No. 18-8389

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

MARION WILSON,

Petitioner,

-v-

BENJAMIN FORD,
Warden,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioner, Marion Wilson, submits this Reply Brief in support of his Petition for Writ of Certiorari ("Petition") to review the decision of the United States Court of Appeals for the Eleventh Circuit entered in this case on August 10, 2018. *See Wilson v. Warden*, 898 F.3d 1314 (11th Cir. 2018), *reh'g denied*, No. 14-10681-P (11th Cir. October 11, 2018).

I. Certiorari Should Be Granted To Address The Eleventh Circuit's Failure To Follow This Court's Directive In Remanding This Case "For Further Proceedings Consistent With This Opinion."[1]

In its decision following this Court's remand, the Eleventh Circuit paid lip service to this Court's instructions regarding how federal courts should review state court decisions and, instead,

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[1] *Wilson v. Sellers*, 138 S. Ct. 1188, 1197 (2018).

conducted an analysis of the Georgia court opinions that is not meaningfully distinguishable from the one it performed prior to this Court's review, an analysis explicitly rejected by this Court. Respondent disputes that the Eleventh Circuit failed to apply this Court's *Wilson* decision, contending that the court in fact followed this Court's directive by "aptly not[ing] that '[b]ecause the Supreme Court of Georgia did not explain its reasons for denying Wilson's state habeas petition, [the court] must "look thorough" 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."'" Opp. Br. at 17. Yet, consideration of this Court's holding in *Wilson v. Sellers* and a simple comparison of the legal analysis set forth in the Eleventh Circuit decisions before and after this Court's *Wilson* decision clearly demonstrate that the Eleventh Circuit did not in actuality apply the *Wilson* decision on remand. Simply citing the standard, but then failing to actually apply it, is exactly the type of analysis that would be rejected as an unreasonable application of this Court's precedent were it done by the state court.[2] Such disregard of this Court's ruling should not be condoned here.

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[2] Respondent mischaracterizes the "contrary to" and "unreasonable application" standards of 28 U.S.C. § 2254(d)(1), contending that Mr. Wilson may not rely on this Court's precedents unless he can "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." Opp'n Br. at 25-26. But, "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (internal citation omitted). Rather, a state-court decision is "contrary to" this Court's precedents under 28 U.S.C. § 2254(d)(1) "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000) (opinion for the Court of O'Connor, J.). A state-court decision is an "unreasonable application" of this Court's precedents where "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id*. at 413. Respondent's suggestion that this Court's decisions have no bearing on Mr. Wilson's case unless they are factually identical is patently baseless.

This Court granted certiorari in Mr. Wilson's case to determine the appropriate "methodology" to use when federal courts review a summary state court decision that has left undisturbed a prior reasoned state court decision on the same issue. *Wilson*, 138 S. Ct. at 1193. The Eleventh Circuit had created a circuit split by ruling that a federal court faced with a summary decision may ignore a prior reasoned state court ruling and instead uphold the summary disposition as long as some hypothetical reasonable ground existed that "could have supported" the ruling. *Id.* This Court granted certiorari to resolve the circuit split and, following briefing and argument, vacated the Eleventh Circuit's judgment and remanded for further proceedings. The Court held that the lower court's "'could have supported' approach" was incorrect and that, in reviewing a state court judgment under 28 U.S.C. § 2254(d), federal courts should instead "'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.[3]

This Court reversed the Eleventh Circuit on the ground that it applied the wrong methodology to analyze the reasonableness of the Georgia court decisions in this case. Accordingly, it stands to reason that, on remand, the Eleventh Circuit, applying the correct methodology, would issue an order that was *not*, in essence, a carbon copy of its pre-*Wilson*

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[3] This Court acknowledged that the presumption may be rebutted with proof such as "convincing alternative arguments for affirmance made to the State's highest court or equivalent evidence presented in its briefing to the federal court similarly establishing that the State's highest court relied on a different ground than the lower state court . . . ." *Wilson*, 138 S. Ct. at 1196. Respondent points out that the Eleventh Circuit determined it need not address whether the presumption had been rebutted because it was "affirming the Supreme Court of Georgia based on the reasoning of the superior court," Opp'n Br. at 17, but any claim that the presumption may be rebutted in this case lacks merit. In arguing against the grant of a certificate of probable cause to appeal, Respondent defended the state habeas court's analysis and never presented an alternative basis to affirm the state habeas court. *See* Doc. 18-15 (brief in opposition to application for certificate of probable cause to appeal state habeas court order). Thus, any suggestion that the *Wilson* presumption has been rebutted in this case is lacking in substance.

opinion. But, in fact, the Eleventh Circuit's post-remand opinion's legal analysis is almost entirely cribbed from the panel's pre-*Wilson* decision, as illustrated by a side-by-side comparison of the legal-analysis section of the two opinions, which is attached as Exhibit A hereto. That comparison shows that, apart from a few mentions of the purported focus of the opinion—the state habeas order—the Eleventh Circuit simply parroted its previous analysis, while excising any attribution of its reasoning to the Georgia Supreme Court.

For example, the Eleventh Circuit contends that the state habeas court reasonably found no prejudice because Mr. Wilson's "new lay testimony presented a 'double-edged sword." App. A at 17. But the term "double-edged sword" and the concept it articulates were not grounds for the state habeas court's ruling. To the contrary, the state habeas court (erroneously) concluded the evidence "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"; that the testimony of former teachers was "speculative" and remote, given their "limited contact" with Mr. Wilson and "the lapse in time between their contacts with Petitioner and the crimes"[4]; and that "the remainder of Petitioner's lay affiants, like the aforementioned affiants, provide 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." App. K at 24-26. The Eleventh Circuit glossed over these justifications in ratifying the state habeas court's decision; yet, under *Wilson*,

[4] Mr. Wilson was only nineteen at the time of the crime. Thus, the lapse in time between his contact with teachers who taught him from elementary school to his one year in college was hardly significant. Moreover, this Court has repudiated such reasoning with respect to a much older capital defendant. *See Porter v. McCollum*, 558 U.S. 30, 37, 43 (2009) (state courts unreasonably discounted evidence of childhood abuse because defendant was 54 years old at the time of the crime).

the reasonableness of *those* justifications for dismissing Mr. Wilson's mitigation evidence should have been the focus of a Section 2254(d) analysis.

The Eleventh Circuit's near-verbatim use of its prior analysis belies any notion that the court, on remand, actually followed this Court's directive to "'train its attention on the particular reasons—both legal and factual—why state courts rejected [Mr. Wilson's] federal claims,'" *Wilson*, 138 S. Ct. at 1191-92 (internal citation omitted), *i.e.*, to analyze the actual reasons identified by the state habeas court as the bases for its decision to determine whether deference under 28 U.S.C. § 2254(d) should be accorded to the state court rulings. Given this Court's inherent interest in enforcing its own rulings, *see e.g.*, *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 274 (1969) (granting certiorari a second time after state court refused to follow this Court's directive), the Eleventh Circuit's failure to apply the methodology this Court adopted in *Wilson* is alone grounds for this Court to grant review.[5]

II. The Brief in Opposition, Like The Eleventh Circuit Opinion Below, Cherry Picks Minor Inconsistencies In The Factual Record To Argue That Mr. Wilson's New Evidence Was Immaterial When, In Fact, The State Habeas Evidence Provided Richly Detailed Information About The Severe Deprivations Of Mr. Wilson's Youth, Which The Jury Never Heard; And

[5] The Brief in Opposition repeatedly argues that certiorari should be denied because the Petition seeks "mere error correction." *See* Opp'n Br. at pp. 20-26, 27. The questions presented in Mr. Wilson's Petition, however, do not simply address whether the Eleventh Circuit reached the correct result based on the particular facts of Mr. Wilson's case. To the contrary, the first question presented initially asks whether the Eleventh Circuit applied the proper analytical framework to its habeas review. And, the second question presented addresses whether the Eleventh Circuit applied an incorrect standard in denying a certificate of appealability to address additional aspects of trial counsel's ineffective representation at sentencing. These issues have broader implications than "mere error correction" in Mr. Wilson's case. Moreover, as this Court has recognized, the Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). And, "the Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law." *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (citing cases).

Previously Unpresented Evidence Of Mr. Wilson's Neurological Impairments And Information Demonstrating The Unreliability And Gross Exaggeration Of The Prosecution's Evidence Of Gang Activity And Mr. Wilson's Gang Involvement.

Mr. Wilson presented in state habeas proceedings ample first-hand testimony and corroborating documentary evidence describing in grim detail an extremely chaotic, abnormal, and deprived upbringing, in contrast to the, at best, general and cursory portrayal of Mr. Wilson's childhood difficulties counsel presented to the jury at trial. The Brief in Opposition, like the panel decision below, fails to grapple meaningfully with this evidence. Instead, it misleadingly points to minor inconsistencies in the record and aggravating details in the new evidence that are relatively minor and/or already before the jury in an attempt to rationalize the state court's wholesale discounting of the potential impact of this plainly mitigating evidence on the jury.

For example, the opposition brief concurs with the panel that one notation in the Department of Family and Children Services (DFCS) records indicating that Mr. Wilson was to be left in his mother's care would have rendered the entire DFCS file, replete with references to abuse and neglect, of no worth to a jury. *See* Opp'n Br. at 23. Yet the DFCS records clearly document a larger pattern of abuse and neglect that Mr. Wilson experienced as a child. *See, e.g.*, Doc. 12-16 at 10 ("Child told [worker] mother does not meet needs in way of clothing, shoes, food. . . . Mother may not be all there."); *id*. at 12 ("Mama does not care where boy is."); *id*. ("Child sometimes alone with [his mother's] boyfriend [referencing Lindell Sullivan]—says boyfriend drinks comes in face & had hit him."); *id*. at 14 ("Receive[d] report of child neglect on Ms. Cox."); *id*. at 30 ("Concerned that inadequate supervision. Mother sounds slow mentally."); *id*. at 35 ("Child's mother is not adequately supervising child and child does not have basic needs of nurturing, care, guidance and other things as food, etc. are questionable."); *id*. at 37 ("Ms. Cox appears mixed up and unable to cope w/ parent's responsibilities. She is ineffective in providing a

secure, stable home with appropriate care for Marion."); *id*. at 40 ("Mother not providing basic supervision & other basic needs."); *id*. ("Child ran away again & claims he does not have basic needs of food, shelter, supervision."). These contemporaneous references, in credible social service documents, corroborate the first-hand observations of neighbors, relatives, teachers and friends that the overall picture of Mr. Wilson's life was one of deprivation, neglect, abuse, and a chronic lack of supervision and guidance.

Similarly, the Brief in Opposition endorses the lower courts' blithe dismissal of neuropsychological test results and mental health expert opinion, never heard by the jury, showing that Mr. Wilson suffered from longstanding impaired brain functioning, likely the result of toxic exposure *in utero* and exacerbated by chronic abuse and neglect in childhood, as merely "speculative" and in unexplained conflict with "other evidence." *See* Opp'n Br. at 19. However, the neuropsychologist's conclusion that Mr. Wilson had "significant organic impairments," "in an area of the brain which governs executive functions such as judgment, decision-making, abstract reasoning and planning skills, as well as impulse-control," Doc. 12-9 at 92, 97-98, was perfectly consistent with 4th grade school records documenting a highly anxious and depressed child with "poor reality contact" and diminished abstract reasoning ability, who had difficulty controlling impulses, and planning and organizing his work, Doc. 12-17 at 5, 7-8. School evaluators tied his obvious behavior and emotional problems to his home situation. *Id*. at 8.

The Brief in Opposition and the lower court thus err in missing the forest for the trees. This Court's precedent mandates that, in evaluating mitigating evidence like that in Mr. Wilson's profile, the inevitable inconsistencies and even items of aggravating quality within the larger body of evidence cannot reasonably justify wholesale discounting of its potential impact on the jury. *See*, *e.g.*, *Porter*, 558 U.S. at 43-44 (unreasonable for state court to "discount to irrelevance"

evidence of mental health impairments, military service, and childhood abuse simply because contrary or aggravating information could have been introduced in response; negative evidence could have been portrayed as consistent with mitigating theme); *Sears v. Upton*, 561 U.S. 945, 950 (2010) ("Competent counsel should have been able to turn some of the adverse evidence into a positive—perhaps in support of a cognitive deficiency mitigation theory" which "might well have helped the jury understand" the defendant).[6]

Here, if properly contextualized, the evidence of Mr. Wilson's lack of supervision and youthful record of making bad decisions in his preteen and teen years is itself mitigating and should have been presented to the jury in that context. Counsel could have, for example, argued that school records indicating that Mr. Wilson was disruptive in class, aggressive towards other students, and

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[6] Respondent seeks to distinguish this Court's decision in *Sears* on the grounds that *Sears* was a case reviewing state, rather than federal, habeas proceedings and accordingly 28 U.S.C. § 2254(d) did not apply; that, according to Respondent, "unlike *Sears*, the state habeas court in Wilson's case examined the prejudice prong of *Strickland*," and that, following remand to the state courts, "counsel were found not to be ineffective." Opp'n Br. at p. 24, n.4. Respondent's arguments are meritless. First, this Court found in *Sears* that "it is plain from the face of the state court's opinion that it failed to apply the correct prejudice inquiry we have established for evaluating Sears' Sixth Amendment claim." *Sears*, 561 U.S. at 946. The case thus has direct bearing on whether Mr. Wilson has shown that the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [Supreme Court] law." 28 U.S.C. § 2254(d)(1). *See, e.g., Williams*, 529 U.S. at 405-06 (opinion for the Court by O'Connor, J.) (explaining that a decision would be "contrary to" *Strickland v. Washington*, 466 U.S. 668 (1984), if the state court applied a preponderance of the evidence standard to assessing prejudice, rather than the "reasonable probability" standard established by *Strickland*). Moreover, Respondent's suggestion that *Sears* did not involve *Strickland*'s prejudice prong is bizarre, given that the decision addressed solely the state court's prejudice determination. *See, e.g., Sears*, 561 U.S. at 956 ("A proper analysis of prejudice under *Strickland* would have taken into account the newly discovered evidence of Sears' 'significant' mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation"). That Sears did not prevail upon remand in state court does not diminish the value of the Court's observations about the established meaning of "prejudice" under *Strickland*.

talked back to his teachers buttressed the neuropsychologist's determination that Mr. Wilson long exhibited symptoms of brain impairments and ADHD that went untreated amid the chaos and trauma of his upbringing. *See* Doc. 12-9 at 98-99 (describing indicators of ADHD, including hyperactivity, aggression and impulsive behavior and noting that children with untreated ADHD often have "histories typically characterized by trouble with school, the law, and episodes of aggressive behavior, elements of which can be clearly seen in Mr. Wilson's life"). Likewise, Mr. Wilson's juvenile record could have been mitigated by the unremarkable fact that by the time Mr. Wilson was a teenager, after a childhood of neglect, abuse and poverty, he got into trouble.

Similarly, the Brief in Opposition and the lower court erred in "discount[ing] to irrelevance"[7] the potential impact on a jury of a competent rebuttal and debunking of the spurious and hyperbolic testimony of Baldwin County law enforcement agents as to alleged gang activity in the county and region, and Mr. Wilson's implied ties to it, simply because Mr. Wilson boasted about being part of a gang that, in reality, was just a small group of teenagers who peddled marijuana and fashioned themselves a "gang." *See* Opp'n Br. at 29. Here, although counsel were aware the State could present no evidence tying the shooting of Donovan Parks to gang activity,[8] they failed to utter a single objection as the prosecutor led Howard Sills,[9] concededly no expert in

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[7] *Porter*, 558 U.S. at 43.

[8] *See, e.g.*, 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." Doc. 9-4 at 40.

[9] Sills was Baldwin County Chief Deputy Sheriff at the time of the crime.

this area[10] (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, Sills testified that in addition to the Parks murder, 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 implication Mr. Wilson, including a beating of a jogger in Milledgeville and, much further afield, a shooting of a young girl in Fayette County. *Id.* at 99, 101. According to Deputy Ricky Horn, "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 ask for a mistrial or object in any way to this testimony.

The prosecutor's gang evidence was both highly aggravating and grossly inaccurate and overblown. Much of it was inadmissible hearsay, yet counsel failed to raise a single objection to the evidence. For instance, Sills testified at trial that a Fayette County murder of a laundromat employee was committed to achieve advancement in the gang, revealing that he was basing his testimony on information he received third-hand. *See* Doc. 10-4 at 101-02. One hearsay objection would have prevented that testimony or elicited a curative instruction from the court.

Moreover, in state habeas proceedings, Mr. Wilson adduced significant evidence that would have been readily available at the time of trial that undermined the reliability and substantially eroded the aggravating impact of the prosecutor's gang evidence. The state's "expert" witness on gangs, Horn, for instance, revealed that he could not identify a single instance of a crime committed in Baldwin County by a FOLKS gang member in furtherance of the gang. Doc.

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

12-5 at 57-58. Neither Sills nor Horn could identify a *single instance* of a gang member in Baldwin County committing a crime in order to elevate his rank. *Id.* at 56-58, 108-09. As for the beaten jogger whom Sills, at trial, had identified as a victim of gang violence, no competent evidence tied that crime to gang members or established that the beating was related to the gang at all. Horn had no idea why the jogger was beaten. Doc. 16-5 at 41-42. Similarly, as shown in state habeas proceedings, neither the assault on the jogger nor the murder of the laundromat employee—crimes that Sills and Horn specifically claimed were gang-related—could be linked to Mr. Wilson in any manner. *See* Doc. 12-5 at 125-26; Doc. 16-5 at 41-42. Trial counsel could easily have debunked the prosecutor's allegations that Baldwin County was a cesspool of gang activity and the inference that Mr. Wilson was tied to random acts of violence in the county simply "by testing [it] in the crucible of cross-examination," *Crawford v. Washington*, 541 U.S 36, 61 (2004).

Finally, Mr. Wilson presented an *actual* gang expert, Dr. John Hagedorn, in state habeas proceedings, who researched Georgia Bureau of Investigation crime statistics for Baldwin County for the relevant time period and found that violent crime in general had *declined* significantly during precisely the time frame in which the State's witnesses claimed FOLKS gangsters were terrorizing the community. *See* Doc. 12-6 at 35-36.

Had Mr. Wilson's counsel competently employed basic litigation skills, including objections and cross-examination, informed by adequate investigation, counsel could have revealed to the jury and court that there was no competent evidence that FOLKS or any gang members in Baldwin County engaged in violent crime in general, much less violent crime in furtherance of the gang—or that any of the alleged gang activity could be tied to Marion Wilson. Instead, because counsel utterly failed to rebut or challenge the state's presentation, the prosecutor

was able to portray Mr. Wilson as a vicious gangster who spread "cancer" throughout the community:

> 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. It was thus error to "discount to irrelevance" the potential impact on the jury of an evidentiary picture altered substantially by competent attorney practice on cross-examination of the state's law enforcement agents.

The Eleventh Circuit focused on inconsequential inconsistencies to trivialize the mitigating evidence of Mr. Wilson's traumatic childhood and denied COA on the gang-related ineffectiveness claim, while relying on the gang evidence the prosecutor had presented without challenge at trial to justify its finding that the state courts reasonably found that trial counsel's performance did not prejudice Mr. Wilson at sentencing. In doing so, the court endorsed an unreasonable analysis of prejudice under *Strickland* that merits review by this Court.[11]

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[11] Respondent argues that the Eleventh Circuit properly applied a "'doubly deferential' standard" to its assessment of prejudice. Opp'n Br. at 21. While the Eleventh Circuit did not purport to apply such a standard, *see* App. A, it is questionable whether "double deference" properly may be applied to *Strickland*'s prejudice prong. The Eleventh Circuit has observed that "double deference to a state court's adjudication of a *Strickland* claim applies only to *Strickland*'s performance prong, not to the prejudice inquiry." *Daniel v. Comm'r*, 822 F.3d 1248, 1262 n.8 (11th Cir. 2016) (citing *Evans v. Sec'y, Dept. of Corr.*, 703 F.3d 1316, 1333-35 (11th Cir. 2013) (en banc) (Jordan, J., concurring). *See also, e.g. Sanchez v. Davis*, 888 F.3d 746, 749 (5th Cir. 2018) ("There is no double deference for this prejudice inquiry . . . ."). As Judge Jordan explained in *Evans*, unlike *Strickland*'s performance prong, which is "highly deferential" to counsel's decision-making and thus "doubly deferential" once deference under 28 U.S.C. § 2254(d) is added, "there is no underlying deference" accorded to the prejudice inquiry. *Evans*, 703 F.3d at 1334 (Jordan, J., concurring). To the extent Respondent's contention that "double deference" should apply to the consideration of prejudice, that issue is the subject of a circuit split and warrants this Court's consideration. *See, e.g.*, *Mathias v. Superintendent Frackville Sci*, 876 F.3d 462, 477 (3d Cir. 2017) (noting that "the Courts of Appeals have taken different approaches to this issue"); *Waiters v. Lee*, 857 F.3d 466, 477 (2d Cir. 2017) (Jacobs, J., dissenting) (noting that "the Circuits

III. Mr. Wilson's Challenge To The Eleventh Circuit's Denial Of A Certificate Of Appealability To Address Gang-Related Ineffective Assistance At Sentencing (Question Presented 2) Is Properly Before The Court.

Trial counsel did virtually nothing to challenge either the admissibility or the substance of the gang-related testimony introduced at sentencing. As discussed above, in state habeas proceedings Mr. Wilson presented substantial, readily available evidence to counter the State's aggravation—evidence that reasonably effective counsel, having undertaken a reasonable investigation prior to trial, would have presented. Mr. Wilson asked the Eleventh Circuit on three separate occasions to expand the certificate of appealability ("COA") to include the claim that counsel provided ineffective representation in failing to counter the State's gang evidence, and was denied each time. In his last attempt, Mr. Wilson pointed out that his "gang-related IAC claim is integrally connected to his overall IAC claim that his attorneys' deficient performance prejudiced him at sentencing," and that it was a misapplication of *Strickland* to parse that claim into multiple sub-parts, given that *Strickland* requires prejudice to be assessed cumulatively and not piece-by-piece." Mot. to Remand at 7-8, *Wilson v. Warden*, No. 14-10681 (11th Cir. May 14, 2018).

In the Petition, Mr. Wilson has urged the Court to grant certiorari to address whether this piecemeal approach to granting COA is improper under *Strickland*—an issue that has split the circuits. *See* Question Presented 2(2). Respondent claims this issue is not properly before the Court for several reasons.

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that have ruled . . . are split" on whether "double deference" applies to the prejudice inquiry and citing cases).

As an initial matter, Respondent contends that Mr. Wilson "waived" this argument because he did not present it to the district court and argued it only in his third effort to expand the COA filed in the Eleventh Circuit.[12] Opp'n Br. at 34. As this Court has explained, however, the Court's "traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below'" *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal citation omitted). Here, the issue was both presented to the Eleventh Circuit and tacitly passed upon by that court when it denied Mr. Wilson's third attempt to expand the COA. Moreover, Respondent himself waived his "waiver" argument by failing to present it to the Eleventh Circuit. *See* Resp. in Opp'n to Mot. To Remand at 10-11, *Wilson v. Warden*, No. 14-10681 (11th Cir. May 15, 2018) (arguing that COA expansion was outside the scope of this Court's remand and that "[t]here is no new law or facts to consider" and, accordingly, the court should deny Mr. Wilson's third attempt to expand the record).

Respondent also argues that the question is not properly before the Court because the Eleventh Circuit did not take a side in the circuit split Mr. Wilson identified. Opp'n Br. at 35. But, Mr. Wilson argued the point to the Eleventh Circuit, and the Eleventh Circuit took action contrary to that argument—an implicit rejection of the argument and endorsement of the other view.

Curiously, Respondent also contends that Mr. Wilson's case is a poor vehicle to address the question because it "comes to the Court on AEDPA review." BIO at 35. But, the question

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[12] The district court granted a COA solely as to ineffective assistance of counsel as to mitigating evidence. Mr. Wilson then, appropriately, asked the Eleventh Circuit to expand the COA. *See, e.g.*, *Tompkins v. Moore*, 193 F.3d 1327, 1332 (11th Cir. 1999) ("The only way a habeas petitioner may raise on appeal issues outside those specified by the district court in the [COA] is by having the court of appeals expand the [COA] to include those issues."); *Roddy v. Vannoy*, 671 Fed. Appx. 295, 296-97 (5th Cir. 2016) ("When a district court grants a COA and certifies some, but not all, issues raised by a petitioner in the district court, the petitioner may move [the court of appeals] to extend the order granting a COA to issues that the district court did not certify.").

presented addresses federal habeas corpus procedure under the AEDPA and perforce must arrive at the Court in that posture. This Court has previously deemed questions about the proper application of the COA standard in federal habeas cases worthy of certiorari review. *See, e.g.*, *Buck v. Davis*, 137 S. Ct. 759 (2017) (granting certiorari to address Fifth Circuit's denial of COA); *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (same). Mr. Wilson submits that the question presented here—whether the cumulative prejudice analysis required by *Strickland* precludes federal courts from parsing ineffective-assistance claims into multiple parts and then granting review of only some—is worthy of this Court's review.

Respondent also conflates the "cumulative error" assessment required under *Strickland* with a separate claim—not raised in this case—that the cumulative effect of multiple constitutional errors deprived a defendant of due process. Under *Strickland*, prejudice is determined by assessing the impact of counsel's various deficiencies cumulatively. *Strickland*, 466 U.S. at 687. Respondent relies on *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006), to argue that Mr. Wilson's COA question is not cognizable because there is no clearly established law on the issue. *See* Opp'n Br. at 35. In *Williams*, the court rejected the claim that "the cumulative effect of the errors at trial rendered [petitioner's] trial fundamentally unfair in violation of due process" because circuit precedent held "that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue." But, Mr. Wilson has not raised that claim. Instead, he is challenging the Eleventh Circuit's application of 28 U.S.C. § 2253(c) in denying a COA on the gang-related prong of his sentencing phase ineffective representation claim. Respondent's assertion—that this Court cannot review that claim because a circuit conflict demonstrates that "this Court's precedents [are not] 'clearly establish[ed]"—mixes § 2253(c) apples with § 2254(d) oranges.

CONCLUSION

For the reasons set forth above and in Mr. Wilson's Petition for Writ of Certiorari, Mr. Wilson respectfully asks the Court to grant certiorari to review the Eleventh Circuit decision in his case.

Respectfully submitted this 6th day of May, 2019.

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No. 18-8389

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

MARION WILSON,

Petitioner,

-v-

BENJAMIN FORD,
Warden,

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 6th day of May, 2019.

Marcia A. Widder

Attorney