NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

ERIC BARRASS,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. In light of *Wilson v. Sellers*, 584 U.S. ___, 138 S. Ct. 1188 (2018), did the Eleventh Circuit err in applying 28 U.S.C. § 2254(d) to the state appellate court's unexplained decision, rather than "looking through" that decision to the reasoned opinion of the state trial court?

II. Where a third person spontaneously confesses multiple times to friends and gives a sworn statement that he committed the crime for which the defendant is being prosecuted, but his confessions also include facts that provide a potential defense to prosecution, are those confessions nonetheless admissible as a matter of constitutional law under *Chambers v. Mississippi*, 410 U.S. 284 (1973), if the third person stood to benefit nothing by disclosing his role in the shooting and must have been aware of the possibility that his disclosure would lead to criminal prosecution?

RELATED PROCEEDINGS

Florida Circuit Court (11th Cir., Miami-Dade County):

State of Florida v. Eric Barrass, No. F06-26018 (April 17, 2007) (judgment following trial and sentencing); *id.* (Feb. 27, 2012) (order denying motion for postconviction relief).

Florida Third District Court of Appeal:

Eric Christopher Barrass v. The State of Florida, No. 3D07-1144 (July 15, 2009), rh'g denied, Oct. 6, 2010

Eric Christopher Barrass v. The State of Florida, No. 3D12-2717 (Nov. 1, 2012)

Eric Christopher Barrass v. The State of Florida, No. 3D12-3083 (Feb. 27, 2013)

Eric Christopher Barrass v. The State of Florida, No. 3D12-3224 (July 9, 2014), rh'g denied, Aug. 28, 2014

United States District Court (S.D. Fla.):

Eric Christopher Barrass v. Julie L. Jones, Secretary of Florida Dep't of Corr., No. 14-24885 (Mar. 13, 2018)

United States Court of Appeals (11th Cir.):

Eric Christopher Barrass v. Secretary, Florida Dep't of Corr., Florida Attorney General, No. 18-11534 (Mar. 7, 2019), reh'g denied, May 8, 2019

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PETITION FOR WRIT OF CERTIORARI

Eric Barrass respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-11534 in that court.

OPINIONS BELOW

The Eleventh Circuit's unpublished order denying Petitioner's petition for rehearing and rehearing *en banc* is attached as Appendix A-1. The opinion of the court of appeals affirming the district court's denial of Mr. Barrass's 28 U.S.C. § 2254 habeas corpus petition is unpublished and attached as Appendix A-2. The

district court's unpublished final judgment is attached as Appendix A-3. The district court's order adopting in part and rejecting in part the magistrate judge's report, and denying Petitioner's habeas corpus petition is unpublished and attached as Appendix A-4. The magistrate judge's unpublished report is attached as Appendix A-5.

The state appellate court's unexplained *per curiam* affirmance of Petitioner's conviction and sentence is reported at 13 So.3d 476, 2009 WL 2055209, and reproduced in Appendix A-6.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The jurisdiction of the district court was invoked under 28 U.S.C. § 2254. The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 2253. On March 7, 2019, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of Petitioner's habeas corpus petition. Petitioner timely filed a petition for rehearing and rehearing *en* banc, which was denied on May 8, 2019. On July 17, 2019, Petitioner timely filed in this Court an application for extension of time to file a petition for writ of certiorari. (No. 19A82). Justice Thomas granted the application on July 25, 2019, extending the time to file a petition until October 5, 2019. (*Id.*). This petition is timely filed under Supreme Court Rule 13.1.

PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Title 28, U.S.C. § 2254(d) provides:

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

STATEMENT OF THE CASE

One early morning in south Florida in August 2006, a long-simmering feud between Petitioner and Timothy Cummings boiled over into a fist fight, which then escalated into a street brawl with a number of their friends, including Petitioner's friend Christopher Travis. Several shots were fired during the fight, and Cummings was shot in the back. App. A-2 at 2; App. A-5 at 3. Although Cummings had been fighting with Petitioner, he never saw Petitioner with a gun and did not know who shot him. App. A-5 at 19. A friend of Cummings's, Brian Cespedes, saw Travis shoot a gun in the air, but also did not know who shot Cummings. *Id.* at 20.

Petitioner and his friends fled after the shooting, but Petitioner soon returned to the scene, where he confessed to shooting Cummings and was arrested. App. A-2 at 2. Although police found a firearm in Petitioner's truck, no gunshot residue was found on his hands. The State of Florida charged Petitioner with the attempted first degree murder and aggravated assault with a firearm. App. A-5 at 3.

Immediately after the shooting, Travis confessed to friends that *he*, not Petitioner, shot Cummings. He nervously told Christina Bauer he shot someone who was trying to harm Petitioner, and then hid when he heard the police driving by. App. A-5 at 18. Cassandra Chily testified that when she saw Travis the day of the shooting he was shaking, upset, and scared, and told her he shot Cummings in the back to keep him from harming Petitioner. *Id.* Chily saw Travis again the next day, and Travis was still upset and told her he had to leave Florida because "he

was afraid of going back to jail" because of the shooting. App. A-5 at 18-19. Travis had similar conversations with Mike Hannan, Shawn Baker, and David Palacios, and in each he admitted that he shot Cummings. App. A-5 at 19.

Thirteen days after the shooting, Travis gave a sworn, recorded statement to a defense investigator where he confessed to shooting Cummings out of fear for Petitioner's life. App. A-2 at 3-4; App. A-5 at 16-19. Travis then fled to California, where he was arrested on a probation violation, and extradited back to Florida. App. A-5 at 29.

Travis initially intended to testify at trial on Petitioner's behalf, but ultimately invoked his Fifth Amendment privilege after the prosecutor threatened to charge him with the shooting, and was therefore unavailable as a witness. App. A-5 at 4.

The prosecutor moved *in limine* to exclude Travis's confessions as hearsay that failed to qualify as a declaration against penal interest under Fla. Stat. § 90.804 because Travis stated that he shot Cummings in defense of Petitioner. App. A-2 at 3-4. The trial court heard testimony from the witnesses to whom Travis had confessed, but agreed with the State that Travis's statements were not against penal interest. App. A-2 at 4; App. A-5 at 16-19. The trial court specifically ruled that testimony from the various witnesses was not admissible under Fla. Stat. § 90.804, but did not mention the federal constitutional claims that Petitioner had raised in a legal memorandum and argument. App. A-2 at 5-6; App. A-4 at 3.

Petitioner's trial testimony differed from his earlier confessions to police. He testified that he was fighting with Cummings when he heard gunshots, looked up, and saw Travis holding a gun. App. A-5 at 21. He asked Travis what happened and Travis answered, "I shot him . . . he had a gun." *Id.* Petitioner left with his friends, then drove back to the scene and was arrested almost immediately. *Id.* at 21-22. He testified that he falsely confessed to the shooting in a misguided attempt to protect Travis. *Id.* at 22.

In closing argument, the prosecutor denigrated Petitioner's defense as one "pulled out of thin air," and balanced on the shoulders of a "mystery man" who never appeared in court and whose statements were never brought before the jury. DE24-2:95-96. He argued that "there is no testimony to support that [Travis] did this other than the defendant's words before you today," and pointed out that those words came from the "same defendant who says he didn't tell the truth" to police after the shooting. DE23-8:95-96.

The jury convicted Petitioner of the lesser offense of attempted second degree murder with a firearm, and the trial court imposed a 25-year mandatory minimum sentence. The Florida Third District Court of Appeal affirmed in a decision that stated only the word, "Affirmed." App. A-6.

Petitioner then turned to federal court, and petitioned for a writ of habeas corpus under 28 U.S.C. § 2254. The petition argued that by excluding Travis's confessions, the trial court denied him his right to present a defense under *Chambers v. Mississippi*, 410 U.S. 284 (1973) and its progeny. The petition was

referred to a magistrate judge who recommended that the petition be granted in light of *Chambers* because "the hearsay statements at issue here (1) were made 'under circumstances that provided considerable assurance of their reliability;' and (2) were critical to Petitioner's defense that the confessing party committed the crime." App. A-5 at 30.

The district court, however, rejected the magistrate judge's recommendation and denied the petition. App. A-3; App. A-4. First, the district court "looked through" the state appellate court's unexplained *per curiam* affirmance to the decision of the state trial court excluding the statements, *see* App. A-4 at 7, and found that the state trial court excluded Travis's confessions because his "statements did not fall under any of the hearsay exceptions enumerated in Fla. Stat. § 90.804," *id.* at 3. The district court next determined that "the state court's evidentiary ruling" was not "contrary to" clearly established Supreme Court law under 28 U.S.C. § 2254(d) because that ruling "was based on a reading of Fla. Stat. § 90.804" – Florida's hearsay rule – "and did not turn on a question of federal law." App. A-4 at 7. The district court also held that the state trial court's evidentiary ruling was not an "unreasonable application" of clearly established law under § 2254(d) because "the Supreme Court has never addressed whether the state court's evidentiary ruling – that testimony regarding a third-party's confession should be excluded if the confession provided for a complete defense – violates a criminal defendant's right to present a complete defense." *Id.* at 8-9.

An Eleventh Circuit panel affirmed. App. A-2. Without mentioning this Court's then-recent decision in *Wilson v. Sellers*, 584 U.S. ___, 138 S. Ct. 1188 (2018), the court of appeals did not "look through" the state appellate court's unexplained affirmance to the reasoned decision of the trial court. Instead, it relied instead on pre-*Wilson* circuit law involving a *reasoned* state appellate court decision to conclude that § 2254(d) deference was required because the Florida courts did not "inadvertently overlook" Petitioner's *Chambers* claim. App. A-2 at 10-11 (citing *Pittman v. Secretary, Fla. Dep't of Corr.*, 871 F.3d 1231, 1245 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 102 (2018)).

The panel next held that Travis's confessions were "exculpatory" because he stated that when he shot Cummings "he did so to protect Barrass," and therefore were not against penal interest. *Id.* And, because Travis's statements were not against penal interest, the "state courts did not reach a legal conclusion contrary to *Chambers* or *Green*" *v. Georgia*, 442 U.S. 95 (1979) (*per curiam*), because the confessions in *Chambers* and *Green* were "inculpatory." *Id.* at 14-15.

Finally, the panel found no unreasonable application of clearly established law because Travis's statements "do not provide 'persuasive assurances of trustworthiness'" under *Chambers*; (2) Travis refused to testify, and (3) no physical evidence connected Travis to the shooting. *Id.* at 15.

Thereafter, the Eleventh Circuit denied Petitioner's petition for rehearing and rehearing *en banc*. App. A-1.

REASONS FOR GRANTING THE WRIT

I. This Court should grant the writ, vacate the Eleventh Circuit's ruling, and remand this case for further proceedings in light of *Wilson v. Sellers*, 584 U.S. ___, 138 S. Ct. 1188 (2018).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a state prisoner who seeks federal habeas corpus relief to show that the state court's adjudication of his federal constitutional claims resulted in a decision that (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "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(d). In *Wilson v. Sellers*, 584 U.S. ___, 138 S. Ct. 1188, 1192 (2018), the Court considered § 2254(d)'s application where a lower state court issues a reasoned decision but the state appellate court reviewing that decision issues a ruling that, for example, "consist[s] of a one-word order, such as 'affirmed'" and is therefore unexplained. The Court held that in those circumstances a federal habeas court must "look through" the unexplained state appellate court decision and review the last reasoned state court decision instead. *Id.*

As was true in *Wilson*, the Eleventh Circuit here did not "look through" the state appellate court's unexplained decision to that of the state trial court when it reviewed Petitioner's claims pursuant to § 2254(d). *See* App. A-2 at 11. Indeed, it did not mention *Wilson* anywhere in its decision. *See id.*, *passim*. Rather, citing *Pittman v. Secretary, Fla. Dep't of Corr.*, 871 F.3d 1231, 1245 (11th Cir. 2017), *cert. denied*, 139 S. Ct. 102 (2018), the Eleventh Circuit relied on arguments made in the

briefing before the state appellate court to conclude that the state appellate court did not "inadvertently overlook" Petitioner's *Chambers* claim, and therefore its decision was worthy of § 2254(d) deference. *See id.* at 10-11.

But *Pittman* was decided before *Wilson*, at a time when a federal habeas court in the Eleventh Circuit was *not* required to "look through" an unexplained state appellate court decision under circuit precedent. *See Wilson v. Warden, Ga. Diagnostic Prison*, 834 F.3d 1227, 1235-36 (11th Cir. 2016) (*en banc*), *reversed by Wilson*, 138 S. Ct. at 1197. And, *Pittman* involved the application of § 2254(d) to a *reasoned* state appellate court decision, rather than an unexplained state appellate court decision like those at issue here and in *Wilson*. *See Pittman*, 871 F.3d at 1245.

The Eleventh Circuit's failure to follow *Wilson* is material here. Had it "looked through" the unexplained state appellate court decision as *Wilson* requires, its review would have been pursuant to a much less deferential standard. While federal habeas review is typically subject to § 2254(d)'s deferential standard, such deference is not required if the state court failed to address the merits of the claim asserted by the petitioner. *Cone v. Bell*, 556 U.S. 449, 472 (2009). "Instead, the claim is reviewed *de novo*." *Id.*

Here, Petitioner presented his federal claim to the state trial court, but that court did not mention the federal claim when it excluded Travis' statements, instead resting its decision on state evidentiary law. App. A-2 at 5-6 (noting trial court stated only that the respective statements "did not qualify 'under 804' as a

declaration against Travis's penal interest"); App. A-4 at 7 (finding the state trial court's exclusion of Travis' confessions "was based on a reading of Fla. Stat. § 90.804" – Florida's hearsay rule – "and did not turn on a question of federal law"). In light of the state trial court's silence on the federal claim, no § 2254(d)(1) deference is required, and review of that claim is *de novo*. *See Cone*, 556 U.S. at 472. Thus, had the Eleventh Circuit "looked through" the unexplained state appellate court decision, and reviewed the state trial court's ruling instead, it would have been required to review Petitioner's claim *de novo*.

Thus, in denying habeas corpus relief to Petitioner, the Eleventh Circuit failed to employ the analysis mandated by *Wilson*, and it did so in a manner that materially affected its review of Petitioner's claim. The Eleventh Circuit's failure to respect *Wilson* is not an isolated incident. The Court has already granted the petition, vacated, and remanded for reconsideration in light of *Wilson* an Eleventh Circuit decision where the court of appeals ignored *Wilson*. *See Diez v. Jones*, 139 S. Ct. 138 (2018) (Mem.).

Petitioner therefore respectfully requests that the Court grant the writ, vacate the Eleventh Circuit's decision below, and remand Petitioner's case to the Eleventh Circuit for further proceedings in light of *Wilson*.

II. The decision of the court below conflicts with *Chambers v. Mississippi*, 410 U.S. 284 (1973) and *Green v. Georgia*, 442 U.S. 95 (1979).

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the defendant was charged with the shooting of a police officer during a chaotic riot outside a pool hall in the small town of Woodville, Mississippi. *Id.* at 285-87. One month before Chambers's trial, Gable McDonald, a man who had also been at the riot but fled to Louisiana soon thereafter, returned to Woodville. Upon his return, McDonald learned that a minister wished to speak with him. After speaking with the minister, McDonald gave a sworn confession to Chambers's attorneys stating that he shot the officer, and acknowledging that he had confessed to the shooting to others. *Id.* at 287-88. At a pretrial hearing, however, McDonald recanted his confession, claiming he had been enticed to confess by the minister. *Id.* at 288.

McDonald testified at Chambers's trial, and his sworn out-of-court confession was admitted into evidence. *Id.* at 291. But as he did at the earlier hearing, he repudiated his confession and testified that he did not shoot the officer. *Id.* at 291. Chambers attempted to call as witnesses three friends of McDonald's to whom McDonald had confessed spontaneously soon after the shooting, but the trial court excluded their testimony under Mississippi's hearsay rules. *Id.* at 292-93. Explaining that "the hearsay rule may not be applied mechanistically to defeat the ends of justice," the Court held that this exclusion deprived Chambers of his due process right to present a defense because McDonald's confessions were critical to

Chambers's defense and "bore persuasive assurances of trustworthiness." *Id.* at 302-03.

The "persuasive assurances of trustworthiness" in *Chambers* were: (1) the fact that McDonald confessed multiple times; "the sheer number of [McDonald's] independent confessions provided additional corroboration for each," 410 U.S. at 300; (2) "each of McDonald's confessions was made spontaneously to a close acquaintance shortly after the murder had occurred," *id.* at 300; (3) "McDonald was seen with a gun immediately after the shooting," *id.*; and (4) "each confession . . . was in a very real sense self-incriminatory and unquestionably against interest" in that "McDonald stood to benefit nothing by disclosing his role in the shooting to any of his three friends and must have been aware of the possibility that disclosure would lead to criminal prosecution," *id.* at 300-01.

All of the "persuasive assurances of trustworthiness" present in *Chambers* are equally present here. First, Travis confessed at least *six* times – even more than McDonald did in *Chambers*. App. A-5 at 17-19. Each of these independent confessions provides corroboration for the others. *See Chambers*, 410 U.S. at 300.

Second, as was true in *Chambers*, five of Travis's confessions were spontaneously made to friends shortly after the shooting. The sixth confession was made to defense investigator Steven Roadruck. App. A-5 at 17. That statement was both sworn and tape-recorded, *id.*, and therefore also bore assurances of trustworthiness, even though not made spontaneously to a friend.

Third, the *State* presented evidence at trial that Travis possessed a firearm at

the time of the shooting. State witness Brian Cespedes testified that he saw Travis with a gun that night, and saw Travis firing it. App. A-5 at 19-20.

Fourth, Travis's statements were "in a very real sense self-incriminatory and unquestionably against interest," *Chambers*, 401 U.S. at 301, in that they inculpated him in the shooting. There was no ambiguity in his statements; he was not vague about his role or what he had done. Nor did he attempt to shift the blame to Petitioner or to anyone else. Instead, he categorically stated that he was the one who shot Cummings.

Moreover, Travis stood to benefit absolutely nothing from revealing his role in the shooting and must have been aware that his confessions could possibly lead to criminal prosecution. This is true even though he stated that he shot Cummings in defense of Petitioner. The fact that someone claims self-defense or defense of others does not preclude criminal prosecution. Moreover, it is undisputed that Travis was on probation at the time of the shooting. App. A-5 at 29. Therefore, by confessing to shooting Cummings, he risked the possibility of prosecution not only for the shooting, but also for violating his probation.

And Travis was well-aware of the possibility of prosecution. Cassandra Chily testified that Travis told her he was afraid of going back to jail, and was going to leave town as a result of the shooting. Consistent with that testimony, he fled Florida soon thereafter and was ultimately arrested in California. Under these circumstances, the testimony regarding Travis's confessions was well within the basic rationale for declarations against interest. *See Chambers*, 410 U.S. at 301

(testimony should have been admitted where, *inter alia*, defendant told witness not to "mess him up" after he confessed to shooting).

Next, Travis's statements here were perhaps even more critical to the defense than McDonald's were in *Chambers*. Chambers was able to present an eyewitness who testified that he saw McDonald shoot the officer. *Chambers*, 410 U.S. at 289. Here, no state witness saw who shot Cummings. And whereas Chambers got McDonald's sworn confession to the shooting admitted into evidence and read to the jury, *id.* at 291, the trial court here refused to allow Travis's sworn, tape-recorded confession to Roadruck into evidence. And yet this Court nonetheless held that the trial court's exclusion of McDonald's confessions violated due process, because "Chambers' defense was far less persuasive than it might have been" had the confession been admitted. *Id.* at 294.

Indeed, the trial court's exclusion of Travis's confessions here left Petitioner in an even greater predicament than did the exclusion of McDonald's confessions in *Chambers*. Petitioner's only defense was that Travis was the shooter. But because Travis invoked his Fifth Amendment privilege, and the trial court excluded Travis's confessions, the only evidence Petitioner was able to marshal to support his defense was his own testimony, which was undercut by his earlier statements to police. And the prosecutor underscored this lack of evidence corroborating Petitioner's testimony in closing argument, calling the defense "pulled out of thin air," and describing Travis as a "mystery man." DE 24-2:95-96.

Finally, the fact that Travis did not testify at trial whereas McDonald did in

Chambers is immaterial under *Green v. Georgia*, 442 U.S. 95 (1979) (*per curiam*). In *Green*, this Court applied *Chambers* to find the exclusion of a co-defendant's confession violated due process even though the co-defendant was not available for cross-examination where the excluded testimony was "highly relevant" to a critical issue at trial, and "substantial reasons existed to assume its reliability." 442 U.S. at 97. Those "substantial reasons" were that the co-defendant made his statement spontaneously to a close friend, and there was evidence corroborating it. *Id.*

The same is true here. Travis's confessions were critical to Petitioner's defense, and bore all the persuasive assurances of trustworthiness that were present in *Chambers*. The fact that Travis was unavailable to testify at trial because he invoked his Fifth Amendment privilege is immaterial under *Green*. Rather, in light of *Chambers* and *Green*, the trial court's exclusion of Travis's confessions that he was the shooter violated Petitioner's due process right to present a defense.

The Eleventh Circuit, however, concluded that the state court's exclusion of Travis's confessions was not contrary to *Chambers* and *Green* because those confessions were "exculpatory" given that Travis stated that he shot Cummings in defense of Petitioner. App. A-2 at 13-14. But whether Travis's confessions included facts that might have provided him with a defense to the shooting is not the relevant inquiry for determining they were admissible as a matter of *constitutional* law. Rather, under *Chambers*, the relevant questions are whether Travis's statements were "in a very real sense self-incriminatory and unquestionably against interest," whether Travis stood to benefit anything from making the confessions, and

whether he was subjectively aware of the possibility that his statements could lead to criminal prosecution. *See* 410 U.S. at 301. And as demonstrated above, all of those questions must be answered in the affirmative.

The decision of the court below is in conflict with *Chambers* and *Green*. This Court's intervention is therefore warranted.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, vacate the decision of the court below, and remand for reconsideration in light of *Wilson v. Sellers*, 584 U.S. ___, 138 S. Ct. 1188 (2018). Alternatively, the Court should grant the petition.

Respectfully submitted,

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