No. 20-6876

IN THE SUPREME COURT OF THE UNITED STATES

LEON TOLLETTE,

Petitioner,

-v-

BENJAMIN FORD, Warden,

Georgia Diagnostic and Classification Prison,

Respondent

REPLY IN SUPPORT OF

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

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<u>QUESTION PRESENTED</u>

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?

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ARGUMENT IN REPLY

I. The Eleventh Circuit Continues to Defy 28 U.S.C. § 2254(d) and *Wilson v. Sellers*, 138 S. Ct. 1188 (2018).

Despite this Court's recent rebuke of the Eleventh Circuit Court of Appeals' approach to reviewing state court decisions in federal habeas proceedings under 28 U.S.C. § 2254(d) in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), the Eleventh Circuit continues to apply the "could have supported" approach of *Harrington v. Richter*, 562 U.S. 86, 102 (2011), even when a reasoned state court decision exists.

The Warden concedes that a reasoned state court decision exists in this case, yet endorses the Eleventh Circuit's *Richter* approach. In state habeas proceedings, Mr. Tollette presented three different ineffective assistance of counsel ("IAC") claims: 1) IAC for the failure to investigate and present mitigating expert testimony and evidence from Mr. Tollette's background ("mitigation ineffectiveness claim"); 2) IAC for the failure to present forensic testimony to rebut the State's aggravated portrayal of the crime ("crime scene ineffectiveness claim"); and 3) IAC for the failure to present expert testimony showing that Mr. Tollette would make a peaceful adaptation to prison life ("prison ineffectiveness claim"). The state habeas court issued a written opinion dismissing the merits of all three IAC claims, which included numerous unreasonable applications of clearly established federal law and unreasonable factual determinations. *See* Pet. 8-9; App. 170-76.[1]

[1] For instance, contrary to *Porter v. McCollum*, 558 U.S. 30, 43 (2009), the habeas court summarily "discounted to irrelevance" much of the evidence presented in habeas simply because, like most mitigating evidence, it had some potential weaknesses. *See, e.g.*, App. 171 (discounting testimony from former gang members

In federal habeas proceedings before the Eleventh Circuit, instead of "train[ing] its attention on the particular reasons—both legal and factual—why [the state habeas court] rejected" Mr. Tollette's mitigation ineffectiveness claim, *Wilson*, 138 S. Ct. at 1192, the court of appeals completely ignored the state habeas court's adjudication of this claim, and claimed to pay deference to the Georgia Supreme Court's direct appeal and Certificate of Probable Cause (CPC) adjudications, App. 18-22, even though neither adjudication said anything about the mitigation ineffectiveness claim. *See* App. 133-34, 190-94. Without a reasoned opinion from the Georgia Supreme Court on Mr. Tollette's mitigation ineffectiveness claim, the Eleventh Circuit defaulted to *Richter*'s "could have supported" standard of review and relied on its own speculative reasons to deem the state court adjudication reasonable. *Compare* App. 20-22 (Eleventh Circuit Opinion), *with* App. 170-76 (state habeas decision). Although the Eleventh Circuit's approach directly contradicts *Wilson*, the Warden defends this position in his Brief in Opposition ("BIO").

The Warden concedes that the Georgia Supreme Court's CPC denial addressed two distinct IAC subclaims, and that the Georgia Supreme Court provided a reasoned opinion on only the crime scene ineffectiveness claim. *See* BIO

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because they turned their lives around, even though their testimony showed that, unlike Mr. 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 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 v. Taylor*, 529 U.S. 362, 397-98 (2000), and instead made individual prejudice determinations for each subclaim. *See* App. 174-76.

2 (the CPC denial addressed only "a portion of the lower state court's prejudice analysis"); *id*. at 3 (the Georgia Supreme Court "gave reasons for disagreeing with a portion of the lower court's prejudice decision"); *id*. at 11 (identifying the two separate IAC subclaims and explaining that "[i]n 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*.") (emphasis added).[2] The Warden also concedes that the Eleventh Circuit applied the *Richter* standard of review to Mr. Tollette's mitigation ineffectiveness claim because "the Georgia Supreme Court did not elucidate its [prejudice] decision" on this claim. BIO 27. The Warden maintains, incorrectly, that this approach is consistent with this Court's precedent. BIO 13-14. But it is not. Certiorari is required to bring the Eleventh Circuit in line with the clear statutory mandate of 28 U.S. § 2254(d), as interpreted by this Court in numerous decisions, and in *Wilson* in particular.

The Eleventh Circuit's adherence to the *Richter* standard even when a reasoned state court decision exists—and the Warden's defense of this approach—is contrary to the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and this Court's precedent interpreting it. It is well-settled that under the AEDPA, a federal court may only grant habeas corpus relief to a petitioner on a claim "adjudicated on the merits in State court" if the state-court decision (1) "was contrary to, or involved an unreasonable application of clearly established Federal

[2] The Warden also recognized this in its Eleventh Circuit brief and conceded that the federal court should defer to the state habeas court's adjudication of the mitigation ineffectiveness claim. *See* Resp. Br. 72-80.

law," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). By its plain language, Section 2254(d) directs the federal court to look to the state court reasoning, where available, to determine whether the petitioner has satisfied either Section 2254(d)(1) or (d)(2).

Given Section 2254(d)'s clear directive, it is unsurprising that this Court has held repeatedly that in cases governed by AEDPA, federal courts must look to the state court opinion to determine whether the petitioner has made the threshold showing of unreasonableness that is required to obtain federal habeas relief. In *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), this Court stated: "Our cases emphasize that review under § 2254(d)(1) focuses on what a state court knew and did." And most recently, in *Wilson*, this Court reiterated that Section 2254(d)(1) requires a federal court to "train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's claims" and "give appropriate deference to that decision." 138 S. Ct. at 1192 (internal quotation mark and citation omitted). *See also Pinholster*, 563 U.S. at 182 ("Section 2254(d)(1) . . . requires an examination of the state-court decision at the time it was made."). Indeed, the centrality of the state court's reasons to whether a petitioner has met his burden under Section 2254(d) is apparent from this Court's analysis of cases governed by AEDPA, which carefully examine the legal and factual bases for a state court's opinion to determine whether the petitioner is entitled to relief under Section 2254(d). *See*, *e.g.*, *Brumfield v. Cain*, 576 U.S. 305, 313 (2015) ("In

conducting the § 2254 inquiry, we . . . *evaluate the state trial court's reasoned decision* refusing to grant Brumfield an *Atkins* evidentiary hearing.") (emphasis added); *id.* ("[W]e train our attention on the two underlying factual determinations on which the trial court's decision was premised"); *id.* at 314 ("Here, our examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable."); *see also Porter v. McCollum*, 558 U.S. 30, 37, 42-44 (2009) (detailed analysis of the state court's application of *Strickland v. Washington*, 466 U.S. 668 (1984)); *Wiggins v. Smith*, 539 U.S. 510, 527-31 (2003) (detailed analysis of state court's factual determinations and application of *Strickland*); *Rompilla v. Beard*, 545 U.S. 374, 388-90 (2005) (similar); *Williams v. Taylor*, 529 U.S. 362, 391-95, 397-98 (2002) (similar).

This Court has also told the lower federal courts what to do when a state court issues only a summary denial of a petitioner's claim unaccompanied by any reasons. In that situation, the "[federal] habeas court must determine what arguments or theories supported or, . . . could have supported, the state court's decision." *Richter*, 562 U.S. at 102. However, if an unreasoned state court opinion is preceded by one that does provide reasons, the federal habeas court "should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale . . . [and] then presume that the unexplained decision adopted the same reasoning." *Wilson*, 138 S. Ct. at 1192. Stated differently, federal courts should not employ the "could have supported" approach from *Richter* when there is a reasoned state court opinion to analyze under Section 2254(d) and no

basis to rebut the presumption that its reasoning was adopted by the subsequent summary ruling.[3]

Despite the clear statutory language and precedent from this Court, the Eleventh Circuit frequently considers a reasoned state court decision irrelevant to its review of federal habeas claims and invokes *Richter*'s "could have supported" standard of review, even after this Court explicitly told the Eleventh Circuit in *Wilson* that it must "look through" summary denials from the Georgia Supreme Court to determine whether the state court decision was reasonable. That is precisely what the Eleventh Circuit did here, and what it has done in numerous other cases post-*Wilson*.[4] The Warden defends this outlier position. This Court's intervention is therefore once again necessary to bring the Eleventh Circuit's federal habeas jurisprudence in line with AEDPA and this Court's precedent.

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[3] Because the Warden conceded below that the federal courts should defer to the state habeas court's adjudication of the mitigation ineffectiveness claim, the Warden has not rebutted the presumption that the Georgia Supreme Court adopted the state habeas court's reasoning in rejecting this claim.

[4] Not surprisingly, the Eleventh Circuit's defiance of § 2254(d) and *Wilson* is the subject of at least two other petitions for writ of certiorari currently pending before this Court, s*ee Esposito v. Ford*, Sup. Ct. No. 20-7185; *Jenkins v. Dunn*, Sup. Ct. No. 20-6972, and has been raised in several other petitions over the past three years. *See Wilson v. Warden*, Sup. Ct. No. 18-8389; *Melton v. Inch, Sec'y, Fla. Dep't of Corr*. Sup. Ct. No. 19-6558; *Meders v. Ford*, Sup. Ct. No. 19-5438; *Morrow v. Ford*, Sup. Ct. No. 18-6409.

II. Certiorari is Required because the Warden, Tracking Eleventh Circuit Precedent, Interprets this Court's Precedent as Allowing Federal Habeas Courts to Disregard the Last Reasoned State Court Decision.

The Eleventh Circuit in this case flouted Section 2254(d) and *Wilson* by refusing to evaluate the state habeas court's unreasonable denial of one of Mr. Tollette's *Strickland* claims. To justify the Eleventh Circuit's flagrant disregard for the last reasoned state court adjudication of Mr. Tollette's mitigation ineffectiveness claim, the Warden advances several concerning arguments that are in direct conflict with Section 2254(d) and this Court's AEDPA jurisprudence.

Most alarmingly, the Warden contends that a federal court may always rely on *Richter* and invent its own reasonable justifications for a state court's denial of habeas relief, even in cases where the state court has issued a reasoned opinion. Without pointing to anything from this Court's precedents, the Warden claims that *Wilson* "did not restrict *Richter* to summary state court denials," BIO 27, and accordingly, the Eleventh Circuit was not obliged to look to the last reasoned state court opinion before determining that the denial of relief was not contrary to, or did not involve an unreasonable application of, clearly established federal law, or was not based on an unreasonable determination of the facts:

> 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.

BIO 3. However, both *Richter* and *Wilson* make clear that a federal court may only employ *Richter*'s "could have supported" standard of review in cases "[w]here a state

court's decision is unaccompanied by an explanation." *Richter*, 562 U.S. at 98. *See also id.* at 102 ("Under § 2254(d), a habeas court must determine what arguments or theories supported or*, as here*, could have supported the state court's decision[.]") (emphasis added). Otherwise, "when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion . . . a federal habeas court *simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable*." *Wilson*, 138 S. Ct. at 1192 (emphasis added). Nowhere in *Wilson* or *Richter* does this Court hold that a federal court may ignore a state court's unreasonable legal and factual determinations and invent its own rationale to justify the denial of relief. *Cf. Wilson*, 138 S. Ct. at 1195-96 ("Had we intended *Richter*'s 'could have supported' framework to apply even where there is a reasoned decision by a lower state court, our opinion in *Premo* [*v. Moore*, 562 U.S. 115 (2011)] would have looked very different. We did not even cite the reviewing state court's summary affirmance. Instead, we focused exclusively on the actual reasons given by the lower state court, and we deferred to those reasons under AEDPA.").[5]

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[5] The Warden's other argument in support of *Richter*-type review—that the Georgia Supreme Court's limited correction of only one of Mr. Tollette's IAC claims amounted to the state court silently "decid[ing] the case anew," BIO 3—is also entirely inconsistent with the principle undergirding § 2254(d) and *Wilson* that federal courts must, when possible, "identify the grounds for the higher court's decision, as AEDPA directs . . . ." *Wilson*, 138 S. Ct. at 1196. As this Court noted in *Wilson*, "this approach is more likely to respect what the state court actually did, and easier to apply in practice, than to ask the federal court to substitute for silence the federal court's thought as to more supportive reasoning." *Id*. at 1197.

While the Warden's position is bold, it is rooted in the Eleventh Circuit's explicit disregard for Section 2254(d) and *Wilson*. Since this Court issued its decision in *Wilson* in 2018, the Eleventh Circuit has consistently maintained that the federal habeas court's review is "not limited to the reasons the [state] [c]ourt gave in its analysis," and that "[u]nder 28 U.S.C. § 2254(d), we must 'determine what arguments or theories . . . could have supported . . . the state court's decision." *Whatley v. Warden*, 927 F.3d 1150, 1182 (11th Cir. 2019). *See, e.g.*, *Wood v. Sec'y, Dep't of Corr.*, 793 Fed. App'x 813, 820 (11th Cir. 2019) (per curiam) ("[W]e are not limited to the reasons the [state court] gave and instead focus on its 'ultimate conclusion.'") (alterations in original) (quoting *Whatley*, 927 F.3d at 1182); *Meders v. Warden*, 911 F.3d 1335, 1349-50 (11th Cir. 2019) (acknowledging *Wilson*, but reaffirming pre-*Wilson* circuit precedent holding that federal courts are not required to carefully review a state court's reasoning under Section 2254(d)). This Court must intervene so that the Eleventh Circuit does not continue to stray off course.

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*. In the alternative, Mr. Tollette respectfully asks the Court to hold this case pending its adjudication of the petitions for writ of

certiorari submitted in *Esposito* and *Jenkins* (or any other case raising a similar challenge to a federal court's failure to apply *Wilson*).

Respectfully submitted,

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