DOCKET NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

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ANTONIO LEBARON MELTON,

Petitioner,

vs.

SECRETARY,
Florida Department of Corrections, et al.,

Respondents.

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

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COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Whether *Wilson v. Sellers* requires faithful adherence to the last reasoned decision of a state court, or may federal courts bolster such a decision by omitting or adding selective judicial findings?

2. Whether trial counsel's admission of error or concession of a lack of strategy deserves deference in a *Strickland v. Washington* analysis?

3. Whether an attorney has a duty to conduct a thorough investigation which includes interviewing and investigating crucial witnesses with knowledge of the defendant's innocence?

4. Whether *Strickland v. Washington* requires that prejudice must be reviewed by aggregating trial counsel's errors?

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Petitioner, **ANTONIO LEBARON MELTON,** is a prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue its writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

CITATION TO OPINIONS BELOW

The Eleventh Circuit's decision appears as *Melton v. Sec'y*, 769 Fed. Appx. 803 (11th Cir. 2019), and is Attachment A. The Eleventh Circuit's order denying panel rehearing is Attachment B. The district court's order denying relief is Attachment C. The state appellate order is Attachment D. The state circuit court order is Attachment E.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction on the basis of 28 U.S.C. § 1254(1). The Eleventh Circuit entered its opinion on April 22, 2019, rehearing was denied on June 7, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

PROCEDURAL HISTORY

On March 26, 1991, Antonio Melton was charged by indictment with first degree murder and armed robbery.

On September 13, 1991, a jury found Melton guilty. Thereafter, he was sentenced to life without the possibility of parole for twenty-five years (Count I), and life imprisonment with a three year minimum mandatory sentence (Count II).

Melton's convictions were affirmed on January 26, 1993, by Florida's First District Court of Appeal (DCA). *Melton v. State*, 611 So. 2d 116 (Fla. 1st DCA 1993).

Melton timely filed a motion for postconviction relief. After an evidentiary hearing, on March 24, 2004, the state circuit court denied all relief.

On August 24, 2005, the DCA per curiam affirmed. *Melton v. State*, 909 So. 2d 865 (Fla. 1st DCA 2005).

On September 8, 2006, Mr. Melton filed a petition for writ of habeas corpus in the U.S. District Court for the Northern District of Florida.

On March 9, 2009, Mr. Melton filed a successive motion for postconviction relief. After an evidentiary hearing, on March 20, 2013, the state circuit court denied.

On February 18, 2014, the DCA per curiam affirmed. *Melton v. State*, 132 So.3d 228 (Fla. 1st DCA 2014).

After re-opening his federal habeas corpus proceeding, on April 28, 2015, the District Court denied relief.

The Eleventh Circuit Court of Appeals granted Melton a certificate of appealability as to one issue. On April 22, 2019, the Eleventh Circuit affirmed the denial of relief. *Melton v. Sec'y*, 769 Fed. Appx. 803 (11th Cir. 2019).

FACTS RELEVANT TO QUESTION PRESENTED

A. The Trial.

On November 17, 1990, cab driver, Ricky Saylor, was robbed and shot and killed. The eyewitnesses to the crime saw two African American males at the scene (PCT. 737.) The authorities had no serious suspects. *See* Def. Ex. 13 (PCR. 440).

On January 23, 1991, Bendleon Lewis and Antonio Melton were arrested for killing pawn shop owner George Carter. They were caught inside the pawn shop and gave statements to the police (PCT. 67): Lewis said that Melton alone shot Mr. Carter, while he was in another part of the pawn shop. Melton said that Mr. Carter's gun went off while all three men struggled for control of it. The evidence against both young men was damning.

On March 15, 1991, Lewis gave a statement implicating Melton and a man named Tony Houston in the killing of Mr. Saylor (PCT. 54, 57-8, 203). According to Lewis, Houston and Melton robbed Mr.

Saylor and Melton shot him. The interview was not transcribed so there is no way of knowing exactly what Lewis's version of events was on March 15th, but thereafter, his story changed several times through two depositions[1] and testimony at two trials. However, it is clear that although Lewis denied his involvement in the crimes, he was at a minimum a lookout and shared in the proceeds (SR. 397-8, 403, 494, 498; PCT. 260).

The only physical evidence tying any one of the three to the scene was a fingerprint belonging to Houston found on the back seat passenger door of the cab (R. 337). Houston's girlfriend, Latasha Dobbins, testified that the three teens were at her apartment and called a cab the night Mr. Saylor was killed.

Houston and Lewis testified implicating Melton as the killer and Melton was convicted. Lewis was never charged for his involvement in the crimes; Houston pled guilty to Second Degree Murder and served ten years.

B. The Initial Postconviction Hearing.

At Melton's evidentiary hearing in 2002, much evidence was presented on the ineffective assistance of counsel, *Brady/Giglio*, and newly discovered evidence of innocence claims. Six witnesses testified regarding statements made to them by Lewis while they were inmates in the county jail.

David Sumler, testified that he came into contact with Lewis in 1991 (PCT. 420). Lewis told him that he and Houston shot a

[1]The second deposition came about because Lewis admitted on the eve of trial to having committed perjury in his first deposition. He had solicited a false alibi for the Saylor killing from a man named Adrian Brooks.

taxi driver and that Melton was not there at the time (PCT. 420). According to Sumler, Lewis was bragging in the cell, which contained 24 other inmates (PCT. 435).

Subsequently, someone from law enforcement came to see Sumler (PCT. 430). He was asked whether Lewis had said anything about Melton being at the scene where the taxi driver was shot (PCT. 430). Sumler related what he knew (PCT. 430). To his knowledge the officer was obtaining information to present to the courts on Melton's behalf (PCT. 439).

Paul Sinkfield testified that Lewis made a statement to him while in jail about two robberies and murders (PCT. 452-53). Lewis stated that he robbed and killed a cab driver with T.H. [Tony Houston] (PCT. 453).[2] Lewis said he himself shot the cab driver because "he was just nervous, got excited and shot him" (PCT. 454).

Lewis also told Sinkfield about the pawn shop murder (PCT. 455). He said that he got into a struggle with the owner, that Melton ran over to help and that's when the gun went off and killed the victim (PCT. 456). At the time of this conversation, Lewis was very worried; he was facing life in prison (PCT. 457).

Later, Sinkfield saw Lewis and Lewis said he was relieved, that he had spoken to his attorney, and that he was going to get a deal (PCT. 458).

Lance Byrd also spoke with Lewis at the jail (PCT. 485). Lewis was wondering if there was any way he could get out of the

[2]Lewis said he was with Melton earlier that day (PCT. 454).

murder at the pawn shop (PCT. 486). Lewis said that his lawyer told him if he came up with something else, he could probably get a lesser sentence (PCT. 487).

Lewis said he knew about the taxicab murder (PCT. 488), and that he was going to tell his lawyer that Melton did it (PCT. 488, 499). Lewis didn't say who killed the taxicab driver (PCT. 499), but he did admit that Melton had left and that he and Houston were still there (PCT. 488, 500).

Alphonso McCary had been in a cell with Melton at the jail, during which time Melton told him that Lewis was trying to put a murder charge on him (PCT. 507). When McCary asked Lewis about this, Lewis said that they came to him with a deal and he was trying to protect himself (PCT. 507).[3] However, Lewis, who seemed to be upset about what he was doing to Melton, said that after this was all over with, he would straighten out what he had done wrong (PCT. 507-08). Lewis proceeded to state that Melton didn't know anything about the cab murder, but that he was trying to save himself and it was better Melton than him (PCT. 508). McCary saw Lewis years later in prison and Lewis stated that he would help Melton when he got out (PCT. 509).

Bruce Crutchfield was in the jail in early 1991 when he came into contact with Lewis. Lewis was hysterical and having a hard time coping with the reality of the situation (PCT. 592). Lewis confessed that he shot a taxi driver (PCT. 592). Lewis said he was by himself when he killed the cab driver (PCT. 593).

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[3]McCary was friends with both Lewis and Melton and had known them for many years before 1991 (PCT. 516-17).

Crutchfield told him to keep his mouth shut, that if he needed to confess, he should confess to God (PCT. 592-93). Crutchfield remembered this conversation because "when somebody walks up to you and tells you that they done something like that and they are sitting there beating their head on the wall ... you don't forget it." (PCT. 622).

Fred Harris was in the jail with his friend, Lewis (PCT. 633). Lewis told him that in the pawn shop case, he, Melton and the victim were wrestling, the gun went off, and the owner was shot (PCT. 635). Lewis was scared and asked for advice (PCT. 636). In response, Harris told him that he needed to do what he had to in order to save himself (PCT. 636). Lewis responded that he was going to state that Melton was the triggerman in the pawn shop case (PCT. 636), even though the pawn shop owner was holding the gun when it went off (PCT. 647).

Trial counsel testified that he did not send an investigator to the jail to interview the cellmates of Lewis (PCT. 713). Trial counsel testified that he did not have any strategic reason for not doing so (PCT. 182-83). He did not recall requesting any independent investigation. After reviewing everything, trial counsel concluded that he should have given it a try (PCT. 713-14); he should have interviewed friends of Lewis (PCT. 244).

According to trial counsel, Melton absolutely denied involvement in the Saylor murder case and he never wavered on this (PCT. 156-57).

In addition to the aforementioned testimony, various exhibits were introduced into evidence. Defense Exhibit 1 is a

letter to trial counsel from the State dated August 9, 1991. The letter states:

> In order to reach a settlement on this case, I would like to propose the following disposition of the taxicab murder case:
>
> Melton would plead guilty to the armed robbery and first degree murder charge on the taxicab case. The State would not seek the death penalty and make a binding recommendation of life. The Court would adjudicate him guilty of the armed robbery and sentence Melton to 25 years on that count. The Court would withhold adjudication of guilt on the murder count and pass it until October for sentencing, or after the disposition and sentencing of the Carter case.
>
> We would then try the Carter case and if it gets to the penalty phase, we could only introduce the prior armed robbery conviction. There would be no mention of the other count nor could the Court consider the taxicab murder case in sentencing because Melton still would not be adjudicated at that time of the murder. ...

Trial counsel recalled receiving a copy of the letter but Melton did not accept the offer (PCT. 193).

Defense Exhibit 2 is a subpoena to Lewis to appear at the State Attorney's Office to testify (PCR. 1696). It is a Joe Doe subpoena and it doesn't state which case it is related to (PCT. 109-10). According to the State, this is a state attorney subpoena and it is standard procedure, particularly if in an investigation, "they don't want other people to see the subpoena and know he's coming down to testify about a certain defendant, or if he's in jail with that same person." (PCT. 112-13).

As to Defense Exhibit 2, trial counsel saw this for the first time in postconviction (PCT. 203). He was unaware that Lewis had been issued a state attorney subpoena under a false name (PCT. 204). Trial counsel would not have been able to find

this subpoena in the clerk's office (PCT. 204). Trial counsel arguably would have used this to show that Lewis expected to receive a benefit for his testimony (PCT. 205).

Trial counsel was shown Defense Exhibit 13, which is a supplemental offense report by Officer Tom O'Neal[4] that was in counsel's file (PCT. 689, PCR. 1731-34). It indicated that Lewis was issued a subpoena to give information in the case and that Lewis was making statements (PCT. 690). However, there is nothing in the report that provided a lead as to whether Lewis approached the State to provide information or obtain favorable treatment (PCT. 691). Trial counsel testified:

> Q. Now, on cross-examination of Mr. Schiller, within the confines of one of his questions, he indicated that you knew that Mr. Lewis had given a statement, had been subpoenaed to the State Attorney's Office and had given a statement, and that you did know that, at some point you came to know that?
> A. Yes.
> Q. Now, is there a categorical difference between Mr. Lewis being subpoenaed and forced to provide information or Mr. Lewis volunteering the information in an attempt to get favorable treatment? How would that have affected your strategy?
> A. Significantly different argument.
> Q. And if you would have known –
> A. And facts.
> Q. Different facts. If you would have known that Mr. Lewis, in fact, approached the State with information, would you have argued that to the jury?
> A. Yes.

(PCT. 735-36).

Defense Exhibit 3 is a handwritten list of things to do (PCR. 1697). Schiller indicated that his notes were made to remind himself to do certain things on the Saylor case (PCT.

[4]O'Neal investigated the homicide of Mr. Saylor (PCT. 45-6).

115). On the list of things to do, one of the items is to locate Summerlin (PCT. 114). Schiller testified that he first learned of Summerlin during the deposition of O'Neal (PCT. 115-16). Schiller had no knowledge that Summerlin's name was actually Sumler (PCT. 116-18). If the witness had knowledge that Lewis told Sumler that Houston had shot the taxicab driver, he would have turned this information over to Melton (PCT. 118).

Defense exhibit 4 is a waiver of speedy trial by Houston, signed on August 28, 1991 (PCR. 1698). Schiller acknowledged that this had to do with Houston testifying against Melton in the Saylor case (PCT. 130). Schiller needed Houston to waive speedy trial and testify against Melton (PCT. 130). At the time, the State was negotiating with Houston and offered him a sentence of 10-25 years (PCT. 131). Houston rejected the offer, but still testified for the State (PCT. 131-32). After he testified, he accepted the plea (PCT. 132).

Trial counsel noted that Defense Exhibit 4 was executed a few weeks before trial and it was unusual for a prosecutor to sign that form; he had never seen it done before (PCT. 200-1). Trial counsel testified that it might support the theory that Houston expected a benefit for testifying against Melton (PCT. 201). Trial counsel acknowledged that the document was available in the court file and he should have presented it to the jury; he had no strategic reason for not doing so (PCT. 201-2, 252).

Defense Exhibit 5 is a written plea agreement executed by Houston on October 9, 1991 (PCR. 1699-1701). The agreement was typed on the same day Houston waived his speedy trial rights

(PCT. 134, PCR. 1701). It appears that trial counsel had the unexecuted copy at the time of Melton's trial (PCT. 207).

Defense Exhibit 6 are notes by trial counsel regarding the deposition of Bruce Frazier (PCT. 160, PCR. 1702-05). The notes reflect that Frazier was reporting to Don West that Lewis was in his cell talking (PCT. 160).

Defense Exhibit 7 is a Department of Corrections post-sentence investigation report of Lewis, dated July 21, 1992 (PCT. 177-78; PCR. 1706-08). The report states, "After Mr. Carter opened the safe he apparently began struggling with Melton. Melton and Lewis then struck the victim, knocking him to the floor." (PCR. 1706). This report, which was produced after Melton's trial (PCT. 179), corroborated the witnesses' testimony who indicated that Lewis said that he, Melton and the victim were involved in a struggle (PCT. 179). It also corroborated Melton's statement to law enforcement (PCT. 179).

Defense Exhibit 10 is a billing statement by attorney Jim Jenkins for his representation of Lewis in the Carter case (PCT. 292, PCR. 1713-24). Jenkins testified he first saw Lewis at the jail after he was appointed (PCT. 283). The next time he saw Lewis, he suggested he cooperate with the State (PCT. 283).

Jenkins testified that he approached the State about Lewis' cooperation and any benefit he might receive (PCT. 285). His bill reflects a February 14, 1991, phone conference with the State (PCR. 1713). Jenkins proceeded to tell Lewis that his cooperation in this case alone would probably not be sufficient, but that if he had any information on any other crimes, he might want to come

forward (PCT. 285-86). Jenkins testified that these events occurred early in his representation of Lewis (PCT. 286).

The next time Jenkins saw Lewis, probably a week or two later, Lewis had information about Melton regarding the Saylor homicide (PCT. 286-87). Jenkins told Lewis that if the information rose to a sufficient level, it might work out for something less than a life sentence; he hoped for a reduction to second degree murder (PCT. 290-1). Jenkins gave the information to the State and the State told Jenkins that his client's cooperation would be considered (PCT. 289, 291, 303).

Jenkins' bill reflects numerous contacts with the State between the time he informed Lewis that additional information would be necessary to obtain a deal and Lewis' interview with the State on March 15, 1991, pursuant to the John Doe subpoena. Jenkins spoke to and/or met with O'Neal and/or the State ten separate times over the course of the next month (PCR. 1713-15).

Trial counsel testified that had he known about all the conversations Jenkins had with O'Neal and the State prior to Lewis' statement implicating Melton, he likely would have wanted to bring forward this information to the jury:

> Q. Now, you had indicated that you had put Mr. Jenkins on in the trial in Mr. Saylor's case and also in the penalty phase, the Carter case, and you indicated what your strategy was. If you had known that Mr. Jenkins had had telephone conversations and meetings with Tom O'Neal beginning February 25th, 1991, I guess -- we have conversations on February 25th, 26th, 27th, 28th, March 1st, March 5th, March 12th, March 14th, and March 15th --all of those dates conversations Mr. Jenkins had had with Thomas O'Neal, would you have presented that information to the jury?
>
> A. If I understood it to be about this case or these cases, I should have.

Q. And particularly the understanding that Mr. Lewis never gave his statement implicating Mr. Melton until March 19th?

A. Exactly.

* * *

Q. And what would be the reason that you would have wanted the information relative to the conversations that Mr. Jenkins with Mr. O'Neal and Mr. Spencer and Mr. Patterson, why would you have wanted the jury to know about those conversations, at least that they had happened?

A. If it could establish that there were ongoing discussions that could suggest that Mr. Lewis was at risk of serious punishment and might benefit from cooperating with the State; if there was a total lack of information about Mr. Saylor's death and any alleged involvement of Mr. Melton in that incident; or any other factor that might establish a motivation for Mr. Lewis to falsely accuse Mr. Melton, those, I think, would all be serious matters that should have been presented to the trier of fact if they could be established.

(PCT. 180-81).

State Exhibit 1 is a set of notes made by O'Neal during interviews at the jail and with Lewis (PCT. 51, PCR. 1560-65).

Initially, O'Neal did not have any suspects in the Saylor case (PCT. 47). He was aware of the subsequent homicide of Mr. Carter and as a result, he spoke to Lewis, who was apprehended coming out of the pawnshop (PCT. 47). O'Neal interviewed Lewis about other homicides, to which he indicated he had no knowledge (PCT. 47-48). However, after receiving information that Lewis was making comments about the pawnshop murder and a murder involving a cabdriver (PCT. 49), O'Neal interviewed Bruce Frazier "and a subject that was originally identified as a Summerlin, later confirmed to be a Sumler." (PCT. 49). According to his notes, Lewis told Sumler that his partner had shot the cab driver and that Lewis had admitted being there (PCT. 51-52). The word

"Melton" was scratched out from the notes and replaced by "partner":

> Q. Okay. Now in your notes there, you have the word, looks like, Melton scratched out and the word partner wrote in there.
> A. Yes, sir.
> Q. Do you recall why that happened or how that happened?
> A. Because I was thinking his partner being Melton but Summerlin did not specifically say Melton, so I took it out.
> Q. Okay. Did he use the word partner?
> A. Yes, sir.

(PCT. 52). O'Neal recalled that the State handed copies of the notes to trial counsel during his deposition (PCT. 75).

Trial counsel testified that based upon the note, he could have argued that because Melton's name was scratched out, that Lewis had indicated to Sumler that it was someone else, not Melton, who assisted Lewis in robbing and shooting Mr. Saylor (PCT. 264). The note and the timing of the interview were relevant to Melton's defense (PCT. 161), in that they demonstrated that Lewis created information against Melton(PCT. 162-63).

Also, based upon the note, trial counsel admitted he should have investigated further (PCT. 164):

> Q. And what type of investigation would that be, sir?
> A. Well, finding out who the individual was who had a statement from Mr. Lewis saying that his partner, allegedly not Melton, had shot the cabbie, meaning Mr. Saylor, at the minimum.
> Q. And if you would have known that the individual who made that statement was incarcerated with Mr. Lewis at the Escambia County Jail when the statement was made, would you have considered that fact in forming your investigation?
> A. I should.
>
> * * *
>
> Q. And would you have began an investigation to attempt to corroborate this individual's statement?

A. I should have.

(PCT. 164-65, 266). And, had Lewis made similar statements to other inmates, trial counsel would have presented their testimony (PCT. 169, 170).

C. The Successive Postconviction Hearing.

At the evidentiary hearing on August 23, 2012, Jamel Houston explained that on August 26, 2007, his brother Tony Houston died (PCR2. 224). In the preceding year, Tony confided in Jamel that Tony had been the shooter when Mr. Saylor was killed (PCR2. 225). At one point, Tony told him that he forced Melton out of the car at gunpoint before robbing and shooting Mr. Saylor (PCR2. 227). Melton did not know what was going to happen (PCR2. 228). Tony and Lewis talked and decided to "blame everything on" Melton (PCR2. 228).

In fact, in 1990, Jamel recalled that Tony came home one night with blood on him (PCR2. 225). Tony acted differently than usual and had a strange look on his face (PCR2. 226).

The night before Tony died he spoke to Jamel on the phone (PCR2. 229). Tony "had a lot of regret for what he did." (PCR2. 229). He had wanted to tell someone what he had done, but was afraid that he would be locked back up (PCR2. 229). The two prayed and Tony apologized for what he had done (PCR2. 237). Tony said he had an innocent man doing time (PCR2. 237).

In 2004, a former cellmate of Houston's from 1991, Adrian Brooks, ran into Tony. The two discussed what had led to their being locked up in 1991 (PCR2. 253). Tony told Brooks that "he

felt sorry for Melton." (PCR2. 253). Tony said that he killed the taxicab driver, not Melton (PCR2. 253).

THE ELEVENTH CIRCUIT COURT OF APPEALS' RULING

The Eleventh Circuit held that the state circuit court reasonably applied *Strickland* in determining that trial counsel was not ineffective in failing to investigate information that Lewis was talking to individuals in jail about the Saylor and Carter homicides. *Melton v. Sec'y*, 769 Fed. Appx. 803 (11th Cir. 2019). However, rather than rely on the testimony of trial counsel at the evidentiary hearing, the Eleventh Circuit ignored the testimony and adopted the state circuit court's unsupported rationale for denying Melton's claim. *Id*.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit contravened the holding of *Wilson v. Sellers* by bolstering the strength of the reasoning in the state circuit court's decision by disregarding the unreasonable bases for that last reasoned opinion.

A. *Wilson* requires federal habeas courts to determine the reasonableness of a state court decision based on the specific and particular reasoning used in the last reasoned state court opinion.

Last term, in *Wilson v. Sellers*, this Court held that federal habeas courts are required to "train [their] attention on the particular reasons— both legal and factual— why state courts rejected a state prisoner's federal claims" when "d]eciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact." 138 S. Ct. 1188, 1191–92 (2018)(emphasis added)(internal quotations and citation omitted). This approach has been "affirmed ... time and time again." *Id*. at 1192. As

such, when the state court "explains its decision on the merits in a reasoned opinion ... a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id*. By omitting the unreasonable reasons that formed the foundation of the lower court opinion, that is precisely what the Eleventh Circuit failed to do in this case.

The Eleventh Circuit purported to adhere to the precepts of *Wilson* by "look[ing] through" to the last reasoned opinion, here, that of the state circuit court. This is the last reasoned opinion, given the summary affirmance by the District Court of Appeal for the First District of Florida (DCA). *Id*. at 1194; see *Melton v. State*, 909 So. 2d 865, 865 (Fla. 1st DCA. 2005)(Table). The Eleventh Circuit's error becomes clear in the next step prescribed by this Court: the Eleventh Circuit failed to both train its attention to the specific factual and legal rationales as to why the last reasoned opinion rejected Melton's federal claims, and defer to those reasons if, and only if, they were reasonable. *See* 138 S. Ct. at 1191–92.

The federal habeas court may not "substitute for [the state court's] silence the federal court's thought as to more supportive reasoning." *Id*. at 1197. The same principles that prevent federal courts from inventing their own reasoning to justify a state court decision require them to faithfully evaluate the actual reasoning in the last reasoned opinion. It is impermissible under *Wilson* to bolster the last reasoned opinion

by selectively cherry-picking arguments and omitting faulty reasoning that led the state circuit court to reach its decision.

B. The Eleventh Circuit decision was both an unreasonable application of Federal law and an unreasonable determination of the facts in light of the evidence.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), federal habeas relief should be granted if the adjudication of the claim resulted in a decision that either "(1) ... 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) (2018). AEDPA encourages deference to state courts, but "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review [and] does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Here, the Eleventh Circuit failed to faithfully evaluate the state circuit court's reasoning; instead, it omitted and ignored the unreasonable determinations of fact and an unreasonable application of law in the name of deference.

1. Unreasonable Determinations of the Facts in Light of the Evidence presented in the State Court Proceeding

The state circuit court's decision to ignore the facts attested to by Melton's trial counsel, Chief Judge Terry Terrell, during the postconviction evidentiary hearing and, instead, substitute them with an unreasonable and opposite determination, is plain error. Had the exculpatory witnesses been contacted and

presented to the jury, no reasonable factfinder could have found Melton guilty.

At the evidentiary hearing, Terrell was asked whether "it would be a fair statement to say that at the Public Defender's Office, your investigative resources are limited?" and he responded, "[w]e have full-time investigators on staff and they do what I ask them to do. So to answer your question in that context, arguably, no." (PCT. 713). Despite this testimony by a sitting judge, the state circuit court disregarded Terrell's testimony and found that "it is unreasonable to suggest that in order to be effective a trial defense counsel has an obligation to utilize their finite time and resources to search out un-named individuals." (PCR. 542-43). This determination ignores unambiguous testimony that the resources available to the Public Defender's Office were not the reason for failing to investigate an exculpatory witness, without any given rationale as to why it should be discounted.

Following that exchange, Terrell was asked whether he had "an opinion as to whether or not [he] should have interviewed the jail inmates" in light of a review of, inter alia, his own case file, and Terrell replied, "[y]es ... I should have given it a try." (PCT. 714). This admission of ineffectiveness by trial counsel is ignored by the state circuit court as that of someone "... too willing to acquiesce to the suggestions that he did not perform effectively in certain areas." (PCR. 545). Once more, the state circuit court gives no rationale for disregarding a fact that acknowledges the fault of trial counsel.

The state circuit court's findings are objectively unreasonable because they reject a record that clearly establishes opposite facts.[5] The federal district court could not rely on the DCA's affirmation because, under *Wilson*, it adopted the state circuit court's reasoning and thus the federal court's reasoning was also not supported by the record. As such, the federal district court was required to conduct a *de novo* review and should have granted habeas relief to Melton on this basis alone. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2283 (2015) (vacating and remanding on determination that the Court of Appeals' factual determinations were unreasonable, without addressing claim of unreasonable application of Federal law).

[5] *See, e.g.*, *Norton v. Spencer*, 351 F.3d 1, 7–8 (1st Cir. 2003)(holding that "when there is nothing in the record, or in the circumstances of [the] case" to support a finding of incredibility, it is an unreasonable determination of facts to do so); *Lewis v. Connecticut Com'r of Correction*, 790 F.3d 109, 123 (2d Cir. 2015)(holding that "failing to note, much less consider ... key facts" in the record is an unreasonable determination of facts); *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 278 (3d Cir. 2016)(holding that disregarding an exhibit that "provided direct evidence that ... testimony was false" was an unreasonable determination of facts); *Rice v. White*, 660 F.3d 242, 255–56 (6th Cir. 2011)(holding that after a trial court prevented the use of peremptory challenges after a *Batson* claim, it was an unreasonable determination of facts to conclude there was no *Batson* violation); *Maxwell v. Roe*, 628 F.3d 486, 500–01 (9th Cir. 2010)(holding that concluding a witness testified truthfully when multiple others testified to his lies was an unreasonable determination of facts); *Farina v. Sec'y, Fla. Dep't of Corr.*, 536 Fed.Appx. 966, 976–77 (11th Cir. 2013)(holding that a finding of "no ... evidence of religion" in proceedings was unreasonable determination of facts when the record shows that the state's comments to the jury included a comment instructing them to not disregard deeply held religious beliefs in favor of the law).

2. Unreasonable Application of Clearly Established Federal Law

Trial counsel testified to a lack of strategic, tactical, or feasibility reasons for not investigating exculpatory witnesses; by dismissing his admission of fault as "too willing to acquiesce" to being deemed ineffective counsel, the state circuit court violated clearly established Federal law under *Strickland*:

> [S]trategic choices made after thorough investigation of law and facts ... are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that *reasonable professional judgments* support the limitations on investigation ... [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. 668, 690–91 (1984). To prove ineffective assistance of counsel, under *Strickland* a defendant must establish: 1) deficient performance, i.e., that counsel's errors must be unreasonable "under prevailing professional norms"; and 2) prejudice, i.e., that the errors made must have been so serious that, but for counsel's performance, "the factfinder would have had a reasonable doubt respecting guilt." *Id*. at 688, 695. A strategic choice based on reasonable investigation is not a prejudicial error. *See id*. Here, however, Terrell, as trial counsel, admitted to not fully investigating exculpatory witnesses for an unreasonable and nonstrategic rationale. The state circuit court rejected his testimony under a standard not recognized by this Court, and not supported in the opinion by any

case law or standards of representation— that of a counsel "too willing" to admit he provided ineffective assistance to a client.

Deference to trial counsel, especially when they testify in postconviction evidentiary hearings, is paramount. Courts have given extensive deference to trial counsel who testify as to their strategic reasons for not pursuing an investigation or other decision to uphold the defense narrative.[6] The same deference should apply to trial counsel when they admit, as here, that they were ineffective for not following up on exculpatory witnesses.

C. The Eleventh Circuit violated *Wilson* by omitting or overlooking dispositive yet unreasonable aspects of the state circuit court's decision from its analysis.

The Eleventh Circuit violated *Wilson* by refusing to acknowledge that the record failed to support the conclusion that trial counsel's investigative resources were limited, and denying relief on that basis. The Eleventh Circuit acknowledged only what the state circuit court mentioned in its decision, ignoring the record entirely. In so doing, the Eleventh Circuit restated the same premise: that it would be unreasonable to ask trial counsel

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[6] *See, e.g.*, *United States v. Ware*, 595 F. App'x 118, 121 (3d Cir. 2014)(per trial counsel testimony that "requesting a lesser-included jury instruction would be contrary to the defense narrative," the court concluded that there was an unsuccessful but strategically reasonable rationale for doing so); *Wilson v. Ozmint*, 352 F.3d 847, 862 (4th Cir. 2003), opinion amended on denial of reh'g, 357 F.3d 461 (4th Cir. 2004)("[f]rom this testimony, it is clear that the defense team's decision not to present additional witnesses was strategic, not the product of neglect."); *Hall v. Wainwright*, 805 F.2d 945, 948 (11th Cir. 1986)(per trial counsel testimony that "he chose not to [present evidence] as a matter of tactics," the court agreed that he had reasonable strategic reasons for doing so).

to expend their finite resources and time, despite the fact that Terrell testified under oath that the Public Defender's Office faced no such obstacle in its investigatory procedures. Terrell said, "they [would have done] what I [had] ask[ed] them to do," meaning that his office did have the resources to investigate an exculpatory witness (PCT. 713).

The Eleventh Circuit also violated *Wilson* by omitting from its analysis that the state circuit court held that trial counsel's testimony was unreliable because of counsel's admission of error. There is no test or prong under AEDPA or *Strickland* that judges the "willing[ness]" of an attorney to admit their own mistakes. Indeed, out of fear for malpractice lawsuits and other repercussions, attorneys are highly unlikely to fall on their own swords for a single client. Factoring in this innate drive for self-preservation, deference should not only be given, but should be emphasized more heavily, when trial counsel testifies to their own error in being a zealous advocate. Such candor toward tribunals should be encouraged by this Court. In judging his own performance, Terrell stated both that his only reason for not seeking out the relevant witnesses was because in "snitch cases" such inquiries had "almost uniformly been unproductive," and that he believes on the basis of the record that he "should have" still attempted to seek them out. Defendants and the legal profession at large would be disserved by this Court upholding that the absence of success in interviewing witnesses in previous and unrelated cases should excuse the deliberate avoidance of speaking to exculpatory witnesses in the future, and that lawyers

need not come forward if they ineffectively served their convicted clients.

Upholding the Eleventh Circuit's decision here makes it impossible to win a *Strickland* claim by encouraging but essentially precluding trial counsel from admitting that they were ineffective. The practical effect of this is to prevent the admission of fault by the trial counsel, or have them act disinterested enough during postconviction hearings so they will not seem "too willing to acquiesce" to a claim of their ineffectiveness. The courts must give deference to the trial counsel's decision making, whether that means the admitted use of a strategy that failed, or the admitted lack of a strategy. Courts cannot fashion their own reasoning and impose it on the trial counsel to prevent habeas relief, just as they cannot discount reasoning given by trial counsel to grant habeas relief.

By omitting these glaring errors of the state circuit court's decision, the Eleventh Circuit effectively returned to the pre-*Wilson* era, refusing to "look through" to the last reasoned state court opinion and instead coming up with its own reasons for why the end result was correct.[7] After omitting these

[7]The Eleventh Circuit has openly refused to follow *Wilson* on multiple occasions, its implied rejection in *Melton* is not an isolated incident. This case is just another recent application of a supposed "no-grading-papers, anti-flyspecking rule" of the Circuit, whose continued existence after *Wilson* contravenes this Court's mandate to focus on "particular reasoning" of the state courts' denial of relief. *See, e.g.*, *Wright v. Sec'y for Dept. of Corrs.*, 278 F.3d 1245, 1254-55 (11th Cir. 2002)(holding that the focus should be on the final result of the state court's decision, not its reasoning); *Loggins v. Thomas*, 654 F.3d 1204, 1217 (11th Cir. 2011)(holding that, under AEDPA, only the end (continued...)

essential facts that contradict the state circuit court's decision, the Eleventh Circuit wrongly denied relief. By cherry-picking select parts of the state circuit court's order to analyze and affirm, instead of directly assessing the rationale, the Eleventh Circuit violates the spirit, if not the letter, of *Wilson v. Sellers*. Ignoring faulty reasoning to make the state circuit court's decision aesthetically pleasing and bolster its logical coherency is analogous to crafting entirely new rationales while ignoring the state court's actual decision.

D. Conclusion

This Court should vacate and remand the case for further proceedings consistent with *Wilson* or, in the alternative, grant certiorari to clarify whether *Wilson* requires faithful adherence to the last reasoned decision or if federal courts may bolster a poorly reasoned last-reasoned decision by omitting or cherry-picking arguments.

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[7](...continued)
result of the state court's decision matters); *Gill v. Mecusker*, 633 F.3d 1272, 1291 (11th Cir. 2011)(holding that the "precise question" under AEDPA is the state court's ultimate conclusion); *Meders v. Warden, Georgia Diagnostic Prison*, 911 F.3d 1335, 1350 (11th Cir. 2019), cert. denied sub nom. *Meders v. Ford*, No. 19-5438, 2019 WL 5150550 (U.S. Oct. 15, 2019)(holding that despite *Wilson*, the "no-grading-papers, anti-flyspecking rule remains the law of the circuit."); *Wiggins v. Sec'y, Fla. Dep't of Corr.*, 766 F. App'x 817, 822 (11th Cir. 2019)(quoting *Meders* and holding that *Wilson* did not address the state court's reasoning).

II. This Court should review whether the Eleventh Circuit's affirmance of the state circuit court's denial of relief is based on an analysis that is in direct conflict with the precedent of this Court.

A. Deficient Performance

1. The Eleventh Circuit violated *Strickland* by overlooking the prevailing professional norm requiring an attorney to conduct a reasonable investigation.

Melton asks that this court grant certiorari to consider whether the Eleventh Circuit's decision is in direct conflict with this court's decisions in *Strickland v. Washington,* 466 U.S. 668 (1984); *Rompilla v. Beard,* 545 U.S. 374 (2005); *Wiggins v. Smith,* 539 U.S. 510 (2003); *Williams v. Taylor,* 529 U.S. 362 (2000); and *Padilla v. Kentucky,* 559 U.S. 356 (2010). The Eleventh Circuit relied on *Strickland* and *Wiggins* to support the contention that Chief Judge Terry Terrell performed effectively when deciding to forego investigating David Sumler, a person with information pertaining to his client's innocence, and who would have led him to additional witnesses with knowledge of his client's innocence.[8]

The Eleventh Circuit erred in upholding the state circuit court's decision to deny relief because its decision was contrary to clearly established law and based on an unreasonable determination of the facts. Under the AEDPA, federal courts may grant a §2254 petition when "the state court's adjudication of the claim resulted in a decision that was contrary to or involved

[8]An investigation into the statements made by Sumler would have likely led to the testimony of Sumler and Bruce Crutchfield that Lewis was at the scene of the crime when the cab driver was shot and Melton was not present.

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". 28 U.S.C §2254(d). In *Williams*, this Court defined a state court's decision to be an unreasonable application of federal law if it "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the petitioner's case." *See Williams*, 529 U.S. at 404-06. Here, the Eleventh Circuit erred by accepting the state circuit court's reasoning which conflicted with established federal law and reaching conclusions that were based on an unreasonable determination of the facts.

A defense attorney "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland,* 466 U.S. at 686, 689. To be deficient, counsel must perform "outside of the wide range of professionally competent assistance", resulting in errors so serious that the plaintiff was effectively deprived of their sixth amendment rights. *Strickland*, 466 U.S. at 689. Trial counsel is ineffective and performs deficiently when their conduct falls below an objective standard of reasonableness. *Strickland*, 466 U.S. at 669. An "objective standard of reasonableness" is based on counsel's reasonableness as compared to the "prevailing professional norms." *Wiggins*, 539 U.S. at 521. The professional norms are reflected by the standards and

guidelines of professional organizations like the American Bar Association, Public Defender organizations, and the Department of Justice. *See Padilla*, 559 U.S. at 368. In addition to the guidelines professional norms have been further codified through case law. *See Strickland,* 466 U.S. at 688.

In its opinion, the Eleventh Circuit held that "none of the record evidence Melton relies on would have led a reasonable attorney to investigate further." *See Melton v. Sec'y,* 769 Fed. Appx. 803, 808 (11th Cir. 2019). The Eleventh Circuit focused on O'Neal's notes regarding Sumler and Terrell's uninformed decision not to interview Sumler or other inmates:

> Addressing Mr. Melton's ineffective assistance claim based on counsel's failure to investigate, the court found "there would have been no reason for [Terrell] to believe ... that David Sumler's testimony would be beneficial to his client." Although Mr. Terrell testified he should have done more to investigate, the court "reject[ed] that type of hindsight since further investigation would have to be premised on [Terrell] receiving some indication that Ben Lewis had told David Sumler something of benefit to his client," evidence of which there was none. The court therefore found that Mr. Terrell was neither deficient nor ineffective in his representation of Mr. Melton.

Melton v. Sec'y, 769 Fed. Appx. at 806.

The note in question stated, Lewis told Sumler that Lewis's "partner shot [the] cabbie [Mr. Saylor]" and that "Lewis was going to talk to LE if not freed on pawn killing." Although O'Neal originally wrote that Lewis told Sumler that Melton killed Mr. Saylor, he later crossed out Melton's name and replaced it with the word "partner" when he realized Sumler "never mentioned Melton by name." *Melton v. Sec'y*, 769 Fed. Appx. at 805.

A reasonable attorney with a statement that someone else confessed to the crime their client was accused of, who was in possession of that witness' birth date and jail cell number, would investigate further; to ignore such potential exculpatory evidence is unreasonable and ineffective. Indeed, Terrell testified that O'Neal's notes were "worthy of further investigation and explanation." *Melton v. Sec'y*, 769 Fed. Appx. at 805. Based on the information provided by O'Neal, Terrell had a duty to investigate Sumler. *See Rompilla v. Beard,* 545 U.S. 374, 382-83 (2005)(failure to investigate a lead that will assist your client renders trial counsel ineffective); *Wiggins v. Smith,* 539 U.S. 510, 523-27 (2003)(failure to investigate witnesses and readily accessible evidence for mitigation, is deficient performance that deprives a defendant of their right to counsel); ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.1 "Investigation" (1989)(hereinafter "1989 ABA Guidelines")(noting defense counsel's obligation to conduct a thorough investigation including witnesses "having purported knowledge of events surrounding the offense itself").

The Eleventh Circuit found Terrell was effective counsel because he made a strategic choice to not interview inmates who heard Lewis' confession. In light of Terrell's trial strategy being solely based on the jury believing Lewis and Houston "were making things up about Mr. Melton", *Melton v. Sec'y*, 769 Fed. Appx. at 805, Terrell's failure to thoroughly investigate the defense theory was deficient.

2. The Eleventh Circuit's decision is in direct conflict with the professional norms that have been established throughout the circuit courts.

In *Melton v. Sec'y*, 769 Fed. Appx. at 805, the Eleventh Circuit found counsel performed effectively even though trial counsel's truncated investigation stopped short of investigating statements and witnesses with knowledge regarding his client's innocence. This is in direct conflict with federal circuit court decisions and the broader professional norms requiring that an attorney has a duty to conduct a thorough investigation which includes interviewing and investigating important witnesses with knowledge of the defendant's guilt or innocence. *See, English v. Romanowski*, 602 F.3d 714, 728 (6th Cir. 2010)(counsel was incompetent when creating a defense strategy around a witness that counsel failed to investigate and decided not to call to the stand, further finding that competent counsel would have conducted pretrial interviews of witnesses); *Williams v. Allen,* 542 F.3d 1326, 1337-39 (11th Cir. 2008)(finding a reasonable attorney would have investigated further than a single witness for the mitigation phase, in light of the many other available witnesses); *Ramonez v. Berghuis*, 490 F.3d 482, 489 (6th Cir. 2007)(a reasonable attorney cannot base their trial strategy on what they guess a witness might say and it is objectively unreasonable to not interview someone with beneficial testimony); *Towns v. Smith,* 395 F.3d 251, 258 (6th Cir. 2005)(an attorney has a duty to investigate "all witnesses who may have information about the defendant's guilt or innocence." Finding the attorney who makes no attempt to contact a witness who was held in the

county jail- "despite acknowledging the need to do so"— was objectively unreasonable); *U.S. ex rel Hampton v. Leibach*, 347 F.3d 219, 246-47 (7th Cir. 2003)(Given the central role of eyewitness testimony to the case, the defense's failure to find exculpatory eyewitnesses whose names had been given to him constituted ineffective assistance of counsel); *Huffington v. Nuth*, 140 F.3d 572, 580 (4th Cir. 1998), citing *Hoots v. Allsbrook*, 785 F.2d 1214, 1221 (4th Cir. 1986)(counsel must ordinarily "investigate possible methods for impeaching prosecution witnesses," and in some instances failure to do so may suffice to prove a claim under *Strickland*); *Bryant v. Scott*, 28 F.3d 1411, 1419 (5th Cir. 1994)(failure to interview and fully investigate witness who admitted to committing the crime and alibi witness made counsel ineffective); *U.S v. Gray*, 878 F.2d 702, 711-12 (3d. Cir. 1989)(failure to locate and speak to witnesses that could testify to clients innocence constituted a deficient performance); *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990)(Trial counsel's decision not to put on any witnesses for a viable theory of defense and instead to rely on the state's case being too weak, falls outside the range of professional conduct; especially when such a decision is made without interviewing useful witnesses); *Blackburn v. Foltz*, 828 F.2d 1177, 1182-83 (6th Cir. 1987)(failure to investigate potential alibi witnesses constituted ineffective assistance of counsel when counsel's files contained the names of potential witnesses.

Had trial counsel investigated he would have learned of exculpatory evidence supporting his theory that Lewis and Houston

had made up testimony implicating Melton and that they were guilty of Mr. Saylor's murder, not Melton. The failure to conduct a sufficient investigation into evidence supporting the defense theory constitutes deficient performance. *See, e.g. English*, 602 F.3d at 728 (6th Cir. 2010).

Furthermore, the state circuit court unreasonably applied the governing legal principle to the facts when it used trial counsel's testimony of ineffective performance as proof that he performed effectively. The state circuit court held: "This court finds that TDC is too willing to acquiesce to the suggestions that he did not perform effectively in certain areas. This court finds no deficiencies or ineffectiveness on the performance of TDC during the defense of Antonio Melton in this case" (PCR. 545). There is no precedent for finding a negative inference from trial counsel's testimony to ineffectiveness.

In *Reeves v. Alabama*, this Court valued trial counsel's testimony in an ineffective assistance of counsel case so highly that a failure to have counsel testify at the evidentiary hearing resulted in a denial to proceed with claims of ineffective assistance. 138 S.Ct 22, 22-23 (2017)(Sotomayor, Ginsburg, and Kagan dissenting). In fact, courts have often relied on trial counsel's experience when rejecting claims of ineffective assistance of counsel. *See Lawrence v. Sec'y, Fla. Dep't. of Corr.*, 700 F.3d 464, 477-78 (11th Cir. 2012)(rejecting a claim of ineffectiveness based, in part, on the "approximately 50 years of combined litigation experience" between the defense team); *Reed v. Sec'y, Florida Dept. of Corr.*, 593 F.3d 1217, 1244 (11th Cir.

2010)(rejecting a claim of ineffectiveness based, in part, on trial counsel being "particularly experienced" because he had 13 years experience and had "tried more than thirty homicide cases, most of which were capital cases"); *Zakrzewski v. McDonough*, 455 F.3d 1254, 1258 (11th Cir. 2006)(rejecting a claim of ineffectiveness, in part, because "both of Zakrzewski's trial counsel had vast experience in criminal defense"). Furthermore, to be constitutionally effective counsel must act strategically. *See Wiggins v. Smith*, 539 U.S. 510, 521 (2003). But courts must not construct strategy where counsel had none. *See Harris v. Reed*, 894 F.2d 871, 878 (7th Cir. 1990) citing *Kimmelman*, 477 U.S. at 365 (1986)("This court finds that the district court's factual findings on this score are clearly erroneous. Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer"). If the court finds comfort in relying on trial counsel's experience to prove his performance was reasonable and strategic then they should similarly rely on experienced trial counsel who testifies to a lack of strategy.

Terrell's defense was based on the presumption that Houston and Lewis had fabricated a story against Melton. When trial counsel refused to investigate the readily available evidence to substantiate that theory his performance was deficient and fell below the constitution's minimum standard of effectiveness.

B. Prejudice

1. There is a circuit split over whether federal courts are required to cumulate errors to satisfy *Strickland's* prejudice prong within the context of an ineffective assistance of counsel claim.

Since the enactment of the AEDPA, federal appellate courts have been split over whether this Court's "clearly established" law requires a cumulative error analysis in a § 2254 claim and whether a cumulative error analysis may apply within the context of an ineffective assistance of counsel claim after *Strickland v. Washington*, 466 U.S. 668 (1984). *See* 28 U.S.C. § 2254(d). In many contexts, this Court has recognized that multiple prejudicial errors can collectively undermine the fundamental fairness of a trial. *See Chambers v. Mississippi*, 410 U.S. 284, 295, 298 (1973) (finding that the cumulation of two trial court errors prejudiced the defendant); *Kyles v. Whitley*, 514 U.S. 419, 421 (1995)(finding that "[o]n habeas review ... the established rule that the state's obligation under [Brady] to disclose evidence favorable to the defense turns on the cumulative effect of all [withheld] evidence).

Under *Strickland*, courts are expected to focus their inquiry "on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. Despite almost identical language and underlying principles, related to fair trial outcomes, courts have consistently considered *Brady* errors cumulatively but failed to adopt a similar cumulative analysis for *Strickland* violations. *See U.S. v. Bagley*, 473 U.S. 667, 682-83 (1985)(defining *Brady's* materiality standard). A ruling from

this Court that directs courts to aggregate multiple *Strickland* violations and cumulate trial errors will clarify the application of *Strickland* on habeas review and guarantee every criminal defendant's right to the effective assistance of counsel.

a. The language in *Strickland* requires cumulative error analysis.

This Court's language and reasoning in *Strickland* requires a cumulative error analysis when determining *Strickland* claims. *See Strickland v. Washington*, 488 U.S. 668, 695 ("In making this [a prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury"). The performance prong in *Strickland* requires a defendant making an ineffective assistance claim to "identify the *acts* or *omissions* of counsel." *Id.* at 690 (emphasis added). Additionally, the prejudice prong in *Strickland* requires defendants to show that "but for counsel's unprofessional *errors*, the result of the proceeding would have been different." *Id.* at 694 (emphasis added). The Court's conscious choice to pluralize "acts", "omissions", and "errors" support finding a requirement that courts cumulate counsel's alleged ineffectiveness.

b. The federal appellate courts are split.

Lower courts have taken different approaches to analyzing ineffective assistance of counsel claims. Courts that have adopted a cumulative error approach interpret the language of *Strickland* and the right to a fair trial as evidence that multiple errors must be accumulated when determining prejudice.

Courts that reject a cumulative standard only review the alleged deficiencies individually.

Seven federal appellate courts "have held that federal courts on § 2254 review may cumulate an attorney's errors as part of the Strickland prejudice analysis." Ruth A Moyer, *To Err Is Human; To Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess Strickland Errors*, 61 Drake L. Rev. 447, 490 (2013); *See Dugas v. Copland*, 428 F.3d 317, 335 (1st Cir. 2005)("Strickland clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced."); *Lindstadt v. Keane*, 239 F.3d 191, 203-04 (2d Cir. 2001)(finding that "the impact of [trial counsel's] errors should be aggregated in its *Strickland* analysis); *McNeil v. Cuyler*, 782 F.2d 443, 451 (3d Cir. 1986) (finding that the "reviewing the cumulative effect" of multiple "actions and omissions" resulted in *Strickland* prejudice); *Richards v. Quarterman*, 566 F.3d 553, 571-72 (5th Cir. 2009) (finding *Strickland* prejudice based on its "review of the record and consider[ation of] the cumulative effect of [counsel's] inadequate performance); *Sussman v. Jenkins*, 636 F.3d 329, 360-61 (7th Cir. 2011)(finding *Strickland* prejudice by assessing "the cumulative impact of [trial counsel's] error when combined with counsel's [other errors]"); *Sanders v. Ryder*, 342 F.3d 991, 1001 (9th Cir. 2003)(finding that "separate errors by counsel at trial ... should be analyzed together to see whether their cumulative effect deprived the defendant of his right to effective

assistance [because] ... they are ... not separate claims, but rather different aspects of a single claim of ineffective assistance of trial counsel); *Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003).

The Sixth and Eighth Circuits do not conduct cumulative error analysis. *See Williams v. Anderson,* 460 F.3d 789, 816 (6th Cir. 2006)(finding that the Supreme Court failed to address whether "cumulative error claims are ... cognizable on habeas" review); *Shelton v. Mapes,* 821 F.3d 941, 951 (8th Cir. 2016) (finding that "habeas relief [may] not be granted based on the cumulative effect of attorney errors" when assessing a *Strickland* prejudice claim).

It is unclear whether the Eleventh and Fourth Circuits agree with the cumulative error analysis in *Strickland* claims. *See Borden v. Allen*, 646 F.3d 785, 823 (11th Cir. 2011)("declin[ing] to elaborate further on the concept of 'cumulative effect' for fear of issuing an advisory opinion on a hypothetical issue"); *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998) ("[I]neffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively ....").

This Court should settle the matter of whether *Strickland* requires that prejudice must be reviewed by aggregating defense counsel's errors.

2. The Eleventh Circuit's decision in Mr. Melton's case is wrong.

In Melton's case, the Eleventh Circuit's *Strickland* analysis was unreasonable because it limited its prejudice inquiry, failing to undertake "the type of probing and fact-specific analysis" required by *Strickland*. *Sears v. Upton*, 561 U.S. 945, 955 (2010). Rather than cumulate prejudice for trial counsel's investigative errors, the Eleventh Circuit's opinion focuses its inquiry on the prejudicial effect of each individual error to make its determination. In light of the trial and evidentiary records, the cumulative impact of trial counsel's failure to perform a reasonable investigation along with the State's *Brady* violations prejudiced Melton's defense.

In making a prejudice inquiry, federal courts must "ask if the defendant ... met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland*, at 696. *Strickland* requires reviewing courts to "consider all the evidence – the good and the bad – when evaluating prejudice." *Wong v. Belmontes*, 588 U.S. 15, 26 (2009); *See Strickland*, 466 U.S. at 195-96.

In Melton's case, the Eleventh Circuit failed to properly conduct its prejudice analysis by weighing the information from the trial record and evidentiary hearing against the State's weak case, based on the testimony of Lewis and Houston. Had trial counsel adequately investigated, he could have presented compelling evidence to establish that Melton was not present at the Saylor shooting, meaningfully discredit Houston's testimony,

and establish that Lewis manufactured the case against Melton in order to obtain substantial benefits for himself in both the Carter and Saylor cases.

Due to defense counsel's errors, the jury had only the testimony of Lewis and Houston and little evidence to support trial counsel's theory that both witnesses had enormous motive to frame Melton and did so. The fact that "the only real physical evidence [within this case] was a fingerprint of ... Houston on the seat of the cab" and Houston was made to believe, by Lewis, that Melton gave Houston up to the police, gave Houston sufficient reason to frame Melton (PCT. 240-41). The fact that Lewis' attorney made statements that fueled Lewis' decision to frame Melton in order to garner favor in the looming pawn shop case further supports Melton's innocence. Lastly, the fact that "this was a case that depended essentially solely on the word of people regarding [Melton's] involvement" and there was no physical evidence linking Melton to the crimes gave trial counsel every reason to investigate further. *Id.* at 244.

Trial counsel acknowledged "that one of the critical points in this case" was that there was no evidence whatsoever placing Melton in that taxicab (PCT. 737). Furthermore, "the only eyewitnesses at the scene where Mr. Saylor was murdered indicated that they only saw two African American men" not three. *Id.* Therefore, trial counsel should have attempted to interview the jail inmates since his investigated resources were not so limited as to prevent further investigation (PCT. 713-14).

In an innocence case, like Melton's, where there is weak and circumstantial evidence pointing to Melton's guilt, the cumulative prejudice of counsel's errors powerfully impacts the outcome. In many contexts, this Court has found that a failure to consider cumulative errors serve as a sufficient basis for granting relief. Therefore, the Eleventh Circuit's failure to cumulatively assess prejudice was improper and provides a sufficient basis for granting relief.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Eleventh Circuit in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to Charmaine Millsaps, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, on this 4th day of November, 2019.

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