No. 18-6409

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2018

SCOTTY GARNELL MORROW,
Petitioner

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic Prison,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Capital Case

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. Respondent Argues That The Eleventh Circuit Is Entitled To An Expansive Reading of 28 U.S.C. § 2254 That Has Been Explicitly Rejected by This Court.

Just three weeks before this Court's decision in *Wilson v. Sellers*, 584 U.S. __, 138 S. Ct. 1188 (2018), the Eleventh Circuit affirmed Mr. Morrow's denial of habeas relief by deferring to findings of fact and clear error determinations that it simply imputed to the Georgia Supreme Court, but that no state court ever made. In support of the court of appeals' decision, Respondent asserts—despite *Wilson*'s plain language to the contrary—that federal habeas review under § 2254 is not limited to the particular reasons given by the state courts. Respondent further suggests that the court of appeals' decision below does not conflict with § 2254 because it properly deferred to the Georgia Supreme Court's "implicit" fact-findings and clear error determinations. Because the Georgia Supreme Court did not, and could not, make such determinations, Respondent's arguments ultimately underscore the Eleventh Circuit's error. This Court should grant *certiorari*, vacate and remand for further proceedings in light of *Wilson*.

A. Respondent—Like the Eleventh Circuit—Fails to Recognize That § 2254 Review is Limited to the "Specific Reasons Given by the State Court."

The core question raised by the Petition is whether the Eleventh Circuit violated the strictures of § 2254, as recently restated by this Court in *Wilson*. Respondent contends that "Morrow['s argument that]

Wilson holds a federal court is limited in § 2254(d) review to *the specific reasons provided by a state court* … is in error." BIO at 24 (emphasis added). That contention is directly contradicted by this Court's clear, express command. *Wilson* confirms, with absolute clarity, that §2254(d) review:

> is a straightforward inquiry when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion. In that case, a federal habeas court *simply reviews the specific reasons given by the state court* and defers to those reasons if they are reasonable.

138 S. Ct. at 1192 (emphasis added).

Respondent nevertheless characterizes *Wilson*'s directive as "ambiguous dicta," asserting that "Morrow is precluded from creating federal law" based on "an issue not contemplated by the *Wilson* Court." BIO at 25. But *Wilson*, by its own terms, simply restated the approach that this Court has "affirmed … time and again." 138 S. Ct. at 1192 (citing *Porter v. McCollum*, 558 U.S. 30, 39-44 (2009) (*per curiam*); *Rompilla v. Beard*, 545 U.S. 374, 388-392 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523-538 (2003)). *Wilson*'s directive is neither ambiguous nor dicta. To the contrary, it is the explicit re-affirmation of the animating principle of § 2254(d) review. *See Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) ("review under § 2254(d)(1) focuses on what a state court knew and did"). Because § 2254 demands that federal habeas review focus solely on the "particular reasons—both legal and factual"—offered by the "state courts," *Wilson*, 138 S. Ct. at 1191-92, the Eleventh

Circuit's failure to accordingly limit its review warrants reversal in this case.

B. § 2254 Does Not Permit A Federal Court to Credit "Implicit" State Appellate Court Fact-Findings.

Respondent further argues that the Eleventh Circuit did "nothing to conflict with [*Wilson*]," BIO at 25, as it deferred exclusively to the fact-findings properly before it.[1] Central to Respondent's argument, however, is his assertion that the Georgia Supreme Court made "implicit" fact-findings and clear error determinations that warranted deference under § 2254. *See, e.g.*, BIO at 27. Respondent's analysis belies a fundamental misunderstanding of appellate—and clear error—review and provides the perfect explanation for why this Court should grant *certiorari*. The Eleventh Circuit's deference to "implicit" state appellate court fact-findings is precisely the error identified in the

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[1] Respondent repeatedly chastises Petitioner for seeking "factbound error correction." *See, e.g.*, BIO at 2, 4, 26, 29. Petitioner does not seek simple error correction; he seeks "the thorough review of an ineffective assistance of counsel claim that is contemplated under our Constitution." Pet. App. 30. *Wilson* demands that in order to properly conduct such review, a federal habeas court must "train its attention on *the particular reasons*—both legal *and factual*—why state courts rejected a state prisoner's federal claims." 138 S. Ct. at 1191-92 (emphases added). It is, therefore, necessary for a federal habeas court to precisely identify the state court's fact-findings in order to conduct its review pursuant to § 2254. The difference between a fact-finding properly deemed clearly erroneous by the state appellate court and a fact-finding unreasonably ignored and discounted by that same court may be the difference, as here, between habeas relief and death. *See infra*.

Petition, *see* Pet. at 20-29, and is in direct conflict with § 2254 and *Wilson*.

Respondent defends the Eleventh Circuit's decision by asserting that "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." BIO at 27. Respondent cites three cases in support. Two cases are inapposite.[2] And *Lee v. Comm'r, Ala. Dep't of Corr.*, relies on the same expansive, and ultimately flawed, interpretation of *Harrington v. Richter*, 562 U.S. 86 (2011), that this Court, in *Wilson*, explicitly rejected as inconsistent with § 2254. 726 F.3d 1172, 1223 (11th Cir. 2013) (explaining "how AEDPA works," and noting that a federal habeas court "examine[s] what other 'implicit findings' the state court *could have made* in its denial of a federal claim") (emphasis added).[3] Respondent's reliance on *Lee*, and his

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[2] This Court's decision in *Sumner v. Mata*, addresses whether *explicit* fact-findings made by a state appellate court are due § 2254 deference. 449 U.S. 539, 545-46 (1981). *Williams v. Johnson*, an Eleventh Circuit decision, discusses the implicit fact-findings of a *trial* court. 845 F.2d 906, 909 (11th Cir. 1988).

[3] To the extent that *Lee*, relying on *Johnson v. Williams*, 568 U.S. 289 (2013), held that a state court need not "show its work" by mentioning "all relevant circumstances" in order to receive AEDPA deference, 726 F.3d at 1211-12, Petitioner agrees that it has not been abrogated. Here, however, the state appellate court *did* address the facts central to Petitioner's claim, but it did so in an unreasonable manner. In that instance, the Eleventh Circuit is not entitled to defer to fact-findings or reasoning—*not contained in the state court's order*—that could have

recognition that the court of appeals deferred to implicit fact-findings of a state appellate court, only serves to highlight the conflict between *Wilson* and the Eleventh Circuit's continued adherence to its "could have supported" approach to § 2254 review.

Respondent further contends that 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." BIO at 26 (emphasis added). That proposition, cited without any support, is manifestly *not* axiomatic. Quite the opposite. Where a state appellate court's conclusion is "not supported by" the relevant fact-findings, as here, it has made a decision involving a quintessentially unreasonable application of law, entitled to no deference under § 2254(d). Indeed, this Court has long held that such an incongruous application of the "correct[] governing legal rule" to "the facts of a particular prisoner's case *certainly* would qualify as a decision 'involving an unreasonable application of … clearly established Federal law.'" *Williams v. Taylor*, 529 U.S. 362, 407-08 (2000) (emphasis added). Respondent's axiom would authorize a federal habeas court to assume, whenever a state appellate court's conclusion of law is

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supported the state court's unreasonable decision. *Wilson*,138 S. Ct. at 1192 (cautioning federal habeas courts conducting § 2254(d) review not to hypothesize what a state appellate court could have relied on or found and to review only "the *specific reasons* given by the state court and defer[] to *those reasons if they are reasonable*") (emphasis added).

unreasonable, that the state court, silently, made a new fact-finding that supported its decision. This Court has squarely rejected such an approach. *Id.*; *see also Wilson*, 138 S. Ct. at 1192.

1. Respondent Misapprehends Clear Error Review.

The Georgia Supreme Court made no "implicit" clear error determinations entitled to § 2254(d) deference. Indeed, Respondent's analysis—repeatedly conflating clear error and *de novo* review—essentially concedes that the Georgia Supreme Court could not possibly have satisfied the highly deferential clear error standard here.[4] For instance, the state habeas court made an unequivocal fact-finding that Morrow was the "victim of a series of rapes" during his childhood. Pet. App. 240. Although Morrow's self-report to a well-credentialed expert in childhood sexual trauma was the only "direct evidence," Pet. App. 12, it was amply corroborated by the post-conviction evidence. *See* Pet. at 13-14. Yet Respondent, in his attempt to prove that the state appellate court found this fact-finding clearly erroneous, forgoes a clear error analysis altogether. Instead, he insists that the state appellate court "implicitly rejected the lower court's finding" and "substituted its own credibility determination, which was entitled to § 2254(d) deference."

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[4] An appellate court "must defer to [a state habeas court's] findings of fact unless those findings are clearly erroneous, that is, unless those findings are without any evidentiary support." *Humphrey v. Walker*, 294 Ga. 855, 860 (2014).

BIO at 31-32. That, of course, is antithetical to clear error review. *See, e.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) (finding of fact based on "decision to credit the testimony of one of two or more witnesses … if not internally inconsistent, can virtually never be clear error"). Moreover, Respondent subsequently argues, strikingly, "the Georgia Supreme Court did *not* find the [sexual abuse] evidence lacked *all* credibility." BIO at 38 (emphases added).[5] Plainly, then, there could be no "implicit" clear error determination. The state habeas court's fact-finding—the *only* operative state court determination of fact on point—was entitled to § 2254 deference.

Similarly, the habeas court made a fact-finding that Morrow's mother's boyfriend made Morrow "strip naked and lie on a bed while [he] whipped him with his belt until he grew too tired to continue." Pet. App. 241-42. This fact-finding was, likewise, supported by ample evidence—including unimpeached eyewitness testimony. *See* Pet. at 15. Respondent nevertheless maintains that this finding was properly determined to be clearly erroneous "because the state appellate court's finding of 'inconsistent' is an implicit rejection of any contrary fact-finding by the lower state court." BIO at 32-33. This too is self-evidently false. By definition, a finding of "inconsistent" testimony

[5] This statement, alone, refutes Respondent's contradictory assertion that this fact-finding was without *any* evidentiary support. *See Walker*, 294 Ga. at 860.

cannot satisfy the clear error standard. Morrow's unpresented physical abuse evidence should have been presumed correct under § 2254(e).

2. When the Georgia Supreme Court Rejects a Lower Court's Fact-Finding as Clearly Erroneous, It Says So.

Respondent is unable to identify a *single* fact-finding from the lower state court's eighty-page order that the Georgia Supreme Court found to be clearly erroneous. He contends nonetheless that "[t]he fact that the court did not … use the term 'clearly erroneous' does not mean that it did not reject any of the lower court's factual findings." BIO at 26. It does. The Georgia Supreme Court has consistently—and clearly—identified lower habeas court fact-findings as "clearly erroneous" when it has determined that such findings are without any evidentiary support. *See, e.g.*, *Schofield v. Meders*, 280 Ga. 865, 867 (2006) ("the habeas court's finding is clearly erroneous"); *id.* at 868 ("[t]his finding is clearly erroneous"); *Whatley v. Terry*, 284 Ga. 555, 559 (2008) ("we find that the habeas court's finding of fact … was clearly erroneous"); *Head v. Carr*, 273 Ga. 613, 624 (2001) ("We hold that the habeas court's findings are [] clearly erroneous factually…"); *id.* at 627 ("The habeas court's finding … is clearly erroneous.").[6]

[6] Significantly, the Georgia Supreme Court has *expressly* relied on its *Morrow* decision for the proposition that it "appl[ies] the facts to the law de novo" as "the next step" *after* it has determined that the "habeas court's findings of fact … are not clearly erroneous." *Brown v. Parody*, 294 Ga. 240, 247 (2013) (Benham, J., dissenting) (quoting *Humphrey v. Morrow*, 289 Ga. 864, 866 (2011)).

C. Respondent Concedes That The Eleventh Circuit Relied Upon Facts Not Found by the State Court.

Petitioner argued that the Eleventh Circuit impermissibly premised its deficient performance determination on an independent fact-finding that Morrow actively denied his history of childhood sexual abuse. *See* Pet. at 23-25. Petitioner reasoned that the Eleventh Circuit's statement that it "fail[s] to understand what else counsel could have done" is otherwise "risible." *Id.* at 24. Respondent disputes Petitioner's contention while simultaneously recognizing that "the paragraph preceding the court of appeals' statement" *expressly* relies on testimony—never cited by any state court, *see id.* at 23—that trial counsel "would have questioned Morrow and his family about this topic." BIO at 30. Respondent further concedes that the "fair inference from this [uncited] testimony [is] that counsel in fact asked about sexual abuse." *Id.* In other words, the Eleventh Circuit explicitly identified and relied on evidence and reasoning that *could have* supported—but did not support—the state court's otherwise unreasonable conclusion, in direct contravention of § 2254 and *Wilson*'s clear directive.

II. The Record Demonstrates That The "Specific Reasons Given By" the Georgia Supreme Court Were Unreasonable.

A. Finding That "Credible Evidence" of Childhood Rape "Would Not Have Been Given Great Weight" By a Jury in Mitigation Is Contrary to This Court's Precedent.

The second question presented provides a vehicle for this Court to redress the Eleventh Circuit's repeated mishandling of sexual abuse mitigation evidence. Respondent does not contest this Court's precedent or the widely accepted findings of the scientific community that sexual abuse is "grossly intrusive in the lives of children and is harmful … in ways which no just or humane society can tolerate." *Kennedy v. Louisiana*, 554 U.S. 407, 468 (2008) (Alito, J., dissenting). Instead, Respondent obfuscates the fundamental question: whether credible evidence of repeated childhood rape may be dismissed, as it was here?

Respondent suggests that "[u]nder Morrow's interpretation," an "*allegation* of sexual abuse … must[7] be considered by a state court to be of the highest mitigating value, *regardless of credibility concerns*." BIO

[7] Respondent similarly claims that "[Morrow] argues that alleged mitigating evidence of sexual abuse *automatically tips the scale* in his favor." BIO at 37 (emphasis added). This is patently wrong. *Compare* Pet. at 35 ("of course, evidence of sexual abuse is sometimes not enough to tip the scales"'). Petitioner asserts only that this uniquely powerful mitigating evidence deserves the consideration demanded by the Constitution.

at 37 (emphases added). But that is not the question here. The state habeas court found—unequivocally—that the evidence was credible. Pet. App. 240. Absent a determination that this was clearly erroneous, the Georgia Supreme Court—and, pursuant to § 2254, the Eleventh Circuit—was required to give proper weight to Morrow's childhood rapes. Instead, as Respondent concedes, the "state appellate court implicitly rejected the lower court's credibility determination,"[8] BIO at 38, and concluded that the evidence "would not have been given great weight by the jury." Pet. App. 189. That is precisely the discounting that this Court has prohibited.[9] *See, e.g.*, *Porter*, 558 U.S. at 42-44. This case, therefore, presents an excellent vehicle for this Court to

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[8] Respondent contends that the "Georgia Supreme Court rightfully examined the credibility of Morrow's new allegations of sexual abuse." BIO at 36. But an appellate court is not tasked with credibility determinations. *Walker*, 294 Ga. at 860 (2014) (recognizing that an appellate court "must also yield to the judgment of the habeas court with respect to the credibility of [habeas] witnesses").

[9] Respondent attempts to rehabilitate the state court's unreasonable discounting by claiming, "the Georgia Supreme did not find [Morrow's sexual abuse] evidence lacked all credibility or mitigating value." BIO at 38. But in his opposition to Petitioner's first question presented, Respondent asserts that the Georgia Supreme Court found the lower court's fact-finding to be clearly erroneous and, accordingly, "implicitly rejected [it]." BIO at 31. In other words, Respondent would have this Court believe that the Georgia Supreme Court "rejected" this fact-finding *and* nevertheless appropriately weighed the evidence pursuant to *Strickland*.

affirm that credible childhood sexual abuse evidence must be afforded due weight.

B. Respondent Concedes that Mr. Morrow's Personal History Is Replete With Powerful Mitigation Evidence.

Respondent concludes that irrespective of the weight due Morrow's childhood sexual abuse, "when the record is viewed as a whole," there is no reasonable probability of a different outcome. BIO at 39. But as Respondent recognizes, trial counsel adduced plentiful evidence 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." BIO at 13. Morrow's evidence of physical and sexual abuse, neglected by trial counsel, would have rendered their mitigation presentation all the more powerful. Indeed, Respondent's extensive recounting of the trial evidence, BIO at 13-17, only underscores the unreasonableness of the state court's prejudice determination in light of "the record [] viewed as a whole," *id.* at 39.

As the state habeas court concluded:

> The undiscovered mitigation, when taken together with the mitigating evidence that was aptly presented by Trial Counsel, is compelling. Furthermore, reasonable jurors could have found Petitioner's crime to be unplanned and emotionally fueled… When his crime is viewed in light of all the available evidence in mitigation, there is—at a bare minimum—a reasonable probability that at least one of the jurors would have struck a different balance as to sentence.

Pet. App. 271-72.

C. This Court Has Clearly Established That Trial Counsel's Actions Were Insufficient to Discharge Their Sixth Amendment Duty to Investigate.

Respondent claims that the failure to uncover Morrow's sexual abuse cannot be attributed to counsel. He argues that "[a]lthough trial counsel informed the trial court … that they needed a social worker to assist with the background investigation, … [they] *strategically* decided a social worker was unnecessary" in light of the work performed by Dr. Buchanan, a psychologist, and Mr. Mugridge, an ATF officer turned defense investigator. BIO at 34 (emphasis added). But trial counsel retained both Buchanan and Mugridge just *weeks* prior to trial. *See* Pet. at 9-10.[10] The funds for a social worker were allocated by the trial court nearly *four years* before trial. Counsel could not possibly have reached the conclusion that a social worker was unnecessary based on the work of either Buchanan or Mugridge. Rather, counsel "back-burnered" the search for a social worker, Pet. at 8, and "weren't even

[10] Respondent alternatively suggests that trial counsel's performance cannot be constitutionally deficient because it "include[d] two psychological evaluations." BIO at 35. But the number of psychological evaluations or interviews is not dispositive. *See, e.g.*, *Wiggins*, 539 U.S. at 525, 544 (finding counsel ineffective even though a defense psychologist conducted multiple "clinical interviews, and performed six different psychological tests of Wiggins" and a criminologist interviewed him). This is particularly true where, as here, Dr. Buchanan's evaluation was a "rushed endeavor" conducted, in large part, *after* Morrow's *voir dire* had commenced. Pet. at 9.

looking in that direction," *id.* at 37. This Court has consistently held that such inattention cannot be deemed reasonable. *See, e.g.*, *Wiggins*, 539 U.S. at 526.

Respondent nevertheless concludes that Morrow is to blame for failing to volunteer the fact that he was raped as a seven year old, asserting that Morrow's argument "[t]urn[s] *Strickland*'s presumption of effective assistance on its head." BIO at 34. But it is the Eleventh Circuit's check-the-box approach to investigating childhood sexual abuse that flips the burden of conducting an adequate mitigation investigation on its head. A survivor of childhood sexual abuse cannot be expected to freely volunteer such traumatic information. And Respondent does not dispute the unique barriers to disclosure relating to childhood sexual abuse. As *amici* note:

> Trauma affects childhood victims of sexual abuse or assault in a way that is distinct from victims of other crimes. Frequently, children are so disabled by the trauma that they cannot disclose the abuse until much later in life. As a direct result of the shame and secrecy historically associated with child sex abuse, victims often remain in the shadows—unable to come forward. Indeed, the average age of reporting is 52. One-third of victims never disclose their abuse. At least thirty-three percent of such cases are never reported.

Brief of Amici Curiae CHILD USA, et al. at 15 (citations omitted). *Strickland* demands more from trial counsel. Where, as here, counsel failed to adequately investigate the possibility of sexual abuse despite

"glaring red flags," Pet. at 37, this Court has found *Strickland*'s presumption of effective assistance to have been rebutted.

CONCLUSION

Petitioner Scotty Garnell Morrow respectfully requests that this Court grant *certiorari*, summarily reverse, and remand for further proceedings in light of *Wilson v. Sellers*, 584 U.S. __, 138 S. Ct. 1188 (2018). In the alternative, this Court should grant *certiorari* and set Petitioner's case for full briefing and argument before the Court.

Respectfully submitted, this 7th day of January, 2019.

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