No. 20-6876

In the
Supreme Court of the United States

Leon Tollette,
Petitioner,

v.

Benjamin Ford, Warden,
Georgia Diagnostic and Classification Prison,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly applied *Wilson v. Sellers*, ___, U.S. ___, 138 S. Ct. 1188 (2018), in affording AEDPA deference to the Georgia Supreme Court's decision denying habeas relief—i.e., the last reasoned decision on Tollette's *Strickland* claim.

2. Whether the court of appeals correctly determined that the Georgia Supreme Court did not unreasonably apply *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984) in rejecting Tollette's claim of ineffective assistance of trial counsel.

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The decision of the Butts County Superior Court denying state habeas relief is unpublished and is included in Petitioner's Appendix E at 135-177.

The decision of the Georgia Supreme Court affirming denial of state habeas relief is unpublished and is included in Petitioner's Appendix D at 133-34.

The decision of the district court denying federal habeas relief is unpublished and is included in Petitioner's Appendix C at 27-132.

The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of relief is unpublished but reported at 816 F. App'x 361 (11th Cir. 2020) and is included in Petitioner's Appendix A at 1-25.

The order of the Eleventh Circuit Court of Appeals denying rehearing and rehearing en banc is unpublished and is included in Petitioner's Appendix B at 26.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment in this case on May 29, 2020. Pet. App. A at 1-25. A petition for writ of certiorari was timely filed in this Court on January 8, 2021. On February 2, 2021, Justice Thomas extended the time within which to file a brief in opposition to the petition for a writ of certiorari to and including March 2, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a … have the Assistance of Counsel for his defence.

The Fourteenth Amendment, Section I, of the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law … .

28 U.S.C. § 2254(d) provides:

> 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.

INTRODUCTION

Petitioner Leon Tollette tries, but fails, to manufacture a conflict with *Wilson v. Sellers*, ___, U.S. ___, 138 S. Ct. 1188, 1192 (2018), which held that a "federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale." The court of appeals was faced with a reasoned, albeit brief, opinion by the Georgia Supreme Court in which the state supreme court disagreed with a portion of the lower state court's prejudice analysis under *Strickland v. Washington*, 466

U.S. 668, 104 S. Ct. 2052 (1984). Because the Georgia Supreme Court's decision was the last state court decision on the merits, gave reasons for disagreeing with a portion of the lower court's prejudice decision, and decided the case anew, the court of appeals gave deference under the Antiterrorism and Death Penalty Act (AEDPA) to the higher state court's opinion. Because the question presented in *Wilson* answered only the question of how to review *summary* state court denials, Tollette has not shown the court of appeals' decision based on the distinct facts of this case is in conflict with *Wilson.*

Tollette argues that the court of appeals resisted here, and in other cases, this Court's instruction in *Wilson* to "look through" and "'train its attention on the particular reasons'" given by a state court in denying a federal claim. *Wilson,* 138 S. Ct. at 1191-92 (quoting *Hittson v. Chatman*, 576 U.S. 1028, 1028 135 S. Ct. 2126 (2015) (Ginsburg, J., concurring in denial of certiorari)). But in this case, and the many other capital cases decided by the court of appeals, the court has consistently "look[ed] through" summary denials and analyzed the reasons given by the state courts under 28 U.S.C. § 2254. What the court of appeals has not done, and is not required to do under this Court's precedent, is limit its review to only the reasons provided by the state court. It has instead reviewed the record in its entirety to ensure the state court's decision stands on solid ground, consistent with this Court's decisions. *See* Pet. App. at 12-23.

Finally, Tollette complains that the court of appeals § 2254(d) review of the state court's *Strickland* prejudice determination is wrong. However, this is merely a request for this Court to conduct error correction of a factbound *Strickland* claim, and one that lacks merit. Certiorari review should be denied.

STATEMENT

A. Facts of the Crimes

On December 21, 1995, Tollette, Xavier Wommack, and Jakeith Robinson, Wommack's cousin, followed a Brinks armored truck to SouthTrust Bank. Pet. App. at 179-80. Tollette sat with a "newspaper near the bank, Wommack stood guard across the street" from the bank, and "Robinson sat ready as the getaway driver." *Id.* at 179. When John Hamilton, a Brinks employee, returned to the armored truck from the bank carrying a bag of money, "Tollette approached Hamilton from behind" and fired a gun at close range into Hamilton's head, back, and legs. *Id.* at 179-80. Hamilton died as a result of his injuries. *Id.* at 180. The driver of the Brinks truck, along with the driver of a nearby Lummus Fargo truck, fired gunshots at Tollette as "he fled with the money bag," and Tollette returned gunfire. *Id.* Wommack fired gunshots "from across the street" to help Tollette escape, but Wommack and Robinson "ultimately drove away without Tollette." *Id.* A nearby police technician and cadet confronted Tollette, but Tollette subsequently surrendered after his attempt to shoot the technician and cadet failed because his gun was empty of bullets. *Id.*

At the beginning of jury selection, Tollette pled guilty to one count of malice murder, felony murder, armed robbery, possession of a firearm by a convicted felon, possession of a firearm during the commission of a crime, and two counts of aggravated assault. *Id.* at 178. At the conclusion of the sentencing phase, the jury recommended a death sentence for Tollette based on two aggravating circumstances: 1) that the murder was committed during the commission of armed robbery, a capital felony; and 2) that Tollette committed the murder for the purpose of receiving money. *Id.* at 178-79.

B. Proceedings Below

1. Trial Proceedings

a. Tollette's Statement

Tollette provided a statement the day he was arrested, December 21, 1995. D8-32:44-73.[1] Tollette indicated that he had taken a Greyhound bus from California to Columbus, Georgia and had arrived three or four days prior to the time of the robbery. *Id.* at 57. Tollette admitted that he came to Georgia "to try to hussle (sic) to make some money[,]" and when asked when the planning for the robbery began, Tollette replied that "this particular robbery, I guess, you could say, well, we had mentioned robberies before but this particular one it would have to be after I got here." *Id.* at 57-58. Tollette claimed that he did not intend to kill the guard, but because the guard had a gun, Tollette became frightened and began shooting. *Id.* at 63-64. Additionally, Tollette admitted that he was in the Los Angeles gang "Shotgun Crips" and his co-defendant Wommack was not "associated" with the "Shotgun Crips," but was instead a member of the "Crips." *Id.* at 66-67.

b. Trial Counsel's Entry of Appearance

Robert Wadkins and Steve Craft were appointed by the trial court to represent Tollette. D8-1:68. Wadkins was appointed on April 30, 1996, and Craft was appointed on October 4, 1996. *Id.* Wadkins began practicing law in 1983 and at the time of his representation of Tollette, Wadkins had handled approximately 300 criminal cases. D9-2:39; D10-24:52. Wadkins

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[1] Citations to the record refer to the Electronic Court Filing (ECF) number associated with the document followed by the appropriate ECF page number.

also handled nine death penalty cases, some of which he handled prior to his representation of Tollette. D10-24:52. Additionally, prior to his work on Tollette's case, Wadkins attended at least one death penalty seminar each year. *Id.* at 53.

Craft began practicing law in 1993, and since that time handled primarily criminal cases. D10-23:31. Prior to his appointment in Tollette's case, Craft handled numerous felony cases, some of which involved murder offenses. *Id.* at 32-33. Prior to 1996, Craft had attended two death penalty seminars. *Id.* at 33. Craft testified that the seminars focused on mitigation investigations. *Id.* at 34.

c. Trial Counsel's Investigation

Soon after being appointed to Tollette's case, counsel realized that the evidence of Tollette's guilt, which included his confession, was overwhelming and that Tollette's case "was a sentencing phase case." D10-23:44; D10-24:23-24. To prepare for the sentencing phase, trial counsel consulted the Office of the Multicounty Public Defender, conducted interviews with Tollette, members of Tollette's family, gathered records, hired a mitigation specialist, and a neuropsychologist. *See, e.g.,* D8-8:28; D9-2:41-42, 51, 53-56; D10-22:40; D10-23:41-45, 47, 68, 69; D10-27:33-54; D10-32:54, 56; D10-41:12; D12-2:8, 13-14; D12-4:66, 68-75, 78, 85; D12-5:36-47.

d. Guilty Plea and Sentencing

After stating in open court on two previous occasions that he wished to plead guilty (D8-18:45; D8-19:4-5), on November 3, 1997, Tollette pled guilty to all counts, and the trial court advised Tollette that a jury would determine his sentence. D8-21:7-8. Wadkins stated for the record that, although he did

not know of any absolute defenses Tollette had to the charges, Wadkins did not concur in Tollette's decision to plead guilty. *Id.* at 15-16. However, Wadkins affirmed that "it is [Tollette's] decision and has been, and he's been consistent in that regard all along." *Id.* at 16.

On November 10, 1997, Tollette's trial counsel requested that the court "in this unusual case where [Tollette] has pled guilty … we would ask the Court to limit the State's evidence, the State's case to matters in aggravation." D8-31:2. The trial court agreed in light of Tollette's guilty plea that it was unnecessary for the State to prove all of the elements that it would have had to prove at trial. *Id.* at 4-8.

The trial court also denied the district attorney's motion to allow Dr. Karen Bailey-Smith, from West Central Hospital, to perform a risk assessment profile regarding Tollette's future dangerousness. D8-31:9. After counsel represented that they did not anticipate calling any expert witnesses, the court denied the motion. *Id.* at 9-10. The district attorney also indicated that the State intended to present testimony regarding a similar act in aggravation in that, two days before the robbery, on December 19, 1995, Tollette had apparently attempted to rob the manager of a nearby business. *Id.* at 16-22. The court granted trial counsel's request to prohibit any reference to the incident. *Id.* at 22-23.

Ultimately, the State presented evidence of the Brinks truck robbery, victim impact evidence, and Tollette's previous convictions. D8-31:86 thru

D8-38:57. Trial counsel presented Tollette's mother who pled, through tears, for the jury to spare her son's life. D8-38:88-91.[2]

2. Motion for New Trial Proceeding

On December 19, 1997, Tollette was allowed to file an out-of-time motion for new trial. D8-5:63. On March 11, 1998, represented by new counsel David Grindle, Tollette filed a subsequent motion for a new trial. *Id.* at 72-74. The trial court held evidentiary hearings on December 4, 1998 and January 25, 1999. D9-1; D9-2. During the January 25, 1999, hearing, Wadkins testified at length regarding trial counsel's representation of Tollette, counsel's mitigation investigation and the many strategic decisions that counsel made during their representation. D9-2:38-80. At the close of the hearing, the trial court denied the motion for new trial. *Id.* at 83. On January 28, 1999, the trial court issued a summary order denying the amended motion for new trial. D8-5:103.

3. Direct Appeal Proceeding

Tollette was ultimately represented on appeal by Jim Elkins and Mike Reynolds. D10-24:119-21; D10-25:72-73, 76-77, 84-87, 92. On November 5, 2005, the Georgia Supreme Court affirmed Tollette's convictions and death sentence. Pet App. at 178. Tollette argued on appeal that trial counsel were ineffective because: (1) "hardly any objections" were raised by trial counsel;

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[2] The court granted a five-minute break after her testimony in order for Tollette's mother to stop crying. D8-38:90-91.

(2) trial counsel did not "prepare adequate mitigation evidence";[3] and (3) trial counsel was ineffective during closing argument for stating; "I have great loathing for my own client." *Id.* at 191. All three claims were denied. *Id.* at 191-93.

The Georgia Supreme Court rejected Tollette's first *Strickland* claim because he failed to identify with any specificity how trial counsel were ineffective for not objecting during the sentencing proceeding. *Id.* at 191. Additionally, the court found Tollette's third *Strickland* claim was lacking because trial counsel had a reasonable strategy for closing argument. Wadkins testified at the motion for new trial hearing that his closing argument was influenced by Tollette "leaning back grinning" and "purs[ing] his lips like he was blowing a kiss" at the victim's daughter as she left the stand during trial. D9-2:61. The Georgia Supreme Court concluded that trial counsel's strategy to "appear 'credible to the jury'" during closing argument by stating that he "loath[ed]" Tollette was reasonable under the circumstances. Pet. App. at 192-93.

Regarding preparation of mitigating evidence, the court noted that trial counsel interviewed potential witnesses, arranged for a mental health examination, hired a mitigation specialist, consulted with other lawyer experts in death penalty cases, and obtained Tollette's school and prison records. *Id.* The investigation led counsel to believe that only Tollette's

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[3] Tollette argues that the ineffectiveness claim raised on direct appeal was not the same as the one raised in state habeas. *See* Pet. 10. While the claim in state habeas was accompanied by more evidence, overall it was the same claim—that trial counsel was ineffective during the sentencing phase for failing to present more mitigating evidence. *Compare* Pet. App. at 191; Pet. App. at 154-76.

mother and sister could be helpful in his case. *Id.* at 192. Based on trial counsel's investigation, the court concluded that Tollette failed to show trial counsel were ineffective in their mitigation investigation. *Id.*

Consequently, the court held that "[h]aving reviewed Tollette's arguments and the record, we conclude that the trial court did not err in denying Tollette's claim of ineffective assistance of trial counsel." *Id.* at 193.

This Court denied Tollette's petition for certiorari review on October 2, 2006. *Tollette v. Georgia*, 549 U.S. 893, 127 S. Ct. 199 (2006).

4. State Habeas Proceedings

a. Superior Court Habeas Proceeding

On August 7, 2007, Tollette filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia. D9-26. In the petition, Tollette argued that he was deprived of effective assistance during the trial, motion for new trial, and direct appeal proceedings. D10-16:3.

Following the evidentiary hearing, arguments of counsel, and post-hearting briefs, the state habeas court issued an order denying habeas corpus relief on February 20, 2013. Pet. App. at 135. Regarding Tollette's claims of ineffective assistance that were raised on direct appeal, the state habeas court held they were barred by res judicata. *Id.* at 139. All ineffective-assistance claims that were not raised on direct appeal were held to be procedurally defaulted because Tollette failed to show cause and prejudice to overcome the claims. *Id.* at 142-46. The court held that Tollette failed to prove appellate counsel were ineffective for not raising the procedurally defaulted claims of ineffective assistance of trial counsel. *Id.* at 143. Specifically, the state court held that trial counsel performed a reasonable

mitigation investigation and Tollette was not prejudiced by trial counsel's performance. *Id.* at 154-76. Because trial counsel were not ineffective, the state habeas court implicitly held that appellate counsel were not ineffective for failing to raise these nonmeritorious claims—thus, there was no cause and prejudice to overcome the default of the underlying ineffective-assistance claims. *Id.*

b. Georgia Supreme Court's Reasoned Denial of Tollette's Application to Appeal

Tollette subsequently filed an application for certificate of probable cause to appeal in the Georgia Supreme Court. D12-26. In his application Tollette raised two *Strickland* claims: (1) he argued that trial counsel failed to conduct a reasonable mitigation investigation and he was prejudiced; and (2) trial counsel failed to investigate the circumstances of the shooting and to present evidence undermining the State's theory that Tollette killed the victim execution style. *Id.* at 23, 45-46. In denying Tollette's application, the Georgia Supreme Court held that the state habeas court used the wrong *Strickland* prejudice standard in denying the second *Strickland* claim raised in Tollette's application. Pet. App. at 133-34. The Georgia Supreme Court examined the claim and ultimately determined, under the proper *Strickland* prejudice standard, that Tollette's trial counsel claim still failed. *Id.* at 134. Since the underlying trial counsel claim failed, the court held appellate counsel were not ineffective for failing to raise this issue and, thus, Tollette had failed to show cause and prejudice to overcome the default of the trial counsel claim. *Id.* The court further concluded that all of the other claims raised by Tollette were without arguable merit. *Id.*

5. Federal Habeas Proceedings

a. District Court's Denial of Relief

Tollette filed a federal petition for writ of habeas corpus on May 6, 2014. D1. Following extensive briefing, the district court entered its order denying federal habeas relief on August 17, 2016. Pet. App. at 27-132. The district court "found that the state habeas court had reasonably concluded that Mr. Tollette's trial counsel (and counsel on the motion for a new trial) had conducted an adequate investigation and made a reasonable choice of trial strategy based on that investigation." *Id.* at 19. However, as found by the court of appeals, the "district court did not address prejudice" regarding much of Tollette's mitigating evidence. *Id.* at 19-20.

b. Court of Appeals' Affirmance of District Court Denial

The court of appeals affirmed the district court's denial of relief on May 29, 2020. Pet. App. 1-25. In deciding Tollette's ineffectiveness claim regarding mitigating evidence, the court of appeals noted that "[o]n post-conviction review, the Georgia Supreme Court denied Mr. Tollette's application for a certificate of probable cause and again concluded that he had failed to demonstrate prejudice resulting from the alleged ineffective assistance of trial counsel (and the counsel who represented him on the motion for a new trial)." *Id.* at 18. The court of appeals pointed out that the Georgia Supreme Court "recognize[ed] that the state habeas court had failed to apply the correct *Strickland* prejudice test," but the state court still "concluded that the evidence Mr. Tollette presented at the state habeas hearing did not demonstrate prejudice under *Strickland*." *Id.* The court of appeals found that "this 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 claims for purposes of AEDPA." *Id.* at 19. And, the court concluded that "it is this denial that we consider under *Wilson v. Sellers*, 138 S. Ct. 1188, 1193–95 (2018), with respect to the issue of prejudice." *Id.*

The court of appeals assumed for the sake of argument that trial counsel performed deficiently but held "on the issue of prejudice, we conclude that the Georgia Supreme Court's resolution of that issue was reasonable." Pet. App. at 20. This decision was based on the court's conclusion that it was not unreasonable to determine that the aggravating evidence outweighed the mitigating evidence. *Id.* at 20-22.

REASONS FOR DENYING THE PETITION

I. The court of appeals' decision does not conflict with *Wilson*.

Tollette seeks certiorari review of his ineffective-assistance claim on the basis that the court of appeals' decision allegedly conflicts with *Wilson*.[4] But Tollette's argument focuses on a single holding and largely ignores the enormous body of law—that must be read in concert with *Wilson*—concerning federal habeas review of a state court decision. When the court of appeals' decision is read in this proper context, there is no conflict with *Wilson*. Instead, the court of appeals correctly applied—to the appropriate state court decision—the holding announced in *Wilson* based upon the

[4] Specifically, Tollette addresses his concerns regarding the court of appeals' decision of his claim that trial counsel were ineffective in their investigation and presentation of mitigating evidence during the sentencing phase of trial.

question presented in *Wilson*. And the court of appeals' ensuing deferential review of the prejudice prong of Tollette's *Strickland* claim properly applied the accumulation of this Court's AEDPA precedent. This case does not present an issue worthy of certiorari review.

Tollette's argument that the court of appeals' decision conflicts with *Wilson*, is premised upon four basic arguments. First, Tollette argues that the court of appeals gave AEDPA deference to the wrong state court opinion—*i.e.* deference to the Georgia Supreme Court's decision instead of the lower state habeas court's decision. Second, he argues that the court of appeals' decision represents continued resistance to *Wilson*. Third, he contends that court of appeals continues to improperly apply the holding in *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770 (2011) to reasoned state court opinions. And fourth, the court of appeals allegedly has internally conflicting opinions regarding which state court decision to give AEDPA deference for a dual prong *Strickland* claim. None of these arguments merit certiorari review.

A. The court of appeals decision to give deference to the Georgia Supreme Court's opinion does not conflict with *Wilson*.

The question presented in *Wilson* was whether a federal court should presume that a later *summary* state court ruling rested on the same grounds as a previous *explained* state court decision. *See Wilson*, 138 S. Ct. at 1192. This Court held that

> …the federal court should "look through" the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning. *But the State may rebut the presumption* by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that

were briefed or argued to the state supreme court or obvious in the record it reviewed.

Wilson, 138 S. Ct. at 1192 (emphasis added).

Here, counter to Tollette's argument that the Georgia Supreme Court left the lower court's decision "undisturbed," is the state supreme court's stated disagreement with a portion of the lower court's prejudice determination. Pet. 3. Given the presumption announced in *Wilson*, and the "totality of the circumstances" review of the *Strickland* prejudice prong, Tollette has not proven the court of appeals state court choice for AEDPA deference is in conflict with this Court's precedent.

1. The Georgia Supreme Court disagreed with the lower court's *Strickland* prejudice determination.

The state habeas court held that Tollette's ineffective assistance of trial counsel claims that were raised on direct appeal were barred by res judicata; and any claims not raised were dismissed as procedurally defaulted. *Id.* at 139, 142-46. However, the state habeas court gave Tollette another bite at his trial counsel ineffective-assistance mitigation claim in order to decide if motion for new trial and appellate counsel ineffectively litigated this claim. *Id.* at 154-55. The court held that Tollette failed to prove appellate counsel were ineffective for not raising the procedurally defaulted claims of ineffective assistance of trial counsel. *Id.* at 143. Specifically, the state court held that trial counsel performed a reasonable mitigation investigation and Tollette was not prejudiced by trial counsel's performance. *Id.* at 154-76.

Tollette filed an application for a certificate of probable cause (CPC) to appeal with the Georgia Supreme Court. D12-26. In his application, Tollette argued that trial counsel failed to conduct a reasonable mitigation

investigation, and that he was prejudiced because the jury did not hear the mitigating evidence he presented during the state habeas proceeding. D12-26:23. Additionally, Tollette argued that trial counsel failed to investigate the circumstances of the shooting and to present evidence undermining the State's theory that Tollette killed the victim execution style. *Id.* at 45-46.

In its order denying Tollette's application to appeal, the court stated: "After reviewing the habeas court's order, *we 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." Pet. App. at 133 (emphasis added). The lower court held that Tollette's new evidence challenging the manner in which he shot the victim "would not have significantly swayed the jury *against finding a statutory aggravating circumstance*." *Id.* (emphasis added). The Georgia Supreme Court rejected this standard "because it fail[ed] to account for the jury's discretionary decision regarding sentencing once it has found at least one statutory aggravating circumstance." *Id.* In making this determination the court relied upon this Court's holding that a "prejudice determination was unreasonable under *Strickland* 'insofar as it failed *to evaluate the totality of the available mitigation evidence* – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation.'" *Id.* (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98, 120 S. Ct. 1495 (2000)) (emphasis added). And that "when conducting this reweighing, a court must consider that '[m]itigating evidence . . . may alter the jury's selection of penalty, even if it does not undermine or rebut the

prosecution's death-eligibility case.'" *Id.* (quoting *Williams, supra*) (brackets in original).

The Georgia Supreme Court then "independently appl[ied] the correct legal principle to the trial and habeas record" and held "as a matter of law that, '[i]n exercising its discretion once [the Petitioner] became eligible for a death sentence,' the jury would not have been significantly swayed by the testimony that the Petitioner presented on this issue in the habeas proceeding." *Id.* at 134 (brackets in original). The Georgia Supreme Court held that because Tollette's underlying trial counsel claim "with respect to this issue" lacked merit, so too did his appellate counsel ineffectiveness claim. *Id.* The court "conclude[d] that this issue ultimately [was] without arguable merit" and the court's "review of the record similarly reveal[ed] that the other claims properly raised by the Petitioner [were] without arguable merit." *Id.*

2. The court of appeals gave AEDPA deference to the Georgia Supreme Court's opinion.

In reviewing Tollette's ineffective-assistance of trial counsel claim regarding background mitigating evidence, the court of appeals noted that "[o]n post-conviction review, the Georgia Supreme Court denied Mr. Tollette's application for a certificate of probable cause and again concluded that he had failed to demonstrate prejudice resulting from the alleged ineffective assistance of trial counsel (and the counsel who represented him on the motion for a new trial)." Pet. App. at 18. The court of appeals pointed out that the Georgia Supreme Court "recognize[ed] that the state habeas court had failed to apply the correct *Strickland* prejudice test," but the state court still "concluded that the evidence Mr. Tollette presented at the state habeas hearing did not demonstrate prejudice under *Strickland*." *Id.* This

determination was followed by a block quote from the Georgia Supreme Court's CPC denial wherein the state court made its own prejudice determination that is explained in the paragraph above. *Id.* at 18-19.

The court of appeals determined that "this 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 claims for purposes of AEDPA." *Id.* at 19. And, the court concluded that "it is this denial that we consider under *Wilson v. Sellers*, 138 S. Ct. 1188, 1193–95 (2018), with respect to the issue of prejudice." *Id.* (citing *Knight v. Fla. Dep't of Corr.*, 958 F.3d 1035 (11th Cir. 2020)).

3. *Wilson* and *Redmon* do not conflict with the court of appeals' decision.

In 2014, an Eleventh Circuit panel held that the denial of a CPC application in Georgia was a decision on the merits for purposes of AEDPA review. *See* Pet. App. at 19 (citing *Hittson v. GDCP Warden,* 759 F.3d 1210, 1232 (11th Cir. 2014)). While there does not appear to be any contention on this point between the parties, further explanation of this issue as it relates to *Wilson* is necessary. The Georgia Supreme Court acknowledged, prior to this Court's 2018 decision in *Wilson*, that the denial of "a habeas application is [] squarely a decision on the merits of the case." *Redmon v. Johnson*, 809 S.E.2d 468, 470 (2018).[5] And this Court took note of *Redmon's* explanation

[5] *See also Redmon,* 809 S.E.2d at 472 ("Put another way, our summary denials of habeas applications should be understood, like summary affirmances by the Supreme Court of the United States and the federal circuit courts, *as approving only the judgment of the court below, not all of its reasoning*.") (emphasis added).

that the Georgia Supreme Court's denial of an application to appeal a state habeas decision meant more than mere acquiescence with the lower court's decision. *See Wilson,* 138 S. Ct. at 1194 ("…in light of the fact that the 'look through' presumption is often realistic, for state higher courts often (but certainly not always, *see Redmon v. Johnson*, 302 Ga. 763, 809 S.E.2d 468 [] (Ga., Jan. 16, 2018)) write 'denied' or 'affirmed' or 'dismissed' when they have examined the lower court's reasoning and found nothing significant with which they disagree.") (citation omitted). That led this Court to conclude that a summary denial by a state court that employs the process outlined in *Redmon* may be the state court opinion that is given AEDPA deference if the state can rebut the presumption that the higher state court did not rely on the reasoning of the lower state court. *Id.* at 1196; *see also Greene v. Fisher*, 565 U.S. 34, 40, 132 S. Ct. 38 (2011) (explaining that § 2254 requires a review of the "last state-court adjudication on the merits"). However, this Court declined to hold that Georgia's habeas appellate process, as explained in *Redmon*, served as a blanket rebuttal in all cases removing the "look through" requirement. *Id.*

Wilson's holding and *Redmon*'s explanation produce three conclusions. First, a one-word summary denial of a petitioner's application to appeal a lower state habeas court's decision in Georgia could be entitled to AEDPA deference without "looking through" to rely on the reasons of the lower court. Of course, this is only true when it is shown that it is not likely that the reasoning of the lower state court was relied upon by the Georgia Supreme Court in denying the application. *See generally Shinn v. Kayer*, ___ U.S. ___, 141 S. Ct. 517, 524 n.1 (2020) (deciding that the Court did not need to determine whether a summary denial by a state court was a decision on the

merits because the lower state court's opinion was "reasonable").[6] Second, an opinion by the Georgia Supreme Court explaining its reasons for disagreement with a lower state court's decision, but still denying the application to appeal, is entitled to AEDPA deference. Third, nothing in *Wilson* suggests that a federal court must also give deference to a lower state court opinion in Georgia simply because the higher state court's reasoned opinion is brief (as opposed to summary). *See Wilson,* 138 S. Ct. at 1197 (rejecting the State's argument that "the 'look through' approach will lead state courts to believe they must write full opinions").

Here, the denial of Tollette's CPC application was much more than a one-word rejection by the Georgia Supreme Court. Instead, the state court explained that a portion of the lower state court's *Strickland* prejudice

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[6] Specifically, this Court explained:

> Section 2254 calls for review of the "last state-court adjudication on the merits." *Greene v. Fisher* []. The Ninth Circuit treated the Superior Court's decision, rather than the Arizona Supreme Court's denial of review, as the last state-court adjudication on the merits. Unreasoned dispositions by appellate courts sometimes qualify as adjudications on the merits. In those cases, we apply a rebuttable presumption that the appellate court's decision rested on the same grounds as the reasoned decision of a lower court. *See Wilson v. Sellers* []. We may assume without deciding that the Arizona Supreme Court's denial of discretionary review was not a merits adjudication because we conclude that the Superior Court did not unreasonably apply federal law. In these circumstances, there would be no need to consider whether an unreasoned decision of a higher court may have rested on different grounds than the decision of a lower court.

Kayer, *supra* (citations omitted).

analysis was at odds with federal and state precedent—but the court concluded that even applying the "the correct legal principle" Tollette still failed to prove prejudice. Pet. App. at 133-34. Implicit in the Georgia Supreme Court's denial is the rejection of Tollette's overall *Strickland* prejudice claim given that—as acknowledged by the Georgia Supreme Court—it is a "'totality'" of the circumstances determination. *Id.* at 133 (quoting *Williams*, 529 U. S. at 397-98). While the Warden did not argue this below, it was not unreasonable for the court of appeals to view the Georgia Supreme Court's *reasoned* denial of Tollette's CPC application as a decision on the merits of the prejudice prong of his *Strickland* claim.

More to the point, Tollette's argument that the court of appeals' decision conflicts with *Wilson* is simply wrong. Based on the question presented in *Wilson*, this Court set only general guidelines for determining when a federal court should "look through." The rebuttable presumption requires a nuanced, fact-specific evaluation of the manner in which the state courts decided a claim. Without more specific guidelines, it was not unreasonable for the court of appeals to give deference to the higher state court's decision given its *stated* disagreement with the lower state court's prejudice analysis.

B. The court of appeals has faithfully followed the "look through" principle reiterated in *Wilson*.

1. In all of the relevant capital habeas cases arising from Georgia the court of appeals has followed the *Wilson* "look through" approach.

Tollette also argues that the Eleventh Circuit has a practice of ignoring or "resist[ing]" *Wilson*'s "look through" presumption. Pet. 1. He is wrong. Since *Wilson*, that court of appeals has decided eight death penalty cases, not

counting this case, where there was a reasoned opinion by the lower state habeas court[7] and a summary CPC denial by the Georgia Supreme Court. In each of those eight cases, the court of appeals "looked through" to the lower state habeas court's opinion and gave it AEDPA deference. *Wilson v. Warden, Ga. Diagnostic Prison*, 898 F.3d 1314, 1322-24 (11th Cir. 2018) *cert. denied Wilson v. Ford*, 139 S. Ct. 2639 (2019) (specifically noting the lower state court's determinations and giving them AEDPA deference); *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1349 (11th Cir. 2019) *cert. denied Meders v. Ford*, 140 S. Ct. 394 (2019) (stating that "the Georgia Supreme Court denied Meders' guilt stage ineffective assistance of counsel claim" however, because "[i]t did so in the appeal from the order entered by the state trial court on remand during the direct appeal. … we 'look through' the Georgia Supreme Court's decision to that trial court order"); *Raulerson v. Warden*, 928 F.3d 987, 996 (11th Cir. 2019) *cert. denied Raulerson v. Warden*, 140 S. Ct. 2568 (2020) (noting that "our discussion focuses on the reasonableness of the superior court's decision even though it is not the last state-court 'adjudicat[ion] on the merits,'…. we 'presume' that the summary denial [by the Georgia Supreme Court] adopted the superior court's reasoning unless the state 'rebut[s] the presumption'") (citations omitted) (quotation marks omitted); *Sealey v. Warden, Ga. Diagnostic Prison*, 954 F.3d 1338, 1354 (11th Cir. 2020) (noting that "because [] the Georgia Supreme Court summarily denied Sealey's certificate for probable cause, we review the state trial court's habeas decision"); *Esposito v. Warden*, 818 F. App'x 962, 969 (11th Cir. 2020) (noting that "[w]hen we review state habeas court decisions in

[7] The lower state habeas court in all death penalty cases is the Superior Court of Butts County.

federal habeas, we 'look through' unreasoned decisions of state appellate courts" and "[h]ere, because the Georgia Supreme Court's denial was a summary one, we review the state habeas court's decision"); *Ledford v. Warden, Ga. Diagnostic Prison*, 975 F.3d 1145, 1157-60 (11th Cir. 2020) (analyzing the lower state habeas court's decision on the merits of Ledford's ineffective assistance claim); *Presnell v. Warden*, 975 F.3d 1199, 1228 (11th Cir. 2020) (noting that "[a]s an initial matter, our analysis, [] focuses on the Butts County Superior Court's decision even though it is not the last state-court adjudication on the merits. …Under *Wilson v. Sellers*, we 'presume' that the summary denial [of the Georgia Supreme Court] adopted the same reasoning. [] We thus 'look through the unexplained decision'") (citations omitted) (quotation marks omitted); *Franks v. GDCP Warden*, 975 F.3d 1165, 1171-85 (11th Cir. 2020) (analyzing the lower "state habeas court's findings of fact and conclusions of law").[8]

2. The *Knight* decision, arising from Florida state courts, is not in conflict with *Wilson*.

Because the court of appeals has clearly applied *Wilson*'s "look-through" principle to all relevant Georgia death penalty cases, Tollette relies heavily upon a case arising from Florida—*Knight v. Fla. Dep't of Corr.*, 958 F.3d 1035 (11th Cir. 2020). But *Knight,* like this case, was a fact-specific application of *Wilson* based on the particular language of the state courts' decisions and the

[8] Tollette also argues that the court of appeals has not faithfully applied Wilson's statement that the federal courts are to "'train its attention on the particular reasons…why state courts rejected a state prisoner's federal claims.'" *Wilson*, 138 S. Ct. at 1191-92 (quoting *Hittson v. Chatman*, 576 U.S. 1028, 1028, 135 S. Ct. 2126 (2015) (Ginsburg, J., concurring in denial of certiorari). Again, Tollette is wrong, and that issue will be addressed below in Section I(C).

procedural history of the state case at issue. The mere fact that *Knight* was cited in conjunction with the court of appeals' decision to give AEDPA deference to the Georgia Supreme Court does not mean the court of appeals viewed these cases as identical. More importantly, Tollette fails to explain how a court of appeals' decision in another case, arising from a different state, creates an issue requiring certiorari review in the case at bar.

Even assuming that *Knight* is relevant to this Court's decision, it offers little for consideration in this case. After holding a "multi-day hearing, the state postconviction court issued its ruling denying all of Knight's claims—including …his ineffective-assistance-of-counsel claim." *Id.* at 1044. The postconviction "ultimately held that Knight 'ha[d] no basis to assert a change in the outcome of the penalty phase.'" *Id.* (brackets in original). Knight appealed to the Florida Supreme Court which "did not analyze *Strickland*'s prejudice prong" "[g]iven that 'Knight ha[d] not demonstrated deficient performance as to any aspect of this ineffectiveness claim.'" *Id.* at 1045 (brackets in original). Instead, the Florida Supreme Court stated "that '[a] discussion of prejudice [was] unnecessary.'" *Id.* (brackets in original).

The court of appeals stated "that because the Florida Supreme Court expressly declined to analyze *Strickland*'s [] prejudice" prong, it would review that issue "de novo." *Id.* at 1046. The court explained that "this case provides us no occasion to 'look through' the Florida Supreme Court's decision and defer to the state trial court's prejudice determination under *Wilson*." This is so because "*Wilson* addressed the question how a federal habeas court should deal with the circumstance in which a state supreme court's decision 'does not come accompanied by reasons'—where, for instance, it consists in only 'a one-word order.'" *Id.* at 1046 n.3 (quoting *Wilson, supra,* at 1192).

Instead in *Knight*, the court of appeals was "confronted with a reasoned opinion from the Florida Supreme Court that addresse[d] Knight's ineffective-assistance claim on the merits." *Id.*

Tollette points to no holding in *Wilson* that addresses the specific situation in *Knight*. The issue in *Wilson* did concern—as stated by the court of appeals—how a federal court is to review, under the AEDPA, a last state court's summary denial of a claim. *See Wilson*, 138 S. Ct. at 1192 ("The issue before us …concerns how a federal habeas court is to find the state court's reasons when the relevant state-court decision on the merits …does not come accompanied with those reasons. For instance, the decision may consist of a one-word order, such as 'affirmed' or 'denied.'"). In *Knight*, the Florida Supreme Court did not affirm or deny the lower state court's prejudice determination but instead *specifically chose* not to address it. Given these facts, Tollette has not shown the court of appeals' decision conflicts with *Wilson*.

Tollette also argues that the cases relied upon by the court of appeals in *Knight*—*Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003), *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456 (2005), and *Johnson v. Secretary*, 643 F.3d 907, (11th Cir. 2011)—do not support the court's decision. In deciding not to "look through," the court of appeals also stated: "We take the Florida Supreme Court's decision just as we find it—and under *Wiggins* and *Rompilla*, because that court declined to address *Strickland*'s prejudice prong, we must consider that issue de novo. *See also Johnson v. Secretary*, 643 F.3d 907, 930 & n.9 (11th Cir. 2011)." *Id.* at 1046 n.3. Tollette argues that *Wiggins*, *Rompilla,* and *Johnson* did not support the court of appeals decision because there was no lower state court opinion on *Strickland* prejudice for the

court of appeals to consider under AEDPA. But that argument turns the court of appeals' decision on its head. The court did not state that *Wiggins*, *Rompilla*, and *Johnson* were procedurally identical but merely that where there was no state court decision on a *Strickland* prong— which meant de novo review of that undecided prong was appropriate. In other words, the court of appeals was focusing on the dual decision to be made under *Strickland*, not the procedural posture of *Wiggins*, *Rompilla*, and *Johnson.*

Simply put, Tollette has not shown that the Eleventh Circuit has anything even approaching a pattern or practice of ignoring—or incorrectly applying—the holding of *Wilson*.

C. *Wilson* does not hold that § 2254 review is limited to only the reasons provided by the state court.

Tollette also complains that the court of appeals' reliance on the following holding in *Harrington v. Richter, to a reasoned state court opinion*, is in error: "Under § 2254(d), a habeas court must determine what arguments or theories supported or, …could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding …of this Court." *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770 (2011). Tollette argues that *Wilson* eradicated *Richter's* application in reasoned opinions. However, a simple review of the language Tollette's argument depends upon in *Wilson,* shows the opposite:

> Deciding whether a state court's decision "involved" an unreasonable application of federal law or "was based on" an unreasonable determination of fact 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," *Hittson v. Chatman*, 576 U. S. ___, ___, 135 S. Ct. 2126,

> 192 L. Ed. 2d 887, 887 (2015) (Ginsburg, J., concurring in denial of certiorari), and to give appropriate deference to that decision, *Harrington v. Richter*, 562 U. S. 86, 101-102, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

Wilson, 138 S. Ct. at 1191-92. The portion of *Richter* that *Wilson* relies upon contains the very standard Tollette complains is inapplicable in reviewing a reasoned state court opinion. While this Court made clear in *Wilson* that *Richter* did not did not remove the "look through" requirement, it did not restrict *Richter* to summary state court denials. Nor did this Court hold in *Wilson* that a federal court is limited in § 2254(d) review to the specific reasons provided by a state court. Again, the court of appeals has faithfully applied this Court's AEDPA precedent.

Here, the court of appeals' only mention of *Richter* is the following quote: "'[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" Pet. App. at 4 (quoting *Richter*, 562 U.S. at 101) (emphasis in original). Moreover, the court of appeals gave AEDPA deference to the overall *Strickland* prejudice denial by the Georgia Supreme Court which did not elucidate its decision; thereby, making *Richter* applicable even under Tollette's interpretation of *Wilson.* More to the point, Tollette's real complaint is not that the court of appeals ignored *Wilson* and applied *Richter*, but that the court of appeals chose the wrong state court decision under *Wilson* to give AEDPA deference.

However, even assuming the court of appeals chose the wrong state court opinion to give AEDPA deference (*but see supra*), Tollette's expansive reading of *Wilson* creates a holding based upon a question not presented. This Court has repeatedly cautioned the federal courts of appeal from fashioning a holding from its precedent on a question not presented to the

Court. *See, e.g., Lopez v. Smith*, ___, U.S. ___, 135 S. Ct. 1, 4 (2014) (per curiam) (rejecting the Ninth Circuit's attempt to create a holding from the Court's precedent where "[n]one" of the Court's decision "address[ed]" the "specific question presented by this case"). The question presented in *Wilson* was whether a federal court should presume that a later summary state court ruling rested on the same grounds as a previous explained state court decision. *See Wilson*, 138 S. Ct. at 1192. The question presented was not whether a federal court was limited in its § 2254(d) review to only the specific reasons provided by a state court in determining a federal claim. In sum, Tollette seizes on little more than ambiguous dicta on an issue not contemplated by the *Wilson* Court.

Also, contrary to Tollette's suggestion, this Court has not limited *Richter*'s holding to summary state court opinions. *See*, *e.g.*, *Shoop v. Hill*, ___ U.S. ___, 139 S. Ct. 504, 506 (2019) (analyzing whether the state court's *reasoned* opinion was "'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement'") (quoting *Richter*, 562 U.S. at 103); *Woods v. Etherton*, ___U.S. ___, 136 S. Ct. 1149, 1152-53 (2016) (per curiam) (providing additional reasons in support of the state court's *reasoned* rejection of Etherton's ineffective-assistance claim under *Richter*'s "fairminded jurist" standard). This makes sense, because under Tollette's flawed interpretation of *Richter* and *Wilson*, a summary state court decision would call for a comprehensive review of the record by the federal court, while a reasoned opinion would be limited to only the reasons or evidence given by the state court. Ultimately, this would result in reasoned opinions

receiving less deference than summary denials because of the circumscribed review.

Also at odds with Tollette's arguments, the court of appeals has not used *Richter* in past opinions to bypass *Wilson's* instruction to "'train 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 (quoting *Hittson*, 576 U.S. at 1028 (Ginsburg, J., concurring in denial of certiorari)). Indeed, in the two cases cited by Tollette for this proposition, *Whatley v. Warden*, 927 F.3d 1150, 1182 (11th Cir. 2019) and *Esposito v. Warden*, 818 F. App'x 962 (11th Cir. 2020), the court of appeals has followed this Court's instructions. In *Whatley*, the court examined the reasons—both factual and legal—given by the state court and reviewed the entirety of the record for support for the state court's decision. Contrary to Tollette's assertion, the court of appeals did not supplant the state court's reasons with its own; it merely explained that the overall record strongly supported the state court's denial of Whatley's *Strickland* claim. *See Whatley*, 927 F.3d at 1183 (concluding that the court's comprehensive review of the record neither "show[ed] that Petitioner …overc[a]me with clear and convincing evidence the presumption of correctness that applies to the Supreme Court of Georgia's findings of fact" nor "show[ed] that the Supreme Court of Georgia …unreasonably appl[ied] *Strickland* in finding that Petitioner could not show *Strickland* prejudice").

Likewise in *Esposito*, the court of appeals noted the state habeas court's reasons for denying Esposito's *Strickland* claim and merely looked to the record for support for those reasons. *See Esposito*, 818 F. App'x at 970-74. In fact, the only mention of the *Richter* standard that Tollette complains about

occurs during the court of appeals' determination of a separate *Strickland* claim that was summarily denied by the state court. *See id.* at 974 (noting that the "state habeas court summarily rejected this claim" and, citing to *Richter*, 562 U.S. at 98, determined Esposito "failed to show that there was no reasonable basis for the state habeas court to reject this claim").

In a recent reversal of the Ninth Circuit court of appeals for not applying AEDPA deference, this Court explained: "Federal courts may not disturb the judgments of state courts unless '*each* ground supporting the state court decision is examined and found to be unreasonable.'" *Kayer*, 141 S. Ct. at 524 (emphasis in original) (quoting *Wetzel v. Lambert*, 565 U. S. 520, 525, 132 S. Ct. 1195 (2012) (per curiam)). This calls for a holistic review of a state court decision and the record, not the myopic review sought by Tollette, which would limit the review to only the reasons given by the state court. In sum, Tollette has not shown that court of appeals in this case, or any other, has defied the holding in *Wilson.*

D. The court of appeals' pre-*Wilson* and post-*Wilson* cases are not in conflict.

Tollette argues that two opinions issued by the court of appeals prior to this Court's decision in *Wilson,* conflict with this case.[9] A possible internal conflict between four cases, decided by different panels, a decade apart, with an intervening decision by this Court, fails to present an issue worthy of this Court's review. Moreover, when the four cases are read together, the

[9] Tollette also mentions *Knight,* but since *Windom* and *Hammond* clearly do not conflict with the decision in his case, *Knight* is irrelevant to this Court's decision regarding whether Tollette has provided an appropriate vehicle for this Court's certiorari review.

decisions, on the whole, do not conflict with one another. Instead, there is just Tollette's disagreement with the court of appeals' application of *Wilson* where he believes it does not benefit him.

The first pre-*Wilson* case Tollette relies upon is *Windom v. Sec'y, Dep't of Corr.*, 578 F.3d 1227 (11th Cir. 2009). Windom raised an ineffective assistance of trial counsel claim prior to his direct appeal. The trial court issued a lengthy reasoned opinion denying Windom's claim of ineffective assistance of counsel during the sentencing phase. *Id.* at 1243-44. On direct appeal, the Florida Supreme Court addressed the lower court's opinion regarding the deficiency prong of the *Strickland* claim and found it was "supported by competent, substantial evidence" and its legal conclusion was "reasonable." *Windom v. State*, 886 So. 2d 915, 928 (Fla. 2004). However, as pointed out by the court of appeals, the Florida Supreme Court never mentioned or "addressed" "the post-conviction court's findings with respect to prejudice." *Windom v. Sec'y, Dep't of Corr.*, 578 F.3d at 1249 n.12. Because the Florida Supreme Court's decision was silent on this issue, the court of appeals examined the lower court's decision under the AEDPA. *Id.* at 1249.

Next, Tollette relies on *Hammond v. Hall*, which held, in clarification of *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." 586 F.3d 1289, 1332 (11th Cir. 2009). In *Hammond*, the lower state habeas court denied a *Strickland* claim on the deficiency prong—with no mention of prejudice. *Id.* at 1330. On appeal, the Georgia Supreme Court "resolved the issue by coming at it from the other direction" and "held that Hammond had failed to show prejudice"

and "decided not to address the performance element." *Id.*[10] Hammond argued to the court of appeals "that by skipping to the prejudice element, the Georgia Supreme Court rejected the trial court's holding that Hammond had failed to establish the performance deficiency element." *Id.* The court of appeals refused Hammond's request explaining that "[i]n deciding to give deference to both decisions, the critical fact to us is that the Georgia Supreme Court does not appear to have disagreed with the trial court's decision on the deficiency element." *Id.* at 1331.

Neither *Windom* nor *Hammond* is in conflict with the court of appeals' decision in this case. Here the Georgia Supreme Court specifically disagreed with a portion of the state habeas court's prejudice determination, explained why the state court was wrong, but agreed with the overall determination that Tollette was not prejudiced by trial counsel's performance. Unlike in *Hammond* and *Windom*, the court of appeals only examined the *Strickland* prong addressed by the last state court—*prejudice*. Obviously, this is not in conflict with *Windom* or *Hammond* because both acknowledge that *Strickland* suggests that determining an ineffectiveness claim on the prejudice prong may be the best course of action in most cases. *See Windom*, 578 F.3d at 1248 ("'[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed'") (brackets in original) (quoting *Strickland*, 466 U.S. at 697); *Hammond*, 586 F.3d at 1331 (11th (same).

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[10] *See Hammond v. State*, 452 S.E.2d 745, 749 ("We need not decide whether in failing to move for a mistrial trial counsel's performance was deficient, because we conclude that this error did not undermine the reliability of the result of the sentencing trial.").

Additionally, in making its decision on which state court opinion received AEDPA deference, the court of appeals concluded that the Georgia Supreme Court's examination of Tollette's *Strickland* claim was a decision on the entire prejudice prong. *See* Pet. App. at 18-19. Right or wrong on this decision, there is still no conflict. In each pre-*Wilson* case, the court of appeals gave deference to the lower state courts' decisions on a *Strickland* prong that the state supreme courts neither disagreed with nor even addressed. Consequently, this case and the pre-*Wilson* cases are simply too different to create a conflict worthy of this Court's review.

* * * *

Tollette's disagreement with the court of appeals' decision to give AEDPA deference to the Georgia Supreme Court's decision that disagreed with the lower state court's opinion does not present an issue worthy of this Court's review. The court of appeals' choice of state courts does not conflict with *Wilson*, and Tollette has not shown that either in this case or other cases, that the court of appeals is examining state court decisions in a manner disapproved in *Wilson.* Instead, what the court of appeals' opinions show here, and beyond, is that to overcome § 2254(d)'s limits to federal habeas relief in these complex and fact-intensive cases, a petitioner has a "difficult" burden set by Congress that cannot be met with the possibility of mere disagreement with a state court's decision. *Kayer*, 141 S. Ct. at 523. Certiorari review is not warranted.

II. The court of appeals review of the Georgia Supreme Court's prejudice determination is not wrong.

Tollette also argues that the court of appeals wrongly evaluated prejudice. But his argument is centered on his disagreement with the state court decision the court of appeals chose, not the court of appeals' actual § 2254(d) review of the Georgia Supreme Court's decision. Additionally, Tollette only points to mere disagreements he had with the lower state court's prejudice analysis, which is not the state court opinion reviewed by the court of appeals and is nothing more than a request for factbound error correction of the state court's opinion. Finally, even if this Court were to grant certiorari to review the court of appeals' decision of the state court's prejudice determination, this Court would quickly realize that the court of appeals' decision was not wrong. Certiorari review on this factbound question is not warranted.

When assessing *Strickland* prejudice, the "inquiry asks 'whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Kayer*, 141 S. Ct. at 523 (quoting *Strickland*, 466 U.S. at 695). In aggravation at trial, the State presented evidence of the Brinks truck robbery (because Tollette had pled guilty), victim impact evidence, and Tollette's previous convictions. D8-31:86 thru D8-38:57. In response, trial counsel presented Tollette's mother, whose testimony the court of appeals summarized as follows:

> She testified that she never married Mr. Tollette's father; Mr. Tollette had three brothers and two sisters and was a good, loveable, and obedient child; they were a "family of love;" Mr. Tollette played sports when young and did well in school until he

> met up with "the wrong group;" Mr. Tollette and his stepfather did not have a father-son relationship and were not as close as she would have liked (though Mr. Tollette did respect his stepfather); Mr. Tollette left home at sixteen without her consent because he became associated with the wrong crowd and wanted to experiment "with some things he knew" he could not do while staying at home; Mr. Tollette had a great relationship with his own son; Mr. Tollette was in jail from time to time but would call her regularly; and Mr. Tollette had no drug problem that she knew of. She apologized to Mr. Hamilton's family and begged the jury to spare Mr. Tollette's life.

Pet. App. at 14-15.

The court of appeals also "summarize[d]" the evidence Tollette argued in state habeas that trial counsel should have presented. Pet. App. at 16. Regarding his family, Tollette had four older siblings and when Tollette was born his mother was "single." *Id.* The area Tollette grew up in—the Los Angeles' neighborhoods of Watts and Gardena—was riddled with gangs, violence, drugs, and a "high" "unemployment and incarceration" rate. *Id.* A cultural anthropologist testified that without a father, the absence of his older brothers, and his "dysfunctional family and impoverished community" made "his gang affiliation [] virtually inevitable." *Id.* at 17. Tollette was also diagnosed by a forensic psychiatrist as having "recurrent episodes of major depression and chronic low self-esteem." *Id.* Prior to the crimes in Georgia, he had several personal losses that included his "biological father, his lack of success in the music business, and his lack of success in dealing drugs due to his own alcohol and drug abuse." *Id.* Finally, his prison records from his previous incarceration in California "had a lack of significant disciplinary history." *Id.*

Looking at the evidence as whole, the court of appeals correctly determined that the denial of prejudice by the Georgia Supreme Court was

"reasonable."[11] *Id.* at 20. In doing so, the court of appeals gave four overall reasons. "First, the aggravating evidence—including the planning and carrying out of the armed robbery and murder, Mr. Tollette's three prior convictions, Mr. Tollette's gang affiliation, and the victim impact statements—was relatively strong." *Id.* Additionally, Tollette "showed no remorse during his statement" and "he apparently 'pursed his lips or bl[ew] a kiss at one of [Mr.] Hamilton's daughters when she was walking off the witness stand after finishing her victim impact statement.'" *Id.*

"Second, some of the mitigating evidence presented at the state habeas proceeding had the potential for being a two-edged sword." *Id.* at 20-21. The court pointed out that Tollette's gang membership lacked mitigating weight and even his own cultural anthropologist testified that Tollette "could have been attracted to [his drug-trafficking] gang because its members had money, nice cars, and women." *Id.* at 21.

Third, certain testimony could have "opened the door" to evidence of "future dangerousness" and "an armored truck robbery in California in which Mr. Tollette was a suspect." *Id.*

Finally, not only was Tollette's mental health evidence "not overwhelming" it also had the potential to be aggravating. *Id.* Although

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[11] Tollette complains that the court of appeals also referenced the prejudice determination made on direct appeal by the Georgia Supreme Court. *See* Pet. App. at 20. The direct appeal opinion did address trial counsel's alleged ineffectiveness with regard to the presentation of Tollette's sister. *Id.* at 190-92. Tollette continued to rely on his sister's testimony during his state and federal collateral attacks. *See id.* at 16. Tollette provides no cogent explanation why the court of appeals should have ignored the Georgia Supreme Court's direct appeal decision, especially given that the court of appeals did not limit its review to that decision but also included the state court's CPC denial. *See id.* at 20.

Tollette was found to be "depressed and his insight into his condition was deficient," he was "also found" to have "normal intellect, an IQ of 89, and judgment that was 'relatively intact.'" *Id.* at 22. Also, he was "seen by others as angry and argumentative, and [had] a diagnosis of personality disorder not otherwise specified with antisocial and schizotypal features." *Id.*

In sum, Tollette has failed to show the court of appeals did not properly apply § 2254(d) to the state appellate court's decision. Moreover, such factbound questions do not warrant further review.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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