No. 18-   , 18A604

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

MARION WILSON,

Petitioner,

-v-

WARDEN,
Georgia Diagnostic Prison,

Respondent.

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

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QUESTIONS PRESENTED FOR REVIEW

THIS IS A CAPITAL CASE

1. The Eleventh Circuit did not focus on the state habeas court's actual reasons for rejecting Petitioner's claim that trial counsel's inadequate investigation and presentation of mitigating evidence of Petitioner's difficult childhood and frontal lobe brain damage amounted to constitutionally ineffective representation, instead deferring to speculative reasons for denying relief on that issue. In doing so, did the Eleventh Circuit ignore this Court's earlier directive in this case that a federal habeas court should "train its attention on the particular reasons – both legal and factual – why state courts rejected a state prisoner's federal claims," *Wilson v. Sellers*, 138 S. Ct. 1188, 1191-92 (2018), in determining whether the Petitioner may be entitled to relief under 28 U.S.C. § 2254(d), and, if properly reviewed in accordance with this Court's prior decision, should the writ of habeas corpus issue?

2. At sentencing, the State presented substantial evidence regarding alleged gang activity in the county where Petitioner's crime took place, much of which was based on uncorroborated hearsay and speculation, and can reasonably be characterized as hyperbolic fear-mongering lacking any relevant connection to the case or Petitioner. Though trial counsel failed to object to the presentation of this evidence, took no steps to limit its admission, and introduced virtually no evidence to mitigate its aggravating impact, the state habeas court held that trial counsel were not ineffective in failing to challenge this evidence. In federal habeas proceedings, the district court endorsed the state court's ruling. Nonetheless, it relied on the gang-related aggravation as proof that Petitioner was not prejudiced by counsel's failure to develop and present mitigating evidence of Petitioner's childhood privations and brain damage. The Eleventh Circuit denied a certificate of appealability to address this aspect of the sentencing phase ineffective-

assistance-of-counsel claim, though it, too, relied on the aggravated nature of the gang evidence to support its conclusion that counsel's failure to develop and present background mitigation was not prejudicial. These facts give rise to the following questions:

1. In light of the questionable provenance of the gang evidence and its damning role both at sentencing and in state and federal habeas proceedings, did the Eleventh Circuit violate 28 U.S.C. § 2253(c) in denying a certificate of appealability to address the gang-related ineffective-assistance-of-counsel subclaim?

2. Given that *Strickland v. Washington*, 466 U.S. 668, 695 (1984), requires courts to determine whether counsel's "errors" (in the plural) created "a reasonable probability that . . . the result of the proceeding would have been different," and, when raising a *Strickland* challenge to counsel's failure to investigate and present mitigating evidence in a capital sentencing hearing, courts must "consider the totality of the available mitigation evidence – both that adduced at trial and the evidence adduced in the habeas proceeding – and reweig[h] it against the evidence in aggravation," *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam) (internal quotation marks omitted), does a federal court err in first parsing a defendant's sentencing phase ineffective-assistance claim into multiple subclaims and then granting a certificate of appealability on only a subset of those claims?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

A. Procedural History 4

B. Statement of Relevant Facts 7

1. Aggravating evidence at trial dwarfed defense counsel's meager presentation at sentencing. 8

2. The evidence in state habeas proceedings demonstrated that counsel failed to investigate and present readily available mitigating evidence. 9

3. In state habeas proceedings, Wilson presented extensive and compelling evidence of his deprived childhood and frontal lobe brain impairments. 10

4. The state habeas court found that Wilson was not prejudiced by counsel's failure to present background mitigating evidence based on its unreasonably wrong conclusion that the evidence was inadmissible and cumulative of trial testimony. 12

5. The district court engaged in a critical assessment of the state habeas court's conclusion that trial counsel performed acceptably, but failed to apply the same rigor to its prejudice analysis. 14

6. The Eleventh Circuit, both before and after this Court's remand in *Wilson*, simply made up reasons for finding the state habeas court's prejudice determination reasonable. 16

HOW THE FEDERAL QUESTION WAS RAISED BELOW 17

REASONS WHY THE PETITION SHOULD BE GRANTED 17

I. The Eleventh Circuit Panel Ignored This Court's Directive in *Wilson v. Sellers* to "Look Through" the Georgia Supreme Court's Unexplained Ruling to the State Habeas Court's Reasoned Decision and Instead Provided Its Own Rationale for Denying Habeas Relief. 17

A. The Eleventh Circuit Disregarded This Court's Instruction to Focus Its § 2254(d) Analysis on the Last Reasoned State Court Decision. 18

B. The State Habeas Court's Decision, Riddled with Unreasonably Wrong Factual and Legal Findings, Is Not Entitled to AEDPA Deference. 19

C. Relief Is Warranted Based on Trial Counsel's Failure to Investigate and Present Compelling Mitigating Evidence. 20

1. Mitigating evidence of Wilson's troubled background cannot be dismissed as merely "cumulative" of the sentencing phase case. 21

2. The state habeas evidence was not a "double-edged sword." 23

3. Evidence of Wilson's damaged frontal lobe is compelling mitigating evidence providing positive grounds for imposition of a sentence less than death, while diminishing the aggravated nature of the State's evidence. 25

4. Wilson was prejudiced by his attorneys' failure to investigation and present readily available evidence of his deprived upbringing and brain damage. 27

II. The Panel Erred in Failing to Grant a Certificate of Appealability as to the Claim that Counsel Unreasonably Failed to Mitigate or Rebut Utterly Fallacious Yet Highly Prejudicial "Gang Expert" Testimony. 29

A. Law Enforcement Witnesses Grievously Misled the Jury as to Gang Activity in Baldwin County. 32

B. Counsel Were Patently, Prejudicially Ineffective. 36

C. This Court's Guidance as to the Proper Mode of Analyzing *Strickland* IAC Claims is Needed. 39

CONCLUSION 41

CERTIFICATE OF SERVICE 42

TABLE OF AUTHORITIES

Cases

Barefoot v. Estelle, 463 U.S. 880 (1983) 31

Browning v. Baker, 875 F.3d 444 (9th Cir. 2017) 39

Buck v. Davis, 137 S. Ct. 759 (2017) 38

Campbell v. United States, 364 F.3d 727 (6th Cir. 2004) 40

Collier v. Turpin, 177 F.3d 1184 (11th Cir. 1999) 23

Dawson v. Delaware, 503 U.S. 159 (1992) 36

DeBruce v. Comm'r, Ala. Dep't of Corr., 758 F.3d 1263 (11th Cir. 2014) 22

Eddings v. Oklahoma, 455 U.S. 104 (1982) 21

Evans v. Sec'y, Dep't of Corr., 703 F.3d 1316 (11th Cir. 2013) 23

Fisher v. Angelone, 163 F.3d 835 (4th Cir. 1998) 40

Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003) 27

Hardwick v. Sec'y Fla. Dep't of Corr., 803 F.3d 541 (11th Cir. 2015) 28

Harrington v. Richter, 562 U.S. 86, 98 (2011) 5, 6, 41

Hinton v. Alabama, 571 U.S. 263 (2014) 37

Johnson v. Sec'y, Dep't of Corr., 643 F.3d 907 (11th Cir. 2011) 22, 28

Lindstadt v. Keane, 239 F.3d 191 (2d Cir. 2001) 40

Miller-El v. Cockrell, 537 U.S. 322 (2003) 19, 31, 38

Miller-El v. Dretke, 545 U.S. 231 (2005) 18

Moore v. Johnson, 194 F.3d 586 (5th Cir. 1999) 40

Moore v. United States, 555 U.S. 1 (2008) 19

Panetti v. Quarterman, 551 U.S. 930 (2007) 20

Porter v. McCollum, 558 U.S. 30 (2009) ii, 13, 19, 27

Rompilla v. Beard, 545 U.S. 374 (2005) 28, 31, 32, 36

Sanders v. Ryder, 342 F.3d 991 (9th Cir. 2003) 40

Sears v. Upton, 561 U.S. 945 (2010) 13, 19, 27

Skipper v. South Carolina, 476 U.S. 1 (1986) 23

Snyder v. Louisiana, 545 U.S. 1137 (2005) 19

Snyder v. Louisiana, 552 U.S. 472 (2008) 18

Strickland v. Washington, 466 U.S. 668 (1984) passim

Tennard v. Dretke, 542 U.S. 274 (2004) 13

United States v. Cronic, 466 U.S. 648 (1984) 37

Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996) 40

Washington v. Smith, 219 F.3d 620 (7th Cir. 2000) 22

Wiggins v. Smith, 539 U.S. 510 (2003) 20, 21, 28, 36

Williams v. Taylor, 529 U.S. 362 (2000) passim

Wilson v. Humphrey, No. 5:10-CV-489 (MTT) (M.D. Ga. Dec. 19, 2013) passim

Wilson v. Sellers, 137 S. Ct. 1203 (2017) 6

Wilson v. Sellers, 138 S. Ct. 1188 (2018) 2, 6, 18

Wilson v. Sellers, 138 S. Ct. 1591 (2018) 6

Wilson v. Terry, 562 U.S. 1093 (2010) 4

Wilson v. Warden, 774 F.3d 671 (11th Cir. 2014) passim

Wilson v. Warden, 834 F.3d 1227 (11th Cir. 2016) 2, 6

Wilson v. Warden, 842 F.3d 1155 (11th Cir. 2016) 2, 6

Wilson v. Warden, 898 F.3d 1314 (11th Cir. 2018) passim

Wilson v. Warden, No. 14-10681-P (11th Cir. 2018) 1, 30

Wong v. Belmontes, 558 U.S. 15 (2009) 24, 25

Woodson v. N. Carolina, 428 U.S. 280 (1976) 23

State Cases

Brown v. State, 206 Ga. App. 800 (1992) 37

Green v. State, 266 Ga. 237 (1996) 37

In re Carr, 282 Ga. 138 (2007) 10

Moore v. State, 221 Ga. 636 (1966) 37

Turner v. State, 267 Ga. 149 (1996) 8

Wilson v. Hall, Butts County Superior Court Case No. 2001-V-38 .... 2, 12, 27, 30

Wilson v. State, 271 Ga. 811 (1999) 4, 8

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2253 .... ii, 3, 39

28 U.S.C. § 2254 .... passim

Constitutional Provisions

U.S. Const. amend. VI 2, 3, 40

U.S. Const. amend. VIII 2, 3, 40

U.S. Const. amend. XIV 2, 3

Other Authorities

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) 36, 37

Eric O'Brien, *Jennings v. Stephens and Judicial Efficiency in Habeas Appeals*, 10 Duke J. Const. L. & Pub. Pol'y Sidebar 21 (2015) 41

Michael C. McLaughlin, *It Adds Up: Ineffective Assistance of Counsel and the Cumulative Deficiency Doctrine*, 30 Ga. St. U. L. Rev. 859 (2014) 41

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No. 18A604

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

Petitioner, Marion Wilson, respectfully petitions this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit entered in this case on August 10, 2018, with rehearing denied on October 11, 2018. *See Wilson v. Warden*, 898 F.3d 1314 (11th Cir. 2018), *rehearing denied*, *Wilson v. Warden*, No. 14-10681-P (11th Cir. 2018).

OPINIONS BELOW

The August 10, 2018 opinion of the Eleventh Circuit, *Wilson v. Warden*, 898 F.3d 1314 (11th Cir. 2018), affirming the denial of Wilson's petition for a writ of habeas corpus is attached hereto as Appendix A. The unpublished October 11, 2018 opinion of the Eleventh Circuit Court of Appeals denying rehearing is attached hereto as Appendix B. The Order of this Court granting certiorari, vacating the judgment and remanding to the Eleventh Circuit in Case No. 17-5562 is

attached hereto as Appendix C. The opinion of this Court reversing and remanding to the Eleventh Circuit, *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), is attached hereto as Appendix D. The unpublished opinion of the Eleventh Circuit Court of Appeals denying rehearing is attached hereto as Appendix E. The order of the Eleventh Circuit reinstating the original panel opinion and affirming the denial of Wilson's petition for a writ of habeas corpus, *Wilson v. Warden*, 842 F.3d 1155 (11th Cir. 2016), is attached hereto as Appendix F. The decision of the Eleventh Circuit, sitting en banc, *Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016), is attached hereto as Appendix G. The panel decision vacated by the en banc court's grant of rehearing, *Wilson v. Warden*, 774 F.3d 671 (11th Cir. 2014), is attached hereto as Appendix H. The unreported federal habeas court decision (Doc. 51) in *Wilson v. Humphrey*, No. 5:10-CV-489 (MTT) (M.D. Ga. Dec. 19, 2013), is attached hereto as Appendix I. The unreported order of the Georgia Supreme Court denying a certificate of probable cause to appeal ("CPC") is attached hereto as Appendix J. The unreported state habeas court order (Doc. 18-4) in *Wilson v. Hall*, Butts County Superior Court Case No. 2001-V-38, denying all relief is attached hereto as Appendix K.

JURISDICTION

The decision of the Eleventh Circuit Court of Appeals, denying rehearing, was entered on October 11, 2018. *See* Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) as Petitioner asserts a deprivation of his rights secured by the Constitution of the United States. The time to file this petition was extended to March 10, 2019. *See* Appendix L.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution:

"In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253 provides in pertinent part:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .

(c)(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2254 provides in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Procedural History

On November 5, 1997, following a trial in the Superior Court of Baldwin County, Georgia, Marion Wilson was convicted and sentenced to death for the 1996 murder of Donovan Parks. The Georgia Supreme Court affirmed on direct appeal. *Wilson v. State*, 271 Ga. 811 (1999), *cert. denied*, 531 U.S. 838 (2000).

After this Court denied certiorari, Wilson sought state post-conviction relief alleging, *inter alia*, that under *Strickland v. Washington*, 466 U.S. 668 (1984), trial counsel was constitutionally ineffective for failing to investigate, develop, and present available mitigating evidence and evidence rebutting the State's case in aggravation. An evidentiary hearing was held on February 22-23, 2005, at which Wilson presented significant evidence, unheard by his sentencing jury, regarding his childhood privations and abuse, and frontal lobe brain damage, and challenged the reliability and admissibility of gang-related evidence the State had submitted, without objection, at sentencing. *See* Docs. 12-05 – 14-04 (state habeas hearing transcripts and Petitioner's exhibits).

The Superior Court of Butts County, Georgia ("state habeas court") denied Wilson's petition on December 1, 2008 (Appendix K). In a one-sentence order on May 3, 2010, the Supreme Court of Georgia summarily denied Wilson's CPC application (Appendix J). This Court denied his petition for writ of certiorari on December 6, 2010. *Wilson v. Terry*, 562 U.S. 1093 (2010).

On December 17, 2010, Wilson filed his timely federal habeas petition in the United States District Court for the Middle District of Georgia. The district court found that the state habeas court had relied on unreasonably wrong factual and legal determinations in finding that trial counsel's performance was adequate, observing that "the conduct of Wilson's trial attorneys with regard to their investigation and presentation of mitigation evidence is difficult to defend." Doc.

51 (Appendix I) at 1. The district court nonetheless denied the petition on the ground that any deficiencies were not prejudicial. *See* Doc. 51 at 59-73. It granted a certificate of appealability on a single issue: "[w]hether trial counsel was ineffective during the penalty phase by failing to conduct a reasonable investigation into mitigation evidence and by failing to make a reasonable presentation of mitigation evidence." *Id.* at 108-09. It subsequently denied Wilson's motion to alter or amend the judgment. *See* Docs. 53, 55. Wilson appealed. Doc. 57.

The Eleventh Circuit denied Wilson's motion to expand the certificate of appealability to include the portion of his ineffective-assistance-of-counsel ("IAC") claim challenging trial counsel's failure to limit and/or rebut extensive gang-related evidence the State presented at sentencing, and later denied Wilson's motion for reconsideration of that ruling. *See* Motions and Orders dated March 18, 2014, April 3, 2014, April 24, 2014, and May 21, 2014.

On December 15, 2014, the Eleventh Circuit affirmed the district court's denial of habeas relief. *See Wilson v. Warden*, 774 F.3d 671 (11th Cir. 2014) (*see* Appendix H). The court determined that the focus of its review under 28 U.S.C. § 2254(d) was the Georgia Supreme Court's summary denial of CPC, based on its determination that the Georgia Supreme Court's one-sentence ruling was "the final decision 'on the merits,'" and that, under *Harrington v. Richter*, 562 U.S. 86, 98 (2011), rather than "deferring to the reasoning of the state trial court, we ask whether there was any 'reasonable basis for the [Supreme Court of Georgia] to deny relief.'" *See Wilson*, 774 F.3d at 678 (citations omitted). The panel accordingly disregarded the specific grounds the state habeas court articulated as the bases for its denial of relief, and instead affirmed on the basis of hypothetical reasons for the Georgia Supreme Court's summary denial of CPC. *Id.* at 679-81.

The panel opinion was vacated when the Eleventh Circuit granted rehearing "to determine en banc whether federal courts must 'look through' the summary denial [of a CPC application] by

the Supreme Court of Georgia and review the reasoning of the Superior Court of Butts County." *Wilson v. Warden, Ga. Diagnostic Prison*, 834 F.3d 1227, 1230 (11th Cir. 2016). On August 23, 2016, the en banc Eleventh Circuit, by a 6-5 vote, adopted the panel's approach, holding that "[w]hen the last adjudication on the merits provides no reasoned opinion, federal courts review that decision using the test announced in *Richter*," which, the majority concluded, required Wilson to "establish that there was no reasonable basis for the Georgia Supreme Court to deny his certificate of probable cause." *Id.* at 1235. The en banc court remanded the case to the panel for consideration of the remaining issues. *Id.* at 1242.

On February 27, 2017, this Court granted certiorari to review the Eleventh Circuit's en banc ruling. *Wilson v. Sellers*, 137 S. Ct. 1203 (2017).[1] On April 17, 2018, the Court reversed the Eleventh Circuit, holding that when a final state court ruling is unaccompanied by reasons for the decision, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "then presume that the unexplained decision adopted the same reasoning." *Wilson*, 138 S. Ct. at 1192. A short time later, this Court vacated the Eleventh Circuit's post-en banc panel decision, *Wilson*, 842 F.3d 1155, and remanded for consideration in light of its decision in *Wilson*, 137 S. Ct. 1203. *See Wilson v. Sellers*, 138 S. Ct. 1591 (2018).

Following this Court's remand, Wilson moved to remand the case to the district court or, alternatively, to expand the COA and allow supplemental briefing. The court did not rule on the motion until August 10, 2018, when the Eleventh Circuit issued its opinion on remand. *Wilson*,

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[1] In the meantime, the Eleventh Circuit panel "reinstat[ed] the original panel opinion and affirm[ed] the denial of Wilson's petition for a writ of habeas corpus." *Wilson v. Warden, Ga. Diagnostic Prison*, 842 F.3d 1155, 1156 (11th Cir. 2016), *vacated by Wilson v. Sellers*, 138 S. Ct. 1591 (2018).

898 F.3d at 1316. The court again affirmed the district court's denial of Wilson's petition for a writ of habeas corpus and denied his motion to remand or, alternatively, permit supplemental briefing and expand the COA. *Id*; *see also id.* at 1322. Although the court noted that this Court's decision required it to "'look through' [the Georgia Supreme Court's unexplained] decision and presume that it adopted the reasoning of the superior court," *id.*, the panel did not engage in an analysis of the state habeas court decision and instead parroted much of the reasoning set forth in its original opinion. Wilson's petitions for rehearing and rehearing en banc were denied on October 11, 2018. This Petition follows.

B. Statement of Relevant Facts

Marion Wilson and his co-defendant Roberts Butts were charged with killing Donovan Parks and stealing his car. At the time of the crime, Mr. Wilson was 19 years old. In separate trials, each defendant was convicted of murder and sentenced to death.[2] The evidence at both trials tended to show that the single gunshot blast that killed the victim was fired by co-defendant Butts—a position not only promoted by the prosecutor in his presentation of evidence and argument at Butts' trial, but endorsed by the prosecutor's actions in offering Wilson, but not Butts, a plea deal to a parolable life sentence, an offer Wilson rejected.[3]

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[2] Mr. Butts was executed for this crime in May 2018.

[3] Wilson went to trial in November 1997, asserting a "mere presence" defense based on Wilson's statements, as corroborated by Butts' confessions to jail inmates Garza, May, and Holcomb. See Doc. 10-5 at 83-84 (describing Butts' confession to shooting Donovan Parks with a shotgun). To introduce those statements, however, defense counsel were required to—but did not—follow the steps necessary for their admission. *See Wilson v. State*, 271 Ga. 811, 815 (1999) (trial court did not err in excluding the evidence as counsel failed to follow the procedure set forth in *Turner v. State*, 267 Ga. 149, 155 (1996)). As a result of counsel's omission, the prosecution convinced the trial court to exclude the corroborating evidence, Doc. 9-19 at 29-35, and Wilson was convicted. Later, at Butts' trial, the prosecution used the same three witnesses to establish

1. Aggravating evidence at trial dwarfed defense counsel's meager presentation at sentencing.

Prior to trial, defense counsel "unquestionably knew the jury was going to hear the worst of Wilson's past . . . . They had notice of the State's 29 aggravating circumstances from Wilson's past, ranging from aggravated assault and first degree arson to reckless conduct and cruelty to animals." District Court Order (Doc. 51) at 30; *see also id.* at 23 n.13. This was borne out at the penalty phase: over the course of 324 transcript pages, the prosecutor presented 22 witnesses who described Mr. Wilson's history of juvenile impulsiveness and violence, and his purported gang involvement, as well as unrelated gang activity in Baldwin County. *See* Doc. 10-1 at 106 – 10-5 at 14. By comparison, the mitigation case was meager. Counsel called only two witnesses to discuss Wilson's background and character, a forensic psychiatrist, Renee Kohanski, and Wilson's mother, Mildred Charlene Cox, whose direct examinations were a 14-page blip in the sea of aggravating evidence the State had produced.[4]

Over the course of nine pages, Dr. Kohanski "regurgitat[ed] facts she culled from records," Doc. 51 at 62 n.56, stating that Mr. Wilson was sickly as a child, possibly as a result of his past-term childbirth; had problems at school, including exhibiting aggressive behavior, difficulty staying on task, poor self-image, and impulsiveness; had excessive maternal dependence, had a racial identity conflict as a biracial child; had an "extraordinarily chaotic home life" with little adult supervision; had a mother who failed to follow through on his school's recommendations for

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that Butts, not Wilson, was the shooter. *Butts v. State*, 273 Ga. 760, 762 (2001). The Georgia Supreme Court also found as a matter of fact that Butts was the trigger-man. *Id.* at 762, 771.

[4] Defense counsel called four other witnesses, three of whom, Sheriff Sills, Officer Blenk, and investigator Thrasher "supported trial counsel's theory that Butts shot Parks," while the fourth, co-defendant Butts, invoked his Fifth Amendment privilege. Doc. 51 at 47.

a medical evaluation to test for attention deficit hyperactivity disorder ("ADHD"); had no father figure; witnessed drug use by his mother's boyfriends; witnessed one boyfriend hold a gun to his mother's head; joined a gang as a substitute family; and had some college education. *See* Doc. 10-5 at 100-08. This information was presented without meaningful detail.

Mr. Wilson's mother, Charlene Cox, testified over the course of five pages of direct examination that Wilson's father was not involved in his life and that Wilson's biracial background was challenging to him, and asked that her son's life be spared for the sake of herself and Wilson's 18-month-old daughter; on redirect, she indicated she had held menial, low-paying jobs. *Id*. at 126-31, 138-39.[5]

2. The evidence in state habeas proceedings demonstrated that counsel failed to investigate and present readily available mitigating evidence.

Abundant mitigation evidence was readily available to trial counsel had they undertaken a constitutionally adequate effort. Instead, due in part to counsel's confusion over who was to develop mitigation and their failure to follow-up on red-flags in the information they obtained, counsel conducted an insufficient investigation of Mr. Wilson's life history.[6] In federal habeas proceedings, the district court observed:

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[5] Counsel's sentencing phase summation reflected the feeble nature of the mitigation case: Counsel denounced their client as not having "led any kind of life but a bad one," Doc. 10-6 at 21; credited the prosecution's evidence, *see id.* at 29; and told jurors that Wilson's status as the non-triggerman was "the *only* reason why you should spare his life," *id*. at 36-37 (emphasis added).

[6] Although appointed counsel Thomas O'Donnell represented to the trial court that he had tried a number of capital trials, Doc. 8-12 at 6, he later admitted in state habeas testimony that neither he nor co-counsel Phillip Carr had any actual capital trial experience or training, Doc. 12-8 at 31-32, 35. Both attorneys were also operating under conflicts of interest at the time they represented Wilson. O'Donnell's wife was a local prison warden who knew the victim was a corrections officer, Doc. 8-14 at 2, and O'Donnell later testified that members of the local corrections community "pressured [him] about the case" daily, Doc. 8-13 at 15-16. Carr's wife

> When trial counsel finally began their trial preparation in earnest, they each somehow thought the other was investigating Wilson's background. Contrary to the state habeas court's findings, they did not interview Wilson's father, and they did not make a strategic decision not to call "devastating" background witnesses. They could not have; they never interviewed background witnesses. On the other hand, they hired mental health experts (although they ignored their recommendations for testing), and perhaps most importantly, they gathered considerable documentary evidence of Wilson's troubled background. Yet they ignored the many red flags in these records and did not expand their investigation beyond the records.

Doc. 51 at 40; *see, e.g.*, *id.* at 34 (district court noting that "records trial counsel received contained a wealth of information about Wilson's troubled past, yet trial counsel did not get Wilson's DFCS records, they did not interview DFCS workers, and they did not interview any other social worker who had been in contact with Wilson. Nor did they contact teachers, counselors, or the school psychologist mentioned in the records"). "[T]he conduct of trial counsel in the development of mitigation evidence," the court concluded, "is difficult to defend." Doc. 51 at 41.

3. In state habeas proceedings, Wilson presented extensive and compelling evidence of his deprived childhood and frontal lobe brain impairments.

In contrast to the defense case at trial, the mitigation evidence presented in state habeas proceedings provided a comprehensive, vivid and compelling account, drawn from more than twenty (20) witnesses and multiple records, of Wilson's lifelong history of privation and mental health difficulties. In brief, the evidence concerning Wilson's background showed:

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also worked for a local state prison. Doc. 8-14 at 3. In addition, O'Donnell concealed his appointment as a Special Assistant Attorney General, a position that should have terminated his further participation in the case, *see* Doc. 21-8 at 57, 60; Doc. 16-13 at 56, and which did result in his removal as appellate counsel when this conflict finally came to light, Doc. 16-13 at 56. In March 2007, Carr was convicted of four counts of child molestation and sentenced to 25 years in prison. Doc. 25-5; *In re Carr*, 282 Ga. 138 (2007).

- While pregnant with Mr. Wilson, his mother was treated for venereal disease, drank alcohol, and injected herself with valium. Doc. 12-10 at 57-58, 100.

- As a baby, Mr. Wilson lived in a "shotgun" shack without basic necessities, such as water, electricity, or heat. *Id.* at 71, 85, 91; Doc. 12-7 at 35-36.

- Later residences were even worse—squalid, with "liter soda bottles filled with urine lined up all around the walls of their place" and, trash, rotten food, and dog excrement littering the floor. Doc. 12-7 at 44-45; Doc. 12-10 at 71-72, 75, 85; Doc. 12-11 at 7.

- Wilson's mother had a string of live-in lovers who used drugs and alcohol and were physically violent toward her and Wilson. Doc. 12-7 at 43, 47–48, 50; Doc. 12-10 at 61, 63, 65-66, 76-77, 91, 93-94, 96; Doc. 12-11 at 74; Doc. 12-16 at 12. Wilson even reported his own abuse to the Department of Family and Children Services ("DFCS"). Doc. 12-16 at 12 ("[Child] says boyfriend . . . had hit him").

- Elementary school officials urged Wilson's mother to address his behavioral problems by permitting treatment for ADHD and placement in special education classes, but she did not. Doc. 12-10 at 74-75, 93–94, 97-98.

- Wilson frequently fled home and found comfort with children he met on the streets. *Id.* at 77-79, 81.

- A social services specialist who encountered Wilson around age fifteen, Doc. 12-9 at 51, reported that his mother had "very limited parenting or coping skills"; did not see to his basic needs, such as food; and left him "almost completely unsupervised." *Id.*; Doc. 12-7 at 69.

Equipped with the results of a competent background investigation, the trial psychiatrist, Renee Kohanski, testified in state habeas that Wilson's behavior was consistent with post-traumatic stress disorder, Doc. 12-9 at 63-64, and ADHD, *id.* at 66, and that he had been a victim of physical neglect, and physical and emotional abuse, *id.* at 71-72. She also agreed with a neuropsychologist, Dr. Herrera that Wilson's frontal lobe was impaired. *Id.* at 66; Doc. 12-10 at 21-22. Dr. Herrera, in turn, explained that as a likely result of prenatal toxin exposure and his

chaotic upbringing, Wilson had organic brain impairments that interfered with "important adaptive abilities, such as planning, judgment, impulse control and decision-making." Doc. 12-9 at 97.[7]

4. The state habeas court found that Wilson was not prejudiced by counsel's failure to present background mitigating evidence based on its unreasonably wrong conclusion that the evidence was inadmissible and cumulative of trial testimony.

The state habeas court rejected Wilson's IAC claim, finding that counsel did not perform deficiently and that Wilson was not prejudiced. The court dismissed most of the evidence presented in habeas proceedings as inconsequential. It concluded that "Petitioner's lay affiants . . . provide[d] testimony that would not have been admissible at trial as the testimony is largely based on hearsay or speculation or was cumulative of testimony elicited by defense counsel from Petitioner's mother and Dr. Kohanski at trial concerning Petitioner's childhood." Doc. 18-4 at 25. The court specifically rejected the testimony of Petitioner's former teachers as "speculative" and noted "the limited contact these teachers had with Petitioner and/or the lapse in time between their contacts with Petitioner and the crimes." *Id.* at 24. It further observed that "even if [the additional potential mitigating] evidence had been admissible at trial," prejudice was not shown "given: (1) the limited nature of the additional, admissible, non-cumulative portions of Petitioner's potentially

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[7] Additional evidence showed that Wilson had the capacity to flourish when placed in a structured, non-abusive environment. For instance, he thrived during a brief period living in the nurturing environment provided by his aunt, Evelyn Gibbs. Doc. 12-10 at 80-82, 88; Doc. 12-11 at 4. Teachers described him as a "sweet" and "likeable" child who was "starving for some loving care in his life." Doc. 12-9 at 8, 11, 38. Even after his juvenile troubles, his teachers and caseworkers saw potential "despite his harsh upbringing and criminal past." *Id.* at 21. One teacher believed that "if Marion had had better early home life circumstances and had been afforded appropriate treatment, attention, guidance, supervision and discipline in his early years, there is a good chance that Marion would not have fallen onto the wrong path, nor failed in his struggle to keep his life from spinning out of control." *Id.* at 41.

mitigating testimony; (2) the overwhelming evidence of Petitioner's guilt . . . and (3) the evidence in aggravation that was presented to the jury . . . ." *Id.* at 31.

These findings were not reasonable. The court's broad dismissal of the evidence as inadmissible has no basis in law, given that the bulk of the testimony constituted factual information derived from the witnesses' personal observations and experience, and regarded information that "a fact-finder could reasonably deem to have mitigating value"[8] —the very definition of relevant, admissible evidence. Moreover, as this Court has held, "rote application of a state [evidentiary] rule" may not be used to exclude "reliable . . . evidence that is relevant to a capital defendant's mitigation defense." *Sears v. Upton*, 561 U.S. 945, 950 n. 6 (2010) (citing *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam)). Additionally, the state habeas court's carte blanche rejection of Wilson's mitigating evidence and its conclusion that his teachers' testimony was irrelevant given "the lapse in time between their contacts with Petitioner and the crimes" is inconsistent with this Court's holding in *Porter v. McCollum*, 558 U.S. 30, 42 (2009), that a state court acts unreasonably in "discount[ing a defendant's mitigating evidence] to irrelevance." *See also id.* at 37, 43 (state court was unreasonable in discounting evidence of abusive childhood because the defendant "was 54 years old at the time of the trial").

Apart from the state habeas court's unreasonably wrong rejection of Wilson's postconviction evidence, the court applied a prejudice analysis wholly divorced from *Strickland*'s prejudice test. It concluded that "the overwhelming evidence of Petitioner's guilt" was a basis to find that Wilson was not prejudiced by trial counsel's meager mitigation case, even though prejudice at sentencing is determined not by a sufficiency-of-the-evidence test, but by showing

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[8] *Tennard v. Dretke*, 542 U.S. 274, 284 (2004).

that "the entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised 'a reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence." *Williams v. Taylor*, 529 U.S. 362, 399 (2000). And, along the same lines, it analyzed the State's case in aggravation without any consideration of whether the mitigating evidence weakened its aggravated effect. *Wilson*, 898 F.3d at 1318.[9]

5. The district court engaged in a critical assessment of the state habeas court's conclusion that trial counsel performed acceptably, but failed to apply the same rigor to its prejudice analysis.

In federal habeas proceedings, the district court identified numerous unreasonable findings of fact the state habeas court had made in defense of trial counsel's performance. *See, e.g.*, Doc. 51 at 24 (state court unreasonably found that counsel were not confused about who would interview background witnesses and that such witnesses were interviewed); *id.* at 32 (state court unreasonably found that background witnesses, who had never been interviewed, "were more

[9] The panel's consideration of the aggravating evidence failed to take into consideration any evidence rebutting the State's allegations. For example, evidence showed the "first degree arson" the panel referenced involved Wilson and other young boys starting a fire in an abandoned building because "they were cold, trying to keep warm." Doc. 10-2 at 98. Regarding the panel's observation that "15-year-old, Wilson shot a stranger, Jose Valle in the buttocks because he 'wanted to see what it felt like to shoot somebody,'" *Wilson*, 898 F.3d at 1318, the panel ignored the testimony of Sheriff's Deputy Robert Hoyt that he did not know who shot Valle, that the victim had identified a different boy as the person who hit him over the head with a gun, and that Valle, too, did not know who had shot him. *Id.* at 104-10, 129; Doc. 10-3 at 30. Another witness testified he did not know who had shot Valle and had not heard Wilson say anything about wanting to see what it felt like to shoot someone. Doc. 10-3 at 3, 6-7, 10-11. The panel likewise noted that "Wilson was charged with cruelty to animals after he 'shot and killed a small dog for no apparent reason," *Wilson*, 898 F.3d at 1318, even though a Glynn County Police officer, who never identified Wilson as the dog shooter, testified that a witness had identified another boy, Romia Bell, as the shooter and Bell was then prosecuted for the shooting. Doc. 10-2 at 46-49, 50.

devastating than helpful"); *id.* at 39 (state court unreasonably found that mental health experts did not recommend psychological testing); *id.* at 40 (state court unreasonably found it reasonable for counsel to reject testing recommended by mental health experts). In light of these errors, and the record of counsel's inadequate investigation, the court all but found that counsel's performance was constitutionally deficient: "[T]he conduct of trial counsel in the development of mitigation evidence is difficult to defend. But, rather than deciding whether Wilson has established his trial counsel's performance was deficient, the Court turns to the state habeas court's prejudice determination." *Id.* at 41.

Addressing prejudice, the district court held that Wilson had not established that the state habeas court's prejudice determination was unreasonable. *See id.* at 59-73. The court concluded it could not find the state habeas court unreasonable in dismissing the new lay testimony as cumulative of Dr. Kohanski's trial testimony, *id.* at 60-65, and additionally that "the teachers' testimony would have opened the door to the admission of Wilson's school records, which contained evidence that would likely have been more harmful than helpful," because they revealed, for instance, that "Wilson was disruptive, physically and verbally aggressive to teachers and students, lacked self-control, and blamed others for his misconduct," *id.* at 65.[10] The court dismissed the new evidence of Wilson's frontal lobe brain damage as immaterial because Dr. Kohanski's testimony that "'Marion's profile is more consistent with an individual who is led rather than someone who actively leads,'" was, in the district court's view, "in stark conflict with the facts." Doc. 67.

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[10] Inasmuch as Dr. Kohanski testified at trial on the basis of the school records that the school conducted an intervention in 1983 because of Wilson's "aggressive behavior that was inappropriate", Doc. 10-5 at 101, it is difficult to understand how state habeas evidence would have opened the door any further.

6. The Eleventh Circuit, both before and after this Court's remand in *Wilson*, simply made up reasons for finding the state habeas court's prejudice determination reasonable.

The Eleventh Circuit, in turn, did not address deficiency and affirmed the district court on the ground that Wilson had not shown that the state court's no-prejudice finding was unreasonable. Rather than focusing on the state habeas court's actual reasons for its finding of no prejudice, however, the panel, both before and after this Court's decision in *Wilson*, held that the state habeas court was not unreasonable in finding a lack of prejudice on the basis of reasons other than those the state habeas court provided. According to the panel, "our review of the record establishes that Wilson's new evidence would not have changed the overall mix of evidence at his trial because his new lay testimony presented a 'double-edged sword.'" *Wilson*, 898 F.3d at 1322; *cf. Wilson*, 774 F.3d at 679 ("The Supreme Court of Georgia could have reasonably concluded that Wilson's new evidence would not have changed the overall mix of evidence at his trial," as the "new evidence presented a 'double-edged sword"). The teachers' mitigating testimony, for instance, "would have also revealed that Wilson was 'disruptive' in school, and the social service workers' mitigating testimony would have added that one of the investigations into Wilson's home life was terminated prematurely because Wilson was incarcerated." 898 F.3d at 1323; *cf.* 774 F.3d at 680 (same). "The lay witnesses' testimony," moreover, "would also have been undermined by other new evidence that 'almost certainly would have come in with [it],'" revealing Wilson's "'I don't care' attitude," physically and verbal aggression, lack of self-control, and tendency to blame others for his misconduct." 898 F.3d at 1323 (citation omitted); *cf.* 774 F.3d at 679 (same). And, the panel concluded, "the new expert testimony would have failed to affect the overall mix of evidence at trial because Dr. Herrera's and Dr. Kohanski's expert testimony was speculative and conflicted with other evidence." 898 F.3d at 1323; *cf.* 774 F.3d at 680 (Georgia Supreme Court could

reasonably have concluded that "balance of evidence . . . would have been unaffected by the new expert testimony," which was "speculat[ive]" and "conflicted with other evidence"). According to the panel, "[t]he only new revelation at Wilson's evidentiary hearing was that the men in Wilson's life abused him," which "[r]easonable jurists could [find] was 'largely cumulative' of the other evidence of Wilson's neglectful childhood." (citation omitted); *cf.* 774 F.3d at 680-81 (same).

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Mr. Wilson's briefing to the Eleventh Circuit argued that the state habeas court's decision was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668. *See* Appellant's Brief, filed July 24, 2014; En Banc Brief, filed August 27, 2015. On remand from this Court, Mr. Wilson made a motion in the Eleventh Circuit for remand to the district court, or for supplemental briefing in the Eleventh Circuit, to address this Court's opinion. *See* Motion filed May 14, 2018. That motion was denied in the panel opinion issued on August 10, 2018.

The issue of expanding the Certificate of Appealability was first raised by Mr. Wilson in an application to the Eleventh Circuit on March 18, 2014. It was raised again when Mr. Wilson requested reconsideration of this ruling. *See* Motion filed April 24, 2014. It was raised a third time after this Court remanded this case to the Eleventh Circuit. *See* Motion filed May 14, 2018.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Eleventh Circuit Panel Ignored This Court's Directive in *Wilson v. Sellers* to "Look Through" the Georgia Supreme Court's Unexplained Ruling to the State Habeas Court's Reasoned Decision and Instead Provided Its Own Rationale for Denying Habeas Relief.

A. The Eleventh Circuit Disregarded This Court's Instruction to Focus Its § 2254(d) Analysis on the Last Reasoned State Court Decision.

In *Wilson v. Sellers*, this Court clarified that review under 28 U.S.C. § 2254(d) requires a federal court "to 'train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims,' . . . . and to give appropriate deference to that decision." 138 S. Ct. at 1191-92 (citations omitted). Where, as here, the last state court decision on the merits is unaccompanied by reasons for its holding, a federal court "should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "then presume that the unexplained decision adopted the same reasoning." *Id.* at 1192. Although the presumption is rebuttable, *id.*, Respondent has never urged and the Eleventh Circuit has never suggested a basis to rebut the presumption. This Court's decision, accordingly, required the Eleventh Circuit to assess the reasonableness of the state habeas court's factual and legal findings. It did not.

Instead, in contravention of this Court's express directive, the Eleventh Circuit panel gave scant attention to the state habeas court's reasoning and grounded its decision on the very same speculative reasons it had provided prior to this Court's remand. The panel's post-remand effort to dodge any further analysis of the state habeas court's rationale is evidenced by the fact that the legal analysis set forth in its opinion copies—nearly word-for-word—its original, vacated 2014 decision affirming the denial of Wilson's petition for a writ of habeas corpus. *Compare Wilson*, 898 F.3d at 1322-24, *with Wilson*, 774 F.3d at 679-81. The panel's disregard of this Court's instruction is grounds for this Court to grant certiorari to ensure that its prior decision is honored by the court it expressly addressed. *See, e.g.*, *Snyder v. Louisiana*, 552 U.S. 472, 476 (2008) (certiorari granted following this Court's decision granting certiorari, vacating the judgment and remanding for consideration in light of *Miller-El v. Dretke*, 545 U.S. 231, 237 (2005)) (citing

Snyder v. Louisiana, 545 U.S. 1137 (2005)); *Miller-El*, 545 U.S. at 237, 257 (granting certiorari a second time and noting that the court of appeals' argument, "first advanced in dissent when the case was last here . . . simply does not fit the facts") (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)); *Moore v. United States*, 555 U.S. 1 (2008) (per curiam) (granting a second petition for certiorari and reversing an Eighth Circuit judgment that merely affirmed the appellate court's previously vacated decision by this Court).[11]

By relying on reasoning that did not form the basis of the relevant state-court decision, the panel decision directly contravened this Court's decision in this very case. Certiorari is warranted on this basis alone.

B. The State Habeas Court's Decision, Riddled with Unreasonably Wrong Factual and Legal Findings, Is Not Entitled to AEDPA Deference.

The state habeas court unreasonably dismissed Wilson's postconviction evidence as largely inadmissible, when it was not, and cast the undefined remainder as "cumulative" of the scant evidence presented at trial. But a state court may not "discount to irrelevance" a defendant's mitigating evidence of childhood privations or expert testimony of neurological impairment. *See, e.g.*, *Porter*, 558 U.S. at 42 (state courts unreasonably failed to give "any consideration for the purpose of nonstatutory mitigation to [expert] testimony regarding the existence of a brain abnormality and cognitive defects," even though "the State's experts identified perceived problems with the tests that [the expert] used and the conclusions he drew from them"); *id.* at 43 (holding it "unreasonable to discount to irrelevance the evidence of Porter's abusive childhood"); *Sears*, 561

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[11] As in *Moore*, the panel essentially reissued its prior ruling without allowing additional briefing following this Court's remand. *See Moore*, 555 U.S. at 3 (noting that the Eighth Circuit affirmed its improper holding again "without new briefing").

at 955 ("We certainly have never held that counsel's efforts to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below.") (citing *Williams*, 529 U.S. at 397-98). Moreover, by improperly discounting essentially the entirety of the postconviction mitigation case without legitimate grounds, the state habeas court's prejudice analysis was perforce unreasonable, as this Court's precedent clearly mandates that prejudice be assessed by "evaluat[ing] the totality of the evidence —both that adduced at trial, *and the evidence adduced in the habeas proceedings*." *Wiggins v. Smith*, 539 U.S. 510, 536 (2003) (quoting *Williams*, 529 U.S. at 397-98) (emphasis added in *Wiggins*)). And, as noted above, the state habeas court's prejudice analysis was additionally marred by its failure to consider how the mitigating evidence presented at trial and in state postconviction proceedings lessened the aggravated nature of the State's evidence and its conclusion that the proof of Wilson's guilt somehow offset the mitigating evidence.

Because the state habeas court decision relied on unreasonably wrong applications of governing Supreme Court law and unreasonably wrong findings of fact, Wilson's IAC claim must be reviewed *de novo*. *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *Wiggins*, 529 U.S. at 372, 373 n.5.

C. Relief Is Warranted Based on Trial Counsel's Failure to Investigate and Present Compelling Mitigating Evidence.

The compelling evidence presented in state habeas proceedings warranted sentencing relief in this case. At trial, the jury heard nothing but a recitation of some relatively minor challenges Wilson faced as a child based on an expert's review of some background documents counsel had provided, and unilluminating testimony from Wilson's mother's that he was abandoned by his

father, had issues because of his biracial background, and had an 18-month-old daughter. This meager evidence was so lacking in any force that the prosecutor did not even bother to address it in closing argument. Doc. 10-5 at 148-49; Doc. 10-6 at 1-20. The state postconviction record presents a compelling case in mitigation of punishment, providing sympathetic details about Wilson's troubling history of abuse and neglect, and organic brain damage, which constitutionally competent counsel could readily have presented.

This Court has long stressed that a troubled history including "abuse," "physical torment," and an "alcoholic absentee mother" is "relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535. Such evidence is particularly relevant given Wilson's young age at the time of the crime. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage . . . . [J]ust as the chronological age of a [young defendant] is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.").

1. Mitigating evidence of Wilson's troubled background cannot be dismissed as merely "cumulative" of the sentencing phase case.

Evidence of Wilson's troubled background cannot be dismissed as merely "cumulative" of the evidence presented at trial—as the Eleventh Circuit did in this case. *See Wilson*, 898 F.3d at 1323-24. First, it is undisputed that the jury that sentenced Wilson to death heard *nothing* of the physical abuse that he was subjected to by multiple men in his life, from early childhood on. *See Wilson*, 898 F.3d at 1324 (observing that evidence that "the men in Wilson's life abused him" was a "new revelation" at his evidentiary hearing). The Eleventh Circuit's conclusion that this *new* evidence was nonetheless "cumulative" or "largely cumulative" of the trial evidence, *see Wilson*, 898 F.3d at 1323, is mere makeweight. *See, e.g.*, *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907,

914-15, 923-24, 936 (11th Cir. 2011) (where jury heard that Johnson's parents had a drinking problem, his "early years were very traumatic," and he "felt abused" by his grandparents, but mitigation evidence presented during habeas proceedings showed not only that his parents engaged in "knock-down, drag-out fights" with each other, but that Johnson and his siblings would be "knocked around" if they did not hide during these fights, that he was beaten with a leather strap, and that he and his siblings were abused by their grandparents, who "rub[bed] [Johnson's] face in his own urine" when he wet the bed, the court found prejudice because of the "description, details, and depth of abuse in [the defendant's] background that were brought to light" during habeas proceedings); *see also DeBruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263, 1277-78 (11th Cir. 2014) ("[H]ad counsel 'presented and explained the significance of' the regular abuse DeBruce suffered throughout his childhood, his exposure to violence in his community and his limited mental capacity, there would have been a compelling basis on which to argue for clemency in light of DeBruce's age and life experiences").

Moreover, evidence is not "cumulative" simply because it provides support for evidence that otherwise would carry little weight. Rather, "[e]vidence is cumulative when it 'supports a fact *established* by existing evidence.'" *Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000) (quoting Black's Law Dictionary 577 (7th ed. 19999)(emphasis added). Here, the meager mitigating evidence presented by Wilson's two mitigation witnesses counsel did not *establish* any meaningful mitigation. Rather, the testimony presented by Dr. Kohanski and Wilson's mother was so bland that even the trial court did not acknowledge it to have any mitigating value. *See* Doc. 14-12 at 118 (Report of the Trial Judge indicating that trial court found the following mitigating circumstances were in evidence: (1) that the defendant was an accomplice whose participation in the murder was relatively minor; (2) Wilson's young age; and (3) that the evidence,

although sufficient to sustain the conviction, did not foreclose all doubt regarding Wilsons' guilt). As such, the substantial evidence introduced in state habeas proceedings cannot fairly be cast aside as merely "cumulative" of the sentencing phase defense. "[C]haracterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts," inasmuch as the evidence presented at trial "was the sort of evidence that a jury naturally would tend to discount" because so lacking in corroboration, while "testimony of more disinterested witnesses . . . would quite naturally be given much greater weight by the jury." *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986). What little the jury *did* hear about Wilson's troubled background—that his upbringing was "extraordinarily chaotic," that he grew up in a "difficult environment," was largely unsupervised, and that his mother's boyfriends used drugs, alcohol and were abusive towards his mother—was only a "hollow shell of the testimony necessary" for the jury's "'particularized consideration of relevant aspects of the [defendant's] character and record.'" *Collier v. Turpin*, 177 F.3d 1184, 1201-02 (11th Cir. 1999) (quoting *Woodson v. N. Carolina*, 428 U.S. 280, 303 (1976)); *see also* Doc. 51 at 62 n.56 (district court's observation that "[t]he live testimony of those who knew Wilson might have been more persuasive than Kohanski's regurgitation of facts she culled from records."). Thus, under no reasonable view of the facts can it be said that the evidence of Wilson's childhood history of physical abuse, privation, and neglect was cumulative of the evidence presented at trial.

2. The state habeas evidence was not a "double-edged sword."

Nor can the new evidence be characterized, as the Eleventh Circuit did, as a "present[ing] a 'double-edged sword,'" that "would . . . have been undermined by other new evidence that 'almost certainly would have come in with [the new lay testimony].'" *Wilson*, 898 F.3d at 1322-23 (quoting *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1327 (11th Cir. 2013) (en banc) and

Wong v. Belmontes, 558 U.S. 15, 20 (2009)). This characterization ignores the fact that much of the new evidence was in fact the proof needed to implement defense counsel's trial strategy. As the district court recognized, the defense mitigation strategy included proving the following mitigating circumstances (although this "mitigation theory [depended on] the background witnesses trial counsel never interviewed"):

> 1. At a very early age, Defendant exhibited signs of mental or emotional disturbance that went untreated;
>
> 2. Defendant's mental and/or emotional disturbances were caused in part[] by the emotional instability of his family members during his early developmental states;
>
> ***
>
> 4. Defendant suffered neglect and deprivation in his childhood years as a result of family violence, turmoil, his father's abandonment, alcoholism within his home, his bi-racial status within the community, the neglect by certain family members, and other factors;
>
> 5. During his early school years, his family was forced to move often because of violence and turmoil in his family;
>
> 6. Defendant was unable to learn properly in school because of his lack of aptitude, family turmoil, and lack of academic assistance from his parents;
>
> 7. Defendant was abused by his step-father.

Doc. 51 at 29-30.

Moreover, contrary to the panel's assertion that the "new lay testimony" would have opened the door to aggravating evidence the jury otherwise would not hear, *see Wilson*, 898 F.3d at 1322-23, all of the so-called "aggravating" facts were already before the jury, through the testimony of both the State and defense witnesses but, as a result of trial counsel's incompetence, stood unrebutted and unexplained. The jury heard testimony from the State's witnesses about Wilson's juvenile criminal history—including that "from the age of 12 years, Wilson was 'either out committing crimes or incarcerated somewhere'"—as well as descriptions of "unprovoked

attacks on his schoolmates . . . ." *Id*. at 1318.[12] Likewise, Dr. Kohanski testified generally at trial about Wilson's school records, thereby opening the door to them regardless of whether the teachers testified. *See* Doc. 10-5 at 100. Moreover, the jury heard about Wilson's negative character traits through Dr. Kohanski, including that Wilson displayed "aggressive" and "inappropriate" behavior in elementary school, prompting a request for a psychological evaluation, and had "difficulty staying on task." *Id*. at 1317. Thus, any evidence of Wilson's "aggressive" behavior and "lack[] [of] self-control" that the panel claims would have been introduced had Wilson's teachers testified, was already before the jury, but without mitigating evidence to counteract it. *Id*. at 1323.[13]

3. Evidence of Wilson's damaged frontal lobe is compelling mitigating evidence providing positive grounds for imposition of

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[12] The State presented *twenty-two* witnesses during the sentencing phase who testified extensively about Wilson's juvenile criminal history and gang affiliation, which informed jurors of the "aggressive" behavior and "lack [of] self-control" that concerned the panel. *See* Doc. 10-1 at 106 through Doc. 10-5 at 14 (state's twenty-two sentencing phase witnesses); *see also* 774 F.3d at 675; Eleventh Circuit Oral Argument, Dec. 2, 2014, 06:46-09:27.

[13] This Court's decision in *Belmontes*, relied on by the Eleventh Circuit, is not to the contrary. In *Belmontes*, trial counsel "built his mitigation strategy around the overriding need to exclude" highly damaging, aggravating evidence that Belmontes had previously pled no-contest to being an accessory to voluntary manslaughter in another case and had "boast[ed] to several people" about committing that murder. *Belmontes*, 558 U.S. at 17-18. Despite these constraints, trial counsel presented "substantial," "humanizing" mitigation evidence, from nine witnesses over the course of two days, describing Belmontes' troubled childhood, strong relationships with his family, and religious conversion while incarcerated. *Id.* at 20-21, 23. In sum, trial counsel was informed regarding the potential mitigation evidence that he could present, made a reasoned decision not to present certain testimony that would have opened the door to aggravating evidence of a prior murder, and succeeded in keeping out that evidence. In contrast, having seen the State's extensive sentencing phase witness list and notice of numerous aggravating circumstances, including evidence of Wilson's juvenile record, Wilson's trial counsel "unquestionably knew the jury was going to hear the worst of Wilson's past regardless" of what mitigation evidence counsel put on. Doc. 51 at 23 n.13, 30. Counsel thus had every reason to locate and present witnesses from Wilson's youth, like his teachers and social service workers, who could contextualize and humanize that evidence and provide counterbalancing testimony regarding Wilson's positive traits.

a sentence less than death, while diminishing the aggravated nature of the State's evidence.

Evidence of Wilson's brain dysfunction, likely brought on by exposure to toxins in the womb and the turbulence of Wilson's early childhood, provides compelling support for a sentence less than death, but jurors heard nothing about this because trial counsel failed to follow the recommendations of their mental health experts to have him tested. *See* Doc. 51 at 30-40. In state habeas proceedings, Dr. Jorge Herrera, an expert in the field of forensic neuropsychology, examined Wilson, performed numerous neuropsychological assessments of him, and administered a battery of well-recognized neuropsychological testing instruments, including those directed towards evaluating higher cerebral functions, executive brain functions, motor skills, ability to focus, language, and memory. Doc. 12-9 at 90-97. The test results revealed "the definite presence of significant organic impairments affecting frontal lobe executive functions." *Id.* at 97. Because Wilson "perform[ed] well on some [instruments] and poorly on others," Dr. Herrera found his performance "consistent with impairments localized in the frontal lobes," the area of the brain that "govern[s] important adaptive abilities," including "impulse control and decision-making." *Id.* at 97. People with frontal lobe impairment are "predisposed to manifest impulse dyscontrol …, as well as poor judgment skills." *Id.* at 98. Dr. Herrera also found that, at least partly due to these impairments, Mr. Wilson likely suffered from ADHD, exhibited in Wilson's case by impulsive and spontaneous hyperactive behavior. *Id.* at 98-99. Wilson's frontal lobe impairment also undermined his ability to cope with stresses, including the extraordinary stresses that accompanied his history of childhood neglect and maltreatment. *Id.* at 97. Dr. Herrera concluded that "Mr. Wilson's association with his co-defendant on the night of the crime and his failure to intervene at the time" in the actions of his co-defendant "is consistent with the concrete thinking and judgement [sic] problems associated with the impairments" that Dr. Herrera's testing revealed. *Id.* at 103.

Dr. Kohanski, in turn, concluded that Dr. Herrera's findings "would have provided [her] with a sound basis to explain to the jury how [Mr. Wilson's] brain damage could have contributed to his behavior throughout his history and on the night of the crime." *Id.* at 60.

Although improperly given no weight by the state and federal courts, *see* Doc. 18-4 at 26, Doc. 51 at 66-68, *Wilson*, 898 F.3d at 1323,[14] evidence of Wilson's frontal lobe impairments had the potential to dramatically shift the balance of aggravating and mitigating circumstances. *See, e.g.*, *Sears*, 561 U.S. at 949-50, 956 (discussing state habeas evidence of petitioner's "significant frontal lobe brain damage," which caused him "problems with planning, sequencing and impulse control," and noting that "[a] proper analysis under *Strickland* would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments"); *Hardwick v. Crosby*, 320 F.3d 1127, 1164, 1182 (11th Cir. 2003) (noting that defense counsel is "objectively unreasonable" when, without strategic reason, they fail to present any available mental health mitigation and that "psychiatric mitigating evidence not only can act in mitigation, it also could significantly weaken the aggravating factors").

4. Wilson was prejudiced by his attorneys' failure to investigation and present readily available evidence of his deprived upbringing and brain damage.

Considering the totality of the evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding, as *Strickland* demands—there is a reasonably likelihood that at least one juror in Wilson's case would have voted for a sentence less than death had the mitigating evidence that counsel unreasonably failed to investigate and present been introduced at trial. *See*

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[14] *See Porter*, 558 U.S. at 43-44 (state courts unreasonably discounted expert evidence of brain damage introduced in postconviction proceedings, despite the fact the State's experts identified perceived problems in the habeas expert's testing).

Wiggins, 539 U.S. at 536, 537. Although the State presented a significant amount of aggravating evidence in this case, that fact alone does not preclude relief. This Court and others have found that petitioners with records as aggravated as Wilson's—or worse—satisfied *Strickland*'s prejudice prong and were entitled to relief on the basis of counsel's inadequate performance. For instance, in *Rompilla v. Beard*, 545 U.S. 374, 399 (2005), the defendant had a "significant history of felony convictions," including for rape, theft, and burglary. This Court, nonetheless, determined that he was prejudiced by counsel's failure to offer evidence relating to his parents' alcoholism and violence toward one another, physical abuse, verbal abuse, and unsanitary living conditions. *Id.* at 393. Likewise, in *Williams*, 529 U.S. at 418, this Court found that counsel's failings prejudiced Williams despite evidence that he "savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw") (Rehnquist, C.J., dissenting in part); *see also Hardwick v. Sec'y Fla. Dep't of Corr.*, 803 F.3d 541, 560 (11th Cir. 2015) ("The strength of our conclusion takes into account not only the affirmative mitigating effect of the evidence . . . [T]he copious and powerful mitigation evidence likely undermines at least two of the aggravating factors."); *Johnson*, 643 F.3d at 912-13, 936-38 (despite the fact that Johnson had a prior conviction for armed robbery, was on parole for burglary at the time of the murders for which he was sentenced to death, and "one month after those two murders he committed armed robbery and attempted murder," the court found Johnson was prejudiced by counsel's failure to present more detailed evidence of the abuse and neglect he endured).

Had the Eleventh Circuit undertaken the analysis this Court directed it to conduct, it would have been forced to conclude that the state habeas court's unreasonable findings of fact and conclusions of law removed the issue of counsel's representation from the deference accorded

under 28 U.S.C. § 2254(d) and that the claim should be reviewed de novo. Applying de novo review, there is a reasonable probability that, had counsel performed competently, Wilson would not have received a death sentence. He respectfully submits that certiorari should be granted to address this issue.

II. The Panel Erred in Failing to Grant a Certificate of Appealability as to the Claim that Counsel Unreasonably Failed to Mitigate or Rebut Utterly Fallacious Yet Highly Prejudicial "Gang Expert" Testimony.

Marion Wilson was sentenced to death by a jury who had been told by law enforcement officers, Chief Howard Sills and Detective Ricky Horn, who claimed to be authorities on the subject of gangs, that Wilson was the head of an army of hundreds of armed and dangerous gangsters who worshipped Satan and were perpetrating thousands of violent crimes—including robberies, shootings and murders—in Baldwin County and throughout the state of Georgia. *See, e.g.*, Doc. 10-4 at 99-100, 103, 114, 121-22, 141-42. These wild allegations were based on nothing more than speculation, conjecture, and unverifiable hearsay, and in every instance were misleading exaggerations at best, as Wilson's habeas counsel later demonstrated simply by using basic cross-examination skills and the Baldwin County Sheriff's Department's own internal documents, which trial counsel never bothered to seek. *See*, *e.g.*, discussion in Doc. 43 (district court brief) § I(C) and Doc. 47 (district court reply brief) § I(B).

Wilson's gang-related IAC claim was integrally connected to his overall IAC claim that his attorneys rendered prejudicially deficient performance at sentencing. Indeed, both the district court and the Eleventh Circuit panel relied on the aggravating nature of the gang-related evidence in finding no prejudice from counsel's failure to develop and present mitigating evidence of

Wilson's childhood privations and brain damage.[15] However, the federal courts below reviewed the gang-related IAC claim separately and then refused to grant a Certificate of Appealability ("COA") so that counsel's performance at sentencing in this respect could be considered in the proper context of the overall sentencing phase IAC claims.[16] In breaking up the claim into different subparts and then refusing to permit an appeal on some of those subparts, the Eleventh Circuit panel below misapplied *Strickland*, which requires IAC claims to be assessed cumulatively and not piece-by-piece. *See*, *e.g.*, *Williams*, 529 U.S. at 397-98.

Although the state habeas court relied for its denial of relief as to this aspect of counsel's performance on the finding that Wilson failed to demonstrate *any* inaccuracies in the "gang expert" testimony,[17] the district court implicitly found that counsel performed deficiently with respect to some aspects of the gang-related IAC claim. *See*, *e.g.*, Doc. 51 at 80-81 (concluding that Chief Sills was not qualified to testify as an expert on gangs, but that his testimony did not prejudice Wilson at sentencing); Doc. 51 at 84 (noting that "Wilson understandably argues [that testimony regarding violent acts allegedly attributed to the FOLKS gang] was based on nothing but speculation and conjecture," but concluding that while "[t]he bases for the testimony about gang crimes generally appears thin, . . . for reasons already discussed, the Court cannot find that the state habeas court's determination of no prejudice was unreasonable" because, even if limited or

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[15] *See*, *e.g.*, Doc. 51 at 67-68; *Wilson*, 898 F.3d at 1323.

[16] *See*, *e.g.*, Doc. 51 at 108-09; *Wilson v. Warden*, CA 11 Case No. 14-10681, Application to Expand Certificate of Appealability, dated March 18, 2014; application denied by Order dated April 3, 2014.

[17] *See*, *e.g.*, Doc. 18-4 at 33-36.

excluded, the jury "would still have learned of Wilson's lengthy criminal history, his own gang activities, and FOLKS's advocacy of violent crime").

These deficiencies and others should have factored into the federal courts' assessment of the overall claim that trial counsel rendered prejudicially deficient performance at sentencing. *See*, *e.g.*, *Rompilla*, 545 U.S. at 386 n.5 ("We may reasonably assume that the jury would give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecutor's characterization of the conviction would suggest."). The prejudice from the admission of the gang-related evidence was palpable. In his sentencing phase summation, the prosecutor focused extensively on this evidence. *See*, *e.g.*, Doc. 10-6 at 13 ("You all know how much terror these gangs have caused. You've heard testimony about it in our community."); *id*. at 14-15 ("Rickey Horn testified even before this case, we've got a Folk Gang problem here. Like to commit crimes. . . . [Mr. Wilson's] the leader and he's leading others. It's like cancer. It's not just him, he spreads it everywhere he goes. He spread it down in Glynn County; spread it in McIntosh County; and he's spread it right here in our neighborhood. You heard Detective Horn tell you about how they can run gangs from prison . . . Don't let him do it. You're going to have all this Folk Gang garbage out with you.").

By the same token, these findings should have supported a finding that Wilson's gang-related IAC claim was non-frivolous and that reasonable jurists could debate whether the state court contravened or unreasonably applied *Strickland* to this claim. *See Miller-El*, 537 U.S. at 336-38; *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

A. Law Enforcement Witnesses Grievously Misled the Jury as to Gang Activity in Baldwin County

During the guilt/innocence phase of Wilson's trial, the State presented no evidence that the murder of Donovan Parks was in any way gang-related. Indeed, there was no evidence that Parks's murder was anything other than an isolated instance of "street" crime unrelated to Wilson and his codefendant's purported involvement in a gang.[18] Indeed, District Attorney Fred Bright agreed to redact from Wilson's custodial statement any mention of his purported gang involvement. Doc. 9-4 at 38. Trial counsel obtained that agreement after filing a motion in limine to prevent any reference to gangs at the guilt/innocence phase of the trial. Doc. 12-8 at 66-67.

However, Wilson's counsel did an about-face at the sentencing phase of trial and agreed that unrestricted testimony about gangs and Wilson's gang involvement would be admissible. Doc. 9-4 at 38. Their decision was an abdication of counsel's obligation to challenge evidence submitted by the State in aggravation of punishment.[19] Astonishingly, counsel made this concession with full knowledge that such evidence would be, as counsel put it, "devastating" to Wilson's chances at the sentencing phase of trial. Doc. 12-6 at 83.[20]

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[18] During Wilson's custodial statement, Chief Howard Sills broached the question of gangs and whether or not Mr. Parks's murder was meant to elevate Robert Butts in the gang. *See* Doc. 10-4 at 73 *et seq*. Wilson acknowledged that he and Butts were in a gang, but denied any knowledge of whether Mr. Butts's motivation for the shooting of Mr. Parks had to do with his gang membership. *Id.* at 76. The State elected not to prosecute Wilson under Georgia's street gang terrorism statute: O.C.G.A. § 16-15-3(2). Detective Ricky Horn testified at his deposition that he had "[n]o information" that the shooting of Mr. Parks was motivated by a desire to have someone's gang status elevated. Doc. 16-5 at 33.

[19] *See*, *e.g.*, *Rompilla*, 545 U.S. at 386 n.4.

[20] Counsel were very concerned that pretrial publicity regarding Wilson's membership in a gang would taint the jury even were it not mentioned during the guilt-innocence phase. Doc. 9-4 at 41-42. Counsel testified that there was a climate of "paranoia" about gangs in the community and among law enforcement in Baldwin County at the time of trial. Doc. 12-8 at 111.

As counsel fully anticipated, the unchallenged testimony presented by the State's ostensible "experts" on gang activity—Chief Sills and Detective Horn—was devastating. Without so much as an objection from Wilson's defense counsel, these law enforcement officials were permitted to offer wide-ranging opinions on gang activity in Baldwin County, the State of Georgia, and the nation at large. Defense counsel, in turn, elicited additional damaging testimony on cross-examination of these witnesses, which only bolstered their substance-less opinions.

Although counsel were aware that the State could present no evidence tying the shooting of Donovan Parks to gang activity,[21] counsel failed to utter a single objection as the prosecutor led Chief Sills, concededly no expert in this area[22] (and never tendered as such) to explain that the Donovan Parks murder would have given the perpetrators more status in the gang. Doc. 10-4 at 102. Furthermore, Chief Sills testified, without any foundation, that Baldwin County had seen numerous other gang-related shootings, beatings and killings. *Id.* at 103. He claimed specific instances of violent crime were attributable to the FOLKS gang, and by explicit implication Marion Wilson, including a beating of a jogger in Milledgeville and, much further afield, a shooting of a young girl in Fayette County, but provided no evidence of these crimes. *Id.* at 99, 101. Detective Horn asserted, without evidence, that "thousands" of such violent crimes had been perpetrated by FOLKS gangsters in Baldwin County "in furtherance of the gang." *Id.* at 141-42. Counsel did not

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[21] *See, e.g.*, Doc. 9-4 at 40 (counsel's statement at an October 17, 1997 pretrial hearing that "the State cannot get into evidence at all [at guilt/innocence] any gang activity unless there is some reason for it. For example, if [the State] was trying to show some sort of motive, which is not going to be the case in this case.").

[22] Chief Sills was not tendered as an expert at trial and conceded in state habeas proceedings that he was not expert on gangs. Doc. 12-5 at 124-25.

ask for a mistrial or object in any way to this testimony. In fact, this last allegation regarding the thousands of FOLKS crimes was elicited on cross-examination by the defense.

Chief Sills and Detective Horn further testified that Baldwin County law enforcement had gathered intelligence, reflected in their official files, that Wilson was the leader, or "OG," of a local branch of a highly structured and dangerous youth gang known as the "Followers Of Lord King Satan," or FOLKS, which consisted of at least 300 members in Baldwin County alone, and probably a lot more. Doc. 10-4 at 100, 114, 123, 126. They testified that FOLKS gang members had a "significant . . . foothold" in Baldwin County and could be found "everywhere" in the county, *id*. at 121, 124; that the gang mentality had "permeated" the county as gangs infiltrated the high schools and local prisons and youth detention centers with hundreds of members, *id*. at 121, 138-39; that the FOLKS gang was the most powerful gang in the nation and was run from an Illinois prison by a man named Larry Hoover, who had almost succeeded in causing his operatives to be elected to public office in Illinois, *id*. at 115; and that FOLKS members consisted of young black males, *id*. at 140, who "commit serious crimes and . . . encourage other gang members to do the same thing," *id*. at 126.

Despite the fact that no evidence indicated the murder of Mr. Parks was gang-related, Sills and Horn were permitted to testify, without objection, and utterly without foundation, that FOLKS gang members encouraged each other to commit violent crimes in order to elevate their status in the gang. Doc. 10-4 at 102, 122, 126. The more violent the crime, the higher in rank a gang member rose, with murder enabling one to achieve the highest rank. *Id*. at 122. Detective Horn, presented to the jury as an experienced law enforcement officer and an expert on gangs in Baldwin County, summed up his assessment of the threat posed by gangs as follows: "I suspect hundreds, probably thousands of crimes committed in Baldwin County over the last seven or eight years by

gang members in furtherance of the gang." Doc. 10-4 at 141-42. No evidence was put forward to substantiate any of these terrifying allegations. Detective Horn also sought to demonize Mr. Wilson by characterizing him and his purported gang as literal Satan worshipers, telling the jury that the acronym FOLKS stood for "Followers of Lord King Satan." Doc. 10-4 at 114.

In habeas proceedings, Sills' and Horn's assertions were shown to be utterly spurious. For example, neither Sills nor Horn could identify a single instance in which a gang member in Baldwin County had committed a violent crime in order to "elevate his rank." *See* Doc. 12-5 at 56-58, 108-09. Detective Horn testified in habeas proceedings that he could not name a single instance in which a crime had been committed in Baldwin County in connection with the FOLKS gang prior to the homicide for which Wilson was on trial. Doc. 12-5 at 57-58. Horn explained that his testimony that thousands of violent crimes had been committed by FOLKS gang members "was a rhetorical answer." *Id.* at 58. In fact, actual crime statistics for the relevant time period showed a significant decline in violent crime in Baldwin County. Doc. 12-6 at 35-36.

Further, Detective Horn—this time under meaningful cross-examination—also revealed he had no credible basis for his inflammatory testimony regarding the meaning of the "FOLKS" acronym. Horn admitted he had no independent knowledge of what "FOLKS" really denoted. Doc. 12-5 at 49.[23]

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[23] In fact, the Baldwin County Sheriff's Office gang training manual, obtained in habeas proceedings, indicated several different and more benign possible formulations of the FOLKS acronym (*i.e.*, Followers of Lord King Shorty, Followers of Lord King Solomon (Doc. 12-5 at 47)). But the manual exhorted trainees to "[m]ake sure you mention . . . that FOLKS stands for Followers Of Lord King Satan" when testifying. Doc. 16-5 at 74. At trial, Detective Horn dutifully complied with this protocol.

B. Counsel Were Patently, Prejudicially Ineffective.

In capital cases, defense counsel have a duty to investigate and challenge the evidence counsel knows the State will submit in aggravation at sentencing. *See*, *e.g.*, *Rompilla*, 545 U.S. at 386 n.5 ("Counsel's obligation to rebut aggravating evidence extend[s] beyond arguing it ought to be kept out."). Moreover, counsel has a duty to seek out "'all reasonably available . . . evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Wiggins*, 539 U.S. at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)). Counsel failed to carry out their duties in these respects.

Here, trial counsel knew that Detective Ricky Horn would be tendered as a gang "expert" and knew what the nature and scope of his testimony would be. See Doc. 12-6 at 102; Doc. 12-8 at 109. Furthermore, counsel believed that the real gang situation in Baldwin County was "nowhere close" to what the police or Detective Horn believed it to be. Doc. 12-8 at 111. In this sense counsel agreed with his own client's assessment of the extremely limited extent of so-called "gang" activity in Milledgeville. By utilizing available legal precedent and elementary cross-examination techniques in an attempt to exclude or limit the scope of Chief Sills and Detective Horn's testimony, trial counsel could, within reasonable probability, have convinced the trial judge or the Georgia Supreme Court that it was unreliable and unfit for the courtroom, or, alternatively, could have at least severely discredited the State's "expert" witnesses in the minds of the jurors.[24]

Yet, trial counsel conceded they were simply unaware of this Court's precedent directly on point, such as the case of *Dawson v. Delaware*, 503 U.S. 159 (1992).[25] Counsel also ignored a

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[24] *See*, *e.g.*, discussion at Doc. 43 § I(C) and Doc. 47 § I(B).

[25] *Dawson*, a capital case, held that evidence of the defendant's involvement in a gang could be challenged on First Amendment grounds and excluded if irrelevant to issues being

plethora of Georgia case law dealing with the admissibility of expert testimony which could have been used to prevent the State's gang "experts" from testifying. *See, e.g., Green v. State*, 266 Ga. 237 (1996); *Moore v. State*, 221 Ga. 636 (1966); *Brown v. State*, 206 Ga. App. 800 (1992). By failing to utilize available facts and law, trial counsel abandoned their obligation to "seek to ensure that [Mr. Wilson was] not harmed by improper, inaccurate or misleading information being considered by the sentencing entity or entities in determining the sentence to be imposed." ABA Guideline 11.8.2(C) (1989). Horn's and Sills' false, misleading and materially inaccurate testimony could and should have been prevented from reaching the ears of the jury. At a minimum, it should have been subjected to the savage cross-examination it deserved.

In the absence of "meaningful adversarial testing"[26] as to the "gang expert" testimony, however, the prosecutor was able to exploit the testimony of Chief Sills and Detective Horn to maximum effect in arguing for the death penalty:

> That is the man right there. That's what Horn said. That's the man. That's the man right there. There he is. He's number one. Numero uno. He's the leader. Just like he led those kids all the time and he clearly was the leader in this case. He's the leader and he's leading others. It's like cancer. It's not just him, he spreads it everywhere he goes. He spread it down in Glynn County; spread it in McIntosh County; and he's spread it right here in our neighborhood.

Doc. 10-6 at 14-15.

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decided in the case. The *Dawson* majority held that such evidence was prejudicial, since the State had not proved that the gang was tied to the murder or had committed violent acts. 503 U.S. at 166. Counsel were unaware of this precedent prior to trial. Doc. 12-11 at 34-35. As this Court has recognized, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014).

[26] *United States v. Cronic*, 466 U.S. 648, 656 (1984).

As for trial counsel, having failed to mount any meaningful challenge to the "gang expert" testimony, they not only failed to use closing argument to cast doubt on the accuracy and reliability of the testimony, but instead endorsed the State's false and misleading "gang expert" testimony. For example, counsel repeatedly told the jury that Wilson was the leader of a gang made up of "at least" 250 young black gang members, "conservatively" speaking. Doc. 10-6 at 27, 32.[27] Furthermore, counsel argued to the jury, Wilson had chosen the path of crime and gangsterism, and that the community was losing a "whole generation" of youth to gangs. *Id.* at 29, 32.

As a result, Wilson was sentenced to death on the basis of false, misleading, fundamentally unreliable, yet highly aggravating evidence that should never have seen the courtroom and simply cannot reasonably be said to have had no meaningful impact on the jury.

Given the damaging nature of the gang-related testimony and defense counsel's abject failure to take any meaningful steps to curtail or rebut this evidence, Wilson surely satisfied the low threshold needed for the grant of COA. "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El*, 537 U.S. at 327).

Here, Wilson set forth a non-frivolous constitutional claim whose merits are debatable among jurists of reason. As previously discussed, the state court's wholesale endorsement of the accuracy and propriety of the obviously dubious "gang expert" testimony, particularly in light of

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[27] In fact, internal Sheriff's Office records obtained in habeas proceedings showed that the number of suspected gang-involved youths in Baldwin County was miniscule compared to Horn's and Sills' evocation of hundreds of marauding gangsters. *See* Doc. 12-5 at 41-42.

the district court's opposite impression thereof, certainly merits further development on appeal. A COA should have been issued.

C. This Court's Guidance as to the Proper Mode of Analyzing *Strickland* IAC Claims is Needed.

In this case, the Eleventh Circuit panel departed from the only sensible reading of 28 U.S.C. §2253, which provides that a habeas petitioner who makes "a substantial showing of the denial of a constitutional right" is entitled to permission to appeal an adverse district court decision to the Court of Appeals. See 28 U.S.C. § 2253 (emphasis added). For Congress' straightforward requirement, the panel has instead substituted the rule that a Court of Appeals may carve a habeas petitioner's claim that he was "denied a constitutional right" into multiple constituent "issues," and then require him to satisfy § 2253's standard with respect to each of those constituent aspects of his federal constitutional claim, considered individually. The Eleventh Circuit's approach thus frustrates Congress' aim of ensuring meaningful appellate review for a habeas petitioner who has presented a substantial claim for relief.[28] Moreover, the panel's mode of COA analysis of IAC claims violates this Court's recognition in *Strickland* and its progeny that a reviewing court deciding such a claim must consider the cumulative impact on the verdict of all counsel's errors or omissions. This Court should grant certiorari in Wilson's case to say so.

Further, the Courts of Appeal are divided as to whether trial counsel's errors should be assessed cumulatively or on an item-by-item basis. For example, the Second Circuit considers

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[28] *See, e.g.*, *Browning v. Baker*, 875 F.3d 444, 471 (9th Cir. 2017) (observing that because *Strickland* requires courts to "consider[] counsel's conduct *as a whole* to determine whether it was constitutionally adequate" the district court had distorted this inquiry by separating Browning's IAC argument into individual 'claims' of IAC corresponding to particular instances of Pike's conduct," a "misguided" approach as "the IAC portion of the COA should have been crafted at a higher level of generality").

counsel's errors in the aggregate because "*Strickland* directs [courts] to look at the 'totality of the evidence before the judge or jury.'" *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001). Similarly, the Ninth Circuit reasons that "[s]eparate errors by counsel at trial and at sentencing should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective assistance." *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003). And the Fifth Circuit has held that the central question under Strickland is "whether the cumulative errors of counsel rendered the jury's findings, either as to guilt or punishment, unreliable." *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999), superseded by statute on unrelated grounds.

The Fourth, Sixth, and Eighth Circuits, by contrast, reject cumulative review of ineffective-assistance claims. *See*, *e.g.*, *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998) (stating that that "ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively."); *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004) (endorsing item-by-item analysis of IAC claims); *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006) ("[C]umulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue."); *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) ("Neither cumulative effect of trial errors nor cumulative effect of attorney errors are grounds for habeas relief."). Granting certiorari would allow the Court to resolve this issue.[29]

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[29] *See*, *e.g.*, Eric O'Brien, *Jennings v. Stephens and Judicial Efficiency in Habeas Appeals*, 10 Duke J. Const. L. & Pub. Pol'y Sidebar 21, 22 (2015) (urging Court to address the "deep circuit split over whether an attorney's errors can be considered cumulatively in ineffective assistance of counsel cases"); Michael C. McLaughlin, *It Adds Up: Ineffective Assistance of Counsel and the Cumulative Deficiency Doctrine*, 30 Ga. St. U. L. Rev. 859, 879 (2014) (same)); Ruth A. Moyer, *To Err Is Human; to Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess Strickland Errors*, 61 Drake L. Rev. 447, 448 (2013) (same).

CONCLUSION

This Court should grant Mr. Wilson's Petition in order to rectify an "extreme malfunction"[30] in the Eleventh Circuit's analysis in Mr. Wilson's case and to impose consistency on the decisions of the Eleventh Circuit Court of Appeals and its sister circuits in their adjudication of claims in federal habeas corpus proceedings.

Respectfully submitted this 8th day of March, 2019.

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[30] *Richter*, 131 S. Ct. at 786.

No. 18-   , 18A604

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

MARION WILSON,

Petitioner,

-v-

WARDEN,
Georgia Diagnostic Prison,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic mail and/or overnight courier on counsel for Respondent at the following address:

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This 8th day of March, 2019.

Marcia A. Widder

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