No. 18-8389

In the
Supreme Court of the United States

Marion Murdock Wilson,
Petitioner,

v.

Benjamin Ford,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In analyzing a claim under *Strickland v. Washington,* 466 U.S. 668 (1984), a court must "consider all the relevant evidence that the jury would have before it"—aggravating as well as mitigating. *Wong v. Belmontes*, 558 U.S. 15, 20 (2009). The court of appeals determined that there was a reasonable basis for the Georgia Supreme Court to reasonably conclude that Wilson was not prejudiced by counsel's investigation and presentation of mitigation evidence at sentencing because the new potentially mitigating evidence Wilson presented in the state habeas proceedings presented a "double-edged sword" as it contained aggravating evidence, was largely cumulative of evidence already presented at sentencing and undermined Wilson's mitigation theory. Did the court of appeals err in determining that the state court's decision denying his claim of ineffective assistance did not unreasonably apply *Strickland*?

2. To obtain a certificate of appealability ("COA"), a petitioner must show 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." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Wilson requested a COA on whether trial counsel was ineffective in not discrediting the prosecution's gang evidence, but the evidence he challenges was supported by the prosecution's evidence and Wilson's statements, and it was corroborated by the testimony of Wilson's state habeas expert. Did the court of appeals err in declining to expand the COA to review this ineffectiveness claim?

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The state habeas court's decision denying relief is unpublished but is Petitioner's Appendix K.

The decision of the Georgia Supreme Court denying Wilson's application for certificate of probable cause to appeal the state habeas court's decision is unpublished but is Petitioner's Appendix J.

The decision of the federal district court denying Wilson's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is unpublished but is Petitioner's Appendix I.

The original panel opinion of the court of appeals is published at 74 F.3d 671 (11th Cir. 2014) and is Petitioner's Appendix H.

The *en banc* opinion of the court of appeals is published at 834 F.3d 1227 (11th Cir. 2016) and is Petitioner's Appendix G.

The court of appeals' panel opinion reinstating its original panel opinion is published at 842 F.3d 1155 (11th Cir. 2016) and is Petitioner's Appendix F.

The decision of this Court following the grant of certiorari review is published at 138 S. Ct. 1188 and included as Petitioner's Appendix D.

The opinion of the court of appeals following remand from this Court is published at 898 F.3d 1314 (11th Cir. 2018) and is Petitioner's Appendix A.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

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

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

> No State . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(c)(1) provides:

> 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.

INTRODUCTION

Petitioner Marion Wilson presents three questions, two arising out of the court of appeals' denial under 28 U.S.C. § 2254(d) of his claim that he received ineffective assistance of counsel at the sentencing phase of his death penalty trial, and one challenging the court' refusal to expand his COA to add another ineffective-assistance claim.

Wilson's first question contends that the court of appeals erred in determining that the state court did not unreasonably apply *Strickland* in concluding that counsel were not ineffective in investigating and presenting mitigation evidence during the penalty phase of his trial. Wilson argues that the new evidence he presented in the state habeas proceedings could not be viewed as "double-edged" because the aggravating portions of that evidence were already presented to the jury and the court of appeals improperly disregarded the mitigating effect of his new evidence. Arguments that the court of appeals simply erred in applying the well-established standard for claims of ineffective assistance do not warrant review by this Court. In any event, this Court's precedent makes clear that *all* the evidence has to be considered when conducting a *Strickland* analysis. Properly applying this Court's precedent, the court of appeals determined that much of Wilson's potentially mitigating evidence presented in the state habeas proceedings was "double-edged' because it included harmful evidence or undermined Wilson's mitigation theory, and that the new evidence was largely cumulative of the evidence already presented at sentencing. The issue is not worthy of certiorari review.

In his second question, Wilson argues the court of appeals erred in declining to expand its COA to include Wilson's claim that trial counsel were

ineffective in rebutting the gang evidence submitted by the prosecution at trial; however, the record establishes that this claim is not debatable among jurists of reason as the evidence challenged by Wilson was supported by the prosecution's evidence, Wilson's statements, and corroborated by the testimony of Wilson's state habeas expert. Because the court of appeals' denial of COA was in direct accord with this Court's precedent, Wilson has failed to present a claim worthy of this Court's certiorari review.

In his third question presented, Wilson argues that there is a split among the circuits as to whether claims of trial counsel error must be reviewed individually or cumulatively. Even assuming this conflict is real, however, this is not the case for resolving it. Wilson did not timely press below the argument that trial counsel's alleged errors in the aggregate amounted to a constitutional violation, and the court of appeals did not address, much less issue a holding, on that question. Further, the case does not implicate the conflict in any event. This case comes to the court on AEDPA review, so the Court likely would affirm regardless of whether it would conclude that courts must consider cumulative counsel error, because Supreme Court precedent had not yet clearly established as much at the time the state habeas court denied habeas relief. Moreover, cumulative error analysis would not affect the outcome of the case.

STATEMENT

A. The Crimes

On the evening of March 28, 1996, Donovan Parks drove to Wal-Mart to buy cat food. *Wilson v. State*, 271 Ga. 811, 812 (1999).[1] He parked his car

[1] "Pet. App." refers to Petitioner's Appendix filed with his petition.

and went inside. *Id.* Two men, Petitioner Marion Wilson and Robert Butts, followed him throughout the checkout lines and then approached Parks once he got back to his car. *Id.* They asked for a ride, and Parks agreed. *Id.* Minutes later, Parks was found lying face down on a residential street, fatally wounded from a shotgun blast to the back of the head. *Id.*

Four days later, officers arrested Wilson and Butts. In a search of Wilson's residence, the police discovered a sawed-off shotgun, the type of ammunition used to kill Parks, and gang paraphernalia. *Id.* Wilson told officers that Butts shot Parks, and that they had both sought assistance from Wilson's cousin to find a "chop shop" to dispose of Parks' car. *Id.* at 812-13. After that endeavor failed, Wilson purchased gasoline and the men set the car on fire. *Id.* at 813.

B. Trial and Direct Appeal Proceedings

Wilson was represented at trial by two experienced criminal defense attorneys. Pet. App. K, p. 11. During the guilt phase of trial, counsel presented a defense focused on establishing residual doubt and argued that Wilson was merely present, both as a defense to the crimes and as mitigation. Pet. App. K, pp. 12, 18. The jury convicted Wilson of malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun. *Wilson*, 271 Ga. 811-12.

During sentencing, continuing the residual doubt mitigation theme, defense counsel presented six witnesses. Pet. App. K, p. 18. Included in the defense presentation was evidence that Butts had confessed to other inmates that he, not Wilson, was the triggerman. *Id.* at 12.

Defense counsel also presented lay and expert testimony to show that Wilson grew up in a poor, dysfunctional, and violent home lacking in care, supervision, and guidance. To that end, counsel presented a forensic psychiatrist, Dr. Renee Kohanski. Dr. Kohanski testified that, by his first grade year, Wilson was identified as exhibiting inappropriate aggressive behavior. Pet. App. K, p. 26. According to Dr. Kohanski, the school assessed Wilson and found he was having difficulty staying on task, and had a poor self-image and excessive maternal dependence, and the school recommended additional testing to determine if there was a medical cause for the behavior, such as attention deficit hyperactive disorder (ADHD). *Id.* Dr. Kohanski testified that the medical evaluation was never conducted because Wilson's mother did not follow through with the testing. *Id.*

Dr. Kohanski also told the jury that the school had noted that Wilson had an "extraordinarily chaotic home-life" in a single parent home, lived in a difficult neighborhood and a difficult environment, and had an identity conflict based on his biracial heritage. *Id.* at 26-27. Dr. Kohanski described a lack of male supervision, with multiple boyfriends coming into the home and using drugs. *Id.* at 27. She testified that the only father figure Wilson had was a former boyfriend of his mother who "behave[ed] in extremely dangerous ways," including holding a gun to his mother's head when Wilson was approximately six or seven years old. *Id.* Dr. Kohanski testified that this type of violence "was not an uncommon event in that household." *Id.*

Although trial counsel had successfully kept the evidence of Wilson's gang affiliations and activities from being admitted in the guilt phase of trial, they were aware it was going to be entered in aggravation by the prosecution in the sentencing phase. Pet. App. I, p. 23, n. 13. In an attempt to mitigate

and explain Wilson's gang involvement, trial counsel had Dr. Kohanski testify that because of his dysfunctional home life, he gravitated towards the gang as a substitute family. Pet. App. K, p. 28.

Trial counsel also presented the testimony of Charlene Cox, Wilson's mother. *Id.* Cox testified that Dr. Kohanski's testimony, which she had sat in the courtroom and heard, was an accurate reflection of Wilson's life. *Id.* She testified that Wilson had a difficult time with his identity, that his father had nothing to do with him, and that he had no male guidance throughout his life. *Id.*

In aggravation, the prosecution then presented Wilson's extensive criminal history. That evidence showed that Wilson started committing serious felonies by age twelve, when he and two other boys started a fire in a vacant apartment complex. Pet. App. K, pp. 29-30; Pet. App. I, p. 41. At twelve or thirteen, he threatened to kill an elderly woman and her son. *Id.* At fifteen, he shot a migrant worker (Jose Valle) in the back because he "wanted to see what it felt like to shoot somebody," and he attacked a worker at Claxton Youth Development Center (YDC), where he was incarcerated after the shooting. Pet. App. K, p. 2; Pet. App. I, pp. 41-43, 67. Before he turned seventeen, Wilson had also attacked a boy twice at school, admitted to shooting and killing a neighbor's small dog for no reason, and had been charged with possession of crack cocaine with intent to distribute. Pet. App. I, pp. 43. Toward the end of his sixteenth year, he shot a man (Robert Underwood) five times, hitting him in the head and leaving a bullet lodged in his spine. *Id.* at 43-44. And soon after Wilson's release from the Milledgeville YDC at age eighteen, officers caught him and a group of young men harassing college students in a parking lot. Pet. App. I, pp. 44-45.

When officers attempted to detain Wilson, he charged an officer, tried to grab his handgun, and then fought with the officer until Wilson had to be pepper-sprayed. *Id.* Wilson pled guilty to felony obstruction. *Id.* at 45.

The prosecution also introduced Wilson's statements made to law enforcement officers after his arrest for Parks' murder, including that he and Butts were members of the FOLKS gang in Baldwin County; that he had been inducted into the gang during his detainment at the Milledgeville YDC; and that he was the "God damn chief-enforcer" for the gang, which was the highest rank he could obtain. Pet. App. K, p. 33. The prosecution introduced statements from Wilson that he became the chief enforcer by "fighting and stuff like that" and that members could move up in rank by committing crimes. Pet. App. I, p. 73.

Detective Ricky Horn, an expert on the Baldwin County FOLKS Gang, testified about the FOLKS Gang in Baldwin County and explained Wilson's admitted leadership role in the gang. Pet. App. K, pp. 31-32; Pet. App. I, p. 46. Detective Horn also testified about the violent and criminal nature of the FOLKS Gang, their influx into the community, and that the acronym in Baldwin County was sometimes used for the "Followers of Lord King Satan." Pet. App. K, pp. 34-35.

In the sentencing-phase closing argument, trial counsel reiterated their theme of a disadvantaged background in addition to residual doubt. Pet. App. K, pp. 8, 29, 31, 39; Pet. App. I, p. 49. Defense again argued that the evidence showed Wilson was not the shooter. *Id.* They argued Wilson was not accepted because he was bi-racial, his father did not want him, and his home life was violent, all which led to Wilson joining a gang. Pet. App. I, p. 49. They urged the theme that the gang provided him a family. *Id.*

After the evidence was presented at sentencing, the jury deliberated for less than two hours and then returned a sentence of death for malice murder. *Id.* at 50. The Georgia Supreme Court affirmed Wilson's convictions and sentences. *Wilson v. State*, 271 Ga. 811, 525 S.E.2d 339 (1999)

C. State Habeas Proceedings

In 2001, Wilson petitioned for a writ of habeas corpus in the Superior Court of Butts County, Georgia. He claimed that his trial counsel rendered ineffective assistance in their investigation and presentation of mitigation evidence during the penalty phase of his trial.

1. State Habeas Evidentiary Hearing

At the two-day state habeas evidentiary hearing, Wilson presented lay-testimony from former teachers, family members, friends, and social workers. Much of the testimony was in affidavit form. Pet. App. I, p. 50.[2]

Similar to Dr. Kohanski's testimony at trial, Wilson's mother, Charlene Cox, only testifying by affidavit, recounted a lack of supervision of Wilson in his youth, the lack of resources in the home, possible abuse, and Wilson's exposure to drugs in the home. Pet. App. I, p. 56. In direct contradiction to this and other habeas testimony that Wilson was without adequate food and clothing, school records introduced in the state habeas proceeding by Wilson showed he was "clean and well dressed." Pet. App. I, p. 64, n. 58. At age 15, records noted that Wilson was "well developed, well nourished, healthy appearing." Pet. App. I, p. 64-65, p. 58.

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[2] O.C.G.A. § 9-14-48(a) permits the submission of evidence by affidavit in state habeas evidentiary hearings.

Other witnesses offered new testimony about alleged physical abuse Wilson suffered from his mother's live-in boyfriends. Pet. App. A, pp. 10, 20. Prior to trial, however, Wilson had told both Dr. Kohanski and evaluators at Central State Hospital that he had never been physically abused. *Id.* at 18; Pet. App. I, p. 64, n. 58. In records from the Department of Corrections, Wilson reiterated that he had never been abused. *Id.* School records also related that his mother's boyfriend "never abused" him. Pet. App. I, p. 64, n. 58.

Dr. Kohanski also testified in the state habeas proceedings that a "structured environment" could significantly ameliorate" Wilson's "behavior problems." Pet. App. A, p.10; Pet. App. I, pp. 54, 56. By contrast, YDC records showed that when Wilson was incarcerated, he attacked a staff member, kneeing him in the groin, grabbing his legs, and shoving the staff member into a steel door. Pet. App. I, p. 42. Also while incarcerated in 1996, Wilson wrote letters to other gang members discussing "murdering all that oppose [the FOLKS] nation." Pet. App. I, pp. 67-68, 74, n. 66.

Testimony in the state habeas proceedings also stated that Wilson was a "fragile child" who was passive and easily led by others. Pet. App. I, pp. 55, 67; Pet. App. A, p. 10. But school records showed that: school officials noted Wilson hit and picked on other children, was physically and verbally aggressive to students and teachers, and blamed others for his misconduct Pet. App. A, p. 15; Pet. App. I, p. 65; Wilson attacked another youth at a ballgame for no reason, leading to a simple battery conviction (Pet. App. I, p. 52, n. 47); and Wilson shot Valle and Underwood and ran drugs on his own (Pet. App. I, p. 67).

Teachers also testified in the state habeas proceedings that he did not get the love he needed from home and that his home life was not stable. Pet. App. A, p. 9; Pet. App. I, p. 57, 61, n. 55. The teachers, however, had no recent interaction with Wilson. Pet. App. K., p. 22; Pet. App. I, pp. 60-61.

Wilson also presented an affidavit from a forensic neuropsychologist, Dr. Jorge Herrera, who opined that Wilson had adequate intelligence, but that he also likely had ADHD and impairment in his brain's frontal lobes, which govern judgment and decision-making. Pet. App. I, pp. 57-58; Pet. App. A, p. 10; Pet. App. K, P. 24. Dr. Kohanski, in an affidavit, concurred with Dr. Herrera's conclusion. Pet. App. A, p. 10; Pet. App. I, p. 58. Dr. Herrera acknowledged, however, that he created his own norms to score the data. Pet. App. A, p. 19; Pet. App. I, p. 69.

Dr. Kohanski, who relied on these testing results, concluded in the state habeas proceedings that if she had previously had this neuropsychological testing at trial, she could have testified that Wilson suffered from lobe impairments, was "highly suggestible," and "easily led by others in certain situations." Pet. App. A. p. 10; Pet. App. I, p. 67.

Finally, Wilson presented John Hagedorn, an expert in Chicago and Milwaukee gangs, who had written a book on the FOLKS gang in other states. Pet. App. I, p. 90. Hagedorn's testimony was, "in large part," cumulative of the evidence presented by Detective Horn at trial. Pet. App. K, p. 36. Hagedorn agreed with Detective Horn's trial testimony that: gang members can improve their rank by committing crimes; it is hard to determine the number of members in a gang as members "often do not admit to gang membership"; members of gangs commit violent crimes in furtherance of the gang and "for personal reasons"; and "Wilson was the chief

enforcer of the local FOLKS gang." Pet. App. I, p. 89. Hagedorn also gave testimony cumulative of that given by Dr. Kohanski that: the gang was a "peer group" for Wilson; the gang offered Wilson structure and support he did not have at home; and he "joined a gang, in part, because he was searching for his identity." Pet. App. K, p. 89.

The "value of Hagedorn's additional, noncumulative testimony was undercut by the fact that his research was conducted in Chicago and Milwaukee, not in Georgia or Baldwin County." Pet. App. I, p. 90; Pet. App. K, p. 36. This led to Hagedorn's concession that gangs vary according to locations and to learn the operations of each gang, an expert must conduct the research in the relevant geographic area. *Id.* In turn, based on this acknowledgement, Hagedorn admitted that "he could not testify 'with any certainty [about] the gang situation in Milledgeville[, Georgia].'" *Id.*

2. State Habeas Court's Decision

The state habeas court denied Wilson's petition in a reasoned opinion. The court concluded that Wilson had failed to establish deficient performance by counsel or resulting prejudice under *Strickland.* Pet. App. K, pp. 16-40. The state habeas court found that most of the lay affiants' testimony would not have been admissible because it was "largely based on hearsay or speculation" and also found it "was cumulative of testimony already elicited by defense counsel from Wilson's mother and Dr. Kohanski" at trial. Pet. App. K, p. 23. This included the testimony from the former teachers, which likewise "would have been largely cumulative of other evidence at trial ... or otherwise inadmissible on evidentiary grounds." Pet. App. K, p. 22. The court concluded, "even assuming its admissibility," the teachers' "limited

contact" with Wilson and the "lapse in time" between their contacts and his crimes made it speculative. *Id.*

Analyzing the newly presented mental health evidence that Wilson had frontal-lobe impairment and ADHD, the state habeas court concluded that Wilson had also failed to establish either prong of *Strickland*. The court found that counsel were not deficient because Wilson gave counsel "no reason to believe additional testing" beyond what was conducted by Dr. Kohanski "was necessary." Pet. App. K, p. 37. The court noted that Dr. Kohanski found Wilson did not have organic brain damage, had "at least" an average IQ, and had not diagnosed him with ADHD. *Id.* The court also found that Wilson had obtained his GED and attended college with "above-average grades." *Id.* The state court also determined that presenting Dr. Herrera's findings about frontal-lobe impairment and ADHD would not have changed the outcome of sentencing. *Id.* at 38.

In assessing Wilson's challenge to trial counsel's representation regarding the gang evidence, the state habeas court concluded that he had failed to establish either prong of *Strickland*. Pet. App. K, pp. 30-36. The court held Wilson "failed to establish that Detective Horn's testimony was inaccurate and/or misleading in any manner." *Id.* at 33. Additionally, the court determined that "trial counsel were not deficient or [Wilson] prejudiced by trial counsel making the strategic decision not to hire a gang expert, but to rely on Dr. Kohanski, as Hagedorn's testimony was, in large part, cumulative of the testimony of Dr. Kohanski and the State's Witness, Ricky Horn." *Id.* at 36. The court concluded that "the limited additional testimony" did not establish prejudice. *Id.*

Finally, the state habeas court determined that even if all the additional potential mitigating evidence had been admissible at trial, there was no reasonable probability of a different outcome given "(1) the limited nature of the additional, admissible, non-cumulative portions of Wilson's potentially mitigating testimony; (2) the overwhelming evidence of Wilson's guilt [which the court listed]; and (3) the evidence in aggravation that was presented to the jury." *Id.* at 29.

3. CPC Denial

Wilson applied to the Georgia Supreme Court for CPC. The Georgia Supreme Court summarily denied Wilson's application. Pet. App. J. Following that denial, Wilson petitioned this Court for certiorari review, raising the same claims of ineffective assistance of counsel, albeit without the § 2254 required deferential analysis. This Court denied review. *Wilson v. Terry*, 562 U.S. 1093 (2010).

D. Federal Habeas Proceedings

1. District Court Proceeding

Wilson then filed a federal habeas corpus petition under 28 U.S.C. § 2254 in the United States District Court. He again claimed that his trial counsel provided ineffective assistance by failing to investigate his background sufficiently and failing to present an effective mitigation defense.

The district court concluded that "the new lay witness testimony did not tell a different story, just a more detailed one" and concluded it would have opened the door to evidence that "would likely have been more harmful than helpful." Pet. App. I, pp. 64-65. As to the new mental health testimony, the district court determined that the findings of Dr. Herrera and the testimony

of Dr. Kohanski "were questionable," that some of Dr. Herrera's findings "hurt more than helped," and that Dr. Kohanski's new testimony of passivity and suggestibility was undermined by the record as a whole. Pet. App. I, pp. 68-70. Regarding the gang testimony, the district court concluded Wilson had not established prejudice based on Wilson's own statements, the cumulative nature of Hagedorn's testimony, and the failure of Wilson to establish inaccuracy in Detective Horn's testimony. Pet. App. I, pp. 73-80, 81-90.

Cumulatively assessing the prejudice prong of *Strickland*, the district court concluded that it could not "find that the state habeas court's prejudice determination was based on unreasonable findings of fact or that it constitute[d] an unreasonable application of *Strickland*." Pet. App. I, p. 73. On December 19, 2014, the district court denied relief and granted a COA only on Wilson's claim that trial counsel were ineffective in their preparation and presentation of mitigation. Pet. App. I, pp. 108-109.

2. Court of Appeals Proceedings

On December 15, 2014, the court of appeals affirmed the denial of habeas relief. Pet. App. H. The court concluded that the Supreme Court of Georgia reasonably could have determined that Wilson failed to establish the prejudice required to prevail on an ineffective assistance claims. Pet. App. H, p. 14. Chief Judge Carnes joined the court of appeals' opinion in full, but concurred "to emphasize how heavily Wilson's criminal history weighs on the aggravating side of the sentencing scale," which "must be taken into account in determining whether the failure to present all available mitigating circumstance evidence was prejudicial." Pet. App. H, pp. 19-24.

Wilson petitioned for rehearing en banc. On July 30, 2015, the court of appeals vacated the panel opinion, granted Wilson's petition for rehearing en banc, and directed the parties to brief whether "a federal habeas court [is] required to look through a state appellate court's summary [merits] decision ... to [review] the reasoning in a lower court decision when deciding whether the state appellate court's decision is entitled to deference under 28 U.S.C. § 2254(d)." Pet. App. G, p. 6. The en banc court of appeals held that "federal courts need not 'look through' a summary decision on the merits to review the reasoning of the lower state court" and remanded to the panel all outstanding issues. *Id.* at 2. The panel reinstated its earlier opinion because it "reviewed the correct state-court decision [the denial of CPC] and the remaining issues [had] not changed." Pet. App. F, p. 2.

Wilson applied for certiorari review and this Court granted, vacated, and remanded the case to the Eleventh Circuit in light of *Wilson v. Sellers*, 584 U. S. ___, 138 S. Ct. 1188 (2018), which held that the court of appeals "must 'look through' an unexplained decision by a state supreme court to the last reasoned decision and presume that the state supreme court adopted the reasoning in the decision by the lower state court." Pet. App. A, p. 2 (citing *Wilson v. Sellers*, 138 S. Ct. at 1192).

On remand, the court of appeals reviewed the state habeas court's decision and concluded that the state court's determination that Wilson and failed to establish ineffective assistance of counsel was not contrary to or an unreasonable application of *Strickland* and denied relief. Pet. App. A.

REASONS FOR DENYING THE PETITION

I. Wilson's claim that the court of appeals erred in applying § 2254 and its precedent in denying relief under the AEDPA does not warrant review.

A. The court of appeals' decision is not contrary to *Wilson v. Sellers*.

Wilson briefly argues that the court of appeals "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." Pet. at 17). This is not the case and his assertion provides no basis for the grant of certiorari review.

On remand, in accordance with *Wilson v. Sellers,* the court of appeals aptly noted that "[b]ecause the Supreme Court of Georgia did not explain its reasons for denying Wilson's state habeas petition, [the court] must 'look through' its decision and presume that it adopted the reasoning of the superior court, 'the last related state-court decision that . . . provide[s] a relevant rationale.'" Pet. App. A, p. 15 (quoting *Wilson*, 138 S. Ct. at 1192). The court further held that although the state may rebut the presumption that the state court relied on different grounds, *because the court was affirming "the Supreme Court of Georgia based on the reasoning of the superior court*, [it] need not address whether the state rebutted the presumption here. *Id.* at 16 (emphasis added).

The court of appeals reviewed the state habeas court's holding under § 2254 and noted:

> The superior court ruled that Wilson could not establish ineffective assistance of counsel because trial counsel's performance was not

> deficient and, alternatively, that because Wilson suffered no prejudice. 2013 U.S. Dist. LEXIS 178241, [WL] at *31. It explained that Wilson failed to establish prejudice because "the testimony proffered in support of this claim would have been inadmissible on evidentiary grounds, cumulative of other testimony, or otherwise would not have, in reasonable probability, changed the outcome of the [sentencing] trial." *Id.*

Pet. App. A, pp. 10-11.

The court of appeals then analyzed whether Wilson had established that the ruling of the state habeas court "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 "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." *Id.* at 13 (quoting 28 U.S.C. § 2254(d)).

Properly applying *Strickland* as part of its analysis under § 2254, the court of appeals reviewed the superior court opinion and explained why its conclusions were reasonable:

> The superior court reasonably concluded that Wilson failed to establish prejudice. It discussed the mitigating and aggravating evidence that the sentencing jury heard as well as Wilson's new evidence and reasonably concluded that, even if the additional potential mitigating evidence had been admitted in Wilson's sentencing, "there is no reasonable probability that the outcome of the [sentencing] trial would have been different." The jury at Wilson's trial heard a large amount of graphic, aggravating evidence, and the superior court reasonably determined that a jury would have still sentenced Wilson to death even if it had heard Wilson's new evidence.

Pet. App. A, p. 17.

Specifically as to lay witnesses, the state habeas court found "Petitioner has not established prejudice as the testimony proffered in

support of this claim would have been inadmissible on evidentiary grounds, cumulative of other testimony, *or otherwise would not have, in reasonable probability, changed the outcome of the trial.*" Pet. App. K, p. 21 (emphasis added). The court of appeals concluded this was a reasonable determination under *Strickland* as the new evidence "presented a 'double-edged sword.'" Pet. App. A, p. 17. In so concluding, the court of appeals reviewed the new lay witness testimony and found any mitigating value was undercut by other conflicting evidence or the aggravating evidence within the potential mitigating evidence. *Id.* at 18.

With regard to the expert testimony, the state habeas court broadly held, "Petitioner's current diagnoses of impaired frontal lobe functioning, which allegedly affects Petitioner's impulsivity and reasoning, and ADHD, would not, if testified to at trial, in light of the facts of this case and the aggravating circumstances presented, in reasonable probability have changed the outcome of Petitioner's trial." Pet. App. K, p. 24. The court of appeals concluded this was a reasonable conclusion as the experts' testimony was "speculative and conflicted with other evidence." Pet. App. A, p. 19.

As to the state habeas court's conclusion that the new evidence was "largely cumulative," Pet. App. K, p. 22; see also *id.* at 21-22, 23, 29, 32, 36, the court of appeals found this determination was also reasonable under § 2254. Pet. App. A., pp. 19-20. The court of appeals noted the evidence presented at trial that showed Wilson: was an "unhealthy child who came from an unstable home"; had no parental supervision; lived on the streets; had "father figures" that "'came and went' and frequently used drugs"; had one father-figure that held a gun to his mother's head in "view of Wilson"; struggled with his identity as he was bi-racial; and joined a gang as a

substitute family. Pet. App. A, p. 20. In concluding that Wilson had failed to meet the mandates of § 2254, the court of appeals explained "the new evidence merely 'tells a more detailed version of the same story told at trial.'" *I'm*

The court of appeals concluded that it could not "say that the [state court's] denial of Wilson's petition was 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Pet. App. A, p. 20 (quoting 28 U.S.C. § 2254(d)(1)). This analysis is in direct accordance with the AEDPA, *Strickland*, and *Wilson v. Sellers*. Certiorari review is unwarranted.

B. This question asks for mere error correction.

Although he briefly argues that the court of appeals did not properly apply this Court's directive in *Wilson v. Sellers*, the focus of Wilson's first question presented is a transparent plea for error correction and his analysis reduces to an argument that state court erred in the way it applied *Strickland* to the facts of his case. This challenge to the court of appeals' application of well-established standards under *Strickland* and the AEDPA does not warrant certiorari review.

To establish his ineffectiveness claim under *Strickland*, Wilson had to establish counsel's performance was deficient and "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. To establish prejudice, Wilson had to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 694. In analyzing prejudice, courts must "consider all the relevant evidence that the jury would have before it if [counsel] had pursued

the different path—not just the mitigation evidence [counsel] could have presented, but also the [aggravating evidence] that almost certainly would have come in with it." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009).

In a § 2254 proceeding, the "pivotal question" "is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). Federal habeas courts thus must take "a 'highly deferential' look at counsel's performance [under *Strickland*] ... through the 'deferential lens' of § 2254(d)...." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011).

The court of appeals correctly concluded that the Georgia Supreme Court did not unreasonably apply *Strickland*. Reviewing Wilson's case and assessing the Georgia Supreme Court's summary denial in light of this "doubly deferential" standard, *Pinholster*, 563 U.S. at 171, the court of appeals found that the "[t]he superior court reasonably concluded that Wilson failed to establish prejudice." Pet. App. A, p. 17. Deferring to the state habeas court's denial of relief, the court of appeals found that much of Wilson's new evidence was "double-edged" or cumulative of evidence presented at trial and, therefore, there was a reasonable basis for the state court to conclude that counsel were not ineffective in their investigation and presentation of evidence in mitigation. *Id.*

Wilson argues that the new evidence he presented in the state habeas proceedings could not be viewed as "double-edged" because the aggravating portions of that evidence were already presented to the jury and that *Wong v. Belmontes*, 558 U.S. 15 (2009), "rebuts" the rationale of the court of appeals. Yet, the crux court of appeals' determination is not that similar aggravating evidence was already before the jury. Rather, it concluded that Wilson was

not prejudiced by trial counsel not submitting this type of additional testimony because any potential mitigating value was undercut by the conflicting, as well as aggravating, evidence intertwined within the same testimony. *See, e.g.*, Pet. App. A, pp. 17-19 ("teachers' 'mitigation' testimony would have also revealed that Wilson was 'disruptive' in school"; "social service workers' 'mitigation' testimony would have added that one of the investigations into Wilson's home life was terminated prematurely because Wilson was incarcerated"; testimony of physical abuse "undermined by the witnesses' uncertainty" and "Wilson's repeated denials" of any abuse). In essence, Wilson seeks to nullify the aggravating evidence in his background because some of this evidence had already been presented to the jury. This Court's precedent does not suggest or support this argument.

He also claims that, unlike Wong's counsel, who made the strategic decision not to present certain testimony that would have led to additional aggravating evidence, his own trial counsel "had every reason to locate and present all the witnesses from Wilson's youth" as they "knew the jury was going to hear the worst of Wilson's past." Pet. 25, n. 13. But the court's analysis was a proper application of this Court's precedent, which makes clear that *all* the evidence has to be considered when conducting a *Strickland* analysis. *See* Pet. App. A, p. 18 (citing *Wong*, 558 U.S. at 20). And as the court of appeals held, "[t]he lay witness' testimony would have been undermined by other new evidence that 'almost certainly would have come in with [the new lay testimony].'" *Id.* As the court of appeals noted, Wilson's former teachers gave some potentially mitigating testimony that he was "a 'tender and good' boy who 'had a lot of potential' and 'loved being hugged,'" and they stated that if he had been given adequate supervision and guidance,

there was a "good chance he would not be on death row." Pet. App. A, p. 9. However, the newly introduced school records and Department of Family and Children Service (DFCS) records undermined this testimony factually and undercut its mitigating value, because they showed Wilson was repeatedly "physically and verbally aggressive to teachers and students, lacked self-control, and blamed others for his misconduct." *Id.* at 15.[3] The court of appeals also determined that, contrary to Wilson's claims of a neglectful, chaotic, and violent home life, DFCS records submitted by Wilson in the state habeas hearing showed that it was "recommended that Wilson remain in his mother's care" and that the Department would "'certainly not' have made that recommendation if the home had been unsafe or Wilson had been deprived of food or necessities." *Id.* Similarly, the court of appeals observed that lay witness testimony that Wilson had been physically abused and neglected was undermined by the speculative nature of the witnesses' testimony, "Wilson's repeated denials," and "school and medical records that described Wilson as 'healthy,' 'clean,' 'well dressed,' 'well developed,' and 'well nourished.'" Pet. App. A, p. 18; *see also* Pet. App. I, p. 64, n. 58. So although Wilson could have introduced testimony of his deprived upbringing through lay witnesses and DFCS records, that same testimony and documentation not only contained aggravating evidence, but also evidence that undermined his factual allegations, as well as his mitigation theory.

Wilson's arguments based on evidence of frontal lobe impairments are also unavailaing. Relying on *Hardwick v. Crosby*, 320 F.3d 1127 (11th Cir.

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[3] Also, as noted by the district court, while in the Youth Detention Center, a structured environment, Wilson attacked a youth development worker and joined a gang. Pet. App. I, p. 67.

2003) and *Sears v. Upton*, 561 U.S. 945 (2010),[4] Wilson alleges that the evidence of his "frontal lobe impairments had the potential to dramatically shift the balance of aggravating and mitigating circumstances." Petition, p. 27. The state court found that if Wilson's diagnosis of frontal lobe damage and ADHD had been submitted at trial there was no reasonable probability of different outcome. (Pet. App. K, p. 24). The court of appeals concluded that this was not unreasonable determination as the new mental health testimony was speculative, conflicted with other evidence and based on the unreliability of the Dr. Herrera's testing. Pet. App. A, pp. 18-19. Most notably, "Dr. Herrera assessed Wilson using his own interpretive standards for the neuropsychological tests he administered on Wilson, instead of accepted, authoritative standards." Pet. App. A, p. 19. Dr. Herrera conceded that, when analyzed under the accepted authoritative standards, Wilson's test score "for attention, ability to focus, distractibility, and impulsiveness were considered 'normal.'" *Id.* The court of appeals also noted that "the state court could have ruled that Kohanski's new conclusions were unreliable because they were based on Herrera's unreliable results." *Id.*

Further, even assuming Wilson could get past the unreliability of his new diagnosis, he still could not show that he suffered prejudice from trial counsel's failure to explain Wilson's "bad decisions" by presenting testimony

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[4] Unlike this case, *Sears* was not subject to deferential review under § 2254(d) as it was directly appealed from state collateral review. *Sears*, 561 U.S. at 946. Also, unlike *Sears*, the state habeas court in Wilson's case examined the prejudice prong of *Strickland*. *Id.* Additionally, this Court did not ultimately determine the effectiveness of counsel in *Sears*, but remanded the case to the state courts, where counsel were found not to be ineffective. *Sears v. Humphrey*, 751 S.E.2d 365 (2013), *cert. denied,* 572 U.S. 1118 (2014).

that he was bullied as a child, abused, lived in filth, was denied food, was passive, and was easily led—as testified to by his lay affiants and habeas experts. That is because this testimony could have been easily rebutted by school, DFCS, and psychological records as well as Wilson's own prior statements in those records. Nor could Wilson establish prejudice from testimony that he was easily led and "susceptible to suggestion" as found by the habeas experts because "other evidence established that Wilson had risen to the rank of 'God damn chief enforcer' of the Milledgeville FOLKS gang and was the 'clear leader of the group' during the incident at Georgia College. Pet. App. A, p. 19; *see also* Pet. App. I, p. 68 (Wilson's letter to fellow gang member while incarcerated). Again, as the court of appeals explained, much of Wilson's new evidence contradicts his mitigation theory and introduced additional aggravating evidence supporting the state habeas court's conclusion that Wilson could not establish prejudice. Accordingly, the state habeas court reasonably concluded that trial counsel was not deficient for not presenting such incredible evidence. *Id.* at 67.

Wilson also fails in his attempts to analogize the facts of his case to other cases from this Court conducting a *Strickland* analysis. (Petition pp. 27-28). These cases merely provide an application of the *Strickland* standards to a unique set of facts. *See Williams v. Taylor*, 529 U.S. 362, 390 (2000) ("[T]he merits of [Williams' claim] are squarely governed by our holding in *Strickland v. Washington*."); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) ("In highlighting counsel's duty to investigate . . . we applied the same 'clearly established' precedent of *Strickland* we apply today."). To gain ground with this argument, Wilson had to show his case was "materially indistinguishable" from the facts of these cases and therefore the state court's

denial of the claim was contrary to, or an unreasonable application of, clearly established federal law. *Williams*, 529 U.S. at 405. He cannot.

Finally, the court of appeals concluded that the state habeas court's finding that Wilson's new evidence was merely cumulative of the evidence presented at trial was not unreasonable. Pet. App. A, p. 19. While "Wilson's new evidence revealed more details of his difficult background and included additional humanizing stories and speculation about brain damage," it told the same story as the evidence presented in mitigation at trial. *Id.* at 20. This holding is in direct accord with this Court's precedent. *See Pinholster*, 131 S. Ct. at 1409-10 (no prejudice where new evidence largely duplicated the mitigation evidence at trial, only telling a more detailed version); *Wong*, 558 U.S. 15 (2009) (per curiam) (same). The court of appeals concluded that the only new evidence presented in the state habeas proceeding was the allegations of abuse, (Pet. App. A, p. 20), but, as set forth above, that this evidence was wholly undermined by evidence contemporaneous with Wilson's childhood and Wilson's own statements to the contrary.

Concluding its analysis, the court of appeals held that "we cannot say that the denial of Wilson's petition was 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id.* (quoting 28 U.S.C. § 2254(d)(1)). This holding, properly applying *Strickland* deference through the lens of the AEDPA to the facts of this case, is in accord with the well-established precedent of this Court. This question does not warrant further review.

II. The court of appeals' refusal to expand the COA to review Wilson's claim of ineffective assistance based on counsel's failure to limit gang evidence does not warrant further review.

A. This question asks for mere error correction.

Wilson's second question presented also seeks pure error correction. Wilson claims that the court of appeals erred in denying his application to expand the certificate of appealability with regard to his claim of ineffective assistance based on the introduction of gang evidence. As with his second question, his analysis makes clear that he takes issue with the court of appeals' application of the well-established standards for *Strickland* claims under AEDPA on review of his motion to expand the COA. This question does not warrant further review by this Court.

B. The court of appeals correctly declined to expand the COA to review Wilson's claim of ineffective assistance based on counsel's failure to limit gang evidence.

In the state courts, Wilson alleged that his counsel were ineffective in their challenge to the prosecution's gang evidence admitted at trial. The state habeas court determined that Wilson had failed to establish either prong of *Strickland,* and thereafter, the Georgia Supreme Court summarily denied Wilson's application for CPC, which included this claim. Pet. App. K, pp. 31-35. The federal district court affirmed the denial of habeas relief, and both the district court and the court of appeals denied Wilson's request for a COA on this issue. Pet. App. A, p. 15; Pet. App. I, pp. 108-109. Wilson argues that the court of appeals' failure to expand the COA to include this claim was error, but the record establishes that Wilson's claim regarding the gang evidence is not debatable among jurists of reason because the testimony alleged by Wilson to be "inaccurate and misleading" Pet. at 37) was supported

by the prosecution's evidence, Wilson's statements, and corroborated by the testimony of Wilson's own state habeas expert. Because the court of appeals' denial of COA was in direct accord with this Court's precedent, Wilson has failed to present a claim worthy of this Court's certiorari review.

To obtain a COA in a § 2254 proceeding, the applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That standard is met when "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller-El v. Cockrell,* 537 U.S. 322 (2003); *Welch v. United States*, 136 S. Ct. 1257, 1259 (2016). The court of appeals properly determined Wilson failed to meet this standard.

Wilson claims that the state court's denial of his claim that trial counsel were ineffective based on their handling of the prosecution's gang evidence was based on an unreasonable determination of the facts and was an unreasonable application of clearly established federal law. He contends that trial counsel did nothing to "demonstrate *any* inaccuracies in the 'gang expert' testimony" (Petition, p, 30 (emphasis in original)) and did not attempt to discredit the State's gang experts. Wilson argues that if trial counsel had obtained their own expert and rebutted this testimony there was a "reasonable probability" that counsel could have excluded or limited the scope of the testimony. *Id.* at 36.

Wilson's challenge fails. First, contrary to Wilson's assertion that trial counsel did nothing to object or rebut the introduction of the gang evidence, trial counsel successfully had the gang evidence excluded during the guilt

phase of trial. Pet. App. K, p. 31. Additionally, as counsel knew prior to trial the substance of Detective Horn's testimony, (Pet. App. I, p. 88), they made the strategic choice to prepare Dr. Kohanski and had her testify at trial, just as Wilson's state habeas expert subsequently did, that "the gang was the only family structure [Wilson] had" and he was led to this "family structure based on his background." Pet. App. K, pp. 35-36. Wilson's claim that trial counsel did nothing is an inaccurate portrayal of the record.

Once the admissible gang evidence was submitted by the prosecution, there was little trial counsel could do to undermine its aggravating nature. As an initial matter, the jury heard Wilson's own boasts to law enforcement that he was the "God damn chief enforcer" of the FOLKS gang in the area; that he joined the gang by "fighting and stuff like that" while incarcerated in the YDC; and that he was at the top of the gang hierarchy. Pet. App. A, p. 7. The jury also had Wilson's notebooks, which stated that FOLKS "should 'kill anyone [they] feel has disrespected [them] or threatened [them] in any way" and should kill for their fellow gang members. Pet. App. I, p. 74.[5] These admissible statements and evidence wholly undercut Wilson's claim that the gang evidence could have been excluded in the sentencing phase of trial by counsel or that counsel were ineffective for not attempting to challenge the prosecution's testimony that Wilson was a leader in the FOLKS gang and that gangs are comprised of violent criminals.

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[5] The district court also noted, in another section of its order, that Wilson's letters to another gang member about "Money, Mackin [and], Murder" being top priority for the FOLKS, which was written while Wilson was incarcerated "certainly would be [admitted] at any retrial" and had to be considered in a *Strickland* analysis. Pet. App. I, p. 68, n. 61.

Wilson's re-telling of the evidence presented at trial is also undermined by the factual record. At trial, Detective Ricky Horn testified about gangs in Milledgeville, Baldwin County, Georgia, where the murder took place. Detective Horn had been in law enforcement for approximately 20 years and had been "collecting intelligence and information" on gangs in that specific area for seven years. Pet. App. K, p. 31. Detective Horn went to gang seminars, did independent studies, and interviewed informants and gang members in Baldwin County. *Id.* at 31-32. Supporting Detective Horn's expertise and testimony, Wilson's state habeas expert, Hagedorn, testified that understanding specific gangs in specific areas requires talking to members of the gang in that area, yet he admitted he had not conducted research in the Milledgeville, Baldwin County area. Pet. App. I, p. 90. Hagedorn conceded he could not testify "with any certainty about the gang situation in Milledgeville," as he had not "done the research" on gangs in that area. Pet. App. K, p. 36. As to Wilson's position within the FOLKS gang, Detective Horn informed the jury that: Wilson was leader of one set of the FOLKS gang and "the highest ranking 'G'" in Milledgeville. Pet. App. I, p. 82; *see also* Pet. App. K, p. 33. This testimony was corroborated by Wilson's own statements to law enforcement that "he was as high as he could be and could not get any higher in the gang" and that he was the "Chief Enforcer" in Baldwin County. Further supporting Wilson's leadership role in the gang was trial counsel's state habeas testimony that, during their own investigation for trial, they learned that Wilson "was the highest 'G' in the FOLKS Gang in Milledgeville." Pet. App. K, p. 33. Hagedorn did not contest that Wilson said that he was the chief enforcer of the gang, nor Wilson's

declaration that he could not get any higher within the gang. Pet. App. K, p. 36.

Wilson also challenges Detective Horn's testimony from trial and the state habeas hearing that there were a large number of gang members in Baldwin County. Detective Horn testified before both the trial court and the state habeas court "that the Sheriff's Department's system identified suspected gang members, but did not identify all the gang members in the area"; and that "he and others in law enforcement still thought 300 was a conservative number." Pet. App. K, pp. 33-34. Correspondingly, Hagedorn conceded that it is hard to determine the accuracy of such statistics and that he had "could not testify 'with any certainty [about] the gang situation in Milledgeville." Pet. App. I, p. 90; Pet. App. K, pp. 33-34, 36. Just as Detective Horn testified at Wilson's trial, Hagedorn admitted that it was hard to obtain accurate information about gangs because gang members do not come forward admitting their membership in the gang. Pet. App. I, p. 89.

Detective Horn also testified at trial that he suspected "probably thousands of crimes committed in Baldwin County over the last seven or eight years" were by gang members. *Id.* at 84. He did not narrow this to "violent crimes," but to criminals acting "sometimes as individuals; sometimes in furtherance of the gang," that had committed "every type of crime." *Id.* He admitted to the jury, however, that it "may be another story" to be able to prove the origin of the crimes in court. *Id.* Again, Petitioner's habeas expert, Hagedorn, agreed with Detective Horn "that it would be hard to prove how many crimes were committed by gang members in furtherance of that gang." Pet. App. K, p. 34. He also conceded that gang members

advance in status or stature by committing crimes, and that "gang members commit crimes or violent acts for personal reasons at time and to help the gang at other times." Pet. App. I, p. 89. Hagedorn also confirmed Detective Horn's trial testimony and Wilson's statement to law enforcement that "that the commission of a crime 'would give [a gang member] some more range if that's what his G want [sic] to do for him." *Id.* at 86.

As to Detective Horn's trial testimony that the acronym "FOLKS" in Baldwin County stood for the Followers of Lord King Satan, Wilson failed to show this testimony was inaccurate. Pet. App. K, p. 35; Pet. App. I, p. 77, n. 68. Detective Horn testified that he obtained the acronym "from literature he had garnered that was written by gang members, [] and probably from seminars." *Id.* Hagedorn did not refute this testimony. Instead, he speculated that the FOLKS acronym may stand for something different in Milledgeville than it does in other areas of the country. *Id.*

Finally, just as Dr. Kohanski testified at Wilson's trial, Hagedorn testified that youths join gangs because of lack of family stability, and that troubled youths are attracted to gangs. Pet. App. I, p. 89.

In light of the strong record supporting the holding that trial counsel were not deficient and Wilson was not prejudiced by trial counsel not providing this cumulative testimony to the jury, it is clear that this issue is not "adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484. The court of appeals' refusal to expand the COA to include Wilson's challenge to his trial counsel's rebuttal of the gang evidence was in accordance with this Court's precedent and does not warrant further review.

C. This case is not a proper vehicle for addressing any circuit conflict about cumulative counsel error.

Wilson suggests at the tail end of his petition that the Court should grant review to resolve a circuit conflict about whether courts must consider the cumulative effect of trial counsel's errors in determining whether counsel rendered constitutionally ineffective assistance. Pet. at 39. Even assuming this conflict is real,[6] this is not the case for resolving it as: the issue was not timely raised below and it would not affect the result in this case.

Wilson did not timely press below the argument that trial counsel's alleged errors in the aggregate amounted to a constitutional violation, and the court of appeals did not address, much less issue a holding, on that

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[6] As an initial matter, the cases Wilson cites to show a circuit conflict may well be reconcilable. For the most part, these cases can be read as applying two compatible and commonsense rules: (1) the cumulative effect of acts of counsel that do *not* rise to the level of deficient performance, i.e., "non-errors," cannot amount to constitutional ineffectiveness, but (2) separate instances of deficient performance can have a cumulative effect of denying a petitioner a fair trial, i.e., prejudice. *See, e.g.*, *Fisher v. Angelone*, 163 F.3d 835, 853 (4th Cir. 1998) (explaining that "cumulative-error analysis evaluates only effect of matters determined to be error, not cumulative effect of non-errors"); *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004) ("We acknowledge that trial-level errors that would be considered harmless when viewed in isolation of each other might, when considered cumulatively, require reversal of a conviction.... But we also agree with the R & R that 'the accumulation of non-errors cannot collectively amount to a violation of due process.'"); *Becker v. Luebbers*, 578 F.3d 907, 914 n.5 (8th Cir. 2009) ("Becker also argues that the cumulative effect of the alleged errors establishes prejudice. Because we hold none of Becker's individual claims of error amount to constitutionally defective representation, Becker's cumulative error argument is without merit. Even if we were to deem some aspect of counsel's performance deficient under *Strickland*, any prejudice analysis would have to be limited to consideration only of the consequences of the constitutionally defective aspects of representation, not an accumulated prejudice based on asserted but unproven errors as urged by Becker. ").

question. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) ("Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here.").

Wilson's theory is that the court of appeals erred in declining to expand the COA to review the state court's decision with respect to trial counsel's failure to limit introduction of gang evidence because the court needed to consider the cumulative effect of that alleged error alongside counsel's alleged error with respect to investigation and presentation of mitigation evidence. Pet. at 39. Wilson, however, did not present this cumulative-counsel-error argument to the district court in his habeas petition, *see* Doc. 1, *Wilson v. Humphrey*, No. 5:10-cv-489, or even in his motion to amend the district court's judgment after that court granted a COA on only the question whether counsel rendered ineffective assistance with respect to investigation and presentation of mitigation evidence. *See* Doc. 51 at 109, *Wilson v. Humphrey*, No. 5:10-cv-489; Doc. 53, *Wilson v. Humphrey*, No. 5:10-cv-489. Nor did he present it to the court of appeals when he initially moved the court to expand the COA to include the gang-evidence issue in 2014, *see* Mar. 18, 2014 App. to Expand Certificate of Appealability, or when he moved for reconsideration of the court's decision not to expand the COA, *see* Apr. 24, 2014 Mot. for Reconsideration. Instead, he waited for four more years, after his case wended its way through a panel decision, en banc review, en banc affirmance, and up to and back down from this Court, before presenting the issue for the first time in a successive motion to expand the certificate of appealability on remand from this Court. *See May 14, 2018* Motion to Remand. The argument was plainly waived by that time. *See, e.g.*, *McFarlin*

v. Conseco Servs., LLC, 381 F.3d 1251, 1263 (11th Cir. 2004) (issue not raised on appeal is waived). Indeed, given the posture of the case on remand, the court of appeals did not even have license to review that new argument—its mandate by that point was to "further consider[]" the case "in light of *Wilson v. Sellers*, 584 U.S. ___ (2018)," not expand the COA to decide new questions never before raised in the case. *Wilson v. Sellers*, No. 17-5562, 2018 U.S. LEXIS 2530, at *1 (Apr. 23, 2018). This Court does not ordinarily grant certiorari to review questions not passed upon by the court below, and it would be unusual indeed to take a case to resolve a circuit conflict where the court below failed to take a side in that conflict.

This case is also a poor vehicle for resolving Wilson's alleged circuit conflict because the Court would not need to resolve that conflict to resolve the case. For starters, this case comes to the Court on AEDPA review. The ultimate question under 28 U.S.C. § 2254 is not whether the court of appeals or the district court erred, but rather whether the state court unreasonably applied this Court's clearly established precedents in denying Wilson habeas relief. Whatever the answer to the question at issue in Wilson's alleged circuit conflict—whether courts must consider the cumulative effect of counsel's errors in determining whether counsel's performance was unconstitutionally ineffective—it is hard to say that this Court's precedents already "clearly establish" that conclusion if there is a circuit conflict on the question. *See 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.") That means this Court likely would have to affirm the court of appeals' decision without ever reaching the

question presented, because it could not say that the state habeas court unreasonably applied clearly established Supreme Court precedent.

Finally, neither the federal nor state courts identified any errors under *Strickland* in Wilson's case, so there is no cumulative error analysis to be conducted. The necessary prerequisite of that analysis is the existence of more than one "error" to consider cumulatively. In short, this case is an exceedingly poor vehicle for addressing any questions about cumulative error analysis under *Strickland*.

CONCLUSION

This Court should deny the petition.

Respectfully submitted.

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