No. 21-

IN THE SUPREME COURT OF THE UNITED STATES

LEON TOLLETTE,

Petitioner,

-v-

BENJAMIN FORD, Warden,

Georgia Diagnostic and Classification Prison,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

CAPITAL CASE

Anna M. Arceneaux (Ga. 401554)*
* *Counsel of Record*
Vanessa J. Carroll (Ga. 993425)
Georgia Resource Center
104 Marietta Street NW, Suite 260
Atlanta, Georgia 30303
anna.arceneaux@garesource.org
vanessa.carroll@garesource.org
(404) 222-9202

COUNSEL FOR PETITIONER

QUESTION PRESENTED

THIS IS A CAPITAL CASE

Two terms ago, this Court rejected the Eleventh Circuit's approach to federal habeas review of state criminal adjudications under 28 U.S.C. § 2254(d). In *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), this Court held that when confronted with a summary denial of relief from a state appellate court, § 2254(d) requires federal courts to "look through" to the last reasoned state court decision when one is available, to assess the reasonableness of a state court's merits ruling. The Court found that the Eleventh Circuit was wrong to extend the standard of review set forth in *Harrington v. Richter*, 562 U.S. 86, 102 (2011), which precludes relief if any reasonable basis "could have supported" the state court's decision, if that decision left undisturbed a prior reasoned state court opinion.

Despite *Wilson*'s clear holding, the Eleventh Circuit refused in this case to "look through" to the reasoned state court merits ruling on counsel's ineffectiveness, as both Petitioner and Respondent agreed was appropriate, and reverted again to a *Richter* review – the approach *Wilson* flatly rejected – because the state supreme court provided reasons on a completely separate ineffectiveness claim. This case thus once again demands this Court's intervention to bring the circuit in line with the statutory mandate as clarified in *Wilson*.

The question presented is this:

> Whether, on federal habeas review under 28 U.S.C. § 2254(d), a federal court may refuse to "look through" to the last reasoned state court decision, as required by *Wilson*, and instead rely on *Richter*'s "could have supported" approach, when a state appellate court issues a reasoned denial of a claim and an unreasoned summary denial of another claim?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the caption of this petition. Petitioner in this Court, Petitioner-Appellant below, is Leon Tollette. Respondent in this Court, Respondent-Appellee below, is Benjamin Ford, in his official capacity as Warden of the Georgia Diagnostic and Classification Prison.

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INTRODUCTION

This case and recent cases in the Eleventh Circuit demonstrate that the circuit continues to resist this Court's holding in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), that federal review of state court decisions under 28 U.S.C. § 2254(d) "*requires* the federal habeas court to 'train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims' . . . and to give appropriate deference to that decision . . . ." *Id.* at 1191-92 (emphasis added) (internal citations omitted). Specifically, this Court in *Wilson* corrected the Eleventh Circuit's outlier practice of applying the standard of review this Court adopted in *Harrington v. Richter*, 562 U.S. 86, 102 (2011), for the review of state court summary dispositions lacking any legal or factual analysis (precluding habeas relief unless federal courts could find no reasonable basis that "could have supported" the decision) to cases where the state courts had, in fact, supplied reasons for their decisions. *Wilson*, 138 S. Ct. at 1194-95. The Court rejected the idea that a court's summary affirmance of a prior reasoned state court decision—a circumstance that often occurs in Georgia state habeas cases—served to supplant the lower court's stated reasons for its decision. Rather, applying this Court's pre-AEDPA ruling in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the *Wilson* Court instructed federal courts assessing the reasonableness of the state court decision to "look through" the summary adjudication to the state court's last reasoned decision on the claim and "then presume that the unexplained decision adopted the same reasoning." *Wilson*, 138 S. Ct. at 1192.

Post-*Wilson*, the Eleventh Circuit has failed to follow *Wilson*'s clear command, creating inconsistency and unpredictability in the circuit's habeas corpus jurisprudence. *See, e.g.*, *Knight v. Fla. Dept. of Corrections*, 958 F.3d 1035, 1046 n.3 (11th Cir. 2020) (reviewing prejudice prong of *Strickland* claim *de novo*, when the lower state court had provided reasons for denying both elements, but the state appellate court had only considered performance); *Whatley v. Warden*, 927 F.3d 1150, 1182 (11th Cir. 2019) ("looking through" to the state court's reasoned determination, but not limiting its § 2254(d) analysis "to the reasons the [state] Court gave," and considering "'what arguments or theories… *could* have supported … the state court's decision.'") (quoting *Richter*, 562 U.S. at 102) (emphasis and ellipses in original). It did so here for reasons peculiar to Petitioner's case, broadly construing the Georgia Supreme Court's denial of a certificate of probable cause to appeal as wholly supplanting the state habeas court's lengthy reasoned decision simply because the Georgia Supreme Court's two-page ruling addressed an isolated error by the state habeas court regarding a single distinct claim, and otherwise rejected review on the ground that "the other claims properly raised by the Petitioner are without arguable merit." App. 134. In other words, the Georgia Supreme Court issued a narrow reasoned decision as to a single issue in the case and otherwise summarily denied a certificate of probable cause ("CPC") as to all other claims raised in the petition. The panel then applied *Richter*'s "could have supported" review, rather than assessing the actual reasons given by the state

habeas court for rejecting even claims that were not the subject of any analysis in the Georgia Supreme Court's order. This approach flouts *Wilson*.

As this Court explained in *Wilson*, when a federal court applying § 2254(d) is faced with a reasoned state court decision that was left undisturbed by a later summary disposition, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "presume that the unexplained decision adopted the same reasoning." 138 S. Ct. at 1192. *See also Shinn v. Kayer*, 141 S. Ct. 517, __ n.1 (2020) (noting that, when reviewing unreasoned appellate court merits decisions under § 2254(d) "we apply a rebuttable presumption that the appellate court's decision rested on the same grounds as the reasoned decision of a lower court") (citing *Wilson*).

OPINIONS AND ORDERS BELOW

The Eleventh Circuit's unpublished per curiam decision is reproduced in the appendix as App. 1-25. The unpublished order denying rehearing, entered on August 11, 2020, is reproduced in the appendix at App. 26.

The unpublished opinion of the United States District Court for the Middle District of Georgia denying relief is found in the appendix at App. 27-132.

The unpublished order of the Georgia Supreme Court denying Mr. Tollette a certificate of probable cause to appeal the state habeas court's denial of habeas relief is found in the appendix at App. 133-177.

The unpublished order of the Superior Court of Butts County, Georgia, denying Mr. Tollette habeas relief is found in the appendix at App. 135-177.

The opinion of the Georgia Supreme Court on direct appeal is reported at *Tollette v. State*, 280 Ga. 100 (Ga. 2005), and is reproduced in the appendix at App. 178-195.

JURISDICTION

The Eleventh Circuit entered judgment on May 29, 2020. The court denied Mr. Tollette's petition for rehearing and rehearing *en banc* on August 11, 2020. By order of the Court on March 19, 2020, the time for filing a petition for writ of certiorari under Rule 13 was extended to 150 days, given conditions related to the current COVID-19 pandemic.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions:

The Sixth Amendment to the United States Constitution, which provides: "In all criminal proceedings, the accused shall enjoy the right…to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution, which provides: "No state shall… deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2254 provides in pertinent part:

(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

On November 3, 1997, Leon Tollette pled guilty to malice murder and related charges stemming from the December 1995 homicide of John Hamilton in Columbus, Georgia. Had Mr. Tollette been represented by competent counsel, there is more than a reasonable likelihood that he would not be on death row today.

Following Mr. Tollette's guilty plea, a sentencing trial began in which the State presented 20 witnesses in aggravation, including several members of Mr. Hamilton's family. Mr. Tollette's counsel responded to the State's mountain of evidence with a single witness: Mr. Tollette's mother Willie Robinson. Ms. Robinson painted an inaccurate picture of Mr. Tollette having an average childhood and family life. As she explained it, Mr. Tollette simply fell in with the wrong crowd.

She closed by begging the jury to spare her son's life. Her testimony, in all, spanned 12 transcript pages.

In closing argument, among other improper comments, District Attorney Gray Conger told the jury, "I submit to you, ladies and gentlemen, prison is too good for this defendant. Prison for the rest of his life, prison for seven years and re-paroled, prison for whatever."

Mr. Tollette's attorneys' incompetence culminated during their own summation, when lead counsel Robert Wadkins threw Mr. Tollette under the bus. Mr. Wadkins began by telling the jury that he, "as any human being would, . . . [had] great loathing for [his] own client." He then devoted the remainder of his brief argument to reminding the jury, over and over, that they had the right to kill Mr. Tollette.

Despite counsel's woefully poor advocacy on their client's behalf, the jury still struggled with its sentencing decision. The jurors made several inquiries to the judge about whether Mr. Tollette would be eligible for parole if sentenced to life without parole, questions that demonstrated that jurors had been confused by the prosecutor's repeated improper arguments about parole. In the end, the jury sentenced Mr. Tollette to death.

Represented by new counsel, Mr. Tollette first raised an ineffective assistance of counsel ("IAC") claim in his motion for new trial ("MNT"), which alleged in cursory fashion that trial counsel were ineffective for failing to investigate and

present mitigating evidence and for stating that he loathed his client. MNT counsel presented no evidence in support of these claims.

On direct appeal, appellate counsel raised virtually the same IAC claim and alleged, without pointing to any new evidence, that trial counsel: 1) failed to make "hardly any objections" to the State's evidence; 2) failed to prepare adequate mitigation and subpoena Mr. Tollette's sister; and 3) prejudiced Mr. Tollette by telling the jury that he loathed his client. App. at 190-192. The Georgia Supreme Court affirmed Mr. Tollette's sentence. *Id.* at 194.

In state habeas proceedings, Mr. Tollette presented previously unheard evidence supporting a new ineffectiveness claim premised on the failure of MNT and appellate counsel to properly litigate trial counsel's ineffectiveness. This claim focused on three deficiencies: 1) the failure to investigate and present mitigating expert testimony and evidence from Mr. Tollette's background ("mitigation ineffectiveness claim"); 2) the failure to present forensic testimony to support the defense theory that Mr. Hamilton's murder was not premeditated ("crime scene ineffectiveness claim"); and 3) the failure to present expert testimony showing that Mr. Tollette would make a peaceful adaptation to prison life ("prison ineffectiveness claim").

As to the mitigation ineffectiveness claim, Mr. Tollette presented evidence in state habeas that demonstrated Mr. Tollette's life was vastly different from the image of a normal, decent upbringing that trial counsel presented to the sentencing jury. In contrast to the unremarkable and normal childhood described by Mr.

Tollette's mother at trial, Mr. Tollette, in fact, was abandoned by his alcoholic father and grew up in an impoverished and violent neighborhood. He experienced physical and emotional abuse and neglect from his mother and stepfather, and had an extensive family history of mental illness and addiction. Without a stable home life and adult supervision, he was pulled into gang life at a young age, which provided him some protection against the violence that surrounded him. Most critically, in the months leading up to the crime, Mr. Tollette was spiraling into despair and hopelessness. He was suffering from major depressive disorder, and self-medicating with drugs and alcohol.

In accordance with state law, O.C.G.A. § 9-14-49, the state habeas court's denial of relief on all claims was accompanied by written findings of fact and conclusions of law. *See generally* App. 135-177. As detailed in federal court briefing, many of the legal and factual determinations on which the state habeas court based its decision were unreasonably wrong and, in federal court, warranted *de novo* review of Mr. Tollette's claims. *See* Petitioner's Brief in Support of Petition for Writ of Habeas Corpus at 120-146, *Tollette v. Warden*, No. 4:14-CV-110 (M.D. Ga. Feb. 11, 2015). For instance, instead of conducting a cumulative prejudice analysis, as clearly established federal law requires,[1] the state habeas court separately evaluated prejudice for each ineffectiveness claim and found none. App. 155-75. For the crime scene ineffectiveness claim, the state habeas court applied the wrong prejudice test by holding that "the sequencing of the gunshot wounds would not

[1] *See Williams v. Taylor*, 529 U.S. 362, 397-98 (2000).

have significantly swayed the jury against finding a statutory aggravating circumstance." App. 175.

Following proceedings in the state habeas court, Mr. Tollette requested a CPC from the Georgia Supreme Court that focused on the mitigation and crime scene ineffectiveness claims. The court denied it, but issued a correction to the habeas court's flawed prejudice analysis of the crime scene ineffectiveness claim:

> [W]e conclude that the habeas court applied the incorrect legal standard in determining whether the Petitioner was prejudiced by trial counsel's not utilizing an expert to challenge the State's characterization of the circumstances of the murder.

App. 133. Nonetheless, the court concluded that Mr. Tollette did not suffer prejudice in not utilizing the forensic testimony "to challenge the State's characterization of the circumstances of the murder." *Id.* at 134. By its plain terms, that language applied solely to the prejudice analysis applied to the crime scene ineffectiveness claim and no other aspect of the lower court decision. The court otherwise summarily rejected the remaining claims "as without arguable merit," *id.*, and left undisturbed the remainder of the habeas court's order.

In federal court, Mr. Tollette raised the same IAC claims presented in state habeas proceedings. As the district court observed, Mr. Tollette asked the court to consider the habeas court's reasoning for every claim except the crime scene ineffectiveness claim addressed by the Georgia Supreme Court. App. 39.

The district court acknowledged "the unsettled law in this area" at the time of its decision.[2] App. 39-40, n.4. Accordingly, in addition to looking for any reasonable basis to uphold the Georgia Supreme Court's summary denial of the mitigation claim pursuant to *Harrington v. Richter*, the court also "reviewed the factual findings and legal conclusions given by the habeas court" because "that court's order provide[d] the last reasoned analysis of [that] claim." App. 40, n.4.

In affirming the denial of relief, an Eleventh Circuit panel disposed of Mr. Tollette's mitigation ineffectiveness claim by looking only at prejudice. App. 15. Relying on another recent decision by the court, *Knight v. Fla. Dep't of Corr.*, 958 F.3d 1035 (11th Cir. 2020), and in a complete misapplication of *Wilson*, the *Tollette* panel held that under 28 U.S.C. § 2254(d), it owed deference only to the Georgia Supreme Court's direct appeal and CPC adjudications, even though neither of those adjudications actually addressed Mr. Tollette's mitigation ineffectiveness claim, which was presented for the first time in state habeas:

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[2] At the time of the district court's order, on August 17, 2016, the Eleventh Circuit had not yet issued its *en banc* decision in *Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016), though the decision followed just days later. The district court noted that at least some members of this Court had "called into question" the *Richter* approach adopted by the Eleventh Circuit in cases where a summary denial by a state appellate court was preceded by a reasoned state court decision. *See* App. 39-40, n.4 (citing *Hittson v. Chatman*, 135 S. Ct 2126 (2015) (Ginsburg and Kagan, JJ., concurring in denial of certiorari)). The district court, too, had noted this Court's decision, in *Brumfield v. Cain*, 135 S.Ct. 2269 (2015), just three days after *Hittson*, which followed the "look through" approach. *Id. Hittson* and *Brumfield*, the district court observed, were contrary to the Eleventh Circuit's panel decision in *Wilson*, then under *en banc* consideration, which applied *Richter*'s "could have supported" approach, even when a reasoned state opinion existed. *Wilson v. Warden*, 774 F.3d 671 (11th Cir. 2014), *vacated by Wilson*, 834 F.3d 1227 (en banc).

> [T]his denial of a certificate of probable cause by the Georgia Supreme Court constituted an adjudication on the merits of Mr. Tollette's ineffective assistance of counsel claim for the purposes of AEDPA. And it is this denial that we consider under *Wilson v. Sellers*, 138 S. Ct. 1188, 193-95 (2018), with respect to the issue of prejudice.

App. 19. The panel went on to state that it would also defer to the Georgia Supreme Court's determination of prejudice on direct appeal:

> Applying AEDPA deference on the issue of prejudice, we conclude that the Georgia Supreme Court's resolution of that issue was reasonable. And it was reasonable both in its decision on direct appeal (with respect to the testimony of Mr. Tollette's sister) and in its decision denying a certificate of probable cause on collateral review (with respect to the other mitigating evidence presented at the state habeas proceeding).

App. 20.

Under *Wilson*, this decision cannot stand.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because, as this and other recent cases show, the Eleventh Circuit persists in disregarding this Court's clear mandate as to how federal courts are to conduct review of state criminal cases in habeas proceedings pursuant to U.S.C. § 2254(d) when there is a reasoned state court decision on the claim that is left undisturbed by a later court's summary affirmance. In this case, rather than "looking through" to the state habeas court's reasoned opinion, as both parties agreed it should, the Eleventh Circuit instead deferred to the Georgia Supreme Court's direct appeal opinion (which did not address this claim because it had not yet been developed) and its subsequent summary CPC denial (which summarily denied review of this claim) to deny Mr. Tollette habeas

relief. This Court's intervention is necessary to ensure the proper and consistent application of U.S.C. § 2254(d).

ARGUMENT

I. The Eleventh Circuit Continues to Resist this Court's *Wilson* Decision, Imposing *Richter's* "Could Have Supported" Approach When It Should "Look Through" to Assess the Reasonableness of the State Court's Last Reasoned Opinion.

A. The Eleventh Circuit Remains an Outlier in the Circuits in Conducting Its Federal Habeas Review of State Criminal Cases.

This Court, in *Wilson v. Sellers*, 136 S.Ct. 1188 (2018), clarified the manner by which federal courts should review state court decisions under U.S.C. § 2254(d) of the AEDPA. Prior to *Wilson*, the Eleventh Circuit stood alone among circuits in its refusal to "look through" a state appellate court's summary denial of habeas relief and presume that the summary denial adopted the same reasons given in the last reasoned state court judgment. *Id*. at 1194.

Instead, the Eleventh Circuit directed federal courts to consider reasons that "could have supported" the state court's decision, even when a lower state court decision was accompanied by reasons. *Wilson v. Warden*, 834 F.3d 1227, 1235 (11th Cir. 2017) (*en banc*) (quoting *Richter*, 562 U.S. at 102), rev'd by *Wilson*, 136 S. Ct. 1188. Even the State disagreed with this position (at least prior to this Court's grant of certiorari); the *en banc* Eleventh Circuit had to appoint *amicus curiae* counsel to advance that argument. *Id*. at 1232.

Shortly before the Eleventh Circuit granted *en banc* review in *Wilson*, this Court sent strong signals to the circuit that its approach was incorrect. Concurring

in the denial of certiorari in another Georgia case, Justices Ginsburg and Kagan observed the Circuit "plainly erred in discarding *Ylst*" following the *Richter* decision and noted that the Eleventh Circuit would soon have the opportunity to correct its error in its *en banc* consideration of *Wilson*, "without the need for this Court to intervene." *Hittson v. Chatman*, 576 U.S. 1028, 1029-31 (2015) (Ginsburg and Kagan, J.J., concurring in the denial of certiorari). The Court followed with a decision in *Brumfield v. Cain*, 135 S.Ct. 2269 (2015), three days later, which made clear that federal courts conducting habeas review under 28 U.S.C. § 2254(d) must "look through" a state supreme court's summary ruling to "evaluate the state trial court's reasoned decision" for denying relief. *Id*. at 2276 (citing *Johnson v. Williams*, 133 S.Ct. 1088, 1094, n.1 (2013), and *Ylst*, 501 U.S. at 806)).

Even with this guidance, a slender majority of the Eleventh Circuit still adhered to its *Richter* approach in the *Wilson en banc* decision, over strong dissents. *Wilson*, 834 F.3d at 1242 (*en banc*); *id*. at 1242 (2018) (Jordan, J., dissenting); *id*. at 1247 (Pryor, Jill, J., dissenting). Indeed, Judge Jordan predicted this Court's intervention, *id*. at 1242 (Jordan, J., dissenting), and this Court granted certiorari and reversed. In *Wilson*, this Court made clear that Section 2254(d) directs federal courts to assess the actual reasons that supported the state court decision and that when a state's final merits ruling is unaccompanied by reasons, federal courts "should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale [and] … presume that the unexplained decision adopted the same reasoning." 138 S.Ct. at 1192. This Court

had followed this approach in its own review of state cases many times before. *Id*. at 1195.

Though this Court very clearly corrected the Eleventh Circuit's approach in *Wilson*, the circuit continues to stray off course in its federal review of state court decisions. In an increasing number of recent cases, while purporting to follow *Wilson*, the Eleventh Circuit still clutches to *Richter*'s "could have supported" approach even in cases where a reasoned state court decision exists – in other words, cases in which *Wilson* clearly dictates a "look through" presumption. *See, e.g.*, *Esposito v. Warden*, 818 Fed. Appx. 962, 970 (11th Cir. 2020) (observing that "under 2254(d), 'the question is . . . whether there is any reasonable argument that counsel satisfied Strickland's deferential standard'" and paying scant attention to the state court's actual reasoning) (quoting *Richter*); *Whatley v. Warden*, 927 F.3d 1150, 1182 (11th Cir. 2019) (noting, in reviewing a reasoned state court decision, "we are not limited to the reasons the Court gave and instead focus on its 'ultimate conclusion'. . . . Under 28 U.S.C. § 2254(d), we must 'determine what arguments or theories . . . *could* have supported . . . the state court's decision.") (emphasis in original) (quoting *Richter*, *supra*, and *Gill v. Mecusker*, 633 F.3d 1272, 1290-91 (11th Cir. 2011)); *Jenkins v. Comm'r, Ala. Dep't of Corr.*, 963 F.3d 1248, 1270 (11th Cir. 2020) (observing, despite reasoned state court decision, that "we ask only 'whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential

standard") (citing *Richter*).[3] In this case, the Eleventh Circuit did so on the ground that the Georgia Supreme Court's order denying CPC effectively had supplanted the state habeas court's reasoned decision simply because the state supreme court had expressly taken issue with the lower court's adjudication of one claim, while summarily affirming the remainder of the court's decision.

Wilson made clear that *Richter* will not apply in Georgia, when the state habeas court must, according to state law, "make written findings of fact and conclusions of law upon which the judgment is based." O.C.G.A. § 9-14-49. Still, the Eleventh Circuit in this decision and others, continues to try to wedge a *Richter*-exception into this Court's clear *Wilson* framework. This path ignores clear dictates from this Court that in AEDPA review, federal courts must "focus[] on what a state knew *and did* . . . ." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (citations omitted) (emphasis added).

This principle still holds in cases like Mr. Tollette's, where the state appellate court silently affirmed some of the claims being raised on federal review, while providing a reasoned denial on one or more separate claims. In such a situation, both § 2254(d) and *Wilson* required the court to consider the last reasoned rationale given for denying each claim. In Mr. Tollette's case, this meant "looking through" the Georgia Supreme Court's summary denial of CPC on the mitigation

[3] In yet another, but different, departure from *Wilson*, discussed more below, the Eleventh Circuit recently found *Wilson* inapplicable altogether and reviewed a claim *de novo* when a reasoned state court opinion was available on an element of a claim that had not been addressed by the state's highest court. *See Knight*, 958 F.3d at 1046.

ineffectiveness claim to the reasoned state habeas decision denying it, while conducting § 2254(d) review of the Georgia Supreme Court's denial with respect to the only issue it addressed, the prejudice prong of the crime scene ineffectiveness claim.

B. The Eleventh Circuit's Recent Decisions Stand in Conflict with Its Own Precedent.

The Eleventh Circuit's decision in *Tollette* also stands in conflict with the circuit's own precedent predating *Richter*, and is further evidence of confusion in the Eleventh Circuit concerning *Wilson*'s application to cases, where, as here, the appellate court specifically addressed the merits of some portion of the claims presented to it, and otherwise left the lower court's reasoned decision intact.

Even before this Court's decision in *Wilson*, the Eleventh Circuit would "look through" appellate court decisions when they, like the Georgia Supreme Court's CPC decision in this case, adjudicated part, but not all, of the petitioner's claims. For instance, in *Windom v. Sec'y, Dep't of Corr.*, 578 F.3d 1227, 1240-43 (11th Cir. 2009), the habeas court denied Windom's ineffectiveness claim on both *Strickland* prongs, but the appellate court's reasoned opinion denied it solely on deficient performance. The Eleventh Circuit, in rejecting the claim on prejudice grounds, looked through the state appellate court opinion and deferred to the habeas court's prejudice determination. *Id.* at 1249.

Likewise, in *Hammond v. Hall*, 586 F.3d 1289 (11th Cir. 2009), the court adopted the same approach and stated clearly:

> We now make explicit the implicit holding in *Windom*: where a state trial court rejects a claim on one prong of the ineffective assistance of counsel test and the state supreme court, without disapproving that holding, affirms on the other prong, both of those state court decisions are due AEDPA deference.

Id. at 1332.

Although the Eleventh Circuit decided *Windom* and *Hammond* before this Court's decision in *Wilson*, the "look through" presumption from those decisions is fully consistent with the "look through" presumption mandated first by *Ylst*. The "look through" presumption from *Windom* and *Hammond* ensures that the federal court "train[s] its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims," *Wilson,* 138 S. Ct. at 1191-92 (quotation omitted), and follows the accepted "maxim [] that silence implies consent." *Ylst*, 501 U.S. at 804. Indeed, in opinions dissenting from the Eleventh Circuit's *en banc* decision in *Wilson*, two judges separately cited *Windom* and *Hammond* as consistent with the "look through" presumption that they maintained, and this Court ultimately agreed, was appropriate when the appellate court summarily affirms a reasoned decision. *See Wilson*, 834 F.3d at 1246-47 (Jordan, J., dissenting); *id.* at 1257 n.7 (Pryor, Jill, J., dissenting).

Accordingly, under *Wilson*, and the Eleventh Circuit's own precedent from *Windom* and *Hammond*, the court should have "looked through" the Georgia Supreme Court's summary denial of Mr. Tollette's mitigation ineffectiveness claim and examined the habeas court's unreasonable adjudication of that claim. And because the direct appeal opinion was not the last reasoned state court adjudication

and could not have even addressed the merits of a claim first raised in habeas, the Eleventh Circuit erred under § 2254(d) in deferring to it at all. Indeed, even Respondent conceded that the court should defer to the habeas court's reasoning on the mitigation ineffectiveness claim. Brief of Appellee at 72-80, *Tollette v. Warden*, No. 16-17149-P (11th Cir. Nov. 8, 2018). However, contrary to *Wilson*, the Eleventh Circuit took the position that the Georgia Supreme Court's reasoned CPC denial of the crime scene ineffectiveness claim rendered the state habeas court's reasoned denial of the mitigation ineffectiveness claim irrelevant under Section 2254(d).

The Eleventh Circuit's recent opinion in *Knight*, 958 F.3d 1035, is further evidence that the Circuit's post-*Wilson* jurisprudence is inconsistent, confusing, and most importantly – out of step with *Wilson* and § 2254(d). In *Knight*, the Eleventh Circuit held that where the habeas court decided both deficient performance and prejudice, but the appellate court decided only performance, the federal court's "'review is not circumscribed by a state court conclusion with respect to prejudice[]' . . . and we must review that prong *de novo*." 958 F.3d at 1046 (citation omitted). The Court expressly stated that *Wilson* did not require it to "look through" the appellate court's decision to the prejudice determination made by the habeas court because unlike *Wilson*, the court was "confronted with a reasoned opinion from the Florida Supreme Court that addresses Knight's ineffective-assistance claim on the merits." *Id*. at 1046 n.3.

Like *Tollette*, *Knight* relies on faulty reasoning inconsistent with *Wilson*. The *Knight* court concluded that it should apply *de novo* review of the prejudice prong

because the state supreme court had expressly declined to reach it, in reliance on decisions that had applied *de novo* review to *Strickland* prongs that had *never* been addressed on the merits by any state court. *See Knight*, 958 F.3d at 1046 & n.3 (citing *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); and *Johnson v. Sec'y*, 643 F.3d 907 (11th Cir. 2011)). None of these case, however, implicated the *Wilson* issue. In *Rompilla*, "the state courts … never reached the issue of prejudice." 545 U.S. at 390. In *Wiggins*, "neither of the state courts below reached this prong of the *Strickland* analysis." 539 U.S. at 534. And in *Johnson*, "[t]he state collateral court never addressed Johnson's abusive background, and whether there was a reasonable probability of a different result ... had [it] been presented." 643 F.3d at 929. Those decisions, accordingly, had no bearing on *Knight*, where there was a reasoned state court decision on the prejudice element of the *Strickland* claim, namely the state trial court's determination. *Knight*, 958 F.3d at 1044. The Eleventh Circuit thus should have "looked through" to the lower court's reasoned decision on the prejudice prong, rather than ending its inquiry and applying *de novo* review because the Florida Supreme Court's "expressly declined to analyze … prejudice." *Id*. at 1045.

Notwithstanding significant differences between the Florida Supreme Court's decision in *Knight* and the Georgia Supreme Court's CPC denial in Mr. Tollette's case, the Eleventh Circuit relied on *Knight* to support its decision to defer only to the Georgia Supreme Court's direct appeal and CPC decisions. App. 19. However, *Knight* is in direct conflict with *Wilson*, *Windom*, and *Hammond* in that it directs

federal courts to ignore reasoned lower court opinions if an appellate court issues anything more than a one-sentence summary denial, even if the appellate court remains silent on significant aspects of the appellant's claim.[4]

As further evidence of the Eleventh Circuit's confusion post-*Wilson* regarding how federal courts should review these types of divided decisions, the Eleventh Circuit panel did not even faithfully apply *Knight* to this case. Under *Knight*'s reasoning, the *Tollette* court should have reviewed the question of prejudice on the mitigation ineffectiveness claim *de novo*, given the Georgia Supreme Court's silence on the claim. However, the panel here did not engage in *de novo* review, but instead deployed *Richter*'s "could have supported" framework because the Georgia Supreme Court's CPC order did not provide any reasons for its denial of the mitigation ineffectiveness claim, but merely found all "other claims … without arguable merit." App. 134.

This Court should grant certiorari to address the Eleventh Circuit's continued deviation from the requirement under § 2254(d) to consider reasoned state court decisions, and the circuit's growing confusion in its post-*Wilson* jurisprudence.

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[4] This Court's recent decision in *Shinn v. Kayer* confirms that the *Knight* panel's approach is inconsistent with *Wilson* and *Richter*. In reviewing a state court's denial of relief on an ineffectiveness claim, this Court considered how the state courts had considered each element of *Strickland* separately to determine the applicable methodology. Finding that the state trial court had *not* provided reasons for its decision denying the petitioner's *Strickland* claim on prejudice grounds, the federal court did not need to "look through" to that decision and appropriately considered the case under *Richter*'s "could have supported" approach. *Shinn v. Kayer*, 592 U.S. ___ (2020) (slip. op. at 9).

II. The Eleventh Circuit's Decision in this Case was Wrong.

Under *Wilson*, there is no question that the Eleventh Circuit erred in this case. Rather than considering the Georgia Supreme Court's summary denial of the claim and adopting *Richter*'s "could have supported" approach, the Court should have "looked through" to the state habeas court's reasons for denying Mr. Tollette's mitigation ineffectiveness claim.

The Georgia Supreme Court's CPC denial left all but one aspect of the habeas court's decision on the ineffectiveness claims undisturbed, namely that of the crime scene ineffectiveness claim, while the direct appeal opinion addressed an ineffectiveness claim that was not even before the Eleventh Circuit.[5] Nonetheless, the panel ignored the state habeas court's reasoned analysis and instead considered the Georgia Supreme Court's direct appeal and subsequent CPC denial to be the relevant adjudications on the merits of all of the ineffectiveness claims for purposes of § 2254(d). App. 18-19. The Eleventh Circuit found both decisions reasonable, "both in its decision on direct appeal (with respect to the testimony of Mr. Tollette's

[5] The state habeas court ruled that the trial counsel ineffectiveness claim was res judicata; the claim before both the state habeas court and the federal courts was, in fact, the claim that appellate counsel were ineffective in failing to litigate MNT counsel's ineffective challenge to trial counsel's ineffective investigation and presentation. *See* App. 154 ("Tollette has effectively appended the barred and defaulted ineffectiveness claims against trial counsel and motion for new trial counsel to his viable ineffectiveness claim against direct appeal counsel."). *See also id*. at 139 ("To the extent that the 21 allegations of ineffectiveness of trial counsel were denied in Tollette's appeal, they are barred by res judicata.").

sister)"[6] and in the CPC denial decision "with respect to the other mitigating evidence presented" in habeas. App. 20. The panel expressly declined to address the argument that the habeas court's prejudice analysis was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). App. 22, n.3.

A comparison of the state habeas court's prejudice determination on the mitigation ineffectiveness claim to the panel's decision reveals that the panel did not "train its attention on the particular reasons—both legal and factual—why state courts rejected [Mr. Tollette's] federal claims," as required under § 2254(d). *Wilson,* 138 S. Ct. at 1191-92 (quotation omitted). Instead, it speculated about reasons that "could have supported" the ruling. For instance, the panel identified the aggravated facts of the crime, Mr. Tollette's lack of remorse and courtroom behavior, and the potential for some of the witnesses to "open the door" to possibly harmful evidence as reasons the state court could have found no prejudice. App. 20-22. But the state habeas court did not identify those reasons in its prejudice determination. App. 170-76. Just as it had done in *Wilson en banc*, the Eleventh Circuit here rejected the "look through" approach in favor of a "could have supported" *Richter* methodology, even when a reasoned state court decision was available on the prejudice element of the *Strickland* claim.

[6] This parenthetical also erroneously suggests that MNT and/or appellate counsel presented testimony from Mr. Tollette's sister. These attorneys presented no evidence, not even a proffer.

Had the Court looked through to the state habeas court's order, as it should have, in conducting its § 2254(d) review, it would have concluded that the court's decision was contrary to clearly established federal law and based on unreasonable legal and factual determinations. For instance, contrary to *Porter v. McCollum*, 558 U.S. 30, 43 (2009), the habeas court improperly "discounted to irrelevance" much of the evidence presented in habeas simply because it had some potential weaknesses. *See*, *e.g.*, App. 171 (discounting testimony from former gang members because they turned their lives around, even though their testimony showed that, unlike Tollette, they received positive interventions); *id.* at 171-72 (discounting any testimony mentioning gang involvement, even though that evidence was already before the jury without any mitigating context). The state habeas court also discounted the evidence presented in habeas because it was not substantially similar to that presented in *Williams v. Taylor*. App. 173-74. However, as this Court recently clarified in *Andrus v. Texas*, 140 S. Ct. 1875, 1886 n.6 (2020), it has never equated what was sufficient for prejudice in one case "with what is necessary to establish prejudice" in another.

The habeas court also unreasonably failed to "evaluate the totality of the available mitigation evidence," from both trial and habeas, "in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397-98. The habeas court instead made individual prejudice determinations for each subclaim. *See* App. 176-78. Had the state court looked at the *entire* record, as this Court's precedent required it to do, it would have concluded that there was a reasonable probability of

a different outcome. This is evident from the jury's repeated inquiries about a life without parole sentence, despite only hearing what even the Eleventh Circuit characterized as a paltry mitigation presentation. App. 10. Had the jury heard evidence of Mr. Tollette's deprived background and profound mental decline in the months leading up to the crime, as opposed to the inaccurate "portrait of a tranquil upbringing" provided by Mr. Tollette's mother, *Andrus*, 140 S. Ct. at 1883, there is a reasonable probability that at least one juror would have rejected death.

III. Only this Court Can Address the Eleventh Circuit's Recurring Refusal to Apply *Wilson*.

Certiorari should be granted here to correct the Eleventh Circuit's continued resistance to *Wilson*'s holding in this case and others. *Wilson*'s "look through" presumption was adopted by this Court because it provided practical and efficient means to effectuate § 2254(d)'s focus on what the state courts "knew and did," and it confined *Richter* to the facts that gave rise to its approach – the absence of any stated rationale to support the state court's disposition. 138 S. Ct. at 1196. The "look through" approach promotes "full and proper respect for state courts, like those in Georgia, which have well-established systems and procedures in place in order to ensure proper consideration to the arguments and contention in the many cases they must process to determine whether relief should be granted when a criminal conviction or its ensuing sentence is challenged." *Id*. Importantly, it avoided "ask[ing] the federal court to substitute for silence the federal court's thought as to more supportive reasoning." 138 S. Ct. at 1197.

Yet the Eleventh Circuit, in refusing here to "look through" to the state habeas court's reasoned decision on the ineffectiveness claim when the Georgia Supreme Court's had provided a reasoned opinion on another, distinct claim, has substituted its reasoning for that of the state court. In so doing, it continues to "trample[] on the principles of federalism and comity that underlie federal collateral review." *Wilson*, 834 F.3d at 1248 (Jordan, J., dissenting). "By rejecting a look-through presumption, the [*Richter*] approach treats the reasoned opinion of a Georgia superior court as a nullity merely because the Georgia Supreme Court subsequently rendered a summary decision." *Id. See also id.* at 1260-61 (Pryor, Jill, J., dissenting). This Court rejected the Eleventh Circuit's outlier approach before, and it now must do so again.

CONCLUSION

This Court should grant Mr. Tollette's petition for certiorari, vacate the Eleventh Circuit's clear departure from *Wilson*, and either take this case up for full consideration or remand with instructions to the Eleventh Circuit to consider Mr. Tollette's claim by "looking through" to the state habeas court's reasoned decision on prejudice, in accordance with *Wilson*.

Respectfully submitted,

/s/ Anna M. Arceneaux
Anna Arceneaux (Ga. 401554)*
* *Counsel of Record*
Vanessa J. Carroll (Ga. 993425)
Georgia Resource Center
104 Marietta Street NW, Suite 260
Atlanta, Georgia 30303
anna.arceneaux@garesource.org
vanessa.carroll@garesource.org
(404) 222-9202

COUNSEL FOR PETITIONER