credibility or mitigating value. Instead, the state appellate court implicitly rejected the lower court's credibility determination and found there were concerns with the reliability of Morrow's evidence and this would have caused the jury not to have given it "great weight." Pet. App. 189. Contrary to Morrow's argument, this is not a case like *Wiggins* where the petitioner had a well-documented history in public records of a severely deprived childhood. *Wiggins v. Smith*, 539 U.S. 510, 525, 123 S. Ct. 2527, 2537 (2003). Rather, this is a case in which a petitioner, after receiving a death sentence, alleges evidence of sexual abuse for the first time in a state post-conviction proceeding, after trial counsel has conducted a reasonable background investigation, with no concrete historical evidence in corroboration. Morrow failed to prove in federal court that the state appellate court committed "'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement'" when it determined that counsel's performance did not cause Morrow prejudice. *White v. Woodall*, 572 U.S. 415, 420,134 S. Ct. 1697, 1699 (2014)).

Morrow's attack on the court of appeals is equally unfounded. Although the court of appeals has determined prejudice was not shown when there was evidence of sexual abuse, this was done through the lens of § 2254 and the prejudice weighing process. The court of appeals has not held, as Morrow claims, that this type of evidence is never mitigating. The court has determined several times over the years that evidence of sexual abuse, and physical and emotional abuse, was mitigating and granted federal habeas relief in some cases as a result. *See*, *e.g.*, *Daniel v. Commissioner*, 822 F.3d 1248, 1275 (11th Cir. 2016) (determined prejudice was shown where there

was evidence of childhood sexual abuse and granted federal habeas relief); *Hardwick v. Fla. Dep't of Corr.*, 803 F.3d 541, 558 (11th Cir. 2015) (determining that Hardwick's history of "neglect, deprivation, abandonment, violence, and physical and sexual abuse" established prejudice and entitled him to relief); *see also Williams v. Allen*, 542 F.3d 1326, 1342-43 (11th Cir. 2008) (determining, in part, that the state court improperly "discount[ed] the significance of the abuse" suffered by Williams and granted relief).

The evidence of abuse Morrow alleged himself or through the affidavits of other witnesses, does not present a case of nearly indistinguishable facts in order for the state appellate court's decision to be contrary to this Court's decisions in cases such as *Wiggins*. The evidence in aggravation showed he had previously abused and raped one of his victims. And, with no other provocation than rejection and an alleged attack on his masculinity, he shot three unarmed women in front of two small children—killing two women and leaving one woman permanently injured. Morrow has failed to show that when the record is viewed as a whole that no "fairminded jurist" would have weighed the mitigating and the aggravating evidence and held Morrow failed to prove a reasonable probability of a different outcome. *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 786 (2011).

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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No. 18-6409

In the
Supreme Court of the United States

Scotty Garnell Morrow,
Petitioner,

v.

GDCP Warden,
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. Whether the court of appeals' decision reviewing the Georgia Supreme Court's reasoned decision, which contained explicit and implicit fact-findings, and then relying upon portions of the record that support the state court's reasoning, without making independent fact-findings, conflicts with *Wilson v. Sellers*, ___, U.S. ___, 138 S. Ct. 1188 (2018).

2. Whether the Georgia Supreme Court unreasonably applied *Strickland v. Washington* when it determined that trial counsel were not deficient for failing to uncover evidence of alleged sexual abuse petitioner never mentioned during a thorough background investigation, and that failing to uncover that evidence did not prejudice petitioner given the balance of aggravating and mitigating evidence.

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OPINIONS BELOW

The decision of the Georgia Supreme Court in the criminal direct appeal is published at 272 Ga. 691, 532 S.E.2d 78 (2000).

The decision of the state habeas court granting relief as to sentence is not published, but is included in Petitioner's Appendix F. The decision of the Georgia Supreme Court reversing the grant of relief and reinstating Petitioner's death sentence is published at 289 Ga. 864, 717 S.E.2d 168 (2011) and is included in Petitioner's Appendix E.

The decision of the district court denying federal habeas relief is unpublished, but is included in Petitioner's Appendix D. The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of relief is published at 886 F.3d 1138 (11th Cir. 2018) and is included in Petitioner's Appendix A.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment in this case on March 27, 2018. On August 9, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 19, 2018, and the petition was timely filed. On October 30, 2018, Justice Thomas extended the time within which to file the brief in opposition to and including December 24, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

> In all criminal prosecutions, the accused shall enjoy the right to a … have the Assistance of Counsel for his defence.

The Fourteenth Amendment, Section I, 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 … .

28 U.S.C. § 2254(d) provides:

> 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 Scotty Morrow seeks factbound error correction of his *Strickland* claim, which is not worthy of this Court's certiorari review.

Morrow tries, but fails, to manufacture a conflict with this Court's decision in *Wilson v. Sellers*, ___, U.S. ___, 138 S. Ct. 1188 (2018). He argues *Wilson* held that, instead of examining the state court's decision in the context of the entire record, a reviewing court may only uphold a state court's decision under § 2254(d) review based on the specific reasons provided in the state court decision. And he claims that the court of appeals failed to limit its review in that way. But *Wilson* did not hold that—it addressed only how to review an *unreasoned* state court decision, not a reasoned opinion—and even

if *Wilson* had included such a holding, the court of appeals in fact upheld the state court's decision based on that court's reasoning. The court of appeals examined the state appellate court's reasons and determined they were supported by the record and this Court's precedents. The court of appeals made no independent fact-findings and did not otherwise step outside the bounds of a proper § 2254(d) review.

Morrow's petition thus reduces to a request for this Court to conduct error correction of a factbound *Strickland* claim, and one that lacks merit. Trial counsel performed a reasonable background investigation, which included interviewing Morrow and his closest family members, and counsel obtained two mental health evaluations. Years later, after Morrow received a death sentence, Morrow and his family came forward with allegations of sexual and physical abuse that trial counsel, despite many interviews with petitioner and family, had not uncovered. No historical records showed or even suggested this abuse occurred or showed any history of mental health problems associated with the alleged abuse. Instead Morrow presented a ream of new affidavits from extended family members and acquaintances. Although some of the affiants suggested Morrow was sexually abused none provided first-hand accounts or testimony that Morrow had informed them of the alleged abuse. Regarding alleged physical abuse by Morrow's mother's boyfriend, the only first-hand account came from Morrow's sister whom trial counsel had spent considerable time interviewing. Contrary to Morrow's arguments, the Georgia Supreme Court, after reviewing the entire record, explicitly and implicitly rejected many of the fact findings of the lower state court, made its own fact-findings and reasonably concluded trial counsel did

not render deficient performance, and that Morrow was not prejudiced by counsel's performance.

Because Morrow has failed to show that the court of appeals' decision is not in accord with this Court's precedent, and that he is not requesting anything other than factbound error correction, his questions presented do not warrant this Court's review.

STATEMENT

A. Facts of the Crimes

In the month leading up to the crimes, numerous witnesses testified at trial that Morrow physically and sexually abused and threatened Barbara Ann Young's life. D14-27:6; D15-1:82-83; D15-2:78; D15-3:58.[1] On the day of the crimes, Young was at home with her two small children and her friends Tonya Woods and LaToya Horne. Pet. App. 147. After a phone conversation in which Young told Morrow to leave her alone, Morrow kicked-in Young's door and entered her home with a loaded gun. D14-27:12; D14-28:78-79.

Upon entering the kitchen, Morrow exchanged words with Woods and yelled "shut your mouth bitch." D14-27:120-123, 125. Morrow then drew his gun from his waistband and shot Woods in her lower "left abdomen, severing her spine and paralyzing her." Pet. App. 175. He then shot Horne in the left arm. D14-27:123; D15-3:147; Pet. App. 175. Morrow "possibly fired at Ms. Young as she fled from the kitchen" and ran down the hallway into her bedroom. Pet. App. 175; D14-27:124. Morrow caught Young after he "kicked open her bedroom door" where they "struggled." Pet. App. 175. A shot was

[1] "D" refers to the Electronic Court Filing (ECF) number, followed by the appropriate ECF page number.

fired that "likely" injured Young's back, and Morrow "likely "smashed [Young's] head into the bedroom's doorframe, leaving behind, skin, hair, and blood." *Id.* Young broke free from Morrow, but as she ran away, Morrow grabbed her hair from behind and shot Young in the back of the head while Young's five-year-old and eight-month-old sons watched from the closet where they were hiding. D14-28:57, 63, 70. Young's oldest son, Christopher Young, testified at trial that he watched Morrow reload his gun and fatally shoot his mother. *Id.* at 70.

Morrow then returned to the kitchen and shot Woods on the left side of her chin "and into her head at close range," causing her death. Pet. App. 175. He then shot Horne, who was lying on the floor, in her right arm and her face. *Id.* at 126-127; D14-28:63; D15-3:140. Morrow exited the home and cut the phone line. D14-27:132. Horne, "badly injured," "managed to walk from house to house down the street seeking someone to call for help before she eventually collapsed; she survived, but with permanent injuries, including deafness in one ear." Pet. App. 176.

B. Proceedings Below

1. Trial Proceedings

A Hall County grand jury indicted Morrow on March 6, 1995, for two counts of malice murder, two counts of felony murder, six counts of aggravated assault, aggravated battery, cruelty to a child, burglary, and possession of a firearm during the commission of felonies. D10-1:26-30. Morrow was represented by two experienced criminal attorneys, William Brownell and Harold Walker. Brownell, who served as lead counsel, had tried over one hundred felony cases and had been involved in as many as

eight to twelve death penalty cases as a prosecutor, two to six of which went through the sentencing phase of trial. D16-22:110-112; D16-28:15; D16-29:6-9. Co-counsel Walker had practiced law since 1979 and testified that, since 1988, approximately half of his practice was devoted to criminal defense. D16-24:52-53.

a. Background Investigation

As Morrow admitted, trial counsel met with Morrow "almost right away," and began to gather a "good factual background" about Morrow. D16-22:110-12, 114; D16-27:5; Pet. at 7. Trial counsel testified that he asked Morrow to provide guidance on where counsel could find the "good" and "bad things" in his life to help with his case. D16-24:85-86. During initial meetings, Morrow discussed growing up, schooling, his father being absent during his youth, his blackouts, his Job Corps time, his prior marriage, his desire to have a normal family, and his relationship with Young. D16-22:115-16; D16-24:55-77. To help develop evidence of Morrow's background, counsel also employed the services of an investigator, Gary Mugridge, and two mental health experts, Drs. Dave Davis and William Buchannan. D16-24:9-10; D16-29:100-05; D16-22:42.

Within a week of Morrow's arrest, trial counsel began regular conversations with Morrow's mother, Betty Bowles, about the case. D16-24:73; D16-30:57-61. Brownell's meeting notes with Bowles show that he had substantive conversations about Morrow's background. For example, Bowles reported that Morrow: was born premature; went to a psychiatrist when he was three or four-years-old; was beaten up at school when he was seven or eight-years-old; had blackouts and headaches; was on the wrestling team in

school but dropped out of school in ninth grade; and participated in Job Corps in Kentucky for three months when he was seventeen-years-old. D16-30:57-62; D16-31:22. Additionally, Bowles stated she worked long hours in the Northeast and had three jobs to support her children, however, her children had their basic needs met. D16-30:57-62; D16-31:22. Also, counsel learned Morrow's father abused Bowles, and that Bowles had been abused by her boyfriend, George May, in New Jersey. D16-22:135-36; D16-27:9.

Trial counsel also regularly discussed the case with Samantha Morrow, Morrow's sister, the source of much of Morrow's new allegations of abuse, and these discussions included information for the penalty phase of trial. D16-24:72; D16-27:5.

Investigator Mugridge also "frequently" spoke with Samantha and Bowles. D16-24:36-37, 86-87. Mugridge also interviewed, *e.g.*, extended family members, former girlfriends, friends of the family, co-workers, a clergy member from Morrow's church, and several acquaintances of Young. D17-9: 11-16, 19-21, 25-29, 31-36, 43, 45-46, 54-56, 59, 67.

Mugridge testified that he was well-aware that Morrow lived in New York and New Jersey and that Bowles and Samantha were Morrow's closest contacts for that time. D16-24:36-37. Mugridge located Lorna Broom, a former girlfriend of Morrow's from New Jersey, but Samantha told Mugridge not to contact her.[2] D16-24:45-46. Additionally, Mugridge tried to locate Morrow's alleged personal mentor, but the family only provided his first

[2] Notes in Mugridge's file indicated Morrow had an "altercation" with Broom and she was "cut up." D17-1:46.

name, could not provide a phone number or address for this individual, and Mugridge was therefore unable to locate him.[3] D16-24:18.

Mugridge also sought Morrow's school records, but he testified that he recalled that there was a problem in locating the records.[4] D16-24:42-43. Mugridge also tried to locate records from psychological testing that Bowles stated Morrow received as a young child, but the family could not provide the name of the psychologist who had performed the testing or where it was conducted.[5] D16-24:44-43; 49-50.

Trial counsel testified that they investigated the possibility that Morrow was physically abused as a child by interviewing Morrow, Morrow's mother, and Morrow's sister, whom trial counsel learned was the most forthcoming about how the children were disciplined. D16-29:62. The information supplied to trial counsel from Morrow, his mother and sister, indicated that, at most, Morrow was subject to "intense spankings." D16-29:67-68.

Regarding sexual abuse, trial counsel, Mugridge, and Buchannan all testified that neither Morrow, his mother nor sister provided information

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[3] Morrow alleges Mugridge "abandoned the effort" to find the mentor because the family simply could not provide a phone number, as shown above, that is an inaccurate portrayal of the record. Pet. at 11.

[4] Morrow alleges that Mugridge testified that obtaining the school records was "'not something that [counsel] had requested or wanted" of him. Pet. at 11 (brackets in original) (quoting D16-24:43). However, the portion of Mugridge's testimony that Morrow quotes is referring to the assumption Mugridge had that counsel did not request or want him to travel to the Northeast, not that counsel did not request or want him to obtain the school records—which Mugridge testified he had attempted to do. D16-24:43.

[5] Regarding background records, trial counsel recalled having trouble tracking down records but did not definitely testify that they did not obtain the records. D16-27:28, 41; D16-29:25, 96.

about sexual abuse. D16-22:97-98; D16-24:37, 108-09. Trial counsel testified that evidence of sexual abuse was "crucial" and was "the type of question that [he was] sure [he] would have asked of [Morrow's] family or of [Morrow] and probably go the answer, no. And that's why we didn't pursue it." D16-24:108-09.

b. Mental Health Investigation

(1) Dr. Dave Davis

Trial counsel hired Dr. Dave Davis, a psychiatrist, on March 16, 1995, within 90 days of Morrow's arrest. D16-29: 100-105. Davis requested and was provided the following information from trial counsel: Morrow's indictment; investigative reports, including statements from every witness; crime scene photos; a video tape of the crime scene; Morrow's statement to police; and an overview of the case. D16-29:94. Davis stated he reviewed the "extensive material provided" and interviewed Morrow. *Id.* at 100-101. During the interview Morrow provided information regarding his immediate relatives; family history of alcohol abuse; father's domestic violence; parents' divorce and subsequent move north with his mother and sister; drug use and alcoholism; history of violence (to include fights as an adolescent, an aggravated assault on a transvestite, and battering his ex-wife and a former girlfriend); educational history; criminal record; medical history; sexual history; and a description of the murders of Young and Woods. *Id.* at 100-105.

Morrow reported that his troubles stemmed from the fact that he was "abandoned by his father, grew up in a bad environment, had no male figures when he was growing up, and no paternal love." D16-29:103. He also stated

that he had always had a bad temper, and he believed that he had mental problems. *Id.* While Morrow openly discussed his sexual history and other personal information with Davis (*see, e.g.,* D16-29:103-04), there was no evidence in the report that Morrow informed Davis that he was sexually or physically abused while he lived in the Northeast. Also, as the Georgia Supreme Court found, Davis stated in his pre-trial psychiatric report that Morrow's "sexual history" was "unremarkable." Pet. App. 181.

Davis stated in his final report that Morrow was competent to stand trial and that he had a personality disorder, not otherwise specified, with anti-social, borderline, and avoidant features. D16-29:104-05. Davis concluded that Morrow's deprived early childhood resulted in his pattern of poor coping. *Id.* Additionally, Davis reported that Morrow's childhood lacked parental supervision, and that Morrow had a long history of being very angry, getting into fights, abusing alcohol and drugs, and had difficulty with long-term occupation. *Id.* Trial counsel made a strategic decision not to use Davis' report at trial because they believed that "a lot" of the information in the report was "harmful" and would be viewed "negatively" by the jury. D16-29:27-28.

(2) Dr. William Buchanan

Trial counsel later hired Dr. William Buchanan in March of 1999 to conduct another mental health evaluation of Morrow to help find "more mitigation information." D16-22:42; D16-24:70; D16-27:27-28; D16-29:29. Trial counsel requested Buchanan's assistance in getting Morrow to open up so that Morrow would appear more sympathetic in front of the jury. D16-29:29. Trial counsel provided Buchanan with information pertaining to

Morrow's background, a copy of their opening statement, and additional information over the phone as the investigation progressed. D16-22:48-51. Trial counsel testified that, "Dr. Buchanan was experienced as a forensic psychologist" and would identify what was relevant. D16-27:10. Although Buchanan never asked for Morrow's records, to meet with Morrow's family, or for any additional information, trial counsel testified that they would have provided Buchanan with any material he requested, as trial counsel had done on previous cases with Buchanan. D16-24:104; D16-27:28; D16-29:32-33. Buchanan admitted that he could not recall trial counsel not providing him with any materials he requested. D16-22:95.

After reviewing the material provided by trial counsel, Buchanan met with Morrow on four occasions on March 29, 1999, May 17, 1999, June 11, 1999, and June 14, 1999, for a total of six to eight hours. D16-22:44-46. In addition, psychological tests were administered to Morrow by Buchanan's psychometrist.[6] *Id.* at 5.

During his interviews, Morrow provided information about his parent's divorce, his own divorce, his birth in Georgia and subsequent move to New Jersey/New York, his school history, his work history, his relationship with Young and her children, and the unfiled rape/kidnapping complaint by Young against him. D17-35:27-32. Regarding Morrow's childhood in New Jersey, Morrow described an incident when he was twelve or thirteen when he picked up a baseball bat in an attempt to defend his mother from her boyfriend. *Id.*

[6] Buchanan had regular meetings with trial counsel about his evaluations and findings but did not write a formal report because trial counsel "anticipated calling him as a witness." D16-22:136; D16-27:29.

at 50. He also stated that his youngest son was seeing a psychiatrist as he had been molested in Florida when he was eight-years-old. *Id.* at 34. Morrow was candid about sensitive personal information, and he never told Buchanan that he was allegedly sexually abused. D16-22:98.

c. Presentation of Evidence

During the guilt-innocence phase, trial counsel presented three witnesses—a law-enforcement investigator, Morrow's sister, and Morrow. The investigator explained that "Young had not referred to the incident where Morrow kidnapped her and had sex with her as a 'rape' and that Morrow had beaten her with his fist rather than with a gun during that incident." Pet. App. 182. "Morrow's sister testified about Morrow's background in an effort to show Morrow's good character, his past good treatment of Ms. Young, and his distress at the time of the murders." *Id.* Morrow was the final witness during the guilt phase and "described his history with Ms. Young," explained "about his alleged past abuse of her that were more favorable to himself than the State's evidence," and admitted "he had reacted impulsively to Ms. Woods' insulting comment to him about Ms. Young's no longer wanting to be in a relationship with him." *Id.*

As the Georgia Supreme Court found, "trial counsel attempted to carry forward their theme about Morrow's good character" to the sentencing phase. *Id.* at 183. The reason for this strategy was based upon trial counsel's experience trying cases in the local community that juries often found mitigation testimony relating "further back in time" to the crimes to be less "relevant." D16-22:159. Trial counsel, after narrowing down their witness list to avoid cumulative testimony, presented fourteen witnesses in the

penalty phase, thirteen lay witnesses, and one mental health expert. D16-29:39-40. Trial counsel were able to elicit testimony from each witness that supported their mitigation theme that the crimes were "absolutely and totally out of character" for Morrow and that Morrow had qualities admired by his friends, family and co-workers. *Id.* at 48.

Trial counsel offered testimony from three of Morrow's family members: his sister, Samantha; his half-sister, Deborah Morrow; and his mother, Betty Bowles. Samantha testified that when Morrow was young their father was very abusive to their mother. D15-9:72-73. Bowles recalled that Morrow once witnessed his father stomp on her stomach, causing her to miscarry. D15-11:18. Samantha testified that when Morrow was three or four-years-old he tried to use a hammer to stop their father from abusing their mother. D15-9:72-73. Bowles testified that she thought Morrow was "very devastated" by the abuse he witnessed. D15-11:18.

Samantha testified that after Morrow's parents divorced, she and Morrow moved with their mother to Brooklyn, New York, where life was "pretty good" even though their mother worked three different jobs. D15-9: 74. Bowles testified that she worked to give her kids a "better life" so that they did not have to "want for anything." D15-11:21. However, Bowles testified that while living in Brooklyn she took Morrow to several psychiatrists to "get him help" because he "was a little slow in some things in school." D15-11:22. The mental health providers told her to "continue to try to encourage him." *Id.*

When Morrow was in the fourth grade, Morrow and his family moved to New Jersey. D15-9:75. Samantha described Morrow during this time as a good student who stayed out of trouble, was in the choir, and enjoyed

athletics. *Id.* at 76. Samantha recalled that "people would pick at [Morrow] in school and stuff," and that Samantha "would go on and fight the people that bothered him." *Id.*

In the ninth or tenth grade Morrow dropped out of school and joined the Job Corps. D15-9:76-77. Samantha testified that Morrow was very homesick while he was in the Job Corps and left the Corps when he turned 18 to return home. *Id.* at 77.

Shortly after returning to New Jersey, Morrow got married, moved to Georgia, welcomed his first son, and spent time with his father. D15-9:78-79. One year later, Morrow returned to New Jersey where he lived for several years and helped his mother take care of special needs foster children who lived in her home. *Id.* at 79-80; D15-11:26. Bowles testified that Morrow took classes to learn how to help care for these children and that Morrow often helped her get the children ready for school. D15-11:26.

Morrow and his entire family eventually returned to Georgia. D15-9:79. Bowles testified that after she returned to Georgia she took in ten different foster children, and Morrow helped her care for them in her home. D15-11:28-29.

Samantha, Deborah, and Bowles each provided testimony suggesting the crimes were out of character for Morrow. D15-9:68; D15-11:29, 33. Samantha also told the jury that Morrow felt remorse about the murders and had grown closer to God since the crimes had occurred. *Id.* at 88.

Trial counsel also presented Morrow's ex-wife, and the mother of his two sons, Claudette Jenkins. Claudette testified Morrow was not violent, although she did admit he slapped her once, and she described him as a loving father. D15-9:48-49. She explained that Morrow was a good father

and that her sons would not be able to handle Morrow receiving a death sentence. *Id.* at 56. Claudette's current husband, Kim Jenkins, also told the jury that Morrow was a "perfect father," and that Morrow's sons would need "severe counseling" if Morrow was sentenced to death. *Id.* at 62-64.

In addition, Morrow's ex-girlfriend, Fonda Jones, testified that she and Morrow had a good relationship and Morrow treated her children well. D15-11:11-12. Jones testified that Morrow never lost his temper or displayed violence. *Id.* at 15.

A family friend, members of the clergy, and a deputy sheriff from the jail, testified about Morrow's dedication to his faith, his reliability, and his good character. D15-8:128-30; D15-9:3-6, 19-23, 26-39. Additionally, three of Morrow's former coworkers testified that they did not witness either violence or anger from Morrow. D15-8:118, 122; D15-9:10.

Finally, Buchannan testified to articulate how Morrow felt at the time of the murders and to explain how Morrow's past affected him at the time of the crimes.[7] D16-22:138-40. Buchanan explained that Morrow was administered a battery of psychological tests which revealed he was of "average, low average intelligence"; suffered from paranoia, suspiciousness, mistrust, social alienation, persecutory ideas, and depression; had poor ability to delay gratification and to control impulses; was introverted, which made it difficult for him to display his emotions; and had difficulty coping and "dealing with

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[7] Trial counsel testified that Morrow did not appear as sympathetic or remorseful as they had hoped when he testified during the guilt phase of trial, and thus, they also presented Buchanan to better explain Morrow's demeanor to the jury. D16-22:138-41.

the stresses of everyday life or stresses of relationships." *Id.* at 126-28, 133, 137.

With regard to Morrow's life history, Buchanan told the jury that Morrow's parents divorced when he was about three or four-years-old because of conflict and physical abuse from Morrow's father toward his mother. *Id.* at 138. Following the divorce, Morrow and his older sister lived with their mother in Georgia, New York, and New Jersey. *Id.* Morrow told Buchanan that when he was about twelve-years-old, his mother was involved in a physically abusive relationship with her boyfriend. *Id.* Buchanan testified that Morrow recalled picking-up a baseball bat to defend his mother and that her boyfriend laughed at Morrow. *Id.* Morrow also felt very helpless and unable to protect his mother from the abuse. *Id.*

Concerning Morrow's schooling in New York and New Jersey, Buchanan testified that Morrow was in special education classes for learning disabilities from the Fourth Grade until the Ninth Grade—which Buchanan confirmed with the tests administered to Morrow. *Id.* at 139-40. In the Ninth Grade Morrow dropped out of school because he felt that his learning disabilities prevented him from being able to do the work. *Id.* at 139.

Buchanan testified that Morrow was married at the age of nineteen, which ended in a separation two years later while his wife was pregnant with their second child. *Id.* at 140. Morrow became depressed and started drinking. *Id.* at 141. Buchanan testified that after two or three months, Morrow stopped drinking and tried to put his life back together. *Id.*

After explaining Morrow's test results and background to the jury, Buchanan testified that because of Morrow's history and personality type he was easily provoked by "negative" comments. D15-10:6. Buchanan stated

Morrow "will hear something negative and he's likely to exaggerate that negativity because of mistrust and paranoia about it." *Id.* Buchanan explained that the comments "You're no good, you're just being used," which Morrow testified Woods told him on the morning of the murders, were enough to trigger feelings of very high paranoia in Morrow. *Id.*

Furthermore, Buchanan related Morrow's detailed description of the murders to the jury. D15-9:144-46; D15-10:1. Buchanan explained that when a person goes through any traumatic event, they will often dissociate as a way of protecting themselves, and that this dissociation will cause them to be unable to display emotion. D15-10:4-5. Buchanan told the jury that on the videotaped confession obtained directly after the crime, Morrow appeared to be in a "state of shock" and was actually dissociating. *Id.* at 4. Buchanan also testified that Morrow appeared to be in a dissociated state during his guilt phase testimony, which explained to the jury why Morrow lacked emotion when he testified. *Id.* at 24. Even though he appeared unremorseful on the stand, Buchanan stated that Morrow showed "sadness, remorse," and "guilt" over the crimes during his testing and interview by Buchanan. *Id.* at 24-25.

d. Jury Determination

Morrow was convicted of "malice murder, felony murder, aggravated assault, aggravated battery, cruelty to a child, burglary, and possession of a firearm during the commission of a felony." *Morrow v. State*, 272 Ga. 691, 691, 532 S.E.2d 78, 82 (2000). The jury found ten statutory aggravating circumstances existed and recommended a sentence of death for each of Morrow's malice murder convictions, and the trial court then sentenced

Morrow to death. D11-6:1, 56-57. Morrow was also sentenced to consecutive sentences of twenty years for aggravated battery, twenty years for cruelty to a child, twenty years for burglary and five years for possession of a firearm during the commission of a felony. *Id.* at 66-69. The felony murder convictions were vacated by operation of law, and the aggravated assault convictions merged with other convictions thereby leaving only five statutory aggravating circumstances. *Morrow*, 272 Ga. at 691-92.

2. Direct Appeal Proceedings

Morrow appealed his convictions and sentences to the Georgia Supreme Court. The Georgia Supreme Court affirmed Morrow's convictions and sentences on June 12, 2000. *Morrow v. State*, 272 Ga. 691. Morrow's motion for reconsideration was denied on July 28, 2000. D16-8. Morrow filed a petition for writ of certiorari in the United States Supreme Court, which was denied on March 26, 2001. *Morrow v. Georgia*, 532 U.S. 944, 121 S. Ct. 1408 (2001).

3. State Habeas Corpus Proceedings

Morrow filed a state habeas corpus petition in the Superior Court of Butts County, Georgia, on October 30, 2001, and an amendment thereto on February 1, 2005. D16-11; D16-20.

a. Ineffective-Assistance Claim

An evidentiary hearing was conducted on April 25-26, 2005. D16-22 thru D19-19. During the hearing, extensive evidence was presented regarding trial counsel's sentencing phase investigation and presentation. Specifically, Morrow argued counsel were ineffective for failing to uncover and present evidence that, while living in the Northeast he was allegedly

physically abused and mistreated by his mother's boyfriend; bullied and degraded by his schoolmates; and sexually abused by an older youth named Earl Green.

In support, Morrow presented affidavits from family and friends and obtained a new mental-health evaluation. The only direct evidence presented during the state habeas proceeding that Morrow was sexually abused came from Morrow's self-report to his new mental health expert, Dr. James Hooper. D17-14:3. Contrary to Morrow's assertion, his new evidence did not "amply corroborate" his allegation of sexual abuse. Pet. 13-14. The only affiants that mentioned sexual abuse were an individual who lived in the home where Morrow stayed as a child, and the cousin of that individual (*see* D17-29:68-72), neither of whom stated they had any knowledge that Morrow was abused. Instead, one of the affiants stated Green tried to sexually assault him, the affiant. D17-29:71-72. And, contrary to Morrow's assertion, Green's criminal records do not contain evidence that he was arrested or convicted of a sexual offense. D17-30:5-119.

Morrow's other evidence consisted of affiants stating he wet the bed as an adolescent and school records showing he had "behavioral changes." Pet. at 14. The record showed that Morrow had learning disabilities growing up. D15-9:76-77, 138-40; D15-11:22. The remaining affidavits submitted by Morrow from his family and friends did not contain any testimony that Morrow informed them he was sexually abused or that they witnessed Morrow being abused.

Regarding physical abuse, during the state habeas proceedings, as stated above, trial counsel testified that they was aware of allegations of physical abuse, but that when he asked Morrow, Samantha, and Bowles

about these allegations, they mitigated the allegations of physical abuse and did not admit to anything other than "spankings." D16-29:64-65, 67. Walker testified that Samantha was the most forthcoming about Morrow's childhood, but Walker never testified that Samantha indicated that Morrow was abused or mistreated. D16-24:105. Although several of Morrow's affiants claimed Morrow was abused by his Mother's boyfriend, George May (D17-14:9; D17-29:19-20, 61, 66, 75, 96), Samantha provided the only eyewitness account to May's alleged abuse (D17-29:20).[8] And, in contradiction to Morrow's habeas affiants' testimony, May's son, Gregory May, gave affidavit testimony that his father never mistreated or abused Morrow. D18-11:105-106. Gregory stated that his father punished Morrow only if Morrow was "being bad in school, being late, lying, being disrespectful, or disobeying," but testified that his father never beat or abused Morrow. *Id.* at 105.

Additionally, Morrow produced no historical records containing evidence that he was sexually or physically abused, or any history of mental health issues associated with the alleged abuse. *See* D17-14:39-43; D17-15:1-3; D17-24:10-17; D17-25:1-41; D17-26:1-13; D17-26:14-15; D17-27:1-37; D17-28:2-76.

b. State Habeas Court's Decision

Post-hearing briefs were submitted by both parties over the course of the next year. D19-27 thru D20-2. Three years after the final post-hearing brief was submitted, Morrow filed a proposed final order—presumably pursuant to a verbal request from the state habeas court, because there was no written or transcribed record of the request. D20-3. Over a year later, on

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[8] It was unclear from the affidavit of Morrow's cousin, Troy Holloway, whether he witnessed May physically abuse Morrow. D17-29:96.

December 1, 2010, Morrow filed a supplemental proposed order.[9] D20-4. Two months later, on February 4, 2011, the state habeas court entered an order granting relief as to Morrow's sentence; specifically the court found trial counsel were ineffective during the sentencing phase in their investigation and presentation of mitigating evidence. D20-5:46-50. With the exception of a few words, the portion of the final order determining the ineffective-assistance claim was identical to the order provided by counsel for Morrow. *Compare* D20-3:3-57; D20-5:27-80.

c. Georgia Supreme Court Decision

Respondent appealed the grant of relief and Morrow cross-appealed. Following briefing and oral argument, the Georgia Supreme Court *unanimously* reinstated Morrow's death sentence in a reasoned opinion. Pet. App. 173-74. Contrary to Morrow's assertion, the Georgia Supreme Court explicitly and implicitly rejected the lower state court's fact-findings and made findings of its own.

The state appellate court "conclude[d] that trial counsel generally performed adequately and that the absence of trial counsel's professional deficiencies, both those we find to have existed and those we assume to have existed, would not in reasonable probability have resulted in a different outcome in either phase of Morrow's trial." Pet. App. 178. The court found "it [was] simply not correct that trial counsel ignored information from the years during Morrow's childhood when he lived in New York and New

[9] Although not part of the record in the federal habeas proceeding, there was a letter from state habeas counsel to the state habeas judge, which was served upon counsel for Respondent, acknowledging that the judge had requested the supplemental proposed order.

Jersey." *Id.* at 180. The court detailed the investigation by trial counsel, the individuals counsel and their investigator interviewed, the mental health evaluations that were completed, and the evidence presented at trial. *Id.* at 179-85.

The court then examined the new evidence that Morrow alleged trial counsel failed to uncover. Regarding the allegations of sexual abuse, the court rejected Morrow's ineffective-assistance claim for three reasons: 1) Morrow did not inform his defense team, to include his mental health expert, that he had been sexually abused; 2) the evidence Morrow alleged should have alerted trial counsel of the abuse was insubstantial; and 3) Morrow's evidence of sexual abuse was too weak to prove prejudice. *Id.* at 188-89.

In support, the court "note[d] that Morrow never reported any such rapes pre-trial to his counsel or to the mental health experts *who questioned him about his background, including his sexual history*." *Id.* at 188 (emphasis added). Importantly, the Georgia Supreme Court "disagree[d]" with the state habeas court's finding "that trial counsel should have been alerted to the alleged rapes simply because Morrow was known to wet the bed and to have some adjustment problems as a child." *Id.* Regarding prejudice, because the *only direct evidence* of the alleged sexual abuse was provided in state habeas through the hearsay testimony of Morrow's new mental health expert, the Georgia Supreme Court determined it would not have carried enough "weight" to change the jury's mind about the sentence. *Id.* at 188-89.

The state court also examined Morrow's allegations of physical abuse. The court determined that Morrow's evidence that he was bullied as a child was "less than compelling as alleged proof of trial counsel's failings and

resulting prejudice" and noted that there was testimony "presented at trial about how Morrow had been bullied often as a child and had been punished by his mother for not standing up for himself and for misbehaving." *Id.* at 187. The Georgia Supreme Court found trial counsel investigated George May and were not informed he was physically abusive to Morrow, and that Morrow's evidence in support was "inconsistent." *Id.* at 189, n.4.

Morrow sought a writ of certiorari ion his ineffective-assistance claim. The petition was denied on April 23, 2012. *Morrow v. Humphrey*, 566 U.S. 964, 132 S. Ct. 1972 (2012).

4. Federal Habeas Corpus Proceedings

Morrow filed his federal petition for writ of habeas corpus on March 8, 2012. The district court denied relief on July 28, 2016. D52:68. Morrow was granted a certificate of appealability "with respect to [his] claim that his trial counsel was ineffective in investigating and presenting the case in mitigation." *Id.* The court of appeals reviewed the record and held the Georgia Supreme Court's opinion did not violate § 2254(d)'s standards.

REASONS FOR DENYING THE PETITION

I. The court of appeals' decision does not conflict with *Wilson*.

Morrow seeks certiorari review of his ineffective-assistance claim on the basis that the court of appeals' decision allegedly conflicts with *Wilson*.[10]

[10] Specifically, Morrow addresses his concerns regarding the court of appeals' decision of his claim that trial counsel were ineffective in their investigation and presentation of mitigating evidence during the sentencing phase regarding sexual and physical abuse that he allegedly suffered while living in the Northeast.

Morrow argues *Wilson* limits § 2254(d) review to *only* the reasons given by the state court and prevents a federal habeas court from relying on additional reasons that support the state court's denial of relief. This argument does not warrant certiorari review for two reasons. First, this Court did not so limit § 2254(d) review and, even if it did, the court of appeals did not provide reasons not found in the state appellate court's opinion. Second, the majority of Morrow's arguments are a request for error correction of his factbound *Strickland* claim. As the court of appeals correctly reviewed his ineffective-assistance claim, certiorari review is not warranted.

A. *Wilson* does not hold that § 2254(d) review is limited to the fact findings of the state court.

Morrow argues that the *Wilson* Court rejected the Eleventh Circuit's interpretation of *Harrington v. Richter* that the federal courts were "authorized" to supply any "findings or theories that *could have supported* the last state court's summary denial of habeas relief, even where there was a reasoned decision from a lower state court." Pet. at 20-21 (emphasis in original). In support, Morrow relies upon the Court's comment in *Wilson* that where the "last state court to decide a prisoner's federal claims explains its decision" "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson*, 138 S. Ct. at 1192. Taken together, Morrow argues *Wilson* holds a federal court is limited in § 2254(d) review to the specific reasons provided by a state court. Pet. at 21. Morrow's interpretation of *Wilson* is in error.

Morrow's expansive reading of *Wilson* creates a holding based upon a question not presented. This Court has repeatedly cautioned the federal courts of appeal from fashioning a holding from its precedent on a question

not presented to the Court. *See, e.g., Lopez v. Smith*, ___, U.S. ___, 135 S. Ct. 1, 4 (2014) (per curiam) (rejecting the Ninth Circuit's attempt to create a holding from the Court's precedent where "[n]one" of the Court's decision "address[ed]" the "specific question presented by this case"); *Nevada v. Jackson*, 569 U.S. 505, 512, 133 S. Ct. 1990, 1994 (2013) (per curiam) ("By framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.'") (quoting 28 U.S.C. § 2254(d)(1)). The question presented was whether a federal court should presume that a later summary state court ruling rested on the same grounds as a previous explained state court decision. *See Wilson*, 138 S. Ct. at 1192. The question presented was not whether a federal court was limited in § 2254(d) review to only the specific reasons provided by a state court in determining a federal claim. Likewise, Morrow is precluded from creating federal law from ambiguous dicta on an issue not contemplated by the *Wilson* Court.

Consequently, Morrow's cabined reading of *Wilson* does not withstand scrutiny and fails to provide an appropriate vehicle for certiorari review.

B. The court of appeals did not make fact findings.

Even if Morrow's interpretation of *Wilson* were accurate, the court of appeals did nothing to conflict with it. His overarching claim in support of his contrary position is that the court of appeals created and relied upon fact findings not contained in the Georgia Supreme Court's decision. In support of his erroneous assertion, Morrow makes two arguments. First, he states that the Georgia Supreme Court adopted the lower state habeas court's facts

"wholesale" and did not make any of its own because the court did not determine any of the lower's court's facts were clearly erroneous. Pet. at 22. Second, Morrow argues that the court of appeals erroneously determined that the Georgia Supreme Court made a specific fact-finding that Morrow denied being sexually abused. Each argument is either a misrepresentation of the court of appeals' decision, the Georgia Supreme Court's decision, or both. More to the point, Morrow's arguments, when stripped of their erroneous assertions, are an improper request for this Court to engage in factbound error correction.

1. The Georgia Supreme Court rejected fact findings of the lower court.

The Georgia Supreme Court, relying upon state law, noted it "adopt[ed]" the lower court's fact-findings unless they were "clearly erroneous." Pet. App. 176. The fact that the court did not go on to use the term "clearly erroneous" does not mean it did not reject any of the lower court's factual findings. Indeed, contrary to Morrow's argument, the Georgia Supreme Court explicitly disagreed with several fact-findings of the lower court. *See*, *e.g.*, *id.* at 188 ("*We disagree with the habeas court's suggestion* that trial counsel should have been alerted to the alleged rapes…") (emphasis added). Further, it is axiomatic that when an appellate court makes a determination that is not supported by a lower court's fact-finding, it has implicitly rejected the lower court's finding.

Morrow fails to cite to any precedent by this Court which requires an appellate court to specifically state each time it determines a factual finding to be clearly erroneous. Instead, the Georgia Supreme Court did what most appellate courts do; it pointed out the more erroneous fact-findings, and made

explicit and implicit factual determinations in its various legal determinations. And, contrary to Morrow's argument (Pet. at 26), the court of appeals has long held, in compliance with this Court's precedent, that implicit fact-findings of a state appellate court are entitled to § 2254(d) deference. *See Sumner v. Mata*, 449 U.S. 539, 545-46, 101 S. Ct. 764, 768 (1981); *Williams v. Johnson*, 845 F.2d 906, 909 (11th Cir. 1988); *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1217 (11th Cir. 2013).

2. The court of appeals did not make a fact-finding that Morrow denied being sexually abused.

Regarding trial counsel's investigation of sexual abuse, Morrow argues that the court of appeals "reasoned that the state court must have found that trial counsel expressly asked about childhood sexual abuse and that Morrow denied such a history." Pet. at 23. In support Morrow cites to a portion of the court of appeals' decision (Pet. App. 18-19), and a comment made by a member of the panel during oral argument (Pet. App. 72-73).

As an initial matter, a statement made by a judge during oral argument is not a determination or holding by the court that can amount to error, as Morrow suggests.

More importantly, the court of appeals did not make the determination Morrow contends it made. The court noted that the "Georgia Supreme Court found 'that Morrow never reported any such rapes pre-trial to his counsel or to the mental health experts who questioned him about his background, including his sexual history.'" Pet. App. 18 (quoting Pet. App. 188). The court then pointed out the testimony of trial counsel that counsel was aware that sexual abuse was "'crucial" and "that this was 'the type of question that

[he was] sure [he] would have asked of [Morrow's] family or of [Morrow].'"[11] *Id.* at 19 (brackets in original) (quoting D16-24:108-09). The court of appeals stated in the next sentence, "But Morrow and his family failed to mention the rape." Pet. App. 19. Finally, the court pointed out, as did the Georgia Supreme Court, that Morrow was evaluated by mental health experts prior to trial who "probed Morrow's family and sexual history but turned up no evidence of abuse." *Id.*

The court of appeals was not making fact findings. Instead, it was reiterating what the Georgia Supreme Court "found" and providing evidence from the record that supported the finding. Pet. App. 18. The state court found that Morrow did not inform counsel or his mental health experts about the alleged rapes despite being questioned about his background, to include his "sexual history." Pet. App. 188. The court of appeals then pointed out, in support of that finding, that counsel had testified that they would have asked about that issue and that the mental health experts also questioned Morrow about his "sexual history." Pet. App. 19. Contrary to Morrow's assertion, the court of appeals did not find that Morrow "denied" being sexually abused, it merely concluded, as did the state court, that "Morrow and his family failed to mention the rape." Pet. App. 19. In short, the court of appeals did not step out of the bounds of § 2254 review and Morrow's true request is for factbound error correction.

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[11] Although not quoted by the court, the remainder of this portion of trial counsel's testimony was that they "probably got the answer, no" when they questioned Morrow and his family about this issue and therefore, did not "pursue" evidence of sexual abuse. *Id.* at 109.

3. Morrow's additional arguments are a transparent request for factbound error correction.

The remainder of Morrow's arguments seek factbound error correction and also misrepresent the record. Morrow argues, in further support of his disagreement with the court of appeals' decision that trial counsel did not perform deficiently, that "[i]t is undisputed that trial counsel *did not contact a single witness who knew Morrow in the Northeast* or requested any records." Pet. at 24 (emphasis added). As the Georgia Supreme Court reasonably found, "counsel met repeatedly with Morrow, his mother, and his sister, and the record makes clear that counsel discussed Morrow's childhood background with them extensively." Pet App. 179. Morrow's mother and sister knew Morrow when he lived in the Northeast as he resided with them. Thus, contrary to Morrow's statement, counsel contacted witnesses who knew him in the Northeast and notably, as correctly highlighted by the court of appeals, Morrow's mother and sister "provided the majority of the new evidence" during his state habeas proceeding.[12] *See* Pet. App. 20.

Morrow also refers to the court of appeals' statement that it "faile[d] to understand what else counsel could have done" to uncover evidence of sexual abuse as "risible" because trial counsel could have "*asked* Morrow" whether he was sexually abused. Pet. at 24 (emphasis in original); Pet. App. 19. But

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[12] Morrow's statement is also a red herring. The first person Morrow informed of the alleged sexual abuse was a mental health expert during his state habeas proceedings. D17-14:3. There is no evidence in the record that Morrow informed anyone, including those who knew him in the Northeast, that he was sexually abused. Nor did the individuals from whom Morrow obtained affidavits in state habeas testify that they either had first-hand knowledge of the alleged abuse or that Morrow informed them of the abuse. And none of the records submitted in state habeas provide direct evidence that Morrow was sexually abused.

the paragraph preceding the court of appeals' statement that Morrow criticizes recounts trial counsel's testimony that counsel would have questioned Morrow and his family about this topic.[13] Pet. App. 19. It is a fair inference from this testimony that counsel in fact asked about sexual abuse. But in any event, any question whether the record supported the court of appeals' statement is a factbound one not worthy of certiorari review.

Moreover, Morrow's argument is contrary to this Court's precedent. This Court has held that "[i]t should go without saying that *the absence of evidence* cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 571 U.S. 12, 22-23, 134 S. Ct. 10, 17 (2013) (emphasis added) (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984)). And "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. Morrow points to no direct evidence that trial counsel did not ask him about the alleged abuse and the record

[13] Morrow also disagrees with the court of appeals giving "significance" to the Georgia Supreme Court's "statement" that Morrow did not inform his mental health experts about his sexual abuse despite being questioned about his "sexual history." Pet. at 24, n.12. This is not a "statement." It is a finding of fact by the state appellate court. *See* Pet. App. 18 ("the Georgia Supreme Court *found* 'that Morrow never reported …'") (emphasis added). As a finding of fact, Morrow had to show that the determination was unreasonable by clear and convincing evidence. 28 U.S.C. § 2254(d)(2), (e)(1). As admitted by Morrow, the report of Dr. Davis contains information regarding Morrow's sexual history, and also details Morrow's background from birth until the crimes. D16-29:100-05. Therefore, there was support in the record for the state court's determination and Morrow's argument is a request for this Court to perform factbound error review of his ineffective-assistance claim.

shows Morrow did not inform counsel of this alleged abuse. D16-24:108-09.

C. In reviewing the Georgia Supreme Court's prejudice determination, the court of appeals properly applied § 2254.

Continuing his flawed reading of the court of appeals' opinion, Morrow argues that two fact-findings by the lower state court were not rejected by the Georgia Supreme Court on appeal, which should have resulted in a different prejudice determination. Again, Morrow is requesting factbound error correction of the state court's opinion by way of an erroneous assertion that the court of appeals improperly applied § 2254. And again, Morrow makes misrepresentations of the record and the court of appeals' decision.

Morrow argues that the lower state habeas court determined that "Morrow was 'the victim of a series of rapes'" and this was allegedly the "*only* state court determination on this point." Pet. at 26 (emphasis in original) (quoting Pet. App. 240). In support, Morrow claims that it could not be "assume[d]" by the court of appeals that the Georgia Supreme Court "silent[ly]" rejected this fact finding. *Id.* However, the Georgia Supreme Court explicitly stated that Morrow's strongest evidence in support of the "alleged rapes" could not be "assume[d]" correct and thereby implicitly rejected the lower court's finding. Pet. App. 188-89. The Georgia Supreme Court examined the record and pointed out that the "only direct evidence of the alleged rapes"[14] was Morrow's "statement to a psychologist" during the

[14] Morrow also complains that the court of appeals "refers to Morrow's '*alleged* rapes' and '*alleged* rapist'" in contravention of appropriate deference to the lower court's finding. Pet brief at 26 (emphasis in original) (quoting Pet. App. 19, 25). Regarding the citation to "alleged rapes," the court of appeals was directly quoting the Georgia Supreme Court's opinion. Pet. App. 25. Otherwise, the court of appeals never referred to the rapes as "alleged."

state habeas proceedings. *Id.* at 188. The state appellate court then quoted prior state law holding that an expert was not "'permitted to serve merely as a conduit for hearsay'" therefore, the court would not "'assume the correctness of the facts alleged in the experts' affidavit[] but, instead, we consider the experts' testimony in light of the weaker [evidence] upon which that testimony, in part, relied.'" *Id.* at 188-89. (quoting *Whatley v. Terry*, 284 Ga. 555, 565, 668 S.E.2d 651, 659 (2008). Consequently, the state appellate court did reject the lower court's finding and substituted its own credibility determination, which was entitled to § 2254(d) deference. *See Sumner*, 449 U.S. at 545-46.

Morrow also argues that the court of appeals did not give § 2254 deference to the lower state court's finding that Morrow was beaten with a belt by his mother's boyfriend, George May. Pet. at 27. Although Morrow admits that the Georgia Supreme Court found the evidence of abuse was "inconsistent," he argues this was not a determination that the lower state court's finding was "clearly erroneous"—thus, the court of appeals was in error for stating he had to rebut the finding of "inconsistent" with clear and convincing evidence. *Id.* at 27-28. Again, Morrow is wrong because the state appellate court's finding of "inconsistent" is an implicit rejection of any

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See Pet. App. 3, 11, 12, 18, 19, 25. As for "alleged rapist" (Pet. App. 19), that was a proper characterization. The accused, Earl Green, was neither tried nor convicted of the crimes alleged by Morrow. Nor was there any evidence in the criminal records submitted by Morrow that Green was tried or convicted of any sexual crimes (*see* D17-30:5-119). *See United States v. Salerno*, 481 U.S. 739, 763, 107 S. Ct. 2095, 2110 (1987) ("Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is 'implicit in the concept of ordered liberty.'") (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 152 (1937)).

contrary fact-finding by the lower state court. Morrow has not shown the court of appeals improperly applied § 2254(d) in giving deference to the Georgia Supreme Court's finding that the evidence of physical abuse by Morrow's mother's boyfriend was "inconsistent."[15]

Additionally, Morrow implies the court of appeals should not have given § 2254(d) deference because the state court's decision was contrary to, or an unreasonable application of, this Court's precedent. In support, Morrow argues that "[e]ven assuming, *arguendo*, that there was some inconsistency, this Court has consistently rejected such an 'all-or-nothing' approach to mitigating evidence." Pet. at 27-28 (footnote omitted) (emphasis in original). But the state court only found the evidence was "inconsistent," it did not hold that it would have carried *no* weight with the jury. Morrow has not shown the court of appeals improperly applied § 2254(d)(1).

In sum, Morrow has failed to show the court of appeals did not properly apply § 2254(d) to the state appellate court's decision. Instead, Morrow requests that this Court grant certiorari review to evaluate the factual

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[15] Morrow argues there was "no inconsistency" and there was "ample evidence" to support the lower court's findings. Pet. at 27, n.16. There was inconsistent evidence. For example, Morrow informed Buchanan that May beat his mother and he stood up to May with a baseball bat, but inexplicably did not inform Buchanan that May ever abused him. D16-22:97-98; D17-35:50. Additionally, Samantha testified at trial that after Morrow's parents divorced, she and Morrow moved with their mother the Northeast where life was "pretty good." D15-9:74. Moreover, trial counsel testified they asked Morrow, Samantha, and Bowles about allegations of physical abuse, but they did not admit to anything other than "spankings." D16-29:64-65, 67. And, contrary to Morrow's contentions, May's son's affidavit was given in "rebuttal" by Respondent and he did testify that his father never mistreated or abused Morrow. D18-11:105-106. As for "ample evidence," the only eye-witness to this abuse was Morrow's sister, whose state habeas testimony was contradicted by her trial testimony. *See* D15-9:74.

determinations of the state appellate court—to which the court of appeals gave proper deference. Such factbound questions do not warrant further review.

II. The court of appeals properly applied this Court's precedent in conducting its § 2254 review of the Georgia Supreme Court's decision regarding Morrow's new evidence of sexual abuse.

A. The court of appeals correctly reviewed the state appellate court's decision regarding trial counsel's investigation of sexual abuse.

Turning *Strickland*'s presumption of effective assistance on its head, Morrow argues that both the court of appeals and the Georgia Supreme Court should have "attributed" to trial counsel "alone" the failure to uncover his alleged sexual abuse. Pet. at 36. Morrow reasons this is true because trial counsel did not hire a "mitigation specialist or social worker whose professional training would offer a greater ability to elicit such sensitive information." *Id.* at 37. The court of appeals properly rejected Morrow's argument, pointing out the investigation completed by counsel and Mugridge and that Morrow "underwent five psychological interviews." Pet. App. 22-23. In any event, Morrow's argument is yet another request for this Court to grant review to conduct error correction on a factbound *Strickland* issue.

Morrow alleges "counsel concede[d] that they [were] ill-equipped to conduct [] a sensitive investigation *and* [took] no steps to remedy that inadequacy." Pet. at 40. Again, Morrow misrepresents the record. Although trial counsel informed the trial court at the beginning of their representation that they needed a social worker to assist with the background investigation, the record shows they later strategically decided a social worker was unnecessary. As the Georgia Supreme Court correctly noted, "[c]ounsel

considered hiring a social worker but concluded that there was no need for one in the light of the preparation that they, their investigator, and their psychologist were doing." Pet. App. 181-82. Additionally, as the court of appeals pointed out, "counsel had no reason to doubt Morrow's honesty" because "Morrow shared intimate details about his sexual history and even revealed that his son had been molested." Pet. App. 19. The fact that Morrow later informed a mental health expert that he was sexually abused is not sufficient proof that trial counsel performed deficiently.[16] Finally, as the court of appeals correctly held, Morrow "fail[ed] to establish that contemporary 'prevailing professional norms' in Georgia dictated hiring a social worker for capital cases." Pet. App. 23 (quoting *Strickland*, 466 U.S. at 688).

Moreover, *Strickland* instructed long ago that counsel should be afforded the presumption of effective assistance. *Strickland*, 466 U.S. at 690 ("the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). Where, as here, trial counsel conducts a reasonable background investigation, to include two psychological evaluations of their client, Morrow has not rebutted the presumption as he

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[16] Morrow contends, relying upon the lower state court's finding, that trial counsel ignored "'glaring red flags'" that he was sexually abused. Pet. at 37 (quoting Pet. App. 240-41, 267). However, the Georgia Supreme Court "disagree[d] with the habeas court's suggestion that trial counsel should have been alerted to the alleged rapes simply because Morrow was known to wet the bed and to have some adjustment problems." Pet. App. 188. Morrow fails to show this was an unreasonable determination and invites this Court to conduct factbound error review of the state appellate court's opinion.

failed to reveal the alleged evidence of abuse. *Strickland*, 466 U.S. at 691 ("[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions").

B. The court of appeals correctly reviewed the state appellate court's decision regarding prejudice.

In determining prejudice, the Georgia Supreme Court rightfully examined the credibility of Morrow's new allegations of sexual abuse and, in compliance with *Strickland*, weighed *all of the evidence* and reasonably concluded Morrow failed to prove prejudice. Pet. App. 188-89, 194-95. The court of appeals determined the record supported the state appellate court's credibility determination and that the state court conducted a prejudice analysis in compliance with this Court's precedent. Pet. App. 24, 25. Morrow disagrees and argues that the court of appeals has routinely held that sexual abuse "is not mitigating," which resulted here in an improper application of this Court's precedent in examining the state appellate court's prejudice decision. Pet. at 35. The court of appeals has never held sexual abuse "is not mitigating," and Morrow's request for review is for mere factbound error correction of the prejudice determination made by the Georgia Supreme Court and deemed reasonable by the court of appeals. The request should be denied.

The *Strickland* Court instructed that the question of prejudice "is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Thus, prejudice is a balancing test with

aggravating evidence on one side and mitigating evidence on the other. *See*, *e.g.*, *Wong v. Belmontes*, 558 U.S. 15, 26, 130 S. Ct. 383, 390 (2009) (per curiam) ("the Court of Appeals repeatedly referred to the aggravating evidence the State presented as 'scant.' [] That characterization misses *Strickland*'s point that the reviewing court must consider all the evidence--the good and the bad--when evaluating prejudice.") (citation omitted). One side cannot be ignored in favor of the other, which is exactly what Morrow is advocating. Specifically, he argues that alleged mitigating evidence of sexual abuse automatically tips the scale in his favor—regardless of credibility, regardless of the aggravating evidence on the other side of the scale.

Morrow's first argument is a request for this Court to conduct a factbound error review of the credibility determination that was implicit in the Georgia Supreme Court's prejudice determination. Under Morrow's interpretation of this Court's precedent, an allegation of sexual abuse by a petitioner for the first time in a post-conviction proceeding must be considered by a state court to be of the highest mitigating value, regardless of credibility concerns. *See* Pet. at 30-40. This Court's precedents do not support that assertion, and that is not necessarily how a jury would view the evidence.[17] *See Strickland*, 466 U.S. at 696 ("in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules").

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[17] It would not have been unreasonable for a jury to be skeptical of newly alleged allegations of sexual abuse only supported by the statements of the person the jury had recently found guilty of murder and cruelty to children.

To be clear, the Georgia Supreme Court did not find the evidence lacked all credibility or mitigating value. Instead, the state appellate court implicitly rejected the lower court's credibility determination and found there were concerns with the reliability of Morrow's evidence and this would have caused the jury not to have given it "great weight." Pet. App. 189. Contrary to Morrow's argument, this is not a case like *Wiggins* where the petitioner had a well-documented history in public records of a severely deprived childhood. *Wiggins v. Smith*, 539 U.S. 510, 525, 123 S. Ct. 2527, 2537 (2003). Rather, this is a case in which a petitioner, after receiving a death sentence, alleges evidence of sexual abuse for the first time in a state post-conviction proceeding, after trial counsel has conducted a reasonable background investigation, with no concrete historical evidence in corroboration. Morrow failed to prove in federal court that the state appellate court committed "'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement'" when it determined that counsel's performance did not cause Morrow prejudice. *White v. Woodall*, 572 U.S. 415, 420,134 S. Ct. 1697, 1699 (2014)).

Morrow's attack on the court of appeals is equally unfounded. Although the court of appeals has determined prejudice was not shown when there was evidence of sexual abuse, this was done through the lens of § 2254 and the prejudice weighing process. The court of appeals has not held, as Morrow claims, that this type of evidence is never mitigating. The court has determined several times over the years that evidence of sexual abuse, and physical and emotional abuse, was mitigating and granted federal habeas relief in some cases as a result. *See*, *e.g.*, *Daniel v. Commissioner*, 822 F.3d 1248, 1275 (11th Cir. 2016) (determined prejudice was shown where there

was evidence of childhood sexual abuse and granted federal habeas relief); *Hardwick v. Fla. Dep't of Corr.*, 803 F.3d 541, 558 (11th Cir. 2015) (determining that Hardwick's history of "neglect, deprivation, abandonment, violence, and physical and sexual abuse" established prejudice and entitled him to relief); *see also Williams v. Allen*, 542 F.3d 1326, 1342-43 (11th Cir. 2008) (determining, in part, that the state court improperly "discount[ed] the significance of the abuse" suffered by Williams and granted relief).

The evidence of abuse Morrow alleged himself or through the affidavits of other witnesses, does not present a case of nearly indistinguishable facts in order for the state appellate court's decision to be contrary to this Court's decisions in cases such as *Wiggins*. The evidence in aggravation showed he had previously abused and raped one of his victims. And, with no other provocation than rejection and an alleged attack on his masculinity, he shot three unarmed women in front of two small children—killing two women and leaving one woman permanently injured. Morrow has failed to show that when the record is viewed as a whole that no "fairminded jurist" would have weighed the mitigating and the aggravating evidence and held Morrow failed to prove a reasonable probability of a different outcome. *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 786 (2011).

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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No. 18-6409

In the
Supreme Court of the United States

Scotty Garnell Morrow,
Petitioner,
v.

GDCP Warden,
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. Whether the court of appeals' decision reviewing the Georgia Supreme Court's reasoned decision, which contained explicit and implicit fact-findings, and then relying upon portions of the record that support the state court's reasoning, without making independent fact-findings, conflicts with *Wilson v. Sellers*, ___, U.S. ___, 138 S. Ct. 1188 (2018).

2. Whether the Georgia Supreme Court unreasonably applied *Strickland v. Washington* when it determined that trial counsel were not deficient for failing to uncover evidence of alleged sexual abuse petitioner never mentioned during a thorough background investigation, and that failing to uncover that evidence did not prejudice petitioner given the balance of aggravating and mitigating evidence.

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OPINIONS BELOW

The decision of the Georgia Supreme Court in the criminal direct appeal is published at 272 Ga. 691, 532 S.E.2d 78 (2000).

The decision of the state habeas court granting relief as to sentence is not published, but is included in Petitioner's Appendix F. The decision of the Georgia Supreme Court reversing the grant of relief and reinstating Petitioner's death sentence is published at 289 Ga. 864, 717 S.E.2d 168 (2011) and is included in Petitioner's Appendix E.

The decision of the district court denying federal habeas relief is unpublished, but is included in Petitioner's Appendix D. The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of relief is published at 886 F.3d 1138 (11th Cir. 2018) and is included in Petitioner's Appendix A.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment in this case on March 27, 2018. On August 9, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 19, 2018, and the petition was timely filed. On October 30, 2018, Justice Thomas extended the time within which to file the brief in opposition to and including December 24, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

In all criminal prosecutions, the accused shall enjoy the right to a … have the Assistance of Counsel for his defence.

The Fourteenth Amendment, Section I, 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 … .

28 U.S.C. § 2254(d) provides:

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 Scotty Morrow seeks factbound error correction of his *Strickland* claim, which is not worthy of this Court's certiorari review.

Morrow tries, but fails, to manufacture a conflict with this Court's decision in *Wilson v. Sellers*, ___, U.S. ___, 138 S. Ct. 1188 (2018). He argues *Wilson* held that, instead of examining the state court's decision in the context of the entire record, a reviewing court may only uphold a state court's decision under § 2254(d) review based on the specific reasons provided in the state court decision. And he claims that the court of appeals failed to limit its review in that way. But *Wilson* did not hold that—it addressed only how to review an *unreasoned* state court decision, not a reasoned opinion—and even

if *Wilson* had included such a holding, the court of appeals in fact upheld the state court's decision based on that court's reasoning. The court of appeals examined the state appellate court's reasons and determined they were supported by the record and this Court's precedents. The court of appeals made no independent fact-findings and did not otherwise step outside the bounds of a proper § 2254(d) review.

Morrow's petition thus reduces to a request for this Court to conduct error correction of a factbound *Strickland* claim, and one that lacks merit. Trial counsel performed a reasonable background investigation, which included interviewing Morrow and his closest family members, and counsel obtained two mental health evaluations. Years later, after Morrow received a death sentence, Morrow and his family came forward with allegations of sexual and physical abuse that trial counsel, despite many interviews with petitioner and family, had not uncovered. No historical records showed or even suggested this abuse occurred or showed any history of mental health problems associated with the alleged abuse. Instead Morrow presented a ream of new affidavits from extended family members and acquaintances. Although some of the affiants suggested Morrow was sexually abused none provided first-hand accounts or testimony that Morrow had informed them of the alleged abuse. Regarding alleged physical abuse by Morrow's mother's boyfriend, the only first-hand account came from Morrow's sister whom trial counsel had spent considerable time interviewing. Contrary to Morrow's arguments, the Georgia Supreme Court, after reviewing the entire record, explicitly and implicitly rejected many of the fact findings of the lower state court, made its own fact-findings and reasonably concluded trial counsel did

not render deficient performance, and that Morrow was not prejudiced by counsel's performance.

Because Morrow has failed to show that the court of appeals' decision is not in accord with this Court's precedent, and that he is not requesting anything other than factbound error correction, his questions presented do not warrant this Court's review.

STATEMENT

A. Facts of the Crimes

In the month leading up to the crimes, numerous witnesses testified at trial that Morrow physically and sexually abused and threatened Barbara Ann Young's life. D14-27:6; D15-1:82-83; D15-2:78; D15-3:58.[1] On the day of the crimes, Young was at home with her two small children and her friends Tonya Woods and LaToya Horne. Pet. App. 147. After a phone conversation in which Young told Morrow to leave her alone, Morrow kicked-in Young's door and entered her home with a loaded gun. D14-27:12; D14-28:78-79.

Upon entering the kitchen, Morrow exchanged words with Woods and yelled "shut your mouth bitch." D14-27:120-123, 125. Morrow then drew his gun from his waistband and shot Woods in her lower "left abdomen, severing her spine and paralyzing her." Pet. App. 175. He then shot Horne in the left arm. D14-27:123; D15-3:147; Pet. App. 175. Morrow "possibly fired at Ms. Young as she fled from the kitchen" and ran down the hallway into her bedroom. Pet. App. 175; D14-27:124. Morrow caught Young after he "kicked open her bedroom door" where they "struggled." Pet. App. 175. A shot was

[1] "D" refers to the Electronic Court Filing (ECF) number, followed by the appropriate ECF page number.

fired that "likely" injured Young's back, and Morrow "likely "smashed [Young's] head into the bedroom's doorframe, leaving behind, skin, hair, and blood." *Id.* Young broke free from Morrow, but as she ran away, Morrow grabbed her hair from behind and shot Young in the back of the head while Young's five-year-old and eight-month-old sons watched from the closet where they were hiding. D14-28:57, 63, 70. Young's oldest son, Christopher Young, testified at trial that he watched Morrow reload his gun and fatally shoot his mother. *Id.* at 70.

Morrow then returned to the kitchen and shot Woods on the left side of her chin "and into her head at close range," causing her death. Pet. App. 175. He then shot Horne, who was lying on the floor, in her right arm and her face. *Id.* at 126-127; D14-28:63; D15-3:140. Morrow exited the home and cut the phone line. D14-27:132. Horne, "badly injured," "managed to walk from house to house down the street seeking someone to call for help before she eventually collapsed; she survived, but with permanent injuries, including deafness in one ear." Pet. App. 176.

B. Proceedings Below

1. Trial Proceedings

A Hall County grand jury indicted Morrow on March 6, 1995, for two counts of malice murder, two counts of felony murder, six counts of aggravated assault, aggravated battery, cruelty to a child, burglary, and possession of a firearm during the commission of felonies. D10-1:26-30. Morrow was represented by two experienced criminal attorneys, William Brownell and Harold Walker. Brownell, who served as lead counsel, had tried over one hundred felony cases and had been involved in as many as

eight to twelve death penalty cases as a prosecutor, two to six of which went through the sentencing phase of trial. D16-22:110-112; D16-28:15; D16-29:6-9. Co-counsel Walker had practiced law since 1979 and testified that, since 1988, approximately half of his practice was devoted to criminal defense. D16-24:52-53.

a. Background Investigation

As Morrow admitted, trial counsel met with Morrow "almost right away," and began to gather a "good factual background" about Morrow. D16-22:110-12, 114; D16-27:5; Pet. at 7. Trial counsel testified that he asked Morrow to provide guidance on where counsel could find the "good" and "bad things" in his life to help with his case. D16-24:85-86. During initial meetings, Morrow discussed growing up, schooling, his father being absent during his youth, his blackouts, his Job Corps time, his prior marriage, his desire to have a normal family, and his relationship with Young. D16-22:115-16; D16-24:55-77. To help develop evidence of Morrow's background, counsel also employed the services of an investigator, Gary Mugridge, and two mental health experts, Drs. Dave Davis and William Buchannan. D16-24:9-10; D16-29:100-05; D16-22:42.

Within a week of Morrow's arrest, trial counsel began regular conversations with Morrow's mother, Betty Bowles, about the case. D16-24:73; D16-30:57-61. Brownell's meeting notes with Bowles show that he had substantive conversations about Morrow's background. For example, Bowles reported that Morrow: was born premature; went to a psychiatrist when he was three or four-years-old; was beaten up at school when he was seven or eight-years-old; had blackouts and headaches; was on the wrestling team in

school but dropped out of school in ninth grade; and participated in Job Corps in Kentucky for three months when he was seventeen-years-old. D16-30:57-62; D16-31:22. Additionally, Bowles stated she worked long hours in the Northeast and had three jobs to support her children, however, her children had their basic needs met. D16-30:57-62; D16-31:22. Also, counsel learned Morrow's father abused Bowles, and that Bowles had been abused by her boyfriend, George May, in New Jersey. D16-22:135-36; D16-27:9.

Trial counsel also regularly discussed the case with Samantha Morrow, Morrow's sister, the source of much of Morrow's new allegations of abuse, and these discussions included information for the penalty phase of trial. D16-24:72; D16-27:5.

Investigator Mugridge also "frequently" spoke with Samantha and Bowles. D16-24:36-37, 86-87. Mugridge also interviewed, *e.g.*, extended family members, former girlfriends, friends of the family, co-workers, a clergy member from Morrow's church, and several acquaintances of Young. D17-9: 11-16, 19-21, 25-29, 31-36, 43, 45-46, 54-56, 59, 67.

Mugridge testified that he was well-aware that Morrow lived in New York and New Jersey and that Bowles and Samantha were Morrow's closest contacts for that time. D16-24:36-37. Mugridge located Lorna Broom, a former girlfriend of Morrow's from New Jersey, but Samantha told Mugridge not to contact her.[2] D16-24:45-46. Additionally, Mugridge tried to locate Morrow's alleged personal mentor, but the family only provided his first

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[2] Notes in Mugridge's file indicated Morrow had an "altercation" with Broom and she was "cut up." D17-1:46.

name, could not provide a phone number or address for this individual, and Mugridge was therefore unable to locate him.[3] D16-24:18.

Mugridge also sought Morrow's school records, but he testified that he recalled that there was a problem in locating the records.[4] D16-24:42-43. Mugridge also tried to locate records from psychological testing that Bowles stated Morrow received as a young child, but the family could not provide the name of the psychologist who had performed the testing or where it was conducted.[5] D16-24:44-43; 49-50.

Trial counsel testified that they investigated the possibility that Morrow was physically abused as a child by interviewing Morrow, Morrow's mother, and Morrow's sister, whom trial counsel learned was the most forthcoming about how the children were disciplined. D16-29:62. The information supplied to trial counsel from Morrow, his mother and sister, indicated that, at most, Morrow was subject to "intense spankings." D16-29:67-68.

Regarding sexual abuse, trial counsel, Mugridge, and Buchannan all testified that neither Morrow, his mother nor sister provided information

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[3] Morrow alleges Mugridge "abandoned the effort" to find the mentor because the family simply could not provide a phone number, as shown above, that is an inaccurate portrayal of the record. Pet. at 11.

[4] Morrow alleges that Mugridge testified that obtaining the school records was "'not something that [counsel] had requested or wanted" of him. Pet. at 11 (brackets in original) (quoting D16-24:43). However, the portion of Mugridge's testimony that Morrow quotes is referring to the assumption Mugridge had that counsel did not request or want him to travel to the Northeast, not that counsel did not request or want him to obtain the school records—which Mugridge testified he had attempted to do. D16-24:43.

[5] Regarding background records, trial counsel recalled having trouble tracking down records but did not definitely testify that they did not obtain the records. D16-27:28, 41; D16-29:25, 96.

about sexual abuse. D16-22:97-98; D16-24:37, 108-09. Trial counsel testified that evidence of sexual abuse was "crucial" and was "the type of question that [he was] sure [he] would have asked of [Morrow's] family or of [Morrow] and probably go the answer, no. And that's why we didn't pursue it." D16-24:108-09.

b. Mental Health Investigation

(1) Dr. Dave Davis

Trial counsel hired Dr. Dave Davis, a psychiatrist, on March 16, 1995, within 90 days of Morrow's arrest. D16-29: 100-105. Davis requested and was provided the following information from trial counsel: Morrow's indictment; investigative reports, including statements from every witness; crime scene photos; a video tape of the crime scene; Morrow's statement to police; and an overview of the case. D16-29:94. Davis stated he reviewed the "extensive material provided" and interviewed Morrow. *Id.* at 100-101. During the interview Morrow provided information regarding his immediate relatives; family history of alcohol abuse; father's domestic violence; parents' divorce and subsequent move north with his mother and sister; drug use and alcoholism; history of violence (to include fights as an adolescent, an aggravated assault on a transvestite, and battering his ex-wife and a former girlfriend); educational history; criminal record; medical history; sexual history; and a description of the murders of Young and Woods. *Id.* at 100-105.

Morrow reported that his troubles stemmed from the fact that he was "abandoned by his father, grew up in a bad environment, had no male figures when he was growing up, and no paternal love." D16-29:103. He also stated

that he had always had a bad temper, and he believed that he had mental problems. *Id.* While Morrow openly discussed his sexual history and other personal information with Davis (*see, e.g.,* D16-29:103-04), there was no evidence in the report that Morrow informed Davis that he was sexually or physically abused while he lived in the Northeast. Also, as the Georgia Supreme Court found, Davis stated in his pre-trial psychiatric report that Morrow's "sexual history" was "unremarkable." Pet. App. 181.

Davis stated in his final report that Morrow was competent to stand trial and that he had a personality disorder, not otherwise specified, with anti-social, borderline, and avoidant features. D16-29:104-05. Davis concluded that Morrow's deprived early childhood resulted in his pattern of poor coping. *Id.* Additionally, Davis reported that Morrow's childhood lacked parental supervision, and that Morrow had a long history of being very angry, getting into fights, abusing alcohol and drugs, and had difficulty with long-term occupation. *Id.* Trial counsel made a strategic decision not to use Davis' report at trial because they believed that "a lot" of the information in the report was "harmful" and would be viewed "negatively" by the jury. D16-29:27-28.

(2) Dr. William Buchanan

Trial counsel later hired Dr. William Buchanan in March of 1999 to conduct another mental health evaluation of Morrow to help find "more mitigation information." D16-22:42; D16-24:70; D16-27:27-28; D16-29:29. Trial counsel requested Buchanan's assistance in getting Morrow to open up so that Morrow would appear more sympathetic in front of the jury. D16-29:29. Trial counsel provided Buchanan with information pertaining to

Morrow's background, a copy of their opening statement, and additional information over the phone as the investigation progressed. D16-22:48-51. Trial counsel testified that, "Dr. Buchanan was experienced as a forensic psychologist" and would identify what was relevant. D16-27:10. Although Buchanan never asked for Morrow's records, to meet with Morrow's family, or for any additional information, trial counsel testified that they would have provided Buchanan with any material he requested, as trial counsel had done on previous cases with Buchanan. D16-24:104; D16-27:28; D16-29:32-33. Buchanan admitted that he could not recall trial counsel not providing him with any materials he requested. D16-22:95.

After reviewing the material provided by trial counsel, Buchanan met with Morrow on four occasions on March 29, 1999, May 17, 1999, June 11, 1999, and June 14, 1999, for a total of six to eight hours. D16-22:44-46. In addition, psychological tests were administered to Morrow by Buchanan's psychometrist.[6] *Id.* at 5.

During his interviews, Morrow provided information about his parent's divorce, his own divorce, his birth in Georgia and subsequent move to New Jersey/New York, his school history, his work history, his relationship with Young and her children, and the unfiled rape/kidnapping complaint by Young against him. D17-35:27-32. Regarding Morrow's childhood in New Jersey, Morrow described an incident when he was twelve or thirteen when he picked up a baseball bat in an attempt to defend his mother from her boyfriend. *Id.*

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[6] Buchanan had regular meetings with trial counsel about his evaluations and findings but did not write a formal report because trial counsel "anticipated calling him as a witness." D16-22:136; D16-27:29.

at 50. He also stated that his youngest son was seeing a psychiatrist as he had been molested in Florida when he was eight-years-old. *Id.* at 34. Morrow was candid about sensitive personal information, and he never told Buchanan that he was allegedly sexually abused. D16-22:98.

c. Presentation of Evidence

During the guilt-innocence phase, trial counsel presented three witnesses—a law-enforcement investigator, Morrow's sister, and Morrow. The investigator explained that "Young had not referred to the incident where Morrow kidnapped her and had sex with her as a 'rape' and that Morrow had beaten her with his fist rather than with a gun during that incident." Pet. App. 182. "Morrow's sister testified about Morrow's background in an effort to show Morrow's good character, his past good treatment of Ms. Young, and his distress at the time of the murders." *Id.* Morrow was the final witness during the guilt phase and "described his history with Ms. Young," explained "about his alleged past abuse of her that were more favorable to himself than the State's evidence," and admitted "he had reacted impulsively to Ms. Woods' insulting comment to him about Ms. Young's no longer wanting to be in a relationship with him." *Id.*

As the Georgia Supreme Court found, "trial counsel attempted to carry forward their theme about Morrow's good character" to the sentencing phase. *Id.* at 183. The reason for this strategy was based upon trial counsel's experience trying cases in the local community that juries often found mitigation testimony relating "further back in time" to the crimes to be less "relevant." D16-22:159. Trial counsel, after narrowing down their witness list to avoid cumulative testimony, presented fourteen witnesses in the

penalty phase, thirteen lay witnesses, and one mental health expert. D16-29:39-40. Trial counsel were able to elicit testimony from each witness that supported their mitigation theme that the crimes were "absolutely and totally out of character" for Morrow and that Morrow had qualities admired by his friends, family and co-workers. *Id.* at 48.

Trial counsel offered testimony from three of Morrow's family members: his sister, Samantha; his half-sister, Deborah Morrow; and his mother, Betty Bowles. Samantha testified that when Morrow was young their father was very abusive to their mother. D15-9:72-73. Bowles recalled that Morrow once witnessed his father stomp on her stomach, causing her to miscarry. D15-11:18. Samantha testified that when Morrow was three or four-years-old he tried to use a hammer to stop their father from abusing their mother. D15-9:72-73. Bowles testified that she thought Morrow was "very devastated" by the abuse he witnessed. D15-11:18.

Samantha testified that after Morrow's parents divorced, she and Morrow moved with their mother to Brooklyn, New York, where life was "pretty good" even though their mother worked three different jobs. D15-9: 74. Bowles testified that she worked to give her kids a "better life" so that they did not have to "want for anything." D15-11:21. However, Bowles testified that while living in Brooklyn she took Morrow to several psychiatrists to "get him help" because he "was a little slow in some things in school." D15-11:22. The mental health providers told her to "continue to try to encourage him." *Id.*

When Morrow was in the fourth grade, Morrow and his family moved to New Jersey. D15-9:75. Samantha described Morrow during this time as a good student who stayed out of trouble, was in the choir, and enjoyed

athletics. *Id.* at 76. Samantha recalled that "people would pick at [Morrow] in school and stuff," and that Samantha "would go on and fight the people that bothered him." *Id.*

In the ninth or tenth grade Morrow dropped out of school and joined the Job Corps. D15-9:76-77. Samantha testified that Morrow was very homesick while he was in the Job Corps and left the Corps when he turned 18 to return home. *Id.* at 77.

Shortly after returning to New Jersey, Morrow got married, moved to Georgia, welcomed his first son, and spent time with his father. D15-9:78-79. One year later, Morrow returned to New Jersey where he lived for several years and helped his mother take care of special needs foster children who lived in her home. *Id.* at 79-80; D15-11:26. Bowles testified that Morrow took classes to learn how to help care for these children and that Morrow often helped her get the children ready for school. D15-11:26.

Morrow and his entire family eventually returned to Georgia. D15-9:79. Bowles testified that after she returned to Georgia she took in ten different foster children, and Morrow helped her care for them in her home. D15-11:28-29.

Samantha, Deborah, and Bowles each provided testimony suggesting the crimes were out of character for Morrow. D15-9:68; D15-11:29, 33. Samantha also told the jury that Morrow felt remorse about the murders and had grown closer to God since the crimes had occurred. *Id.* at 88.

Trial counsel also presented Morrow's ex-wife, and the mother of his two sons, Claudette Jenkins. Claudette testified Morrow was not violent, although she did admit he slapped her once, and she described him as a loving father. D15-9:48-49. She explained that Morrow was a good father

and that her sons would not be able to handle Morrow receiving a death sentence. *Id.* at 56. Claudette's current husband, Kim Jenkins, also told the jury that Morrow was a "perfect father," and that Morrow's sons would need "severe counseling" if Morrow was sentenced to death. *Id.* at 62-64.

In addition, Morrow's ex-girlfriend, Fonda Jones, testified that she and Morrow had a good relationship and Morrow treated her children well. D15-11:11-12. Jones testified that Morrow never lost his temper or displayed violence. *Id.* at 15.

A family friend, members of the clergy, and a deputy sheriff from the jail, testified about Morrow's dedication to his faith, his reliability, and his good character. D15-8:128-30; D15-9:3-6, 19-23, 26-39. Additionally, three of Morrow's former coworkers testified that they did not witness either violence or anger from Morrow. D15-8:118, 122; D15-9:10.

Finally, Buchannan testified to articulate how Morrow felt at the time of the murders and to explain how Morrow's past affected him at the time of the crimes.[7] D16-22:138-40. Buchanan explained that Morrow was administered a battery of psychological tests which revealed he was of "average, low average intelligence"; suffered from paranoia, suspiciousness, mistrust, social alienation, persecutory ideas, and depression; had poor ability to delay gratification and to control impulses; was introverted, which made it difficult for him to display his emotions; and had difficulty coping and "dealing with

[7] Trial counsel testified that Morrow did not appear as sympathetic or remorseful as they had hoped when he testified during the guilt phase of trial, and thus, they also presented Buchanan to better explain Morrow's demeanor to the jury. D16-22:138-41.

the stresses of everyday life or stresses of relationships." *Id.* at 126-28, 133, 137.

With regard to Morrow's life history, Buchanan told the jury that Morrow's parents divorced when he was about three or four-years-old because of conflict and physical abuse from Morrow's father toward his mother. *Id.* at 138. Following the divorce, Morrow and his older sister lived with their mother in Georgia, New York, and New Jersey. *Id.* Morrow told Buchanan that when he was about twelve-years-old, his mother was involved in a physically abusive relationship with her boyfriend. *Id.* Buchanan testified that Morrow recalled picking-up a baseball bat to defend his mother and that her boyfriend laughed at Morrow. *Id.* Morrow also felt very helpless and unable to protect his mother from the abuse. *Id.*

Concerning Morrow's schooling in New York and New Jersey, Buchanan testified that Morrow was in special education classes for learning disabilities from the Fourth Grade until the Ninth Grade—which Buchanan confirmed with the tests administered to Morrow. *Id.* at 139-40. In the Ninth Grade Morrow dropped out of school because he felt that his learning disabilities prevented him from being able to do the work. *Id.* at 139.

Buchanan testified that Morrow was married at the age of nineteen, which ended in a separation two years later while his wife was pregnant with their second child. *Id.* at 140. Morrow became depressed and started drinking. *Id.* at 141. Buchanan testified that after two or three months, Morrow stopped drinking and tried to put his life back together. *Id.*

After explaining Morrow's test results and background to the jury, Buchanan testified that because of Morrow's history and personality type he was easily provoked by "negative" comments. D15-10:6. Buchanan stated

Morrow "will hear something negative and he's likely to exaggerate that negativity because of mistrust and paranoia about it." *Id.* Buchanan explained that the comments "You're no good, you're just being used," which Morrow testified Woods told him on the morning of the murders, were enough to trigger feelings of very high paranoia in Morrow. *Id.*

Furthermore, Buchanan related Morrow's detailed description of the murders to the jury. D15-9:144-46; D15-10:1. Buchanan explained that when a person goes through any traumatic event, they will often dissociate as a way of protecting themselves, and that this dissociation will cause them to be unable to display emotion. D15-10:4-5. Buchanan told the jury that on the videotaped confession obtained directly after the crime, Morrow appeared to be in a "state of shock" and was actually dissociating. *Id.* at 4. Buchanan also testified that Morrow appeared to be in a dissociated state during his guilt phase testimony, which explained to the jury why Morrow lacked emotion when he testified. *Id.* at 24. Even though he appeared unremorseful on the stand, Buchanan stated that Morrow showed "sadness, remorse," and "guilt" over the crimes during his testing and interview by Buchanan. *Id.* at 24-25.

d. Jury Determination

Morrow was convicted of "malice murder, felony murder, aggravated assault, aggravated battery, cruelty to a child, burglary, and possession of a firearm during the commission of a felony." *Morrow v. State*, 272 Ga. 691, 691, 532 S.E.2d 78, 82 (2000). The jury found ten statutory aggravating circumstances existed and recommended a sentence of death for each of Morrow's malice murder convictions, and the trial court then sentenced

Morrow to death. D11-6:1, 56-57. Morrow was also sentenced to consecutive sentences of twenty years for aggravated battery, twenty years for cruelty to a child, twenty years for burglary and five years for possession of a firearm during the commission of a felony. *Id.* at 66-69. The felony murder convictions were vacated by operation of law, and the aggravated assault convictions merged with other convictions thereby leaving only five statutory aggravating circumstances. *Morrow*, 272 Ga. at 691-92.

2. Direct Appeal Proceedings

Morrow appealed his convictions and sentences to the Georgia Supreme Court. The Georgia Supreme Court affirmed Morrow's convictions and sentences on June 12, 2000. *Morrow v. State*, 272 Ga. 691. Morrow's motion for reconsideration was denied on July 28, 2000. D16-8. Morrow filed a petition for writ of certiorari in the United States Supreme Court, which was denied on March 26, 2001. *Morrow v. Georgia*, 532 U.S. 944, 121 S. Ct. 1408 (2001).

3. State Habeas Corpus Proceedings

Morrow filed a state habeas corpus petition in the Superior Court of Butts County, Georgia, on October 30, 2001, and an amendment thereto on February 1, 2005. D16-11; D16-20.

a. Ineffective-Assistance Claim

An evidentiary hearing was conducted on April 25-26, 2005. D16-22 thru D19-19. During the hearing, extensive evidence was presented regarding trial counsel's sentencing phase investigation and presentation. Specifically, Morrow argued counsel were ineffective for failing to uncover and present evidence that, while living in the Northeast he was allegedly

physically abused and mistreated by his mother's boyfriend; bullied and degraded by his schoolmates; and sexually abused by an older youth named Earl Green.

In support, Morrow presented affidavits from family and friends and obtained a new mental-health evaluation. The only direct evidence presented during the state habeas proceeding that Morrow was sexually abused came from Morrow's self-report to his new mental health expert, Dr. James Hooper. D17-14:3. Contrary to Morrow's assertion, his new evidence did not "amply corroborate" his allegation of sexual abuse. Pet. 13-14. The only affiants that mentioned sexual abuse were an individual who lived in the home where Morrow stayed as a child, and the cousin of that individual (*see* D17-29:68-72), neither of whom stated they had any knowledge that Morrow was abused. Instead, one of the affiants stated Green tried to sexually assault him, the affiant. D17-29:71-72. And, contrary to Morrow's assertion, Green's criminal records do not contain evidence that he was arrested or convicted of a sexual offense. D17-30:5-119.

Morrow's other evidence consisted of affiants stating he wet the bed as an adolescent and school records showing he had "behavioral changes." Pet. at 14. The record showed that Morrow had learning disabilities growing up. D15-9:76-77, 138-40; D15-11:22. The remaining affidavits submitted by Morrow from his family and friends did not contain any testimony that Morrow informed them he was sexually abused or that they witnessed Morrow being abused.

Regarding physical abuse, during the state habeas proceedings, as stated above, trial counsel testified that they was aware of allegations of physical abuse, but that when he asked Morrow, Samantha, and Bowles

about these allegations, they mitigated the allegations of physical abuse and did not admit to anything other than "spankings." D16-29:64-65, 67. Walker testified that Samantha was the most forthcoming about Morrow's childhood, but Walker never testified that Samantha indicated that Morrow was abused or mistreated. D16-24:105. Although several of Morrow's affiants claimed Morrow was abused by his Mother's boyfriend, George May (D17-14:9; D17-29:19-20, 61, 66, 75, 96), Samantha provided the only eyewitness account to May's alleged abuse (D17-29:20).[8] And, in contradiction to Morrow's habeas affiants' testimony, May's son, Gregory May, gave affidavit testimony that his father never mistreated or abused Morrow. D18-11:105-106. Gregory stated that his father punished Morrow only if Morrow was "being bad in school, being late, lying, being disrespectful, or disobeying," but testified that his father never beat or abused Morrow. *Id.* at 105.

Additionally, Morrow produced no historical records containing evidence that he was sexually or physically abused, or any history of mental health issues associated with the alleged abuse. *See* D17-14:39-43; D17-15:1-3; D17-24:10-17; D17-25:1-41; D17-26:1-13; D17-26:14-15; D17-27:1-37; D17-28:2-76.

b. State Habeas Court's Decision

Post-hearing briefs were submitted by both parties over the course of the next year. D19-27 thru D20-2. Three years after the final post-hearing brief was submitted, Morrow filed a proposed final order—presumably pursuant to a verbal request from the state habeas court, because there was no written or transcribed record of the request. D20-3. Over a year later, on

[8] It was unclear from the affidavit of Morrow's cousin, Troy Holloway, whether he witnessed May physically abuse Morrow. D17-29:96.

December 1, 2010, Morrow filed a supplemental proposed order.[9] D20-4. Two months later, on February 4, 2011, the state habeas court entered an order granting relief as to Morrow's sentence; specifically the court found trial counsel were ineffective during the sentencing phase in their investigation and presentation of mitigating evidence. D20-5:46-50. With the exception of a few words, the portion of the final order determining the ineffective-assistance claim was identical to the order provided by counsel for Morrow. *Compare* D20-3:3-57; D20-5:27-80.

c. Georgia Supreme Court Decision

Respondent appealed the grant of relief and Morrow cross-appealed. Following briefing and oral argument, the Georgia Supreme Court *unanimously* reinstated Morrow's death sentence in a reasoned opinion. Pet. App. 173-74. Contrary to Morrow's assertion, the Georgia Supreme Court explicitly and implicitly rejected the lower state court's fact-findings and made findings of its own.

The state appellate court "conclude[d] that trial counsel generally performed adequately and that the absence of trial counsel's professional deficiencies, both those we find to have existed and those we assume to have existed, would not in reasonable probability have resulted in a different outcome in either phase of Morrow's trial." Pet. App. 178. The court found "it [was] simply not correct that trial counsel ignored information from the years during Morrow's childhood when he lived in New York and New

[9] Although not part of the record in the federal habeas proceeding, there was a letter from state habeas counsel to the state habeas judge, which was served upon counsel for Respondent, acknowledging that the judge had requested the supplemental proposed order.

Jersey." *Id.* at 180. The court detailed the investigation by trial counsel, the individuals counsel and their investigator interviewed, the mental health evaluations that were completed, and the evidence presented at trial. *Id.* at 179-85.

The court then examined the new evidence that Morrow alleged trial counsel failed to uncover. Regarding the allegations of sexual abuse, the court rejected Morrow's ineffective-assistance claim for three reasons: 1) Morrow did not inform his defense team, to include his mental health expert, that he had been sexually abused; 2) the evidence Morrow alleged should have alerted trial counsel of the abuse was insubstantial; and 3) Morrow's evidence of sexual abuse was too weak to prove prejudice. *Id.* at 188-89.

In support, the court "note[d] that Morrow never reported any such rapes pre-trial to his counsel or to the mental health experts *who questioned him about his background, including his sexual history*." *Id.* at 188 (emphasis added). Importantly, the Georgia Supreme Court "disagree[d]" with the state habeas court's finding "that trial counsel should have been alerted to the alleged rapes simply because Morrow was known to wet the bed and to have some adjustment problems as a child." *Id.* Regarding prejudice, because the *only direct evidence* of the alleged sexual abuse was provided in state habeas through the hearsay testimony of Morrow's new mental health expert, the Georgia Supreme Court determined it would not have carried enough "weight" to change the jury's mind about the sentence. *Id.* at 188-89.

The state court also examined Morrow's allegations of physical abuse. The court determined that Morrow's evidence that he was bullied as a child was "less than compelling as alleged proof of trial counsel's failings and

resulting prejudice" and noted that there was testimony "presented at trial about how Morrow had been bullied often as a child and had been punished by his mother for not standing up for himself and for misbehaving." *Id.* at 187. The Georgia Supreme Court found trial counsel investigated George May and were not informed he was physically abusive to Morrow, and that Morrow's evidence in support was "inconsistent." *Id.* at 189, n.4.

Morrow sought a writ of certiorari ion his ineffective-assistance claim. The petition was denied on April 23, 2012. *Morrow v. Humphrey*, 566 U.S. 964, 132 S. Ct. 1972 (2012).

4. Federal Habeas Corpus Proceedings

Morrow filed his federal petition for writ of habeas corpus on March 8, 2012. The district court denied relief on July 28, 2016. D52:68. Morrow was granted a certificate of appealability "with respect to [his] claim that his trial counsel was ineffective in investigating and presenting the case in mitigation." *Id.* The court of appeals reviewed the record and held the Georgia Supreme Court's opinion did not violate § 2254(d)'s standards.

REASONS FOR DENYING THE PETITION

I. The court of appeals' decision does not conflict with *Wilson*.

Morrow seeks certiorari review of his ineffective-assistance claim on the basis that the court of appeals' decision allegedly conflicts with *Wilson*.[10]

[10] Specifically, Morrow addresses his concerns regarding the court of appeals' decision of his claim that trial counsel were ineffective in their investigation and presentation of mitigating evidence during the sentencing phase regarding sexual and physical abuse that he allegedly suffered while living in the Northeast.

Morrow argues *Wilson* limits § 2254(d) review to *only* the reasons given by the state court and prevents a federal habeas court from relying on additional reasons that support the state court's denial of relief. This argument does not warrant certiorari review for two reasons. First, this Court did not so limit § 2254(d) review and, even if it did, the court of appeals did not provide reasons not found in the state appellate court's opinion. Second, the majority of Morrow's arguments are a request for error correction of his factbound *Strickland* claim. As the court of appeals correctly reviewed his ineffective-assistance claim, certiorari review is not warranted.

A. *Wilson* does not hold that § 2254(d) review is limited to the fact findings of the state court.

Morrow argues that the *Wilson* Court rejected the Eleventh Circuit's interpretation of *Harrington v. Richter* that the federal courts were "authorized" to supply any "findings or theories that *could have supported* the last state court's summary denial of habeas relief, even where there was a reasoned decision from a lower state court." Pet. at 20-21 (emphasis in original). In support, Morrow relies upon the Court's comment in *Wilson* that where the "last state court to decide a prisoner's federal claims explains its decision" "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson*, 138 S. Ct. at 1192. Taken together, Morrow argues *Wilson* holds a federal court is limited in § 2254(d) review to the specific reasons provided by a state court. Pet. at 21. Morrow's interpretation of *Wilson* is in error.

Morrow's expansive reading of *Wilson* creates a holding based upon a question not presented. This Court has repeatedly cautioned the federal courts of appeal from fashioning a holding from its precedent on a question

not presented to the Court. *See, e.g., Lopez v. Smith*, ___, U.S. ___, 135 S. Ct. 1, 4 (2014) (per curiam) (rejecting the Ninth Circuit's attempt to create a holding from the Court's precedent where "[n]one" of the Court's decision "address[ed]" the "specific question presented by this case"); *Nevada v. Jackson*, 569 U.S. 505, 512, 133 S. Ct. 1990, 1994 (2013) (per curiam) ("By framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.'") (quoting 28 U.S.C. § 2254(d)(1)). The question presented was whether a federal court should presume that a later summary state court ruling rested on the same grounds as a previous explained state court decision. *See Wilson*, 138 S. Ct. at 1192. The question presented was not whether a federal court was limited in § 2254(d) review to only the specific reasons provided by a state court in determining a federal claim. Likewise, Morrow is precluded from creating federal law from ambiguous dicta on an issue not contemplated by the *Wilson* Court.

Consequently, Morrow's cabined reading of *Wilson* does not withstand scrutiny and fails to provide an appropriate vehicle for certiorari review.

B. The court of appeals did not make fact findings.

Even if Morrow's interpretation of *Wilson* were accurate, the court of appeals did nothing to conflict with it. His overarching claim in support of his contrary position is that the court of appeals created and relied upon fact findings not contained in the Georgia Supreme Court's decision. In support of his erroneous assertion, Morrow makes two arguments. First, he states that the Georgia Supreme Court adopted the lower state habeas court's facts

"wholesale" and did not make any of its own because the court did not determine any of the lower's court's facts were clearly erroneous. Pet. at 22. Second, Morrow argues that the court of appeals erroneously determined that the Georgia Supreme Court made a specific fact-finding that Morrow denied being sexually abused. Each argument is either a misrepresentation of the court of appeals' decision, the Georgia Supreme Court's decision, or both. More to the point, Morrow's arguments, when stripped of their erroneous assertions, are an improper request for this Court to engage in factbound error correction.

1. The Georgia Supreme Court rejected fact findings of the lower court.

The Georgia Supreme Court, relying upon state law, noted it "adopt[ed]" the lower court's fact-findings unless they were "clearly erroneous." Pet. App. 176. The fact that the court did not go on to use the term "clearly erroneous" does not mean it did not reject any of the lower court's factual findings. Indeed, contrary to Morrow's argument, the Georgia Supreme Court explicitly disagreed with several fact-findings of the lower court. *See*, *e.g.*, *id.* at 188 ("*We disagree with the habeas court's suggestion* that trial counsel should have been alerted to the alleged rapes…") (emphasis added). Further, it is axiomatic that when an appellate court makes a determination that is not supported by a lower court's fact-finding, it has implicitly rejected the lower court's finding.

Morrow fails to cite to any precedent by this Court which requires an appellate court to specifically state each time it determines a factual finding to be clearly erroneous. Instead, the Georgia Supreme Court did what most appellate courts do; it pointed out the more erroneous fact-findings, and made

explicit and implicit factual determinations in its various legal determinations. And, contrary to Morrow's argument (Pet. at 26), the court of appeals has long held, in compliance with this Court's precedent, that implicit fact-findings of a state appellate court are entitled to § 2254(d) deference. *See Sumner v. Mata*, 449 U.S. 539, 545-46, 101 S. Ct. 764, 768 (1981); *Williams v. Johnson*, 845 F.2d 906, 909 (11th Cir. 1988); *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1217 (11th Cir. 2013).

2. The court of appeals did not make a fact-finding that Morrow denied being sexually abused.

Regarding trial counsel's investigation of sexual abuse, Morrow argues that the court of appeals "reasoned that the state court must have found that trial counsel expressly asked about childhood sexual abuse and that Morrow denied such a history." Pet. at 23. In support Morrow cites to a portion of the court of appeals' decision (Pet. App. 18-19), and a comment made by a member of the panel during oral argument (Pet. App. 72-73).

As an initial matter, a statement made by a judge during oral argument is not a determination or holding by the court that can amount to error, as Morrow suggests.

More importantly, the court of appeals did not make the determination Morrow contends it made. The court noted that the "Georgia Supreme Court found 'that Morrow never reported any such rapes pre-trial to his counsel or to the mental health experts who questioned him about his background, including his sexual history.'" Pet. App. 18 (quoting Pet. App. 188). The court then pointed out the testimony of trial counsel that counsel was aware that sexual abuse was "'crucial" and "that this was 'the type of question that

[he was] sure [he] would have asked of [Morrow's] family or of [Morrow].'"[11] *Id.* at 19 (brackets in original) (quoting D16-24:108-09). The court of appeals stated in the next sentence, "But Morrow and his family failed to mention the rape." Pet. App. 19. Finally, the court pointed out, as did the Georgia Supreme Court, that Morrow was evaluated by mental health experts prior to trial who "probed Morrow's family and sexual history but turned up no evidence of abuse." *Id.*

The court of appeals was not making fact findings. Instead, it was reiterating what the Georgia Supreme Court "found" and providing evidence from the record that supported the finding. Pet. App. 18. The state court found that Morrow did not inform counsel or his mental health experts about the alleged rapes despite being questioned about his background, to include his "sexual history." Pet. App. 188. The court of appeals then pointed out, in support of that finding, that counsel had testified that they would have asked about that issue and that the mental health experts also questioned Morrow about his "sexual history." Pet. App. 19. Contrary to Morrow's assertion, the court of appeals did not find that Morrow "denied" being sexually abused, it merely concluded, as did the state court, that "Morrow and his family failed to mention the rape." Pet. App. 19. In short, the court of appeals did not step out of the bounds of § 2254 review and Morrow's true request is for factbound error correction.

[11] Although not quoted by the court, the remainder of this portion of trial counsel's testimony was that they "probably got the answer, no" when they questioned Morrow and his family about this issue and therefore, did not "pursue" evidence of sexual abuse. *Id.* at 109.

3. Morrow's additional arguments are a transparent request for factbound error correction.

The remainder of Morrow's arguments seek factbound error correction and also misrepresent the record. Morrow argues, in further support of his disagreement with the court of appeals' decision that trial counsel did not perform deficiently, that "[i]t is undisputed that trial counsel *did not contact a single witness who knew Morrow in the Northeast* or requested any records." Pet. at 24 (emphasis added). As the Georgia Supreme Court reasonably found, "counsel met repeatedly with Morrow, his mother, and his sister, and the record makes clear that counsel discussed Morrow's childhood background with them extensively." Pet App. 179. Morrow's mother and sister knew Morrow when he lived in the Northeast as he resided with them. Thus, contrary to Morrow's statement, counsel contacted witnesses who knew him in the Northeast and notably, as correctly highlighted by the court of appeals, Morrow's mother and sister "provided the majority of the new evidence" during his state habeas proceeding.[12] *See* Pet. App. 20.

Morrow also refers to the court of appeals' statement that it "faile[d] to understand what else counsel could have done" to uncover evidence of sexual abuse as "risible" because trial counsel could have "*asked* Morrow" whether he was sexually abused. Pet. at 24 (emphasis in original); Pet. App. 19. But

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[12] Morrow's statement is also a red herring. The first person Morrow informed of the alleged sexual abuse was a mental health expert during his state habeas proceedings. D17-14:3. There is no evidence in the record that Morrow informed anyone, including those who knew him in the Northeast, that he was sexually abused. Nor did the individuals from whom Morrow obtained affidavits in state habeas testify that they either had first-hand knowledge of the alleged abuse or that Morrow informed them of the abuse. And none of the records submitted in state habeas provide direct evidence that Morrow was sexually abused.

the paragraph preceding the court of appeals' statement that Morrow criticizes recounts trial counsel's testimony that counsel would have questioned Morrow and his family about this topic.[13] Pet. App. 19. It is a fair inference from this testimony that counsel in fact asked about sexual abuse. But in any event, any question whether the record supported the court of appeals' statement is a factbound one not worthy of certiorari review.

Moreover, Morrow's argument is contrary to this Court's precedent. This Court has held that "[i]t should go without saying that *the absence of evidence* cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 571 U.S. 12, 22-23, 134 S. Ct. 10, 17 (2013) (emphasis added) (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984)). And "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. Morrow points to no direct evidence that trial counsel did not ask him about the alleged abuse and the record

[13] Morrow also disagrees with the court of appeals giving "significance" to the Georgia Supreme Court's "statement" that Morrow did not inform his mental health experts about his sexual abuse despite being questioned about his "sexual history." Pet. at 24, n.12. This is not a "statement." It is a finding of fact by the state appellate court. *See* Pet. App. 18 ("the Georgia Supreme Court *found* 'that Morrow never reported …'") (emphasis added). As a finding of fact, Morrow had to show that the determination was unreasonable by clear and convincing evidence. 28 U.S.C. § 2254(d)(2), (e)(1). As admitted by Morrow, the report of Dr. Davis contains information regarding Morrow's sexual history, and also details Morrow's background from birth until the crimes. D16-29:100-05. Therefore, there was support in the record for the state court's determination and Morrow's argument is a request for this Court to perform factbound error review of his ineffective-assistance claim.

shows Morrow did not inform counsel of this alleged abuse. D16-24:108-09.

C. In reviewing the Georgia Supreme Court's prejudice determination, the court of appeals properly applied § 2254.

Continuing his flawed reading of the court of appeals' opinion, Morrow argues that two fact-findings by the lower state court were not rejected by the Georgia Supreme Court on appeal, which should have resulted in a different prejudice determination. Again, Morrow is requesting factbound error correction of the state court's opinion by way of an erroneous assertion that the court of appeals improperly applied § 2254. And again, Morrow makes misrepresentations of the record and the court of appeals' decision.

Morrow argues that the lower state habeas court determined that "Morrow was 'the victim of a series of rapes'" and this was allegedly the "*only* state court determination on this point." Pet. at 26 (emphasis in original) (quoting Pet. App. 240). In support, Morrow claims that it could not be "assume[d]" by the court of appeals that the Georgia Supreme Court "silent[ly]" rejected this fact finding. *Id.* However, the Georgia Supreme Court explicitly stated that Morrow's strongest evidence in support of the "alleged rapes" could not be "assume[d]" correct and thereby implicitly rejected the lower court's finding. Pet. App. 188-89. The Georgia Supreme Court examined the record and pointed out that the "only direct evidence of the alleged rapes"[14] was Morrow's "statement to a psychologist" during the

[14] Morrow also complains that the court of appeals "refers to Morrow's '*alleged* rapes' and '*alleged* rapist'" in contravention of appropriate deference to the lower court's finding. Pet brief at 26 (emphasis in original) (quoting Pet. App. 19, 25). Regarding the citation to "alleged rapes," the court of appeals was directly quoting the Georgia Supreme Court's opinion. Pet. App. 25. Otherwise, the court of appeals never referred to the rapes as "alleged."

state habeas proceedings. *Id.* at 188. The state appellate court then quoted prior state law holding that an expert was not "'permitted to serve merely as a conduit for hearsay'" therefore, the court would not "'assume the correctness of the facts alleged in the experts' affidavit[] but, instead, we consider the experts' testimony in light of the weaker [evidence] upon which that testimony, in part, relied.'" *Id.* at 188-89. (quoting *Whatley v. Terry*, 284 Ga. 555, 565, 668 S.E.2d 651, 659 (2008). Consequently, the state appellate court did reject the lower court's finding and substituted its own credibility determination, which was entitled to § 2254(d) deference. *See Sumner*, 449 U.S. at 545-46.

Morrow also argues that the court of appeals did not give § 2254 deference to the lower state court's finding that Morrow was beaten with a belt by his mother's boyfriend, George May. Pet. at 27. Although Morrow admits that the Georgia Supreme Court found the evidence of abuse was "inconsistent," he argues this was not a determination that the lower state court's finding was "clearly erroneous"—thus, the court of appeals was in error for stating he had to rebut the finding of "inconsistent" with clear and convincing evidence. *Id.* at 27-28. Again, Morrow is wrong because the state appellate court's finding of "inconsistent" is an implicit rejection of any

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See Pet. App. 3, 11, 12, 18, 19, 25. As for "alleged rapist" (Pet. App. 19), that was a proper characterization. The accused, Earl Green, was neither tried nor convicted of the crimes alleged by Morrow. Nor was there any evidence in the criminal records submitted by Morrow that Green was tried or convicted of any sexual crimes (*see* D17-30:5-119). *See United States v. Salerno*, 481 U.S. 739, 763, 107 S. Ct. 2095, 2110 (1987) ("Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is 'implicit in the concept of ordered liberty.'") (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 152 (1937)).

contrary fact-finding by the lower state court. Morrow has not shown the court of appeals improperly applied § 2254(d) in giving deference to the Georgia Supreme Court's finding that the evidence of physical abuse by Morrow's mother's boyfriend was "inconsistent."[15]

Additionally, Morrow implies the court of appeals should not have given § 2254(d) deference because the state court's decision was contrary to, or an unreasonable application of, this Court's precedent. In support, Morrow argues that "[e]ven assuming, *arguendo*, that there was some inconsistency, this Court has consistently rejected such an 'all-or-nothing' approach to mitigating evidence." Pet. at 27-28 (footnote omitted) (emphasis in original). But the state court only found the evidence was "inconsistent," it did not hold that it would have carried *no* weight with the jury. Morrow has not shown the court of appeals improperly applied § 2254(d)(1).

In sum, Morrow has failed to show the court of appeals did not properly apply § 2254(d) to the state appellate court's decision. Instead, Morrow requests that this Court grant certiorari review to evaluate the factual

[15] Morrow argues there was "no inconsistency" and there was "ample evidence" to support the lower court's findings. Pet. at 27, n.16. There was inconsistent evidence. For example, Morrow informed Buchanan that May beat his mother and he stood up to May with a baseball bat, but inexplicably did not inform Buchanan that May ever abused him. D16-22:97-98; D17-35:50. Additionally, Samantha testified at trial that after Morrow's parents divorced, she and Morrow moved with their mother the Northeast where life was "pretty good." D15-9:74. Moreover, trial counsel testified they asked Morrow, Samantha, and Bowles about allegations of physical abuse, but they did not admit to anything other than "spankings." D16-29:64-65, 67. And, contrary to Morrow's contentions, May's son's affidavit was given in "rebuttal" by Respondent and he did testify that his father never mistreated or abused Morrow. D18-11:105-106. As for "ample evidence," the only eye-witness to this abuse was Morrow's sister, whose state habeas testimony was contradicted by her trial testimony. *See* D15-9:74.

determinations of the state appellate court—to which the court of appeals gave proper deference. Such factbound questions do not warrant further review.

II. The court of appeals properly applied this Court's precedent in conducting its § 2254 review of the Georgia Supreme Court's decision regarding Morrow's new evidence of sexual abuse.

A. The court of appeals correctly reviewed the state appellate court's decision regarding trial counsel's investigation of sexual abuse.

Turning *Strickland*'s presumption of effective assistance on its head, Morrow argues that both the court of appeals and the Georgia Supreme Court should have "attributed" to trial counsel "alone" the failure to uncover his alleged sexual abuse. Pet. at 36. Morrow reasons this is true because trial counsel did not hire a "mitigation specialist or social worker whose professional training would offer a greater ability to elicit such sensitive information." *Id.* at 37. The court of appeals properly rejected Morrow's argument, pointing out the investigation completed by counsel and Mugridge and that Morrow "underwent five psychological interviews." Pet. App. 22-23. In any event, Morrow's argument is yet another request for this Court to grant review to conduct error correction on a factbound *Strickland* issue.

Morrow alleges "counsel concede[d] that they [were] ill-equipped to conduct [] a sensitive investigation *and* [took] no steps to remedy that inadequacy." Pet. at 40. Again, Morrow misrepresents the record. Although trial counsel informed the trial court at the beginning of their representation that they needed a social worker to assist with the background investigation, the record shows they later strategically decided a social worker was unnecessary. As the Georgia Supreme Court correctly noted, "[c]ounsel

considered hiring a social worker but concluded that there was no need for one in the light of the preparation that they, their investigator, and their psychologist were doing." Pet. App. 181-82. Additionally, as the court of appeals pointed out, "counsel had no reason to doubt Morrow's honesty" because "Morrow shared intimate details about his sexual history and even revealed that his son had been molested." Pet. App. 19. The fact that Morrow later informed a mental health expert that he was sexually abused is not sufficient proof that trial counsel performed deficiently.[16] Finally, as the court of appeals correctly held, Morrow "fail[ed] to establish that contemporary 'prevailing professional norms' in Georgia dictated hiring a social worker for capital cases." Pet. App. 23 (quoting *Strickland*, 466 U.S. at 688).

Moreover, *Strickland* instructed long ago that counsel should be afforded the presumption of effective assistance. *Strickland*, 466 U.S. at 690 ("the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). Where, as here, trial counsel conducts a reasonable background investigation, to include two psychological evaluations of their client, Morrow has not rebutted the presumption as he

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[16] Morrow contends, relying upon the lower state court's finding, that trial counsel ignored "'glaring red flags'" that he was sexually abused. Pet. at 37 (quoting Pet. App. 240-41, 267). However, the Georgia Supreme Court "disagree[d] with the habeas court's suggestion that trial counsel should have been alerted to the alleged rapes simply because Morrow was known to wet the bed and to have some adjustment problems." Pet. App. 188. Morrow fails to show this was an unreasonable determination and invites this Court to conduct factbound error review of the state appellate court's opinion.

failed to reveal the alleged evidence of abuse. *Strickland*, 466 U.S. at 691 ("[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions").

B. The court of appeals correctly reviewed the state appellate court's decision regarding prejudice.

In determining prejudice, the Georgia Supreme Court rightfully examined the credibility of Morrow's new allegations of sexual abuse and, in compliance with *Strickland*, weighed *all of the evidence* and reasonably concluded Morrow failed to prove prejudice. Pet. App. 188-89, 194-95. The court of appeals determined the record supported the state appellate court's credibility determination and that the state court conducted a prejudice analysis in compliance with this Court's precedent. Pet. App. 24, 25. Morrow disagrees and argues that the court of appeals has routinely held that sexual abuse "is not mitigating," which resulted here in an improper application of this Court's precedent in examining the state appellate court's prejudice decision. Pet. at 35. The court of appeals has never held sexual abuse "is not mitigating," and Morrow's request for review is for mere factbound error correction of the prejudice determination made by the Georgia Supreme Court and deemed reasonable by the court of appeals. The request should be denied.

The *Strickland* Court instructed that the question of prejudice "is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Thus, prejudice is a balancing test with

aggravating evidence on one side and mitigating evidence on the other. *See*, *e.g.*, *Wong v. Belmontes*, 558 U.S. 15, 26, 130 S. Ct. 383, 390 (2009) (per curiam) ("the Court of Appeals repeatedly referred to the aggravating evidence the State presented as 'scant.' [] That characterization misses *Strickland*'s point that the reviewing court must consider all the evidence--the good and the bad--when evaluating prejudice.") (citation omitted). One side cannot be ignored in favor of the other, which is exactly what Morrow is advocating. Specifically, he argues that alleged mitigating evidence of sexual abuse automatically tips the scale in his favor—regardless of credibility, regardless of the aggravating evidence on the other side of the scale.

Morrow's first argument is a request for this Court to conduct a factbound error review of the credibility determination that was implicit in the Georgia Supreme Court's prejudice determination. Under Morrow's interpretation of this Court's precedent, an allegation of sexual abuse by a petitioner for the first time in a post-conviction proceeding must be considered by a state court to be of the highest mitigating value, regardless of credibility concerns. *See* Pet. at 30-40. This Court's precedents do not support that assertion, and that is not necessarily how a jury would view the evidence.[17] *See Strickland*, 466 U.S. at 696 ("in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules").

[17] It would not have been unreasonable for a jury to be skeptical of newly alleged allegations of sexual abuse only supported by the statements of the person the jury had recently found guilty of murder and cruelty to children.

To be clear, the Georgia Supreme Court did not find the evidence lacked all credibility or mitigating value. Instead, the state appellate court implicitly rejected the lower court's credibility determination and found there were concerns with the reliability of Morrow's evidence and this would have caused the jury not to have given it "great weight." Pet. App. 189. Contrary to Morrow's argument, this is not a case like *Wiggins* where the petitioner had a well-documented history in public records of a severely deprived childhood. *Wiggins v. Smith*, 539 U.S. 510, 525, 123 S. Ct. 2527, 2537 (2003). Rather, this is a case in which a petitioner, after receiving a death sentence, alleges evidence of sexual abuse for the first time in a state post-conviction proceeding, after trial counsel has conducted a reasonable background investigation, with no concrete historical evidence in corroboration. Morrow failed to prove in federal court that the state appellate court committed "'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement'" when it determined that counsel's performance did not cause Morrow prejudice. *White v. Woodall*, 572 U.S. 415, 420,134 S. Ct. 1697, 1699 (2014)).

Morrow's attack on the court of appeals is equally unfounded. Although the court of appeals has determined prejudice was not shown when there was evidence of sexual abuse, this was done through the lens of § 2254 and the prejudice weighing process. The court of appeals has not held, as Morrow claims, that this type of evidence is never mitigating. The court has determined several times over the years that evidence of sexual abuse, and physical and emotional abuse, was mitigating and granted federal habeas relief in some cases as a result. *See*, *e.g.*, *Daniel v. Commissioner*, 822 F.3d 1248, 1275 (11th Cir. 2016) (determined prejudice was shown where there

was evidence of childhood sexual abuse and granted federal habeas relief); *Hardwick v. Fla. Dep't of Corr.*, 803 F.3d 541, 558 (11th Cir. 2015) (determining that Hardwick's history of "neglect, deprivation, abandonment, violence, and physical and sexual abuse" established prejudice and entitled him to relief); *see also Williams v. Allen*, 542 F.3d 1326, 1342-43 (11th Cir. 2008) (determining, in part, that the state court improperly "discount[ed] the significance of the abuse" suffered by Williams and granted relief).

The evidence of abuse Morrow alleged himself or through the affidavits of other witnesses, does not present a case of nearly indistinguishable facts in order for the state appellate court's decision to be contrary to this Court's decisions in cases such as *Wiggins*. The evidence in aggravation showed he had previously abused and raped one of his victims. And, with no other provocation than rejection and an alleged attack on his masculinity, he shot three unarmed women in front of two small children—killing two women and leaving one woman permanently injured. Morrow has failed to show that when the record is viewed as a whole that no "fairminded jurist" would have weighed the mitigating and the aggravating evidence and held Morrow failed to prove a reasonable probability of a different outcome. *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 786 (2011).

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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No. 18-6409

In the
Supreme Court of the United States

Scotty Garnell Morrow,
Petitioner,
v.

GDCP Warden,
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. Whether the court of appeals' decision reviewing the Georgia Supreme Court's reasoned decision, which contained explicit and implicit fact-findings, and then relying upon portions of the record that support the state court's reasoning, without making independent fact-findings, conflicts with *Wilson v. Sellers*, ___, U.S. ___, 138 S. Ct. 1188 (2018).

2. Whether the Georgia Supreme Court unreasonably applied *Strickland v. Washington* when it determined that trial counsel were not deficient for failing to uncover evidence of alleged sexual abuse petitioner never mentioned during a thorough background investigation, and that failing to uncover that evidence did not prejudice petitioner given the balance of aggravating and mitigating evidence.

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OPINIONS BELOW

The decision of the Georgia Supreme Court in the criminal direct appeal is published at 272 Ga. 691, 532 S.E.2d 78 (2000).

The decision of the state habeas court granting relief as to sentence is not published, but is included in Petitioner's Appendix F. The decision of the Georgia Supreme Court reversing the grant of relief and reinstating Petitioner's death sentence is published at 289 Ga. 864, 717 S.E.2d 168 (2011) and is included in Petitioner's Appendix E.

The decision of the district court denying federal habeas relief is unpublished, but is included in Petitioner's Appendix D. The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of relief is published at 886 F.3d 1138 (11th Cir. 2018) and is included in Petitioner's Appendix A.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment in this case on March 27, 2018. On August 9, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 19, 2018, and the petition was timely filed. On October 30, 2018, Justice Thomas extended the time within which to file the brief in opposition to and including December 24, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

In all criminal prosecutions, the accused shall enjoy the right to a … have the Assistance of Counsel for his defence.

The Fourteenth Amendment, Section I, 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 … .

28 U.S.C. § 2254(d) provides:

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 Scotty Morrow seeks factbound error correction of his *Strickland* claim, which is not worthy of this Court's certiorari review.

Morrow tries, but fails, to manufacture a conflict with this Court's decision in *Wilson v. Sellers*, ___, U.S. ___, 138 S. Ct. 1188 (2018). He argues *Wilson* held that, instead of examining the state court's decision in the context of the entire record, a reviewing court may only uphold a state court's decision under § 2254(d) review based on the specific reasons provided in the state court decision. And he claims that the court of appeals failed to limit its review in that way. But *Wilson* did not hold that—it addressed only how to review an *unreasoned* state court decision, not a reasoned opinion—and even

if *Wilson* had included such a holding, the court of appeals in fact upheld the state court's decision based on that court's reasoning. The court of appeals examined the state appellate court's reasons and determined they were supported by the record and this Court's precedents. The court of appeals made no independent fact-findings and did not otherwise step outside the bounds of a proper § 2254(d) review.

Morrow's petition thus reduces to a request for this Court to conduct error correction of a factbound *Strickland* claim, and one that lacks merit. Trial counsel performed a reasonable background investigation, which included interviewing Morrow and his closest family members, and counsel obtained two mental health evaluations. Years later, after Morrow received a death sentence, Morrow and his family came forward with allegations of sexual and physical abuse that trial counsel, despite many interviews with petitioner and family, had not uncovered. No historical records showed or even suggested this abuse occurred or showed any history of mental health problems associated with the alleged abuse. Instead Morrow presented a ream of new affidavits from extended family members and acquaintances. Although some of the affiants suggested Morrow was sexually abused none provided first-hand accounts or testimony that Morrow had informed them of the alleged abuse. Regarding alleged physical abuse by Morrow's mother's boyfriend, the only first-hand account came from Morrow's sister whom trial counsel had spent considerable time interviewing. Contrary to Morrow's arguments, the Georgia Supreme Court, after reviewing the entire record, explicitly and implicitly rejected many of the fact findings of the lower state court, made its own fact-findings and reasonably concluded trial counsel did

not render deficient performance, and that Morrow was not prejudiced by counsel's performance.

Because Morrow has failed to show that the court of appeals' decision is not in accord with this Court's precedent, and that he is not requesting anything other than factbound error correction, his questions presented do not warrant this Court's review.

STATEMENT

A. Facts of the Crimes

In the month leading up to the crimes, numerous witnesses testified at trial that Morrow physically and sexually abused and threatened Barbara Ann Young's life. D14-27:6; D15-1:82-83; D15-2:78; D15-3:58.[1] On the day of the crimes, Young was at home with her two small children and her friends Tonya Woods and LaToya Horne. Pet. App. 147. After a phone conversation in which Young told Morrow to leave her alone, Morrow kicked-in Young's door and entered her home with a loaded gun. D14-27:12; D14-28:78-79.

Upon entering the kitchen, Morrow exchanged words with Woods and yelled "shut your mouth bitch." D14-27:120-123, 125. Morrow then drew his gun from his waistband and shot Woods in her lower "left abdomen, severing her spine and paralyzing her." Pet. App. 175. He then shot Horne in the left arm. D14-27:123; D15-3:147; Pet. App. 175. Morrow "possibly fired at Ms. Young as she fled from the kitchen" and ran down the hallway into her bedroom. Pet. App. 175; D14-27:124. Morrow caught Young after he "kicked open her bedroom door" where they "struggled." Pet. App. 175. A shot was

[1] "D" refers to the Electronic Court Filing (ECF) number, followed by the appropriate ECF page number.

fired that "likely" injured Young's back, and Morrow "likely "smashed [Young's] head into the bedroom's doorframe, leaving behind, skin, hair, and blood." *Id.* Young broke free from Morrow, but as she ran away, Morrow grabbed her hair from behind and shot Young in the back of the head while Young's five-year-old and eight-month-old sons watched from the closet where they were hiding. D14-28:57, 63, 70. Young's oldest son, Christopher Young, testified at trial that he watched Morrow reload his gun and fatally shoot his mother. *Id.* at 70.

Morrow then returned to the kitchen and shot Woods on the left side of her chin "and into her head at close range," causing her death. Pet. App. 175. He then shot Horne, who was lying on the floor, in her right arm and her face. *Id.* at 126-127; D14-28:63; D15-3:140. Morrow exited the home and cut the phone line. D14-27:132. Horne, "badly injured," "managed to walk from house to house down the street seeking someone to call for help before she eventually collapsed; she survived, but with permanent injuries, including deafness in one ear." Pet. App. 176.

B. Proceedings Below

1. Trial Proceedings

A Hall County grand jury indicted Morrow on March 6, 1995, for two counts of malice murder, two counts of felony murder, six counts of aggravated assault, aggravated battery, cruelty to a child, burglary, and possession of a firearm during the commission of felonies. D10-1:26-30. Morrow was represented by two experienced criminal attorneys, William Brownell and Harold Walker. Brownell, who served as lead counsel, had tried over one hundred felony cases and had been involved in as many as

eight to twelve death penalty cases as a prosecutor, two to six of which went through the sentencing phase of trial. D16-22:110-112; D16-28:15; D16-29:6-9. Co-counsel Walker had practiced law since 1979 and testified that, since 1988, approximately half of his practice was devoted to criminal defense. D16-24:52-53.

a. Background Investigation

As Morrow admitted, trial counsel met with Morrow "almost right away," and began to gather a "good factual background" about Morrow. D16-22:110-12, 114; D16-27:5; Pet. at 7. Trial counsel testified that he asked Morrow to provide guidance on where counsel could find the "good" and "bad things" in his life to help with his case. D16-24:85-86. During initial meetings, Morrow discussed growing up, schooling, his father being absent during his youth, his blackouts, his Job Corps time, his prior marriage, his desire to have a normal family, and his relationship with Young. D16-22:115-16; D16-24:55-77. To help develop evidence of Morrow's background, counsel also employed the services of an investigator, Gary Mugridge, and two mental health experts, Drs. Dave Davis and William Buchannan. D16-24:9-10; D16-29:100-05; D16-22:42.

Within a week of Morrow's arrest, trial counsel began regular conversations with Morrow's mother, Betty Bowles, about the case. D16-24:73; D16-30:57-61. Brownell's meeting notes with Bowles show that he had substantive conversations about Morrow's background. For example, Bowles reported that Morrow: was born premature; went to a psychiatrist when he was three or four-years-old; was beaten up at school when he was seven or eight-years-old; had blackouts and headaches; was on the wrestling team in

school but dropped out of school in ninth grade; and participated in Job Corps in Kentucky for three months when he was seventeen-years-old. D16-30:57-62; D16-31:22. Additionally, Bowles stated she worked long hours in the Northeast and had three jobs to support her children, however, her children had their basic needs met. D16-30:57-62; D16-31:22. Also, counsel learned Morrow's father abused Bowles, and that Bowles had been abused by her boyfriend, George May, in New Jersey. D16-22:135-36; D16-27:9.

Trial counsel also regularly discussed the case with Samantha Morrow, Morrow's sister, the source of much of Morrow's new allegations of abuse, and these discussions included information for the penalty phase of trial. D16-24:72; D16-27:5.

Investigator Mugridge also "frequently" spoke with Samantha and Bowles. D16-24:36-37, 86-87. Mugridge also interviewed, *e.g.*, extended family members, former girlfriends, friends of the family, co-workers, a clergy member from Morrow's church, and several acquaintances of Young. D17-9: 11-16, 19-21, 25-29, 31-36, 43, 45-46, 54-56, 59, 67.

Mugridge testified that he was well-aware that Morrow lived in New York and New Jersey and that Bowles and Samantha were Morrow's closest contacts for that time. D16-24:36-37. Mugridge located Lorna Broom, a former girlfriend of Morrow's from New Jersey, but Samantha told Mugridge not to contact her.[2] D16-24:45-46. Additionally, Mugridge tried to locate Morrow's alleged personal mentor, but the family only provided his first

[2] Notes in Mugridge's file indicated Morrow had an "altercation" with Broom and she was "cut up." D17-1:46.

name, could not provide a phone number or address for this individual, and Mugridge was therefore unable to locate him.[3] D16-24:18.

Mugridge also sought Morrow's school records, but he testified that he recalled that there was a problem in locating the records.[4] D16-24:42-43. Mugridge also tried to locate records from psychological testing that Bowles stated Morrow received as a young child, but the family could not provide the name of the psychologist who had performed the testing or where it was conducted.[5] D16-24:44-43; 49-50.

Trial counsel testified that they investigated the possibility that Morrow was physically abused as a child by interviewing Morrow, Morrow's mother, and Morrow's sister, whom trial counsel learned was the most forthcoming about how the children were disciplined. D16-29:62. The information supplied to trial counsel from Morrow, his mother and sister, indicated that, at most, Morrow was subject to "intense spankings." D16-29:67-68.

Regarding sexual abuse, trial counsel, Mugridge, and Buchannan all testified that neither Morrow, his mother nor sister provided information

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[3] Morrow alleges Mugridge "abandoned the effort" to find the mentor because the family simply could not provide a phone number, as shown above, that is an inaccurate portrayal of the record. Pet. at 11.

[4] Morrow alleges that Mugridge testified that obtaining the school records was "'not something that [counsel] had requested or wanted" of him. Pet. at 11 (brackets in original) (quoting D16-24:43). However, the portion of Mugridge's testimony that Morrow quotes is referring to the assumption Mugridge had that counsel did not request or want him to travel to the Northeast, not that counsel did not request or want him to obtain the school records—which Mugridge testified he had attempted to do. D16-24:43.

[5] Regarding background records, trial counsel recalled having trouble tracking down records but did not definitely testify that they did not obtain the records. D16-27:28, 41; D16-29:25, 96.

about sexual abuse. D16-22:97-98; D16-24:37, 108-09. Trial counsel testified that evidence of sexual abuse was "crucial" and was "the type of question that [he was] sure [he] would have asked of [Morrow's] family or of [Morrow] and probably go the answer, no. And that's why we didn't pursue it." D16-24:108-09.

b. Mental Health Investigation

(1) Dr. Dave Davis

Trial counsel hired Dr. Dave Davis, a psychiatrist, on March 16, 1995, within 90 days of Morrow's arrest. D16-29: 100-105. Davis requested and was provided the following information from trial counsel: Morrow's indictment; investigative reports, including statements from every witness; crime scene photos; a video tape of the crime scene; Morrow's statement to police; and an overview of the case. D16-29:94. Davis stated he reviewed the "extensive material provided" and interviewed Morrow. *Id.* at 100-101. During the interview Morrow provided information regarding his immediate relatives; family history of alcohol abuse; father's domestic violence; parents' divorce and subsequent move north with his mother and sister; drug use and alcoholism; history of violence (to include fights as an adolescent, an aggravated assault on a transvestite, and battering his ex-wife and a former girlfriend); educational history; criminal record; medical history; sexual history; and a description of the murders of Young and Woods. *Id.* at 100-105.

Morrow reported that his troubles stemmed from the fact that he was "abandoned by his father, grew up in a bad environment, had no male figures when he was growing up, and no paternal love." D16-29:103. He also stated

that he had always had a bad temper, and he believed that he had mental problems. *Id.* While Morrow openly discussed his sexual history and other personal information with Davis (*see, e.g.,* D16-29:103-04), there was no evidence in the report that Morrow informed Davis that he was sexually or physically abused while he lived in the Northeast. Also, as the Georgia Supreme Court found, Davis stated in his pre-trial psychiatric report that Morrow's "sexual history" was "unremarkable." Pet. App. 181.

Davis stated in his final report that Morrow was competent to stand trial and that he had a personality disorder, not otherwise specified, with anti-social, borderline, and avoidant features. D16-29:104-05. Davis concluded that Morrow's deprived early childhood resulted in his pattern of poor coping. *Id.* Additionally, Davis reported that Morrow's childhood lacked parental supervision, and that Morrow had a long history of being very angry, getting into fights, abusing alcohol and drugs, and had difficulty with long-term occupation. *Id.* Trial counsel made a strategic decision not to use Davis' report at trial because they believed that "a lot" of the information in the report was "harmful" and would be viewed "negatively" by the jury. D16-29:27-28.

(2) Dr. William Buchanan

Trial counsel later hired Dr. William Buchanan in March of 1999 to conduct another mental health evaluation of Morrow to help find "more mitigation information." D16-22:42; D16-24:70; D16-27:27-28; D16-29:29. Trial counsel requested Buchanan's assistance in getting Morrow to open up so that Morrow would appear more sympathetic in front of the jury. D16-29:29. Trial counsel provided Buchanan with information pertaining to

Morrow's background, a copy of their opening statement, and additional information over the phone as the investigation progressed. D16-22:48-51. Trial counsel testified that, "Dr. Buchanan was experienced as a forensic psychologist" and would identify what was relevant. D16-27:10. Although Buchanan never asked for Morrow's records, to meet with Morrow's family, or for any additional information, trial counsel testified that they would have provided Buchanan with any material he requested, as trial counsel had done on previous cases with Buchanan. D16-24:104; D16-27:28; D16-29:32-33. Buchanan admitted that he could not recall trial counsel not providing him with any materials he requested. D16-22:95.

After reviewing the material provided by trial counsel, Buchanan met with Morrow on four occasions on March 29, 1999, May 17, 1999, June 11, 1999, and June 14, 1999, for a total of six to eight hours. D16-22:44-46. In addition, psychological tests were administered to Morrow by Buchanan's psychometrist.[6] *Id.* at 5.

During his interviews, Morrow provided information about his parent's divorce, his own divorce, his birth in Georgia and subsequent move to New Jersey/New York, his school history, his work history, his relationship with Young and her children, and the unfiled rape/kidnapping complaint by Young against him. D17-35:27-32. Regarding Morrow's childhood in New Jersey, Morrow described an incident when he was twelve or thirteen when he picked up a baseball bat in an attempt to defend his mother from her boyfriend. *Id.*

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[6] Buchanan had regular meetings with trial counsel about his evaluations and findings but did not write a formal report because trial counsel "anticipated calling him as a witness." D16-22:136; D16-27:29.

at 50. He also stated that his youngest son was seeing a psychiatrist as he had been molested in Florida when he was eight-years-old. *Id.* at 34. Morrow was candid about sensitive personal information, and he never told Buchanan that he was allegedly sexually abused. D16-22:98.

c. Presentation of Evidence

During the guilt-innocence phase, trial counsel presented three witnesses—a law-enforcement investigator, Morrow's sister, and Morrow. The investigator explained that "Young had not referred to the incident where Morrow kidnapped her and had sex with her as a 'rape' and that Morrow had beaten her with his fist rather than with a gun during that incident." Pet. App. 182. "Morrow's sister testified about Morrow's background in an effort to show Morrow's good character, his past good treatment of Ms. Young, and his distress at the time of the murders." *Id.* Morrow was the final witness during the guilt phase and "described his history with Ms. Young," explained "about his alleged past abuse of her that were more favorable to himself than the State's evidence," and admitted "he had reacted impulsively to Ms. Woods' insulting comment to him about Ms. Young's no longer wanting to be in a relationship with him." *Id.*

As the Georgia Supreme Court found, "trial counsel attempted to carry forward their theme about Morrow's good character" to the sentencing phase. *Id.* at 183. The reason for this strategy was based upon trial counsel's experience trying cases in the local community that juries often found mitigation testimony relating "further back in time" to the crimes to be less "relevant." D16-22:159. Trial counsel, after narrowing down their witness list to avoid cumulative testimony, presented fourteen witnesses in the

penalty phase, thirteen lay witnesses, and one mental health expert. D16-29:39-40. Trial counsel were able to elicit testimony from each witness that supported their mitigation theme that the crimes were "absolutely and totally out of character" for Morrow and that Morrow had qualities admired by his friends, family and co-workers. *Id.* at 48.

Trial counsel offered testimony from three of Morrow's family members: his sister, Samantha; his half-sister, Deborah Morrow; and his mother, Betty Bowles. Samantha testified that when Morrow was young their father was very abusive to their mother. D15-9:72-73. Bowles recalled that Morrow once witnessed his father stomp on her stomach, causing her to miscarry. D15-11:18. Samantha testified that when Morrow was three or four-years-old he tried to use a hammer to stop their father from abusing their mother. D15-9:72-73. Bowles testified that she thought Morrow was "very devastated" by the abuse he witnessed. D15-11:18.

Samantha testified that after Morrow's parents divorced, she and Morrow moved with their mother to Brooklyn, New York, where life was "pretty good" even though their mother worked three different jobs. D15-9:74. Bowles testified that she worked to give her kids a "better life" so that they did not have to "want for anything." D15-11:21. However, Bowles testified that while living in Brooklyn she took Morrow to several psychiatrists to "get him help" because he "was a little slow in some things in school." D15-11:22. The mental health providers told her to "continue to try to encourage him." *Id.*

When Morrow was in the fourth grade, Morrow and his family moved to New Jersey. D15-9:75. Samantha described Morrow during this time as a good student who stayed out of trouble, was in the choir, and enjoyed

athletics. *Id.* at 76. Samantha recalled that "people would pick at [Morrow] in school and stuff," and that Samantha "would go on and fight the people that bothered him." *Id.*

In the ninth or tenth grade Morrow dropped out of school and joined the Job Corps. D15-9:76-77. Samantha testified that Morrow was very homesick while he was in the Job Corps and left the Corps when he turned 18 to return home. *Id.* at 77.

Shortly after returning to New Jersey, Morrow got married, moved to Georgia, welcomed his first son, and spent time with his father. D15-9:78-79. One year later, Morrow returned to New Jersey where he lived for several years and helped his mother take care of special needs foster children who lived in her home. *Id.* at 79-80; D15-11:26. Bowles testified that Morrow took classes to learn how to help care for these children and that Morrow often helped her get the children ready for school. D15-11:26.

Morrow and his entire family eventually returned to Georgia. D15-9:79. Bowles testified that after she returned to Georgia she took in ten different foster children, and Morrow helped her care for them in her home. D15-11:28-29.

Samantha, Deborah, and Bowles each provided testimony suggesting the crimes were out of character for Morrow. D15-9:68; D15-11:29, 33. Samantha also told the jury that Morrow felt remorse about the murders and had grown closer to God since the crimes had occurred. *Id.* at 88.

Trial counsel also presented Morrow's ex-wife, and the mother of his two sons, Claudette Jenkins. Claudette testified Morrow was not violent, although she did admit he slapped her once, and she described him as a loving father. D15-9:48-49. She explained that Morrow was a good father

and that her sons would not be able to handle Morrow receiving a death sentence. *Id.* at 56. Claudette's current husband, Kim Jenkins, also told the jury that Morrow was a "perfect father," and that Morrow's sons would need "severe counseling" if Morrow was sentenced to death. *Id.* at 62-64.

In addition, Morrow's ex-girlfriend, Fonda Jones, testified that she and Morrow had a good relationship and Morrow treated her children well. D15-11:11-12. Jones testified that Morrow never lost his temper or displayed violence. *Id.* at 15.

A family friend, members of the clergy, and a deputy sheriff from the jail, testified about Morrow's dedication to his faith, his reliability, and his good character. D15-8:128-30; D15-9:3-6, 19-23, 26-39. Additionally, three of Morrow's former coworkers testified that they did not witness either violence or anger from Morrow. D15-8:118, 122; D15-9:10.

Finally, Buchannan testified to articulate how Morrow felt at the time of the murders and to explain how Morrow's past affected him at the time of the crimes.[7] D16-22:138-40. Buchanan explained that Morrow was administered a battery of psychological tests which revealed he was of "average, low average intelligence"; suffered from paranoia, suspiciousness, mistrust, social alienation, persecutory ideas, and depression; had poor ability to delay gratification and to control impulses; was introverted, which made it difficult for him to display his emotions; and had difficulty coping and "dealing with

[7] Trial counsel testified that Morrow did not appear as sympathetic or remorseful as they had hoped when he testified during the guilt phase of trial, and thus, they also presented Buchanan to better explain Morrow's demeanor to the jury. D16-22:138-41.

the stresses of everyday life or stresses of relationships." *Id.* at 126-28, 133, 137.

With regard to Morrow's life history, Buchanan told the jury that Morrow's parents divorced when he was about three or four-years-old because of conflict and physical abuse from Morrow's father toward his mother. *Id.* at 138. Following the divorce, Morrow and his older sister lived with their mother in Georgia, New York, and New Jersey. *Id.* Morrow told Buchanan that when he was about twelve-years-old, his mother was involved in a physically abusive relationship with her boyfriend. *Id.* Buchanan testified that Morrow recalled picking-up a baseball bat to defend his mother and that her boyfriend laughed at Morrow. *Id.* Morrow also felt very helpless and unable to protect his mother from the abuse. *Id.*

Concerning Morrow's schooling in New York and New Jersey, Buchanan testified that Morrow was in special education classes for learning disabilities from the Fourth Grade until the Ninth Grade—which Buchanan confirmed with the tests administered to Morrow. *Id.* at 139-40. In the Ninth Grade Morrow dropped out of school because he felt that his learning disabilities prevented him from being able to do the work. *Id.* at 139.

Buchanan testified that Morrow was married at the age of nineteen, which ended in a separation two years later while his wife was pregnant with their second child. *Id.* at 140. Morrow became depressed and started drinking. *Id.* at 141. Buchanan testified that after two or three months, Morrow stopped drinking and tried to put his life back together. *Id.*

After explaining Morrow's test results and background to the jury, Buchanan testified that because of Morrow's history and personality type he was easily provoked by "negative" comments. D15-10:6. Buchanan stated

Morrow "will hear something negative and he's likely to exaggerate that negativity because of mistrust and paranoia about it." *Id.* Buchanan explained that the comments "You're no good, you're just being used," which Morrow testified Woods told him on the morning of the murders, were enough to trigger feelings of very high paranoia in Morrow. *Id.*

Furthermore, Buchanan related Morrow's detailed description of the murders to the jury. D15-9:144-46; D15-10:1. Buchanan explained that when a person goes through any traumatic event, they will often dissociate as a way of protecting themselves, and that this dissociation will cause them to be unable to display emotion. D15-10:4-5. Buchanan told the jury that on the videotaped confession obtained directly after the crime, Morrow appeared to be in a "state of shock" and was actually dissociating. *Id.* at 4. Buchanan also testified that Morrow appeared to be in a dissociated state during his guilt phase testimony, which explained to the jury why Morrow lacked emotion when he testified. *Id.* at 24. Even though he appeared unremorseful on the stand, Buchanan stated that Morrow showed "sadness, remorse," and "guilt" over the crimes during his testing and interview by Buchanan. *Id.* at 24-25.

d. Jury Determination

Morrow was convicted of "malice murder, felony murder, aggravated assault, aggravated battery, cruelty to a child, burglary, and possession of a firearm during the commission of a felony." *Morrow v. State*, 272 Ga. 691, 691, 532 S.E.2d 78, 82 (2000). The jury found ten statutory aggravating circumstances existed and recommended a sentence of death for each of Morrow's malice murder convictions, and the trial court then sentenced

Morrow to death. D11-6:1, 56-57. Morrow was also sentenced to consecutive sentences of twenty years for aggravated battery, twenty years for cruelty to a child, twenty years for burglary and five years for possession of a firearm during the commission of a felony. *Id.* at 66-69. The felony murder convictions were vacated by operation of law, and the aggravated assault convictions merged with other convictions thereby leaving only five statutory aggravating circumstances. *Morrow*, 272 Ga. at 691-92.

2. Direct Appeal Proceedings

Morrow appealed his convictions and sentences to the Georgia Supreme Court. The Georgia Supreme Court affirmed Morrow's convictions and sentences on June 12, 2000. *Morrow v. State*, 272 Ga. 691. Morrow's motion for reconsideration was denied on July 28, 2000. D16-8. Morrow filed a petition for writ of certiorari in the United States Supreme Court, which was denied on March 26, 2001. *Morrow v. Georgia*, 532 U.S. 944, 121 S. Ct. 1408 (2001).

3. State Habeas Corpus Proceedings

Morrow filed a state habeas corpus petition in the Superior Court of Butts County, Georgia, on October 30, 2001, and an amendment thereto on February 1, 2005. D16-11; D16-20.

a. Ineffective-Assistance Claim

An evidentiary hearing was conducted on April 25-26, 2005. D16-22 thru D19-19. During the hearing, extensive evidence was presented regarding trial counsel's sentencing phase investigation and presentation. Specifically, Morrow argued counsel were ineffective for failing to uncover and present evidence that, while living in the Northeast he was allegedly

physically abused and mistreated by his mother's boyfriend; bullied and degraded by his schoolmates; and sexually abused by an older youth named Earl Green.

In support, Morrow presented affidavits from family and friends and obtained a new mental-health evaluation. The only direct evidence presented during the state habeas proceeding that Morrow was sexually abused came from Morrow's self-report to his new mental health expert, Dr. James Hooper. D17-14:3. Contrary to Morrow's assertion, his new evidence did not "amply corroborate" his allegation of sexual abuse. Pet. 13-14. The only affiants that mentioned sexual abuse were an individual who lived in the home where Morrow stayed as a child, and the cousin of that individual (*see* D17-29:68-72), neither of whom stated they had any knowledge that Morrow was abused. Instead, one of the affiants stated Green tried to sexually assault him, the affiant. D17-29:71-72. And, contrary to Morrow's assertion, Green's criminal records do not contain evidence that he was arrested or convicted of a sexual offense. D17-30:5-119.

Morrow's other evidence consisted of affiants stating he wet the bed as an adolescent and school records showing he had "behavioral changes." Pet. at 14. The record showed that Morrow had learning disabilities growing up. D15-9:76-77, 138-40; D15-11:22. The remaining affidavits submitted by Morrow from his family and friends did not contain any testimony that Morrow informed them he was sexually abused or that they witnessed Morrow being abused.

Regarding physical abuse, during the state habeas proceedings, as stated above, trial counsel testified that they was aware of allegations of physical abuse, but that when he asked Morrow, Samantha, and Bowles

about these allegations, they mitigated the allegations of physical abuse and did not admit to anything other than "spankings." D16-29:64-65, 67. Walker testified that Samantha was the most forthcoming about Morrow's childhood, but Walker never testified that Samantha indicated that Morrow was abused or mistreated. D16-24:105. Although several of Morrow's affiants claimed Morrow was abused by his Mother's boyfriend, George May (D17-14:9; D17-29:19-20, 61, 66, 75, 96), Samantha provided the only eyewitness account to May's alleged abuse (D17-29:20).[8] And, in contradiction to Morrow's habeas affiants' testimony, May's son, Gregory May, gave affidavit testimony that his father never mistreated or abused Morrow. D18-11:105-106. Gregory stated that his father punished Morrow only if Morrow was "being bad in school, being late, lying, being disrespectful, or disobeying," but testified that his father never beat or abused Morrow. *Id.* at 105.

Additionally, Morrow produced no historical records containing evidence that he was sexually or physically abused, or any history of mental health issues associated with the alleged abuse. *See* D17-14:39-43; D17-15:1-3; D17-24:10-17; D17-25:1-41; D17-26:1-13; D17-26:14-15; D17-27:1-37; D17-28:2-76.

b. State Habeas Court's Decision

Post-hearing briefs were submitted by both parties over the course of the next year. D19-27 thru D20-2. Three years after the final post-hearing brief was submitted, Morrow filed a proposed final order—presumably pursuant to a verbal request from the state habeas court, because there was no written or transcribed record of the request. D20-3. Over a year later, on

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[8] It was unclear from the affidavit of Morrow's cousin, Troy Holloway, whether he witnessed May physically abuse Morrow. D17-29:96.

December 1, 2010, Morrow filed a supplemental proposed order.[9] D20-4. Two months later, on February 4, 2011, the state habeas court entered an order granting relief as to Morrow's sentence; specifically the court found trial counsel were ineffective during the sentencing phase in their investigation and presentation of mitigating evidence. D20-5:46-50. With the exception of a few words, the portion of the final order determining the ineffective-assistance claim was identical to the order provided by counsel for Morrow. *Compare* D20-3:3-57; D20-5:27-80.

c. Georgia Supreme Court Decision

Respondent appealed the grant of relief and Morrow cross-appealed. Following briefing and oral argument, the Georgia Supreme Court *unanimously* reinstated Morrow's death sentence in a reasoned opinion. Pet. App. 173-74. Contrary to Morrow's assertion, the Georgia Supreme Court explicitly and implicitly rejected the lower state court's fact-findings and made findings of its own.

The state appellate court "conclude[d] that trial counsel generally performed adequately and that the absence of trial counsel's professional deficiencies, both those we find to have existed and those we assume to have existed, would not in reasonable probability have resulted in a different outcome in either phase of Morrow's trial." Pet. App. 178. The court found "it [was] simply not correct that trial counsel ignored information from the years during Morrow's childhood when he lived in New York and New

[9] Although not part of the record in the federal habeas proceeding, there was a letter from state habeas counsel to the state habeas judge, which was served upon counsel for Respondent, acknowledging that the judge had requested the supplemental proposed order.

Jersey." *Id.* at 180. The court detailed the investigation by trial counsel, the individuals counsel and their investigator interviewed, the mental health evaluations that were completed, and the evidence presented at trial. *Id.* at 179-85.

The court then examined the new evidence that Morrow alleged trial counsel failed to uncover. Regarding the allegations of sexual abuse, the court rejected Morrow's ineffective-assistance claim for three reasons: 1) Morrow did not inform his defense team, to include his mental health expert, that he had been sexually abused; 2) the evidence Morrow alleged should have alerted trial counsel of the abuse was insubstantial; and 3) Morrow's evidence of sexual abuse was too weak to prove prejudice. *Id.* at 188-89.

In support, the court "note[d] that Morrow never reported any such rapes pre-trial to his counsel or to the mental health experts *who questioned him about his background, including his sexual history*." *Id.* at 188 (emphasis added). Importantly, the Georgia Supreme Court "disagree[d]" with the state habeas court's finding "that trial counsel should have been alerted to the alleged rapes simply because Morrow was known to wet the bed and to have some adjustment problems as a child." *Id.* Regarding prejudice, because the *only direct evidence* of the alleged sexual abuse was provided in state habeas through the hearsay testimony of Morrow's new mental health expert, the Georgia Supreme Court determined it would not have carried enough "weight" to change the jury's mind about the sentence. *Id.* at 188-89.

The state court also examined Morrow's allegations of physical abuse. The court determined that Morrow's evidence that he was bullied as a child was "less than compelling as alleged proof of trial counsel's failings and

resulting prejudice" and noted that there was testimony "presented at trial about how Morrow had been bullied often as a child and had been punished by his mother for not standing up for himself and for misbehaving." *Id.* at 187. The Georgia Supreme Court found trial counsel investigated George May and were not informed he was physically abusive to Morrow, and that Morrow's evidence in support was "inconsistent." *Id.* at 189, n.4.

Morrow sought a writ of certiorari ion his ineffective-assistance claim. The petition was denied on April 23, 2012. *Morrow v. Humphrey*, 566 U.S. 964, 132 S. Ct. 1972 (2012).

4. Federal Habeas Corpus Proceedings

Morrow filed his federal petition for writ of habeas corpus on March 8, 2012. The district court denied relief on July 28, 2016. D52:68. Morrow was granted a certificate of appealability "with respect to [his] claim that his trial counsel was ineffective in investigating and presenting the case in mitigation." *Id.* The court of appeals reviewed the record and held the Georgia Supreme Court's opinion did not violate § 2254(d)'s standards.

REASONS FOR DENYING THE PETITION

I. The court of appeals' decision does not conflict with *Wilson*.

Morrow seeks certiorari review of his ineffective-assistance claim on the basis that the court of appeals' decision allegedly conflicts with *Wilson*.[10]

[10] Specifically, Morrow addresses his concerns regarding the court of appeals' decision of his claim that trial counsel were ineffective in their investigation and presentation of mitigating evidence during the sentencing phase regarding sexual and physical abuse that he allegedly suffered while living in the Northeast.

Morrow argues *Wilson* limits § 2254(d) review to *only* the reasons given by the state court and prevents a federal habeas court from relying on additional reasons that support the state court's denial of relief. This argument does not warrant certiorari review for two reasons. First, this Court did not so limit § 2254(d) review and, even if it did, the court of appeals did not provide reasons not found in the state appellate court's opinion. Second, the majority of Morrow's arguments are a request for error correction of his factbound *Strickland* claim. As the court of appeals correctly reviewed his ineffective-assistance claim, certiorari review is not warranted.

A. *Wilson* does not hold that § 2254(d) review is limited to the fact findings of the state court.

Morrow argues that the *Wilson* Court rejected the Eleventh Circuit's interpretation of *Harrington v. Richter* that the federal courts were "authorized" to supply any "findings or theories that *could have supported* the last state court's summary denial of habeas relief, even where there was a reasoned decision from a lower state court." Pet. at 20-21 (emphasis in original). In support, Morrow relies upon the Court's comment in *Wilson* that where the "last state court to decide a prisoner's federal claims explains its decision" "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson*, 138 S. Ct. at 1192. Taken together, Morrow argues *Wilson* holds a federal court is limited in § 2254(d) review to the specific reasons provided by a state court. Pet. at 21. Morrow's interpretation of *Wilson* is in error.

Morrow's expansive reading of *Wilson* creates a holding based upon a question not presented. This Court has repeatedly cautioned the federal courts of appeal from fashioning a holding from its precedent on a question

not presented to the Court. *See, e.g., Lopez v. Smith*, ___, U.S. ___, 135 S. Ct. 1, 4 (2014) (per curiam) (rejecting the Ninth Circuit's attempt to create a holding from the Court's precedent where "[n]one" of the Court's decision "address[ed]" the "specific question presented by this case"); *Nevada v. Jackson*, 569 U.S. 505, 512, 133 S. Ct. 1990, 1994 (2013) (per curiam) ("By framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.'") (quoting 28 U.S.C. § 2254(d)(1)). The question presented was whether a federal court should presume that a later summary state court ruling rested on the same grounds as a previous explained state court decision. *See Wilson*, 138 S. Ct. at 1192. The question presented was not whether a federal court was limited in § 2254(d) review to only the specific reasons provided by a state court in determining a federal claim. Likewise, Morrow is precluded from creating federal law from ambiguous dicta on an issue not contemplated by the *Wilson* Court.

Consequently, Morrow's cabined reading of *Wilson* does not withstand scrutiny and fails to provide an appropriate vehicle for certiorari review.

B. The court of appeals did not make fact findings.

Even if Morrow's interpretation of *Wilson* were accurate, the court of appeals did nothing to conflict with it. His overarching claim in support of his contrary position is that the court of appeals created and relied upon fact findings not contained in the Georgia Supreme Court's decision. In support of his erroneous assertion, Morrow makes two arguments. First, he states that the Georgia Supreme Court adopted the lower state habeas court's facts

"wholesale" and did not make any of its own because the court did not determine any of the lower's court's facts were clearly erroneous. Pet. at 22. Second, Morrow argues that the court of appeals erroneously determined that the Georgia Supreme Court made a specific fact-finding that Morrow denied being sexually abused. Each argument is either a misrepresentation of the court of appeals' decision, the Georgia Supreme Court's decision, or both. More to the point, Morrow's arguments, when stripped of their erroneous assertions, are an improper request for this Court to engage in factbound error correction.

1. The Georgia Supreme Court rejected fact findings of the lower court.

The Georgia Supreme Court, relying upon state law, noted it "adopt[ed]" the lower court's fact-findings unless they were "clearly erroneous." Pet. App. 176. The fact that the court did not go on to use the term "clearly erroneous" does not mean it did not reject any of the lower court's factual findings. Indeed, contrary to Morrow's argument, the Georgia Supreme Court explicitly disagreed with several fact-findings of the lower court. *See*, *e.g.*, *id.* at 188 ("*We disagree with the habeas court's suggestion* that trial counsel should have been alerted to the alleged rapes…") (emphasis added). Further, it is axiomatic that when an appellate court makes a determination that is not supported by a lower court's fact-finding, it has implicitly rejected the lower court's finding.

Morrow fails to cite to any precedent by this Court which requires an appellate court to specifically state each time it determines a factual finding to be clearly erroneous. Instead, the Georgia Supreme Court did what most appellate courts do; it pointed out the more erroneous fact-findings, and made

explicit and implicit factual determinations in its various legal determinations. And, contrary to Morrow's argument (Pet. at 26), the court of appeals has long held, in compliance with this Court's precedent, that implicit fact-findings of a state appellate court are entitled to § 2254(d) deference. *See Sumner v. Mata*, 449 U.S. 539, 545-46, 101 S. Ct. 764, 768 (1981); *Williams v. Johnson*, 845 F.2d 906, 909 (11th Cir. 1988); *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1217 (11th Cir. 2013).

2. The court of appeals did not make a fact-finding that Morrow denied being sexually abused.

Regarding trial counsel's investigation of sexual abuse, Morrow argues that the court of appeals "reasoned that the state court must have found that trial counsel expressly asked about childhood sexual abuse and that Morrow denied such a history." Pet. at 23. In support Morrow cites to a portion of the court of appeals' decision (Pet. App. 18-19), and a comment made by a member of the panel during oral argument (Pet. App. 72-73).

As an initial matter, a statement made by a judge during oral argument is not a determination or holding by the court that can amount to error, as Morrow suggests.

More importantly, the court of appeals did not make the determination Morrow contends it made. The court noted that the "Georgia Supreme Court found 'that Morrow never reported any such rapes pre-trial to his counsel or to the mental health experts who questioned him about his background, including his sexual history.'" Pet. App. 18 (quoting Pet. App. 188). The court then pointed out the testimony of trial counsel that counsel was aware that sexual abuse was "'crucial" and "that this was 'the type of question that

[he was] sure [he] would have asked of [Morrow's] family or of [Morrow].'"[11] *Id.* at 19 (brackets in original) (quoting D16-24:108-09). The court of appeals stated in the next sentence, "But Morrow and his family failed to mention the rape." Pet. App. 19. Finally, the court pointed out, as did the Georgia Supreme Court, that Morrow was evaluated by mental health experts prior to trial who "probed Morrow's family and sexual history but turned up no evidence of abuse." *Id.*

The court of appeals was not making fact findings. Instead, it was reiterating what the Georgia Supreme Court "found" and providing evidence from the record that supported the finding. Pet. App. 18. The state court found that Morrow did not inform counsel or his mental health experts about the alleged rapes despite being questioned about his background, to include his "sexual history." Pet. App. 188. The court of appeals then pointed out, in support of that finding, that counsel had testified that they would have asked about that issue and that the mental health experts also questioned Morrow about his "sexual history." Pet. App. 19. Contrary to Morrow's assertion, the court of appeals did not find that Morrow "denied" being sexually abused, it merely concluded, as did the state court, that "Morrow and his family failed to mention the rape." Pet. App. 19. In short, the court of appeals did not step out of the bounds of § 2254 review and Morrow's true request is for factbound error correction.

[11] Although not quoted by the court, the remainder of this portion of trial counsel's testimony was that they "probably got the answer, no" when they questioned Morrow and his family about this issue and therefore, did not "pursue" evidence of sexual abuse. *Id.* at 109.

3. Morrow's additional arguments are a transparent request for factbound error correction.

The remainder of Morrow's arguments seek factbound error correction and also misrepresent the record. Morrow argues, in further support of his disagreement with the court of appeals' decision that trial counsel did not perform deficiently, that "[i]t is undisputed that trial counsel *did not contact a single witness who knew Morrow in the Northeast* or requested any records." Pet. at 24 (emphasis added). As the Georgia Supreme Court reasonably found, "counsel met repeatedly with Morrow, his mother, and his sister, and the record makes clear that counsel discussed Morrow's childhood background with them extensively." Pet App. 179. Morrow's mother and sister knew Morrow when he lived in the Northeast as he resided with them. Thus, contrary to Morrow's statement, counsel contacted witnesses who knew him in the Northeast and notably, as correctly highlighted by the court of appeals, Morrow's mother and sister "provided the majority of the new evidence" during his state habeas proceeding.[12] *See* Pet. App. 20.

Morrow also refers to the court of appeals' statement that it "faile[d] to understand what else counsel could have done" to uncover evidence of sexual abuse as "risible" because trial counsel could have "*asked* Morrow" whether he was sexually abused. Pet. at 24 (emphasis in original); Pet. App. 19. But

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[12] Morrow's statement is also a red herring. The first person Morrow informed of the alleged sexual abuse was a mental health expert during his state habeas proceedings. D17-14:3. There is no evidence in the record that Morrow informed anyone, including those who knew him in the Northeast, that he was sexually abused. Nor did the individuals from whom Morrow obtained affidavits in state habeas testify that they either had first-hand knowledge of the alleged abuse or that Morrow informed them of the abuse. And none of the records submitted in state habeas provide direct evidence that Morrow was sexually abused.

the paragraph preceding the court of appeals' statement that Morrow criticizes recounts trial counsel's testimony that counsel would have questioned Morrow and his family about this topic.[13] Pet. App. 19. It is a fair inference from this testimony that counsel in fact asked about sexual abuse. But in any event, any question whether the record supported the court of appeals' statement is a factbound one not worthy of certiorari review.

Moreover, Morrow's argument is contrary to this Court's precedent. This Court has held that "[i]t should go without saying that *the absence of evidence* cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 571 U.S. 12, 22-23, 134 S. Ct. 10, 17 (2013) (emphasis added) (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984)). And "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. Morrow points to no direct evidence that trial counsel did not ask him about the alleged abuse and the record

[13] Morrow also disagrees with the court of appeals giving "significance" to the Georgia Supreme Court's "statement" that Morrow did not inform his mental health experts about his sexual abuse despite being questioned about his "sexual history." Pet. at 24, n.12. This is not a "statement." It is a finding of fact by the state appellate court. *See* Pet. App. 18 ("the Georgia Supreme Court *found* 'that Morrow never reported …'") (emphasis added). As a finding of fact, Morrow had to show that the determination was unreasonable by clear and convincing evidence. 28 U.S.C. § 2254(d)(2), (e)(1). As admitted by Morrow, the report of Dr. Davis contains information regarding Morrow's sexual history, and also details Morrow's background from birth until the crimes. D16-29:100-05. Therefore, there was support in the record for the state court's determination and Morrow's argument is a request for this Court to perform factbound error review of his ineffective-assistance claim.

shows Morrow did not inform counsel of this alleged abuse. D16-24:108-09.

C. In reviewing the Georgia Supreme Court's prejudice determination, the court of appeals properly applied § 2254.

Continuing his flawed reading of the court of appeals' opinion, Morrow argues that two fact-findings by the lower state court were not rejected by the Georgia Supreme Court on appeal, which should have resulted in a different prejudice determination. Again, Morrow is requesting factbound error correction of the state court's opinion by way of an erroneous assertion that the court of appeals improperly applied § 2254. And again, Morrow makes misrepresentations of the record and the court of appeals' decision.

Morrow argues that the lower state habeas court determined that "Morrow was 'the victim of a series of rapes'" and this was allegedly the "*only* state court determination on this point." Pet. at 26 (emphasis in original) (quoting Pet. App. 240). In support, Morrow claims that it could not be "assume[d]" by the court of appeals that the Georgia Supreme Court "silent[ly]" rejected this fact finding. *Id.* However, the Georgia Supreme Court explicitly stated that Morrow's strongest evidence in support of the "alleged rapes" could not be "assume[d]" correct and thereby implicitly rejected the lower court's finding. Pet. App. 188-89. The Georgia Supreme Court examined the record and pointed out that the "only direct evidence of the alleged rapes"[14] was Morrow's "statement to a psychologist" during the

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[14] Morrow also complains that the court of appeals "refers to Morrow's '*alleged* rapes' and '*alleged* rapist'" in contravention of appropriate deference to the lower court's finding. Pet brief at 26 (emphasis in original) (quoting Pet. App. 19, 25). Regarding the citation to "alleged rapes," the court of appeals was directly quoting the Georgia Supreme Court's opinion. Pet. App. 25. Otherwise, the court of appeals never referred to the rapes as "alleged."

state habeas proceedings. *Id.* at 188. The state appellate court then quoted prior state law holding that an expert was not "'permitted to serve merely as a conduit for hearsay'" therefore, the court would not "'assume the correctness of the facts alleged in the experts' affidavit[] but, instead, we consider the experts' testimony in light of the weaker [evidence] upon which that testimony, in part, relied.'" *Id.* at 188-89. (quoting *Whatley v. Terry*, 284 Ga. 555, 565, 668 S.E.2d 651, 659 (2008). Consequently, the state appellate court did reject the lower court's finding and substituted its own credibility determination, which was entitled to § 2254(d) deference. *See Sumner*, 449 U.S. at 545-46.

Morrow also argues that the court of appeals did not give § 2254 deference to the lower state court's finding that Morrow was beaten with a belt by his mother's boyfriend, George May. Pet. at 27. Although Morrow admits that the Georgia Supreme Court found the evidence of abuse was "inconsistent," he argues this was not a determination that the lower state court's finding was "clearly erroneous"—thus, the court of appeals was in error for stating he had to rebut the finding of "inconsistent" with clear and convincing evidence. *Id.* at 27-28. Again, Morrow is wrong because the state appellate court's finding of "inconsistent" is an implicit rejection of any

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See Pet. App. 3, 11, 12, 18, 19, 25. As for "alleged rapist" (Pet. App. 19), that was a proper characterization. The accused, Earl Green, was neither tried nor convicted of the crimes alleged by Morrow. Nor was there any evidence in the criminal records submitted by Morrow that Green was tried or convicted of any sexual crimes (*see* D17-30:5-119). *See United States v. Salerno*, 481 U.S. 739, 763, 107 S. Ct. 2095, 2110 (1987) ("Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is 'implicit in the concept of ordered liberty.'") (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 152 (1937)).

contrary fact-finding by the lower state court. Morrow has not shown the court of appeals improperly applied § 2254(d) in giving deference to the Georgia Supreme Court's finding that the evidence of physical abuse by Morrow's mother's boyfriend was "inconsistent."[15]

Additionally, Morrow implies the court of appeals should not have given § 2254(d) deference because the state court's decision was contrary to, or an unreasonable application of, this Court's precedent. In support, Morrow argues that "[e]ven assuming, *arguendo*, that there was some inconsistency, this Court has consistently rejected such an 'all-or-nothing' approach to mitigating evidence." Pet. at 27-28 (footnote omitted) (emphasis in original). But the state court only found the evidence was "inconsistent," it did not hold that it would have carried *no* weight with the jury. Morrow has not shown the court of appeals improperly applied § 2254(d)(1).

In sum, Morrow has failed to show the court of appeals did not properly apply § 2254(d) to the state appellate court's decision. Instead, Morrow requests that this Court grant certiorari review to evaluate the factual

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[15] Morrow argues there was "no inconsistency" and there was "ample evidence" to support the lower court's findings. Pet. at 27, n.16. There was inconsistent evidence. For example, Morrow informed Buchanan that May beat his mother and he stood up to May with a baseball bat, but inexplicably did not inform Buchanan that May ever abused him. D16-22:97-98; D17-35:50. Additionally, Samantha testified at trial that after Morrow's parents divorced, she and Morrow moved with their mother the Northeast where life was "pretty good." D15-9:74. Moreover, trial counsel testified they asked Morrow, Samantha, and Bowles about allegations of physical abuse, but they did not admit to anything other than "spankings." D16-29:64-65, 67. And, contrary to Morrow's contentions, May's son's affidavit was given in "rebuttal" by Respondent and he did testify that his father never mistreated or abused Morrow. D18-11:105-106. As for "ample evidence," the only eye-witness to this abuse was Morrow's sister, whose state habeas testimony was contradicted by her trial testimony. *See* D15-9:74.

determinations of the state appellate court—to which the court of appeals gave proper deference. Such factbound questions do not warrant further review.

II. The court of appeals properly applied this Court's precedent in conducting its § 2254 review of the Georgia Supreme Court's decision regarding Morrow's new evidence of sexual abuse.

A. The court of appeals correctly reviewed the state appellate court's decision regarding trial counsel's investigation of sexual abuse.

Turning *Strickland*'s presumption of effective assistance on its head, Morrow argues that both the court of appeals and the Georgia Supreme Court should have "attributed" to trial counsel "alone" the failure to uncover his alleged sexual abuse. Pet. at 36. Morrow reasons this is true because trial counsel did not hire a "mitigation specialist or social worker whose professional training would offer a greater ability to elicit such sensitive information." *Id.* at 37. The court of appeals properly rejected Morrow's argument, pointing out the investigation completed by counsel and Mugridge and that Morrow "underwent five psychological interviews." Pet. App. 22-23. In any event, Morrow's argument is yet another request for this Court to grant review to conduct error correction on a factbound *Strickland* issue.

Morrow alleges "counsel concede[d] that they [were] ill-equipped to conduct [] a sensitive investigation *and* [took] no steps to remedy that inadequacy." Pet. at 40. Again, Morrow misrepresents the record. Although trial counsel informed the trial court at the beginning of their representation that they needed a social worker to assist with the background investigation, the record shows they later strategically decided a social worker was unnecessary. As the Georgia Supreme Court correctly noted, "[c]ounsel

considered hiring a social worker but concluded that there was no need for one in the light of the preparation that they, their investigator, and their psychologist were doing." Pet. App. 181-82. Additionally, as the court of appeals pointed out, "counsel had no reason to doubt Morrow's honesty" because "Morrow shared intimate details about his sexual history and even revealed that his son had been molested." Pet. App. 19. The fact that Morrow later informed a mental health expert that he was sexually abused is not sufficient proof that trial counsel performed deficiently.[16] Finally, as the court of appeals correctly held, Morrow "fail[ed] to establish that contemporary 'prevailing professional norms' in Georgia dictated hiring a social worker for capital cases." Pet. App. 23 (quoting *Strickland*, 466 U.S. at 688).

Moreover, *Strickland* instructed long ago that counsel should be afforded the presumption of effective assistance. *Strickland*, 466 U.S. at 690 ("the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). Where, as here, trial counsel conducts a reasonable background investigation, to include two psychological evaluations of their client, Morrow has not rebutted the presumption as he

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[16] Morrow contends, relying upon the lower state court's finding, that trial counsel ignored "'glaring red flags'" that he was sexually abused. Pet. at 37 (quoting Pet. App. 240-41, 267). However, the Georgia Supreme Court "disagree[d] with the habeas court's suggestion that trial counsel should have been alerted to the alleged rapes simply because Morrow was known to wet the bed and to have some adjustment problems." Pet. App. 188. Morrow fails to show this was an unreasonable determination and invites this Court to conduct factbound error review of the state appellate court's opinion.

failed to reveal the alleged evidence of abuse. *Strickland*, 466 U.S. at 691 ("[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions").

B. The court of appeals correctly reviewed the state appellate court's decision regarding prejudice.

In determining prejudice, the Georgia Supreme Court rightfully examined the credibility of Morrow's new allegations of sexual abuse and, in compliance with *Strickland*, weighed *all of the evidence* and reasonably concluded Morrow failed to prove prejudice. Pet. App. 188-89, 194-95. The court of appeals determined the record supported the state appellate court's credibility determination and that the state court conducted a prejudice analysis in compliance with this Court's precedent. Pet. App. 24, 25. Morrow disagrees and argues that the court of appeals has routinely held that sexual abuse "is not mitigating," which resulted here in an improper application of this Court's precedent in examining the state appellate court's prejudice decision. Pet. at 35. The court of appeals has never held sexual abuse "is not mitigating," and Morrow's request for review is for mere factbound error correction of the prejudice determination made by the Georgia Supreme Court and deemed reasonable by the court of appeals. The request should be denied.

The *Strickland* Court instructed that the question of prejudice "is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Thus, prejudice is a balancing test with

aggravating evidence on one side and mitigating evidence on the other. *See*, *e.g.*, *Wong v. Belmontes*, 558 U.S. 15, 26, 130 S. Ct. 383, 390 (2009) (per curiam) ("the Court of Appeals repeatedly referred to the aggravating evidence the State presented as 'scant.' [] That characterization misses *Strickland*'s point that the reviewing court must consider all the evidence--the good and the bad--when evaluating prejudice.") (citation omitted). One side cannot be ignored in favor of the other, which is exactly what Morrow is advocating. Specifically, he argues that alleged mitigating evidence of sexual abuse automatically tips the scale in his favor—regardless of credibility, regardless of the aggravating evidence on the other side of the scale.

Morrow's first argument is a request for this Court to conduct a factbound error review of the credibility determination that was implicit in the Georgia Supreme Court's prejudice determination. Under Morrow's interpretation of this Court's precedent, an allegation of sexual abuse by a petitioner for the first time in a post-conviction proceeding must be considered by a state court to be of the highest mitigating value, regardless of credibility concerns. *See* Pet. at 30-40. This Court's precedents do not support that assertion, and that is not necessarily how a jury would view the evidence.[17] *See Strickland*, 466 U.S. at 696 ("in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules").

[17] It would not have been unreasonable for a jury to be skeptical of newly alleged allegations of sexual abuse only supported by the statements of the person the jury had recently found guilty of murder and cruelty to children.

To be clear, the Georgia Supreme Court did not find the evidence lacked all credibility or mitigating value. Instead, the state appellate court implicitly rejected the lower court's credibility determination and found there were concerns with the reliability of Morrow's evidence and this would have caused the jury not to have given it "great weight." Pet. App. 189. Contrary to Morrow's argument, this is not a case like *Wiggins* where the petitioner had a well-documented history in public records of a severely deprived childhood. *Wiggins v. Smith*, 539 U.S. 510, 525, 123 S. Ct. 2527, 2537 (2003). Rather, this is a case in which a petitioner, after receiving a death sentence, alleges evidence of sexual abuse for the first time in a state post-conviction proceeding, after trial counsel has conducted a reasonable background investigation, with no concrete historical evidence in corroboration. Morrow failed to prove in federal court that the state appellate court committed "'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement'" when it determined that counsel's performance did not cause Morrow prejudice. *White v. Woodall*, 572 U.S. 415, 420,134 S. Ct. 1697, 1699 (2014)).

Morrow's attack on the court of appeals is equally unfounded. Although the court of appeals has determined prejudice was not shown when there was evidence of sexual abuse, this was done through the lens of § 2254 and the prejudice weighing process. The court of appeals has not held, as Morrow claims, that this type of evidence is never mitigating. The court has determined several times over the years that evidence of sexual abuse, and physical and emotional abuse, was mitigating and granted federal habeas relief in some cases as a result. *See*, *e.g.*, *Daniel v. Commissioner*, 822 F.3d 1248, 1275 (11th Cir. 2016) (determined prejudice was shown where there

was evidence of childhood sexual abuse and granted federal habeas relief); *Hardwick v. Fla. Dep't of Corr.*, 803 F.3d 541, 558 (11th Cir. 2015) (determining that Hardwick's history of "neglect, deprivation, abandonment, violence, and physical and sexual abuse" established prejudice and entitled him to relief); *see also Williams v. Allen*, 542 F.3d 1326, 1342-43 (11th Cir. 2008) (determining, in part, that the state court improperly "discount[ed] the significance of the abuse" suffered by Williams and granted relief).

The evidence of abuse Morrow alleged himself or through the affidavits of other witnesses, does not present a case of nearly indistinguishable facts in order for the state appellate court's decision to be contrary to this Court's decisions in cases such as *Wiggins*. The evidence in aggravation showed he had previously abused and raped one of his victims. And, with no other provocation than rejection and an alleged attack on his masculinity, he shot three unarmed women in front of two small children—killing two women and leaving one woman permanently injured. Morrow has failed to show that when the record is viewed as a whole that no "fairminded jurist" would have weighed the mitigating and the aggravating evidence and held Morrow failed to prove a reasonable probability of a different outcome. *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 786 (2011).

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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No. 18-6409

In the

Supreme Court of the United States

Scotty Garnell Morrow,
Petitioner,

v.

GDCP Warden,
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. Whether the court of appeals' decision reviewing the Georgia Supreme Court's reasoned decision, which contained explicit and implicit fact-findings, and then relying upon portions of the record that support the state court's reasoning, without making independent fact-findings, conflicts with *Wilson v. Sellers*, ___, U.S. ___, 138 S. Ct. 1188 (2018).

2. Whether the Georgia Supreme Court unreasonably applied *Strickland v. Washington* when it determined that trial counsel were not deficient for failing to uncover evidence of alleged sexual abuse petitioner never mentioned during a thorough background investigation, and that failing to uncover that evidence did not prejudice petitioner given the balance of aggravating and mitigating evidence.

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OPINIONS BELOW

The decision of the Georgia Supreme Court in the criminal direct appeal is published at 272 Ga. 691, 532 S.E.2d 78 (2000).

The decision of the state habeas court granting relief as to sentence is not published, but is included in Petitioner's Appendix F. The decision of the Georgia Supreme Court reversing the grant of relief and reinstating Petitioner's death sentence is published at 289 Ga. 864, 717 S.E.2d 168 (2011) and is included in Petitioner's Appendix E.

The decision of the district court denying federal habeas relief is unpublished, but is included in Petitioner's Appendix D. The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of relief is published at 886 F.3d 1138 (11th Cir. 2018) and is included in Petitioner's Appendix A.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment in this case on March 27, 2018. On August 9, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including October 19, 2018, and the petition was timely filed. On October 30, 2018, Justice Thomas extended the time within which to file the brief in opposition to and including December 24, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

> In all criminal prosecutions, the accused shall enjoy the right to a … have the Assistance of Counsel for his defence.

The Fourteenth Amendment, Section I, 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 … .

28 U.S.C. § 2254(d) provides:

> 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 Scotty Morrow seeks factbound error correction of his *Strickland* claim, which is not worthy of this Court's certiorari review.

Morrow tries, but fails, to manufacture a conflict with this Court's decision in *Wilson v. Sellers*, ___, U.S. ___, 138 S. Ct. 1188 (2018). He argues *Wilson* held that, instead of examining the state court's decision in the context of the entire record, a reviewing court may only uphold a state court's decision under § 2254(d) review based on the specific reasons provided in the state court decision. And he claims that the court of appeals failed to limit its review in that way. But *Wilson* did not hold that—it addressed only how to review an *unreasoned* state court decision, not a reasoned opinion—and even

if *Wilson* had included such a holding, the court of appeals in fact upheld the state court's decision based on that court's reasoning. The court of appeals examined the state appellate court's reasons and determined they were supported by the record and this Court's precedents. The court of appeals made no independent fact-findings and did not otherwise step outside the bounds of a proper § 2254(d) review.

Morrow's petition thus reduces to a request for this Court to conduct error correction of a factbound *Strickland* claim, and one that lacks merit. Trial counsel performed a reasonable background investigation, which included interviewing Morrow and his closest family members, and counsel obtained two mental health evaluations. Years later, after Morrow received a death sentence, Morrow and his family came forward with allegations of sexual and physical abuse that trial counsel, despite many interviews with petitioner and family, had not uncovered. No historical records showed or even suggested this abuse occurred or showed any history of mental health problems associated with the alleged abuse. Instead Morrow presented a ream of new affidavits from extended family members and acquaintances. Although some of the affiants suggested Morrow was sexually abused none provided first-hand accounts or testimony that Morrow had informed them of the alleged abuse. Regarding alleged physical abuse by Morrow's mother's boyfriend, the only first-hand account came from Morrow's sister whom trial counsel had spent considerable time interviewing. Contrary to Morrow's arguments, the Georgia Supreme Court, after reviewing the entire record, explicitly and implicitly rejected many of the fact findings of the lower state court, made its own fact-findings and reasonably concluded trial counsel did

not render deficient performance, and that Morrow was not prejudiced by counsel's performance.

Because Morrow has failed to show that the court of appeals' decision is not in accord with this Court's precedent, and that he is not requesting anything other than factbound error correction, his questions presented do not warrant this Court's review.

STATEMENT

A. Facts of the Crimes

In the month leading up to the crimes, numerous witnesses testified at trial that Morrow physically and sexually abused and threatened Barbara Ann Young's life. D14-27:6; D15-1:82-83; D15-2:78; D15-3:58.[1] On the day of the crimes, Young was at home with her two small children and her friends Tonya Woods and LaToya Horne. Pet. App. 147. After a phone conversation in which Young told Morrow to leave her alone, Morrow kicked-in Young's door and entered her home with a loaded gun. D14-27:12; D14-28:78-79.

Upon entering the kitchen, Morrow exchanged words with Woods and yelled "shut your mouth bitch." D14-27:120-123, 125. Morrow then drew his gun from his waistband and shot Woods in her lower "left abdomen, severing her spine and paralyzing her." Pet. App. 175. He then shot Horne in the left arm. D14-27:123; D15-3:147; Pet. App. 175. Morrow "possibly fired at Ms. Young as she fled from the kitchen" and ran down the hallway into her bedroom. Pet. App. 175; D14-27:124. Morrow caught Young after he "kicked open her bedroom door" where they "struggled." Pet. App. 175. A shot was

[1] "D" refers to the Electronic Court Filing (ECF) number, followed by the appropriate ECF page number.

fired that "likely" injured Young's back, and Morrow "likely "smashed [Young's] head into the bedroom's doorframe, leaving behind, skin, hair, and blood." *Id.* Young broke free from Morrow, but as she ran away, Morrow grabbed her hair from behind and shot Young in the back of the head while Young's five-year-old and eight-month-old sons watched from the closet where they were hiding. D14-28:57, 63, 70. Young's oldest son, Christopher Young, testified at trial that he watched Morrow reload his gun and fatally shoot his mother. *Id.* at 70.

Morrow then returned to the kitchen and shot Woods on the left side of her chin "and into her head at close range," causing her death. Pet. App. 175. He then shot Horne, who was lying on the floor, in her right arm and her face. *Id.* at 126-127; D14-28:63; D15-3:140. Morrow exited the home and cut the phone line. D14-27:132. Horne, "badly injured," "managed to walk from house to house down the street seeking someone to call for help before she eventually collapsed; she survived, but with permanent injuries, including deafness in one ear." Pet. App. 176.

B. Proceedings Below

1. Trial Proceedings

A Hall County grand jury indicted Morrow on March 6, 1995, for two counts of malice murder, two counts of felony murder, six counts of aggravated assault, aggravated battery, cruelty to a child, burglary, and possession of a firearm during the commission of felonies. D10-1:26-30. Morrow was represented by two experienced criminal attorneys, William Brownell and Harold Walker. Brownell, who served as lead counsel, had tried over one hundred felony cases and had been involved in as many as

eight to twelve death penalty cases as a prosecutor, two to six of which went through the sentencing phase of trial. D16-22:110-112; D16-28:15; D16-29:6-9. Co-counsel Walker had practiced law since 1979 and testified that, since 1988, approximately half of his practice was devoted to criminal defense. D16-24:52-53.

a. Background Investigation

As Morrow admitted, trial counsel met with Morrow "almost right away," and began to gather a "good factual background" about Morrow. D16-22:110-12, 114; D16-27:5; Pet. at 7. Trial counsel testified that he asked Morrow to provide guidance on where counsel could find the "good" and "bad things" in his life to help with his case. D16-24:85-86. During initial meetings, Morrow discussed growing up, schooling, his father being absent during his youth, his blackouts, his Job Corps time, his prior marriage, his desire to have a normal family, and his relationship with Young. D16-22:115-16; D16-24:55-77. To help develop evidence of Morrow's background, counsel also employed the services of an investigator, Gary Mugridge, and two mental health experts, Drs. Dave Davis and William Buchannan. D16-24:9-10; D16-29:100-05; D16-22:42.

Within a week of Morrow's arrest, trial counsel began regular conversations with Morrow's mother, Betty Bowles, about the case. D16-24:73; D16-30:57-61. Brownell's meeting notes with Bowles show that he had substantive conversations about Morrow's background. For example, Bowles reported that Morrow: was born premature; went to a psychiatrist when he was three or four-years-old; was beaten up at school when he was seven or eight-years-old; had blackouts and headaches; was on the wrestling team in

school but dropped out of school in ninth grade; and participated in Job Corps in Kentucky for three months when he was seventeen-years-old. D16-30:57-62; D16-31:22. Additionally, Bowles stated she worked long hours in the Northeast and had three jobs to support her children, however, her children had their basic needs met. D16-30:57-62; D16-31:22. Also, counsel learned Morrow's father abused Bowles, and that Bowles had been abused by her boyfriend, George May, in New Jersey. D16-22:135-36; D16-27:9.

Trial counsel also regularly discussed the case with Samantha Morrow, Morrow's sister, the source of much of Morrow's new allegations of abuse, and these discussions included information for the penalty phase of trial. D16-24:72; D16-27:5.

Investigator Mugridge also "frequently" spoke with Samantha and Bowles. D16-24:36-37, 86-87. Mugridge also interviewed, *e.g.*, extended family members, former girlfriends, friends of the family, co-workers, a clergy member from Morrow's church, and several acquaintances of Young. D17-9: 11-16, 19-21, 25-29, 31-36, 43, 45-46, 54-56, 59, 67.

Mugridge testified that he was well-aware that Morrow lived in New York and New Jersey and that Bowles and Samantha were Morrow's closest contacts for that time. D16-24:36-37. Mugridge located Lorna Broom, a former girlfriend of Morrow's from New Jersey, but Samantha told Mugridge not to contact her.[2] D16-24:45-46. Additionally, Mugridge tried to locate Morrow's alleged personal mentor, but the family only provided his first

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[2] Notes in Mugridge's file indicated Morrow had an "altercation" with Broom and she was "cut up." D17-1:46.

name, could not provide a phone number or address for this individual, and Mugridge was therefore unable to locate him.[3] D16-24:18.

Mugridge also sought Morrow's school records, but he testified that he recalled that there was a problem in locating the records.[4] D16-24:42-43. Mugridge also tried to locate records from psychological testing that Bowles stated Morrow received as a young child, but the family could not provide the name of the psychologist who had performed the testing or where it was conducted.[5] D16-24:44-43; 49-50.

Trial counsel testified that they investigated the possibility that Morrow was physically abused as a child by interviewing Morrow, Morrow's mother, and Morrow's sister, whom trial counsel learned was the most forthcoming about how the children were disciplined. D16-29:62. The information supplied to trial counsel from Morrow, his mother and sister, indicated that, at most, Morrow was subject to "intense spankings." D16-29:67-68.

Regarding sexual abuse, trial counsel, Mugridge, and Buchannan all testified that neither Morrow, his mother nor sister provided information

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[3] Morrow alleges Mugridge "abandoned the effort" to find the mentor because the family simply could not provide a phone number, as shown above, that is an inaccurate portrayal of the record. Pet. at 11.

[4] Morrow alleges that Mugridge testified that obtaining the school records was "'not something that [counsel] had requested or wanted" of him. Pet. at 11 (brackets in original) (quoting D16-24:43). However, the portion of Mugridge's testimony that Morrow quotes is referring to the assumption Mugridge had that counsel did not request or want him to travel to the Northeast, not that counsel did not request or want him to obtain the school records—which Mugridge testified he had attempted to do. D16-24:43.

[5] Regarding background records, trial counsel recalled having trouble tracking down records but did not definitely testify that they did not obtain the records. D16-27:28, 41; D16-29:25, 96.

about sexual abuse. D16-22:97-98; D16-24:37, 108-09. Trial counsel testified that evidence of sexual abuse was "crucial" and was "the type of question that [he was] sure [he] would have asked of [Morrow's] family or of [Morrow] and probably go the answer, no. And that's why we didn't pursue it." D16-24:108-09.

b. Mental Health Investigation

(1) Dr. Dave Davis

Trial counsel hired Dr. Dave Davis, a psychiatrist, on March 16, 1995, within 90 days of Morrow's arrest. D16-29: 100-105. Davis requested and was provided the following information from trial counsel: Morrow's indictment; investigative reports, including statements from every witness; crime scene photos; a video tape of the crime scene; Morrow's statement to police; and an overview of the case. D16-29:94. Davis stated he reviewed the "extensive material provided" and interviewed Morrow. *Id.* at 100-101. During the interview Morrow provided information regarding his immediate relatives; family history of alcohol abuse; father's domestic violence; parents' divorce and subsequent move north with his mother and sister; drug use and alcoholism; history of violence (to include fights as an adolescent, an aggravated assault on a transvestite, and battering his ex-wife and a former girlfriend); educational history; criminal record; medical history; sexual history; and a description of the murders of Young and Woods. *Id.* at 100-105.

Morrow reported that his troubles stemmed from the fact that he was "abandoned by his father, grew up in a bad environment, had no male figures when he was growing up, and no paternal love." D16-29:103. He also stated

that he had always had a bad temper, and he believed that he had mental problems. *Id.* While Morrow openly discussed his sexual history and other personal information with Davis (*see, e.g.,* D16-29:103-04), there was no evidence in the report that Morrow informed Davis that he was sexually or physically abused while he lived in the Northeast. Also, as the Georgia Supreme Court found, Davis stated in his pre-trial psychiatric report that Morrow's "sexual history" was "unremarkable." Pet. App. 181.

Davis stated in his final report that Morrow was competent to stand trial and that he had a personality disorder, not otherwise specified, with anti-social, borderline, and avoidant features. D16-29:104-05. Davis concluded that Morrow's deprived early childhood resulted in his pattern of poor coping. *Id.* Additionally, Davis reported that Morrow's childhood lacked parental supervision, and that Morrow had a long history of being very angry, getting into fights, abusing alcohol and drugs, and had difficulty with long-term occupation. *Id.* Trial counsel made a strategic decision not to use Davis' report at trial because they believed that "a lot" of the information in the report was "harmful" and would be viewed "negatively" by the jury. D16-29:27-28.

(2) Dr. William Buchanan

Trial counsel later hired Dr. William Buchanan in March of 1999 to conduct another mental health evaluation of Morrow to help find "more mitigation information." D16-22:42; D16-24:70; D16-27:27-28; D16-29:29. Trial counsel requested Buchanan's assistance in getting Morrow to open up so that Morrow would appear more sympathetic in front of the jury. D16-29:29. Trial counsel provided Buchanan with information pertaining to

Morrow's background, a copy of their opening statement, and additional information over the phone as the investigation progressed. D16-22:48-51. Trial counsel testified that, "Dr. Buchanan was experienced as a forensic psychologist" and would identify what was relevant. D16-27:10. Although Buchanan never asked for Morrow's records, to meet with Morrow's family, or for any additional information, trial counsel testified that they would have provided Buchanan with any material he requested, as trial counsel had done on previous cases with Buchanan. D16-24:104; D16-27:28; D16-29:32-33. Buchanan admitted that he could not recall trial counsel not providing him with any materials he requested. D16-22:95.

After reviewing the material provided by trial counsel, Buchanan met with Morrow on four occasions on March 29, 1999, May 17, 1999, June 11, 1999, and June 14, 1999, for a total of six to eight hours. D16-22:44-46. In addition, psychological tests were administered to Morrow by Buchanan's psychometrist.[6] *Id.* at 5.

During his interviews, Morrow provided information about his parent's divorce, his own divorce, his birth in Georgia and subsequent move to New Jersey/New York, his school history, his work history, his relationship with Young and her children, and the unfiled rape/kidnapping complaint by Young against him. D17-35:27-32. Regarding Morrow's childhood in New Jersey, Morrow described an incident when he was twelve or thirteen when he picked up a baseball bat in an attempt to defend his mother from her boyfriend. *Id.*

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[6] Buchanan had regular meetings with trial counsel about his evaluations and findings but did not write a formal report because trial counsel "anticipated calling him as a witness." D16-22:136; D16-27:29.

at 50. He also stated that his youngest son was seeing a psychiatrist as he had been molested in Florida when he was eight-years-old. *Id.* at 34. Morrow was candid about sensitive personal information, and he never told Buchanan that he was allegedly sexually abused. D16-22:98.

c. Presentation of Evidence

During the guilt-innocence phase, trial counsel presented three witnesses—a law-enforcement investigator, Morrow's sister, and Morrow. The investigator explained that "Young had not referred to the incident where Morrow kidnapped her and had sex with her as a 'rape' and that Morrow had beaten her with his fist rather than with a gun during that incident." Pet. App. 182. "Morrow's sister testified about Morrow's background in an effort to show Morrow's good character, his past good treatment of Ms. Young, and his distress at the time of the murders." *Id.* Morrow was the final witness during the guilt phase and "described his history with Ms. Young," explained "about his alleged past abuse of her that were more favorable to himself than the State's evidence," and admitted "he had reacted impulsively to Ms. Woods' insulting comment to him about Ms. Young's no longer wanting to be in a relationship with him." *Id.*

As the Georgia Supreme Court found, "trial counsel attempted to carry forward their theme about Morrow's good character" to the sentencing phase. *Id.* at 183. The reason for this strategy was based upon trial counsel's experience trying cases in the local community that juries often found mitigation testimony relating "further back in time" to the crimes to be less "relevant." D16-22:159. Trial counsel, after narrowing down their witness list to avoid cumulative testimony, presented fourteen witnesses in the

penalty phase, thirteen lay witnesses, and one mental health expert. D16-29:39-40. Trial counsel were able to elicit testimony from each witness that supported their mitigation theme that the crimes were "absolutely and totally out of character" for Morrow and that Morrow had qualities admired by his friends, family and co-workers. *Id.* at 48.

Trial counsel offered testimony from three of Morrow's family members: his sister, Samantha; his half-sister, Deborah Morrow; and his mother, Betty Bowles. Samantha testified that when Morrow was young their father was very abusive to their mother. D15-9:72-73. Bowles recalled that Morrow once witnessed his father stomp on her stomach, causing her to miscarry. D15-11:18. Samantha testified that when Morrow was three or four-years-old he tried to use a hammer to stop their father from abusing their mother. D15-9:72-73. Bowles testified that she thought Morrow was "very devastated" by the abuse he witnessed. D15-11:18.

Samantha testified that after Morrow's parents divorced, she and Morrow moved with their mother to Brooklyn, New York, where life was "pretty good" even though their mother worked three different jobs. D15-9: 74. Bowles testified that she worked to give her kids a "better life" so that they did not have to "want for anything." D15-11:21. However, Bowles testified that while living in Brooklyn she took Morrow to several psychiatrists to "get him help" because he "was a little slow in some things in school." D15-11:22. The mental health providers told her to "continue to try to encourage him." *Id.*

When Morrow was in the fourth grade, Morrow and his family moved to New Jersey. D15-9:75. Samantha described Morrow during this time as a good student who stayed out of trouble, was in the choir, and enjoyed

athletics. *Id.* at 76. Samantha recalled that "people would pick at [Morrow] in school and stuff," and that Samantha "would go on and fight the people that bothered him." *Id.*

In the ninth or tenth grade Morrow dropped out of school and joined the Job Corps. D15-9:76-77. Samantha testified that Morrow was very homesick while he was in the Job Corps and left the Corps when he turned 18 to return home. *Id.* at 77.

Shortly after returning to New Jersey, Morrow got married, moved to Georgia, welcomed his first son, and spent time with his father. D15-9:78-79. One year later, Morrow returned to New Jersey where he lived for several years and helped his mother take care of special needs foster children who lived in her home. *Id.* at 79-80; D15-11:26. Bowles testified that Morrow took classes to learn how to help care for these children and that Morrow often helped her get the children ready for school. D15-11:26.

Morrow and his entire family eventually returned to Georgia. D15-9:79. Bowles testified that after she returned to Georgia she took in ten different foster children, and Morrow helped her care for them in her home. D15-11:28-29.

Samantha, Deborah, and Bowles each provided testimony suggesting the crimes were out of character for Morrow. D15-9:68; D15-11:29, 33. Samantha also told the jury that Morrow felt remorse about the murders and had grown closer to God since the crimes had occurred. *Id.* at 88.

Trial counsel also presented Morrow's ex-wife, and the mother of his two sons, Claudette Jenkins. Claudette testified Morrow was not violent, although she did admit he slapped her once, and she described him as a loving father. D15-9:48-49. She explained that Morrow was a good father

and that her sons would not be able to handle Morrow receiving a death sentence. *Id.* at 56. Claudette's current husband, Kim Jenkins, also told the jury that Morrow was a "perfect father," and that Morrow's sons would need "severe counseling" if Morrow was sentenced to death. *Id.* at 62-64.

In addition, Morrow's ex-girlfriend, Fonda Jones, testified that she and Morrow had a good relationship and Morrow treated her children well. D15-11:11-12. Jones testified that Morrow never lost his temper or displayed violence. *Id.* at 15.

A family friend, members of the clergy, and a deputy sheriff from the jail, testified about Morrow's dedication to his faith, his reliability, and his good character. D15-8:128-30; D15-9:3-6, 19-23, 26-39. Additionally, three of Morrow's former coworkers testified that they did not witness either violence or anger from Morrow. D15-8:118, 122; D15-9:10.

Finally, Buchannan testified to articulate how Morrow felt at the time of the murders and to explain how Morrow's past affected him at the time of the crimes.[7] D16-22:138-40. Buchanan explained that Morrow was administered a battery of psychological tests which revealed he was of "average, low average intelligence"; suffered from paranoia, suspiciousness, mistrust, social alienation, persecutory ideas, and depression; had poor ability to delay gratification and to control impulses; was introverted, which made it difficult for him to display his emotions; and had difficulty coping and "dealing with

[7] Trial counsel testified that Morrow did not appear as sympathetic or remorseful as they had hoped when he testified during the guilt phase of trial, and thus, they also presented Buchanan to better explain Morrow's demeanor to the jury. D16-22:138-41.

the stresses of everyday life or stresses of relationships." *Id.* at 126-28, 133, 137.

With regard to Morrow's life history, Buchanan told the jury that Morrow's parents divorced when he was about three or four-years-old because of conflict and physical abuse from Morrow's father toward his mother. *Id.* at 138. Following the divorce, Morrow and his older sister lived with their mother in Georgia, New York, and New Jersey. *Id.* Morrow told Buchanan that when he was about twelve-years-old, his mother was involved in a physically abusive relationship with her boyfriend. *Id.* Buchanan testified that Morrow recalled picking-up a baseball bat to defend his mother and that her boyfriend laughed at Morrow. *Id.* Morrow also felt very helpless and unable to protect his mother from the abuse. *Id.*

Concerning Morrow's schooling in New York and New Jersey, Buchanan testified that Morrow was in special education classes for learning disabilities from the Fourth Grade until the Ninth Grade—which Buchanan confirmed with the tests administered to Morrow. *Id.* at 139-40. In the Ninth Grade Morrow dropped out of school because he felt that his learning disabilities prevented him from being able to do the work. *Id.* at 139.

Buchanan testified that Morrow was married at the age of nineteen, which ended in a separation two years later while his wife was pregnant with their second child. *Id.* at 140. Morrow became depressed and started drinking. *Id.* at 141. Buchanan testified that after two or three months, Morrow stopped drinking and tried to put his life back together. *Id.*

After explaining Morrow's test results and background to the jury, Buchanan testified that because of Morrow's history and personality type he was easily provoked by "negative" comments. D15-10:6. Buchanan stated

Morrow "will hear something negative and he's likely to exaggerate that negativity because of mistrust and paranoia about it." *Id.* Buchanan explained that the comments "You're no good, you're just being used," which Morrow testified Woods told him on the morning of the murders, were enough to trigger feelings of very high paranoia in Morrow. *Id.*

Furthermore, Buchanan related Morrow's detailed description of the murders to the jury. D15-9:144-46; D15-10:1. Buchanan explained that when a person goes through any traumatic event, they will often dissociate as a way of protecting themselves, and that this dissociation will cause them to be unable to display emotion. D15-10:4-5. Buchanan told the jury that on the videotaped confession obtained directly after the crime, Morrow appeared to be in a "state of shock" and was actually dissociating. *Id.* at 4. Buchanan also testified that Morrow appeared to be in a dissociated state during his guilt phase testimony, which explained to the jury why Morrow lacked emotion when he testified. *Id.* at 24. Even though he appeared unremorseful on the stand, Buchanan stated that Morrow showed "sadness, remorse," and "guilt" over the crimes during his testing and interview by Buchanan. *Id.* at 24-25.

d. Jury Determination

Morrow was convicted of "malice murder, felony murder, aggravated assault, aggravated battery, cruelty to a child, burglary, and possession of a firearm during the commission of a felony." *Morrow v. State*, 272 Ga. 691, 691, 532 S.E.2d 78, 82 (2000). The jury found ten statutory aggravating circumstances existed and recommended a sentence of death for each of Morrow's malice murder convictions, and the trial court then sentenced

Morrow to death. D11-6:1, 56-57. Morrow was also sentenced to consecutive sentences of twenty years for aggravated battery, twenty years for cruelty to a child, twenty years for burglary and five years for possession of a firearm during the commission of a felony. *Id.* at 66-69. The felony murder convictions were vacated by operation of law, and the aggravated assault convictions merged with other convictions thereby leaving only five statutory aggravating circumstances. *Morrow*, 272 Ga. at 691-92.

2. Direct Appeal Proceedings

Morrow appealed his convictions and sentences to the Georgia Supreme Court. The Georgia Supreme Court affirmed Morrow's convictions and sentences on June 12, 2000. *Morrow v. State*, 272 Ga. 691. Morrow's motion for reconsideration was denied on July 28, 2000. D16-8. Morrow filed a petition for writ of certiorari in the United States Supreme Court, which was denied on March 26, 2001. *Morrow v. Georgia*, 532 U.S. 944, 121 S. Ct. 1408 (2001).

3. State Habeas Corpus Proceedings

Morrow filed a state habeas corpus petition in the Superior Court of Butts County, Georgia, on October 30, 2001, and an amendment thereto on February 1, 2005. D16-11; D16-20.

a. Ineffective-Assistance Claim

An evidentiary hearing was conducted on April 25-26, 2005. D16-22 thru D19-19. During the hearing, extensive evidence was presented regarding trial counsel's sentencing phase investigation and presentation. Specifically, Morrow argued counsel were ineffective for failing to uncover and present evidence that, while living in the Northeast he was allegedly

physically abused and mistreated by his mother's boyfriend; bullied and degraded by his schoolmates; and sexually abused by an older youth named Earl Green.

In support, Morrow presented affidavits from family and friends and obtained a new mental-health evaluation. The only direct evidence presented during the state habeas proceeding that Morrow was sexually abused came from Morrow's self-report to his new mental health expert, Dr. James Hooper. D17-14:3. Contrary to Morrow's assertion, his new evidence did not "amply corroborate" his allegation of sexual abuse. Pet. 13-14. The only affiants that mentioned sexual abuse were an individual who lived in the home where Morrow stayed as a child, and the cousin of that individual (*see* D17-29:68-72), neither of whom stated they had any knowledge that Morrow was abused. Instead, one of the affiants stated Green tried to sexually assault him, the affiant. D17-29:71-72. And, contrary to Morrow's assertion, Green's criminal records do not contain evidence that he was arrested or convicted of a sexual offense. D17-30:5-119.

Morrow's other evidence consisted of affiants stating he wet the bed as an adolescent and school records showing he had "behavioral changes." Pet. at 14. The record showed that Morrow had learning disabilities growing up. D15-9:76-77, 138-40; D15-11:22. The remaining affidavits submitted by Morrow from his family and friends did not contain any testimony that Morrow informed them he was sexually abused or that they witnessed Morrow being abused.

Regarding physical abuse, during the state habeas proceedings, as stated above, trial counsel testified that they was aware of allegations of physical abuse, but that when he asked Morrow, Samantha, and Bowles

about these allegations, they mitigated the allegations of physical abuse and did not admit to anything other than "spankings." D16-29:64-65, 67. Walker testified that Samantha was the most forthcoming about Morrow's childhood, but Walker never testified that Samantha indicated that Morrow was abused or mistreated. D16-24:105. Although several of Morrow's affiants claimed Morrow was abused by his Mother's boyfriend, George May (D17-14:9; D17-29:19-20, 61, 66, 75, 96), Samantha provided the only eyewitness account to May's alleged abuse (D17-29:20).[8] And, in contradiction to Morrow's habeas affiants' testimony, May's son, Gregory May, gave affidavit testimony that his father never mistreated or abused Morrow. D18-11:105-106. Gregory stated that his father punished Morrow only if Morrow was "being bad in school, being late, lying, being disrespectful, or disobeying," but testified that his father never beat or abused Morrow. *Id.* at 105.

Additionally, Morrow produced no historical records containing evidence that he was sexually or physically abused, or any history of mental health issues associated with the alleged abuse. *See* D17-14:39-43; D17-15:1-3; D17-24:10-17; D17-25:1-41; D17-26:1-13; D17-26:14-15; D17-27:1-37; D17-28:2-76.

b. State Habeas Court's Decision

Post-hearing briefs were submitted by both parties over the course of the next year. D19-27 thru D20-2. Three years after the final post-hearing brief was submitted, Morrow filed a proposed final order—presumably pursuant to a verbal request from the state habeas court, because there was no written or transcribed record of the request. D20-3. Over a year later, on

[8] It was unclear from the affidavit of Morrow's cousin, Troy Holloway, whether he witnessed May physically abuse Morrow. D17-29:96.

December 1, 2010, Morrow filed a supplemental proposed order.[9] D20-4. Two months later, on February 4, 2011, the state habeas court entered an order granting relief as to Morrow's sentence; specifically the court found trial counsel were ineffective during the sentencing phase in their investigation and presentation of mitigating evidence. D20-5:46-50. With the exception of a few words, the portion of the final order determining the ineffective-assistance claim was identical to the order provided by counsel for Morrow. *Compare* D20-3:3-57; D20-5:27-80.

c. Georgia Supreme Court Decision

Respondent appealed the grant of relief and Morrow cross-appealed. Following briefing and oral argument, the Georgia Supreme Court *unanimously* reinstated Morrow's death sentence in a reasoned opinion. Pet. App. 173-74. Contrary to Morrow's assertion, the Georgia Supreme Court explicitly and implicitly rejected the lower state court's fact-findings and made findings of its own.

The state appellate court "conclude[d] that trial counsel generally performed adequately and that the absence of trial counsel's professional deficiencies, both those we find to have existed and those we assume to have existed, would not in reasonable probability have resulted in a different outcome in either phase of Morrow's trial." Pet. App. 178. The court found "it [was] simply not correct that trial counsel ignored information from the years during Morrow's childhood when he lived in New York and New

[9] Although not part of the record in the federal habeas proceeding, there was a letter from state habeas counsel to the state habeas judge, which was served upon counsel for Respondent, acknowledging that the judge had requested the supplemental proposed order.

Jersey." *Id.* at 180. The court detailed the investigation by trial counsel, the individuals counsel and their investigator interviewed, the mental health evaluations that were completed, and the evidence presented at trial. *Id.* at 179-85.

The court then examined the new evidence that Morrow alleged trial counsel failed to uncover. Regarding the allegations of sexual abuse, the court rejected Morrow's ineffective-assistance claim for three reasons: 1) Morrow did not inform his defense team, to include his mental health expert, that he had been sexually abused; 2) the evidence Morrow alleged should have alerted trial counsel of the abuse was insubstantial; and 3) Morrow's evidence of sexual abuse was too weak to prove prejudice. *Id.* at 188-89.

In support, the court "note[d] that Morrow never reported any such rapes pre-trial to his counsel or to the mental health experts *who questioned him about his background, including his sexual history*." *Id.* at 188 (emphasis added). Importantly, the Georgia Supreme Court "disagree[d]" with the state habeas court's finding "that trial counsel should have been alerted to the alleged rapes simply because Morrow was known to wet the bed and to have some adjustment problems as a child." *Id.* Regarding prejudice, because the *only direct evidence* of the alleged sexual abuse was provided in state habeas through the hearsay testimony of Morrow's new mental health expert, the Georgia Supreme Court determined it would not have carried enough "weight" to change the jury's mind about the sentence. *Id.* at 188-89.

The state court also examined Morrow's allegations of physical abuse. The court determined that Morrow's evidence that he was bullied as a child was "less than compelling as alleged proof of trial counsel's failings and

resulting prejudice" and noted that there was testimony "presented at trial about how Morrow had been bullied often as a child and had been punished by his mother for not standing up for himself and for misbehaving." *Id.* at 187. The Georgia Supreme Court found trial counsel investigated George May and were not informed he was physically abusive to Morrow, and that Morrow's evidence in support was "inconsistent." *Id.* at 189, n.4.

Morrow sought a writ of certiorari ion his ineffective-assistance claim. The petition was denied on April 23, 2012. *Morrow v. Humphrey*, 566 U.S. 964, 132 S. Ct. 1972 (2012).

4. Federal Habeas Corpus Proceedings

Morrow filed his federal petition for writ of habeas corpus on March 8, 2012. The district court denied relief on July 28, 2016. D52:68. Morrow was granted a certificate of appealability "with respect to [his] claim that his trial counsel was ineffective in investigating and presenting the case in mitigation." *Id.* The court of appeals reviewed the record and held the Georgia Supreme Court's opinion did not violate § 2254(d)'s standards.

REASONS FOR DENYING THE PETITION

I. The court of appeals' decision does not conflict with *Wilson*.

Morrow seeks certiorari review of his ineffective-assistance claim on the basis that the court of appeals' decision allegedly conflicts with *Wilson*.[10]

[10] Specifically, Morrow addresses his concerns regarding the court of appeals' decision of his claim that trial counsel were ineffective in their investigation and presentation of mitigating evidence during the sentencing phase regarding sexual and physical abuse that he allegedly suffered while living in the Northeast.

Morrow argues *Wilson* limits § 2254(d) review to *only* the reasons given by the state court and prevents a federal habeas court from relying on additional reasons that support the state court's denial of relief. This argument does not warrant certiorari review for two reasons. First, this Court did not so limit § 2254(d) review and, even if it did, the court of appeals did not provide reasons not found in the state appellate court's opinion. Second, the majority of Morrow's arguments are a request for error correction of his factbound *Strickland* claim. As the court of appeals correctly reviewed his ineffective-assistance claim, certiorari review is not warranted.

A. *Wilson* does not hold that § 2254(d) review is limited to the fact findings of the state court.

Morrow argues that the *Wilson* Court rejected the Eleventh Circuit's interpretation of *Harrington v. Richter* that the federal courts were "authorized" to supply any "findings or theories that *could have supported* the last state court's summary denial of habeas relief, even where there was a reasoned decision from a lower state court." Pet. at 20-21 (emphasis in original). In support, Morrow relies upon the Court's comment in *Wilson* that where the "last state court to decide a prisoner's federal claims explains its decision" "a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson*, 138 S. Ct. at 1192. Taken together, Morrow argues *Wilson* holds a federal court is limited in § 2254(d) review to the specific reasons provided by a state court. Pet. at 21. Morrow's interpretation of *Wilson* is in error.

Morrow's expansive reading of *Wilson* creates a holding based upon a question not presented. This Court has repeatedly cautioned the federal courts of appeal from fashioning a holding from its precedent on a question

not presented to the Court. *See, e.g., Lopez v. Smith*, ___, U.S. ___, 135 S. Ct. 1, 4 (2014) (per curiam) (rejecting the Ninth Circuit's attempt to create a holding from the Court's precedent where "[n]one" of the Court's decision "address[ed]" the "specific question presented by this case"); *Nevada v. Jackson*, 569 U.S. 505, 512, 133 S. Ct. 1990, 1994 (2013) (per curiam) ("By framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.'") (quoting 28 U.S.C. § 2254(d)(1)). The question presented was whether a federal court should presume that a later summary state court ruling rested on the same grounds as a previous explained state court decision. *See Wilson*, 138 S. Ct. at 1192. The question presented was not whether a federal court was limited in § 2254(d) review to only the specific reasons provided by a state court in determining a federal claim. Likewise, Morrow is precluded from creating federal law from ambiguous dicta on an issue not contemplated by the *Wilson* Court.

Consequently, Morrow's cabined reading of *Wilson* does not withstand scrutiny and fails to provide an appropriate vehicle for certiorari review.

B. The court of appeals did not make fact findings.

Even if Morrow's interpretation of *Wilson* were accurate, the court of appeals did nothing to conflict with it. His overarching claim in support of his contrary position is that the court of appeals created and relied upon fact findings not contained in the Georgia Supreme Court's decision. In support of his erroneous assertion, Morrow makes two arguments. First, he states that the Georgia Supreme Court adopted the lower state habeas court's facts

"wholesale" and did not make any of its own because the court did not determine any of the lower's court's facts were clearly erroneous. Pet. at 22. Second, Morrow argues that the court of appeals erroneously determined that the Georgia Supreme Court made a specific fact-finding that Morrow denied being sexually abused. Each argument is either a misrepresentation of the court of appeals' decision, the Georgia Supreme Court's decision, or both. More to the point, Morrow's arguments, when stripped of their erroneous assertions, are an improper request for this Court to engage in factbound error correction.

1. The Georgia Supreme Court rejected fact findings of the lower court.

The Georgia Supreme Court, relying upon state law, noted it "adopt[ed]" the lower court's fact-findings unless they were "clearly erroneous." Pet. App. 176. The fact that the court did not go on to use the term "clearly erroneous" does not mean it did not reject any of the lower court's factual findings. Indeed, contrary to Morrow's argument, the Georgia Supreme Court explicitly disagreed with several fact-findings of the lower court. *See*, *e.g.*, *id.* at 188 ("*We disagree with the habeas court's suggestion* that trial counsel should have been alerted to the alleged rapes…") (emphasis added). Further, it is axiomatic that when an appellate court makes a determination that is not supported by a lower court's fact-finding, it has implicitly rejected the lower court's finding.

Morrow fails to cite to any precedent by this Court which requires an appellate court to specifically state each time it determines a factual finding to be clearly erroneous. Instead, the Georgia Supreme Court did what most appellate courts do; it pointed out the more erroneous fact-findings, and made

explicit and implicit factual determinations in its various legal determinations. And, contrary to Morrow's argument (Pet. at 26), the court of appeals has long held, in compliance with this Court's precedent, that implicit fact-findings of a state appellate court are entitled to § 2254(d) deference. *See Sumner v. Mata*, 449 U.S. 539, 545-46, 101 S. Ct. 764, 768 (1981); *Williams v. Johnson*, 845 F.2d 906, 909 (11th Cir. 1988); *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1217 (11th Cir. 2013).

2. The court of appeals did not make a fact-finding that Morrow denied being sexually abused.

Regarding trial counsel's investigation of sexual abuse, Morrow argues that the court of appeals "reasoned that the state court must have found that trial counsel expressly asked about childhood sexual abuse and that Morrow denied such a history." Pet. at 23. In support Morrow cites to a portion of the court of appeals' decision (Pet. App. 18-19), and a comment made by a member of the panel during oral argument (Pet. App. 72-73).

As an initial matter, a statement made by a judge during oral argument is not a determination or holding by the court that can amount to error, as Morrow suggests.

More importantly, the court of appeals did not make the determination Morrow contends it made. The court noted that the "Georgia Supreme Court found 'that Morrow never reported any such rapes pre-trial to his counsel or to the mental health experts who questioned him about his background, including his sexual history.'" Pet. App. 18 (quoting Pet. App. 188). The court then pointed out the testimony of trial counsel that counsel was aware that sexual abuse was "'crucial" and "that this was 'the type of question that

[he was] sure [he] would have asked of [Morrow's] family or of [Morrow].'"[11] *Id.* at 19 (brackets in original) (quoting D16-24:108-09). The court of appeals stated in the next sentence, "But Morrow and his family failed to mention the rape." Pet. App. 19. Finally, the court pointed out, as did the Georgia Supreme Court, that Morrow was evaluated by mental health experts prior to trial who "probed Morrow's family and sexual history but turned up no evidence of abuse." *Id.*

The court of appeals was not making fact findings. Instead, it was reiterating what the Georgia Supreme Court "found" and providing evidence from the record that supported the finding. Pet. App. 18. The state court found that Morrow did not inform counsel or his mental health experts about the alleged rapes despite being questioned about his background, to include his "sexual history." Pet. App. 188. The court of appeals then pointed out, in support of that finding, that counsel had testified that they would have asked about that issue and that the mental health experts also questioned Morrow about his "sexual history." Pet. App. 19. Contrary to Morrow's assertion, the court of appeals did not find that Morrow "denied" being sexually abused, it merely concluded, as did the state court, that "Morrow and his family failed to mention the rape." Pet. App. 19. In short, the court of appeals did not step out of the bounds of § 2254 review and Morrow's true request is for factbound error correction.

[11] Although not quoted by the court, the remainder of this portion of trial counsel's testimony was that they "probably got the answer, no" when they questioned Morrow and his family about this issue and therefore, did not "pursue" evidence of sexual abuse. *Id.* at 109.

3. Morrow's additional arguments are a transparent request for factbound error correction.

The remainder of Morrow's arguments seek factbound error correction and also misrepresent the record. Morrow argues, in further support of his disagreement with the court of appeals' decision that trial counsel did not perform deficiently, that "[i]t is undisputed that trial counsel *did not contact a single witness who knew Morrow in the Northeast* or requested any records." Pet. at 24 (emphasis added). As the Georgia Supreme Court reasonably found, "counsel met repeatedly with Morrow, his mother, and his sister, and the record makes clear that counsel discussed Morrow's childhood background with them extensively." Pet App. 179. Morrow's mother and sister knew Morrow when he lived in the Northeast as he resided with them. Thus, contrary to Morrow's statement, counsel contacted witnesses who knew him in the Northeast and notably, as correctly highlighted by the court of appeals, Morrow's mother and sister "provided the majority of the new evidence" during his state habeas proceeding.[12] *See* Pet. App. 20.

Morrow also refers to the court of appeals' statement that it "faile[d] to understand what else counsel could have done" to uncover evidence of sexual abuse as "risible" because trial counsel could have "*asked* Morrow" whether he was sexually abused. Pet. at 24 (emphasis in original); Pet. App. 19. But

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[12] Morrow's statement is also a red herring. The first person Morrow informed of the alleged sexual abuse was a mental health expert during his state habeas proceedings. D17-14:3. There is no evidence in the record that Morrow informed anyone, including those who knew him in the Northeast, that he was sexually abused. Nor did the individuals from whom Morrow obtained affidavits in state habeas testify that they either had first-hand knowledge of the alleged abuse or that Morrow informed them of the abuse. And none of the records submitted in state habeas provide direct evidence that Morrow was sexually abused.

the paragraph preceding the court of appeals' statement that Morrow criticizes recounts trial counsel's testimony that counsel would have questioned Morrow and his family about this topic.[13] Pet. App. 19. It is a fair inference from this testimony that counsel in fact asked about sexual abuse. But in any event, any question whether the record supported the court of appeals' statement is a factbound one not worthy of certiorari review.

Moreover, Morrow's argument is contrary to this Court's precedent. This Court has held that "[i]t should go without saying that *the absence of evidence* cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt v. Titlow*, 571 U.S. 12, 22-23, 134 S. Ct. 10, 17 (2013) (emphasis added) (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984)). And "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. Morrow points to no direct evidence that trial counsel did not ask him about the alleged abuse and the record

[13] Morrow also disagrees with the court of appeals giving "significance" to the Georgia Supreme Court's "statement" that Morrow did not inform his mental health experts about his sexual abuse despite being questioned about his "sexual history." Pet. at 24, n.12. This is not a "statement." It is a finding of fact by the state appellate court. *See* Pet. App. 18 ("the Georgia Supreme Court *found* 'that Morrow never reported …'") (emphasis added). As a finding of fact, Morrow had to show that the determination was unreasonable by clear and convincing evidence. 28 U.S.C. § 2254(d)(2), (e)(1). As admitted by Morrow, the report of Dr. Davis contains information regarding Morrow's sexual history, and also details Morrow's background from birth until the crimes. D16-29:100-05. Therefore, there was support in the record for the state court's determination and Morrow's argument is a request for this Court to perform factbound error review of his ineffective-assistance claim.

shows Morrow did not inform counsel of this alleged abuse. D16-24:108-09.

C. In reviewing the Georgia Supreme Court's prejudice determination, the court of appeals properly applied § 2254.

Continuing his flawed reading of the court of appeals' opinion, Morrow argues that two fact-findings by the lower state court were not rejected by the Georgia Supreme Court on appeal, which should have resulted in a different prejudice determination. Again, Morrow is requesting factbound error correction of the state court's opinion by way of an erroneous assertion that the court of appeals improperly applied § 2254. And again, Morrow makes misrepresentations of the record and the court of appeals' decision.

Morrow argues that the lower state habeas court determined that "Morrow was 'the victim of a series of rapes'" and this was allegedly the "*only* state court determination on this point." Pet. at 26 (emphasis in original) (quoting Pet. App. 240). In support, Morrow claims that it could not be "assume[d]" by the court of appeals that the Georgia Supreme Court "silent[ly]" rejected this fact finding. *Id.* However, the Georgia Supreme Court explicitly stated that Morrow's strongest evidence in support of the "alleged rapes" could not be "assume[d]" correct and thereby implicitly rejected the lower court's finding. Pet. App. 188-89. The Georgia Supreme Court examined the record and pointed out that the "only direct evidence of the alleged rapes"[14] was Morrow's "statement to a psychologist" during the

[14] Morrow also complains that the court of appeals "refers to Morrow's '*alleged* rapes' and '*alleged* rapist'" in contravention of appropriate deference to the lower court's finding. Pet brief at 26 (emphasis in original) (quoting Pet. App. 19, 25). Regarding the citation to "alleged rapes," the court of appeals was directly quoting the Georgia Supreme Court's opinion. Pet. App. 25. Otherwise, the court of appeals never referred to the rapes as "alleged."

state habeas proceedings. *Id.* at 188. The state appellate court then quoted prior state law holding that an expert was not "'permitted to serve merely as a conduit for hearsay'" therefore, the court would not "'assume the correctness of the facts alleged in the experts' affidavit[] but, instead, we consider the experts' testimony in light of the weaker [evidence] upon which that testimony, in part, relied.'" *Id.* at 188-89. (quoting *Whatley v. Terry*, 284 Ga. 555, 565, 668 S.E.2d 651, 659 (2008). Consequently, the state appellate court did reject the lower court's finding and substituted its own credibility determination, which was entitled to § 2254(d) deference. *See Sumner*, 449 U.S. at 545-46.

Morrow also argues that the court of appeals did not give § 2254 deference to the lower state court's finding that Morrow was beaten with a belt by his mother's boyfriend, George May. Pet. at 27. Although Morrow admits that the Georgia Supreme Court found the evidence of abuse was "inconsistent," he argues this was not a determination that the lower state court's finding was "clearly erroneous"—thus, the court of appeals was in error for stating he had to rebut the finding of "inconsistent" with clear and convincing evidence. *Id.* at 27-28. Again, Morrow is wrong because the state appellate court's finding of "inconsistent" is an implicit rejection of any

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See Pet. App. 3, 11, 12, 18, 19, 25. As for "alleged rapist" (Pet. App. 19), that was a proper characterization. The accused, Earl Green, was neither tried nor convicted of the crimes alleged by Morrow. Nor was there any evidence in the criminal records submitted by Morrow that Green was tried or convicted of any sexual crimes (*see* D17-30:5-119). *See United States v. Salerno*, 481 U.S. 739, 763, 107 S. Ct. 2095, 2110 (1987) ("Our society's belief, reinforced over the centuries, that all are innocent until the state has proved them to be guilty, like the companion principle that guilt must be proved beyond a reasonable doubt, is 'implicit in the concept of ordered liberty.'") (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 152 (1937)).

contrary fact-finding by the lower state court. Morrow has not shown the court of appeals improperly applied § 2254(d) in giving deference to the Georgia Supreme Court's finding that the evidence of physical abuse by Morrow's mother's boyfriend was "inconsistent."[15]

Additionally, Morrow implies the court of appeals should not have given § 2254(d) deference because the state court's decision was contrary to, or an unreasonable application of, this Court's precedent. In support, Morrow argues that "[e]ven assuming, *arguendo*, that there was some inconsistency, this Court has consistently rejected such an 'all-or-nothing' approach to mitigating evidence." Pet. at 27-28 (footnote omitted) (emphasis in original). But the state court only found the evidence was "inconsistent," it did not hold that it would have carried *no* weight with the jury. Morrow has not shown the court of appeals improperly applied § 2254(d)(1).

In sum, Morrow has failed to show the court of appeals did not properly apply § 2254(d) to the state appellate court's decision. Instead, Morrow requests that this Court grant certiorari review to evaluate the factual

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[15] Morrow argues there was "no inconsistency" and there was "ample evidence" to support the lower court's findings. Pet. at 27, n.16. There was inconsistent evidence. For example, Morrow informed Buchanan that May beat his mother and he stood up to May with a baseball bat, but inexplicably did not inform Buchanan that May ever abused him. D16-22:97-98; D17-35:50. Additionally, Samantha testified at trial that after Morrow's parents divorced, she and Morrow moved with their mother the Northeast where life was "pretty good." D15-9:74. Moreover, trial counsel testified they asked Morrow, Samantha, and Bowles about allegations of physical abuse, but they did not admit to anything other than "spankings." D16-29:64-65, 67. And, contrary to Morrow's contentions, May's son's affidavit was given in "rebuttal" by Respondent and he did testify that his father never mistreated or abused Morrow. D18-11:105-106. As for "ample evidence," the only eye-witness to this abuse was Morrow's sister, whose state habeas testimony was contradicted by her trial testimony. *See* D15-9:74.

determinations of the state appellate court—to which the court of appeals gave proper deference. Such factbound questions do not warrant further review.

II. The court of appeals properly applied this Court's precedent in conducting its § 2254 review of the Georgia Supreme Court's decision regarding Morrow's new evidence of sexual abuse.

A. The court of appeals correctly reviewed the state appellate court's decision regarding trial counsel's investigation of sexual abuse.

Turning *Strickland*'s presumption of effective assistance on its head, Morrow argues that both the court of appeals and the Georgia Supreme Court should have "attributed" to trial counsel "alone" the failure to uncover his alleged sexual abuse. Pet. at 36. Morrow reasons this is true because trial counsel did not hire a "mitigation specialist or social worker whose professional training would offer a greater ability to elicit such sensitive information." *Id.* at 37. The court of appeals properly rejected Morrow's argument, pointing out the investigation completed by counsel and Mugridge and that Morrow "underwent five psychological interviews." Pet. App. 22-23. In any event, Morrow's argument is yet another request for this Court to grant review to conduct error correction on a factbound *Strickland* issue.

Morrow alleges "counsel concede[d] that they [were] ill-equipped to conduct [] a sensitive investigation *and* [took] no steps to remedy that inadequacy." Pet. at 40. Again, Morrow misrepresents the record. Although trial counsel informed the trial court at the beginning of their representation that they needed a social worker to assist with the background investigation, the record shows they later strategically decided a social worker was unnecessary. As the Georgia Supreme Court correctly noted, "[c]ounsel

considered hiring a social worker but concluded that there was no need for one in the light of the preparation that they, their investigator, and their psychologist were doing." Pet. App. 181-82. Additionally, as the court of appeals pointed out, "counsel had no reason to doubt Morrow's honesty" because "Morrow shared intimate details about his sexual history and even revealed that his son had been molested." Pet. App. 19. The fact that Morrow later informed a mental health expert that he was sexually abused is not sufficient proof that trial counsel performed deficiently.[16] Finally, as the court of appeals correctly held, Morrow "fail[ed] to establish that contemporary 'prevailing professional norms' in Georgia dictated hiring a social worker for capital cases." Pet. App. 23 (quoting *Strickland*, 466 U.S. at 688).

Moreover, *Strickland* instructed long ago that counsel should be afforded the presumption of effective assistance. *Strickland*, 466 U.S. at 690 ("the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). Where, as here, trial counsel conducts a reasonable background investigation, to include two psychological evaluations of their client, Morrow has not rebutted the presumption as he

[16] Morrow contends, relying upon the lower state court's finding, that trial counsel ignored "'glaring red flags'" that he was sexually abused. Pet. at 37 (quoting Pet. App. 240-41, 267). However, the Georgia Supreme Court "disagree[d] with the habeas court's suggestion that trial counsel should have been alerted to the alleged rapes simply because Morrow was known to wet the bed and to have some adjustment problems." Pet. App. 188. Morrow fails to show this was an unreasonable determination and invites this Court to conduct factbound error review of the state appellate court's opinion.

failed to reveal the alleged evidence of abuse. *Strickland*, 466 U.S. at 691 ("[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions").

B. The court of appeals correctly reviewed the state appellate court's decision regarding prejudice.

In determining prejudice, the Georgia Supreme Court rightfully examined the credibility of Morrow's new allegations of sexual abuse and, in compliance with *Strickland*, weighed *all of the evidence* and reasonably concluded Morrow failed to prove prejudice. Pet. App. 188-89, 194-95. The court of appeals determined the record supported the state appellate court's credibility determination and that the state court conducted a prejudice analysis in compliance with this Court's precedent. Pet. App. 24, 25. Morrow disagrees and argues that the court of appeals has routinely held that sexual abuse "is not mitigating," which resulted here in an improper application of this Court's precedent in examining the state appellate court's prejudice decision. Pet. at 35. The court of appeals has never held sexual abuse "is not mitigating," and Morrow's request for review is for mere factbound error correction of the prejudice determination made by the Georgia Supreme Court and deemed reasonable by the court of appeals. The request should be denied.

The *Strickland* Court instructed that the question of prejudice "is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Thus, prejudice is a balancing test with

aggravating evidence on one side and mitigating evidence on the other. *See*, *e.g.*, *Wong v. Belmontes*, 558 U.S. 15, 26, 130 S. Ct. 383, 390 (2009) (per curiam) ("the Court of Appeals repeatedly referred to the aggravating evidence the State presented as 'scant.' [] That characterization misses *Strickland*'s point that the reviewing court must consider all the evidence--the good and the bad--when evaluating prejudice.") (citation omitted). One side cannot be ignored in favor of the other, which is exactly what Morrow is advocating. Specifically, he argues that alleged mitigating evidence of sexual abuse automatically tips the scale in his favor—regardless of credibility, regardless of the aggravating evidence on the other side of the scale.

Morrow's first argument is a request for this Court to conduct a factbound error review of the credibility determination that was implicit in the Georgia Supreme Court's prejudice determination. Under Morrow's interpretation of this Court's precedent, an allegation of sexual abuse by a petitioner for the first time in a post-conviction proceeding must be considered by a state court to be of the highest mitigating value, regardless of credibility concerns. *See* Pet. at 30-40. This Court's precedents do not support that assertion, and that is not necessarily how a jury would view the evidence.[17] *See Strickland*, 466 U.S. at 696 ("in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules").

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[17] It would not have been unreasonable for a jury to be skeptical of newly alleged allegations of sexual abuse only supported by the statements of the person the jury had recently found guilty of murder and cruelty to children.

To be clear, the Georgia Supreme Court did not find the evidence lacked all credibility or mitigating value. Instead, the state appellate court implicitly rejected the lower court's credibility determination and found there were concerns with the reliability of Morrow's evidence and this would have caused the jury not to have given it "great weight." Pet. App. 189. Contrary to Morrow's argument, this is not a case like *Wiggins* where the petitioner had a well-documented history in public records of a severely deprived childhood. *Wiggins v. Smith*, 539 U.S. 510, 525, 123 S. Ct. 2527, 2537 (2003). Rather, this is a case in which a petitioner, after receiving a death sentence, alleges evidence of sexual abuse for the first time in a state post-conviction proceeding, after trial counsel has conducted a reasonable background investigation, with no concrete historical evidence in corroboration. Morrow failed to prove in federal court that the state appellate court committed "'an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement'" when it determined that counsel's performance did not cause Morrow prejudice. *White v. Woodall*, 572 U.S. 415, 420,134 S. Ct. 1697, 1699 (2014)).

Morrow's attack on the court of appeals is equally unfounded. Although the court of appeals has determined prejudice was not shown when there was evidence of sexual abuse, this was done through the lens of § 2254 and the prejudice weighing process. The court of appeals has not held, as Morrow claims, that this type of evidence is never mitigating. The court has determined several times over the years that evidence of sexual abuse, and physical and emotional abuse, was mitigating and granted federal habeas relief in some cases as a result. *See*, *e.g.*, *Daniel v. Commissioner*, 822 F.3d 1248, 1275 (11th Cir. 2016) (determined prejudice was shown where there

was evidence of childhood sexual abuse and granted federal habeas relief); *Hardwick v. Fla. Dep't of Corr.*, 803 F.3d 541, 558 (11th Cir. 2015) (determining that Hardwick's history of "neglect, deprivation, abandonment, violence, and physical and sexual abuse" established prejudice and entitled him to relief); *see also Williams v. Allen*, 542 F.3d 1326, 1342-43 (11th Cir. 2008) (determining, in part, that the state court improperly "discount[ed] the significance of the abuse" suffered by Williams and granted relief).

The evidence of abuse Morrow alleged himself or through the affidavits of other witnesses, does not present a case of nearly indistinguishable facts in order for the state appellate court's decision to be contrary to this Court's decisions in cases such as *Wiggins*. The evidence in aggravation showed he had previously abused and raped one of his victims. And, with no other provocation than rejection and an alleged attack on his masculinity, he shot three unarmed women in front of two small children—killing two women and leaving one woman permanently injured. Morrow has failed to show that when the record is viewed as a whole that no "fairminded jurist" would have weighed the mitigating and the aggravating evidence and held Morrow failed to prove a reasonable probability of a different outcome. *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 786 (2011).

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018, , I served this brief on all parties required to be served by mailing a copy of the brief to be delivered via email and post-prepaid and properly addressed upon:

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