

**COMPARISON OF LEGAL DISCUSSIONS FROM PANEL DECISIONS  
BEFORE AND AFTER *WILSON v. SELLERS*<sup>1</sup>**

<b><i>Wilson v. Warden</i>, 774 F.3d 671 (11th 2014)</b>	<b><i>Wilson v. Warden</i>, 898 F.3d 1314 (11th 2018)</b>
<p>III. DISCUSSION</p> <p>As an initial matter, the one-line decision of the Supreme Court of Georgia denying Wilson's certificate of probable cause is the relevant state-court decision for our review because it is the final decision "on the merits." <i>Newland v. Hall</i>, 527 F.3d 1162, 1199 (11th Cir. 2008); see also <i>Jones v. GDPC Warden</i>, 753 F.3d 1171, 1182 (11th Cir. 2014). Instead of deferring to the reasoning of the state trial court, we ask whether there was any "reasonable basis for the [Supreme Court of Georgia] to deny relief." <i>Harrington</i>, 131 S. Ct. at 784.</p>	<p>III. DISCUSSION</p> <p>As an initial matter, we deny Wilson's motion to remand or, alternatively, to expand the certificate of appealability and to permit supplemental briefing. Wilson has failed to make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), with respect to his additional claims that his counsel were ineffective. And we resolve Wilson's appeal based on the original briefs filed by the parties. The district court evaluated the reasonableness of the reasons stated by the superior court when it denied Wilson's petition for a writ of habeas corpus, and [*1322] the parties focused on those reasons in their original briefs to this Court.</p> <p>Because the Supreme Court of Georgia did not explain its reasons for denying Wilson's state habeas petition, we 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." <i>Wilson</i>, 138 S. Ct. at 1192. "[T]he [s]tate may rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds . . . ." <i>Id.</i> Because we affirm the decision of the Supreme Court of Georgia based on the reasoning of the superior court, we need not address whether the state rebutted the presumption here.</p>

<sup>1</sup> Essentially identical portions of the opinions have been bold-faced. No portion of the discussion section of either opinion has been deleted, but spacing has been added in order to allow comparable portions of the opinions to remain side-by-side for comparison purposes.

[\*679] Wilson argues that his trial counsel were ineffective because they failed to investigate his background and present mitigation evidence at his sentencing. To obtain relief, Wilson must establish both that his trial counsel's "performance was deficient, and that the deficiency prejudiced [his] defense." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 2529, 156 L. Ed. 2d 471 (2003). Unless he establishes both requirements, "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. And "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.* at 697, 104 S. Ct. at 2069.

To establish prejudice, Wilson had to prove "that [his] counsel's errors were so serious as to deprive [him] of a fair trial." *Id.* at 687, 104 S. Ct. at 2064. Wilson challenged his trial counsel's performance during the penalty phase of his trial, so he had to establish that "there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S. Ct. at 2069. To decide whether there is a reasonable probability of a different result, "we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (quoting

Wilson argues that his trial counsel were ineffective because they failed to investigate his background and present mitigation evidence at his sentencing. To obtain relief, Wilson must establish both that his trial counsel's "performance was deficient, and that the deficiency prejudiced [his] defense." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Unless he establishes both requirements, "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687. And "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.* at 697.

To establish prejudice, Wilson had to prove "that [his] counsel's errors were so serious as to deprive [him] of a fair trial." *Id.* at 687. Wilson challenged his trial counsel's performance during the penalty phase of his trial, so he had to establish that "there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. To decide whether there is a reasonable probability of a different result, "we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweigh it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (alteration adopted) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98,

*Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S. Ct. 1495, 1515, 146 L. Ed. 2d 389 (2000)) (alteration in original).

The Supreme Court of Georgia could have reasonably concluded that Wilson failed to establish that he was prejudiced. The Supreme Court of Georgia could have reasonably concluded that **Wilson's new evidence would not have changed the overall mix of evidence at his trial. His new evidence presented a "double-edged sword,"** *Evans*, 703 F.3d at 1324, and was "largely cumulative" of evidence trial counsel presented to the jury, *Holsey v. Warden, Ga. Diag. Prison*, 694 F.3d 1230, 1260-61 (11th Cir. 2012).

The Supreme Court of Georgia could have reasonably concluded that the balance of the evidence at Wilson's trial would have been unaffected by the new lay testimony. **The teachers' testimony might have "humanized" Wilson, and other lay witnesses' testimony might have offered more detailed accounts of Wilson's home life, but that testimony was a "double-edged sword."** *Evans*, 703 F.3d at 1324. **The teachers' "mitigation" testimony would have also revealed that Wilson was "disruptive" in school, and the social service workers' "mitigation" testimony would have added that one of the investigations into Wilson's home life was terminated prematurely because Wilson**

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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.

Indeed, our review of the record establishes that **Wilson's new evidence would not have changed the overall mix of evidence at his trial because his new lay testimony presented a "double-edged sword."** *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1327 (11th Cir. 2013) (citation and quotation marks omitted). **The teachers' testimony might have humanized Wilson, and other lay witnesses' testimony might have offered more detailed accounts of Wilson's home life. But the teachers' [\*1323] mitigating testimony would have also revealed that Wilson was "disruptive" in school, and the social service workers' mitigating testimony would have added that one of the investigations into Wilson's home life was terminated prematurely because Wilson was incarcerated.**

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The lay witness' testimony would have been undermined by other new evidence that "almost certainly would have come in with [the new lay testimony]." *Wong v. Belmontes*, 558 U.S. 15, 20, 130 S. Ct. 383, 386, 175 L. Ed. 2d 328 (2009). Reports in Wilson's school records stated that Wilson had an "'I don't care' attitude," and that he was physically and verbally aggressive to teachers and students, lacked self-control, and blamed others for his misconduct. A report from the Department of Family and Children Services recommended that Wilson remain in his mother's care, and a representative from the Department testified 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. And [\*680] the lay witnesses' testimony that Wilson was physically abused and neglected would have been undermined by the witnesses' uncertainty, Wilson's repeated denials that he was physically abused as a child and school and medical records that described Wilson as "healthy," "clean," "well dressed," "well developed," and "well nourished."

The Supreme Court of Georgia could have reasonably concluded that the balance of the evidence at Wilson's trial also would have been unaffected by the new expert testimony. Herrera assessed Wilson using his own interpretive standards for the neuropsychological tests he administered on Wilson, instead of accepted, authoritative standards. Herrera testified that Wilson's test scores for attention, ability to focus, distractability, and impulsiveness were considered "normal" under the accepted, authoritative standards. Because Herrera

The lay witnesses' testimony would also have been undermined by other new evidence that "almost certainly would have come in with [the new lay testimony]." *Wong v. Belmontes*, 558 U.S. 15, 20, 130 S. Ct. 383, 175 L. Ed. 2d 328 (2009). Reports in Wilson's school records stated that Wilson had an "'I don't care' attitude," was physically and verbally aggressive to teachers and students, lacked self-control, and blamed others for his misconduct. A report from the Department of Family and Children Services recommended that Wilson remain in his mother's care, and a representative from the Department testified 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. And the lay witnesses' testimony that Wilson was physically abused and neglected would have been undermined by the witnesses' uncertainty, Wilson's repeated denials that he was physically abused as a child, and school and medical records that described Wilson as "healthy," "clean," "well dressed," "well developed," and "well nourished."

Our review of the record also suggests that the new expert testimony would have failed to affect the overall mix of evidence at trial because Dr. Herrera's and Dr. Kohanski's expert testimony was speculative and conflicted with other evidence. Dr. Herrera assessed Wilson using his own interpretive standards for the neuropsychological tests he administered on Wilson, instead of accepted, authoritative standards. Dr. Herrera testified that Wilson's test scores for attention, ability to focus, distractability, and impulsiveness were considered "normal" under the accepted, authoritative standards. Because Dr.

recommended against neurological imaging, his conclusion that Wilson had frontal lobe damage was based on only Herrera's unique interpretation of the tests. And the state court could have ruled that Kohanski's new conclusions were unreliable because they were based on Herrera's unreliable results.

Herrera's and Kohanski's expert testimony conflicted with other evidence. They testified that a person with Wilson's test results would be susceptible to suggestion and more of a follower than a leader. But 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.

The Supreme Court of Georgia could have also reasonably concluded that Wilson's new evidence was "largely cumulative" of the evidence trial counsel presented to the jury. *Holsey*, 694 F.3d at 1260-61. The evidence presented at trial and the new evidence "tell the same story," *id.* at 1267, of an unhealthy child, who came from an unstable home and received no parental supervision. The jury heard that, from the age of 9 or 10, Wilson lived on the streets in a difficult neighborhood. His father figures "came and went" and frequently used drugs. One such father figure held a gun to Wilson's mother's head in view of Wilson. Wilson struggled with his identity and joined a gang as a substitute for family. The jury also heard humanizing characteristics, such as Cox's plea to spare Wilson's life for the sake of his 18-month-old daughter, and that Wilson's biological father had no role in Wilson's life. And Kohanski testified that she would have liked to see images of Wilson's brain to confirm that he did not have a brain injury.

Herrera did not recommend neurological imaging, his conclusion that Wilson had frontal lobe damage was based on only Dr. Herrera's unique interpretation of the tests. Dr. Kohanski's new conclusions were unreliable because they were based on Dr. Herrera's unreliable results. And Dr. Herrera's and Dr. Kohanski's expert testimony conflicted with other evidence. They testified that a person with Wilson's test results would be susceptible to suggestion and more of a follower than a leader. But 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.

The superior court reasonably concluded that Wilson's new evidence was "largely cumulative" of the evidence trial counsel presented to the jury. *See Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1260 (11th Cir. 2012)(opinion of Carnes, J.); *accord id.* at 1260-61. The evidence presented at trial and the new evidence "tell the same story," *id.* at 1267, of an unhealthy child who came from an unstable home and received no parental supervision. The jury heard that, from the age of 9 or 10, Wilson lived on the streets in a difficult neighborhood. His father figures "came and went" and frequently used drugs. One such father figure held a gun to Wilson's mother's head in view of Wilson. Wilson struggled with his identity and joined a gang as a substitute for family. The jury also heard humanizing characteristics, such as Cox's plea to spare Wilson's life for the sake of his 18-month-old daughter, and that Wilson's biological father had no role in Wilson's life. And Dr. Kohanski testified that she would have liked to see [\*1324] images of

The Supreme Court of Georgia could have reasonably concluded that **the new evidence "tells a more detailed version of the same story told at trial," *id. at 1260-61*. Wilson's new evidence revealed more details of his difficult background and included additional humanizing stories and speculation about brain damage. The only new revelation at Wilson's evidentiary hearing was that the men in Wilson's life abused him. But the evidence of this abuse "was relatively limited in scope and . . . [not] descripti[ve]." *Id. at 1282; cf. Cooper v. Sec'y of Dep't of Corr., 646 F.3d 1328, 1337, 1349 (11th Cir. 2011)*. Reasonable jurists could rule that this evidence was "largely cumulative" of the other evidence of Wilson's neglectful childhood. *Holsey, 694 F.3d at 1260-61*. The Supreme Court of Georgia could have looked at the overall mix of evidence, aggravating and mitigating, old and new, and reasonably determined that a jury would have still sentenced Wilson to death. The jury at Wilson's trial heard a large [\*681] amount of graphic, aggravating evidence, and it would be reasonable to conclude that Wilson's new evidence was as hurtful as it was helpful, and largely cumulative of the evidence presented at trial. We cannot say that the decision of the Supreme Court of Georgia to deny 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," 28 U.S.C. § 2254(d)(1).**

#### IV. CONCLUSION

We AFFIRM the denial of Wilson's petition for a writ of habeas corpus.

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Indeed, **the new evidence merely "tells a more detailed version of the same story told at trial." *Id. at 1260*. Wilson's new evidence revealed more details of his difficult background and included additional humanizing stories and speculation about brain damage. The only new revelation at Wilson's evidentiary hearing was that the men in Wilson's life abused him. Reasonable jurists could rule that this evidence was "largely cumulative" of the other evidence of Wilson's neglectful childhood. *Holsey, 694 F.3d at 1260*. 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." 28 U.S.C. § 2254(d)(1).**

#### IV. CONCLUSION

We AFFIRM the denial of Wilson's petition for a writ of habeas corpus. And we DENY Wilson's motion to remand or, alternatively, to expand the certificate of appealability and to permit supplemental briefing.