No. 20-

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ESPOSITO,
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

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QUESTIONS PRESENTED

THIS IS A CAPITAL CASE

1. The state habeas court in Petitioner's case issued a reasoned decision denying relief, which the Georgia Supreme Court summarily affirmed. In *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018), this Court held that, under these precise circumstances, 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." The Eleventh Circuit paid mere lip service to this command. It instead largely ignored the unreasonably wrong legal and factual findings on which the state courts ruled, and rationalized the denial of relief with speculative reasons of its own creation. The Eleventh Circuit's dubious application of *Wilson* in this case is no outlier. Indeed, at least two other certiorari petitions currently before the Court from Eleventh Circuit decisions also present iterations of the same problem.

The question presented is whether the Eleventh Circuit should be allowed to flout this Court's clear instruction that § 2254(d) 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." *Wilson*, 138 S. Ct. at 1192 (emphasis added, internal quotation marks and citation omitted).

2. As many, but not all, circuits have recognized, this Court's decisions indicate that the prejudicial impact of trial counsel's deficiencies must be assessed in the aggregate. *Strickland v. Washington*, 466 U.S. 668 (1984), requires courts to determine "whether there is a reasonable probability that, absent the errors" (in the plural), "the factfinder would have had a reasonable doubt respecting guilt," and, in capital cases, whether "absent the errors" (in the plural), it is reasonably probable that the sentencer would have concluded that the balance of aggravation and mitigation did not warrant death. *Id.* at 695 (emphases added). At sentencing, courts must reweigh "the totality of the available mitigation evidence—both that adduced at trial and the evidence adduced in the habeas proceeding . . . against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000).

Did the Eleventh Circuit violate these precepts by:

a. Granting a certificate of appealability on only a portion of Petitioner's sentencing-ineffectiveness subclaims and denying the right to appeal the rest, thereby precluding any assessment of cumulative prejudice; and

b. Employing a piecemeal approach to the prejudice inquiry on the appealed subclaims and failing to assess their cumulative effect at sentencing?

LIST OF RELATED DECISIONS

Trial and Direct Appeal

State v. Esposito, No. 96CC349 (Morgan Cnty. Super. Ct., Oct. 2, 1998)

Esposito v. State, No. S00P0654 (Ga. Oct. 30, 2000), *reh'g denied* (Oct. 30, 2000)

Esposito v. Georgia, No. 00-9669 (S. Ct. Jun. 25, 2001), *reh'g denied* (Aug. 27, 2001)

State Habeas Proceedings

Esposito v. Hall, Warden, No. 2002-v-321 (Butts Cnty. Super. Ct., Apr. 29, 2011)

Esposito v. Hall, Warden, No. S11E1608 (Ga. Mar. 19, 2012)

Esposito v. Humphrey, Warden, No. 12-5859 (S. Ct. Oct. 29, 2012)

Federal Habeas Proceedings

Esposito v. Humphrey, Warden, No. 5:12-CV-163 (M.D. Ga., Macon Div., Dec. 11, 2014)

Esposito v. Warden, No. 15-11384 (11th Cir. Jun. 23, 2020), *reh'g denied* (Sept. 15, 2020)

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The unpublished order of the Georgia Supreme Court denying Mr. Esposito a certificate of probable cause to appeal the state habeas court's denial of habeas relief is found in the appendix at App. 102. The unpublished order of the Superior Court of Butts County, Georgia, denying Mr. Esposito habeas relief is found in the appendix at App. 103-149.

The opinion of the Georgia Supreme Court on direct appeal is reported at *Esposito v. State*, 538 S.E.2d 55 (Ga. 2000), and is reproduced in the appendix at App. 150-156.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit entered judgment on June 23, 2020, and denied rehearing and rehearing *en banc* on September 15, 2020. By Order of this Court on March 19, 2020, the time for filing a petition for writ of certiorari under Rule 13 was extended to 150 days, due to the ongoing COVID-19 pandemic.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment guarantee of counsel, applicable against the States through the Fourteenth Amendment's Due Process Clause, and 28 U.S.C. §§ 2253 and 2254, which provide, in relevant part, as follows:

U.S. Const. Amend. VI

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

U.S. Const. Amend. XIV

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. § 2253

. . .

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under [28 U.S.C. § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2254

. . .

(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

Mr. Esposito and his girlfriend Alicia Woodward were charged with the murder of Lola Davis, who was kidnapped in North Carolina and killed in Georgia.[1] Mr. Esposito went to trial

[1] At sentencing, the State introduced evidence that a few days later the defendants murdered the Sniders, an elderly couple who were abducted in Oklahoma and killed in Texas.

first.[2] His appointed counsel anticipated he would be found guilty and chose a twofold defense aimed at securing a life sentence: that Mr. Esposito was less culpable than Ms. Woodward and that his abuse-filled childhood and psychological problems warranted a sentence less than death. Yet, due to their lack of preparation,[3] counsel gave an incomplete and unpersuasive presentation of what could have been a compelling case for life.

The jury heard almost nothing about the horrors Mr. Esposito suffered throughout his childhood from years of physical, emotional, and sexual abuse at the hands of his deranged, controlling, hyper-sexualized, and violent mother; his physically abusive father; and his physically and sexually abusive stepfather. Only one of the seven witnesses trial counsel called, Mr. Esposito's maternal aunt Althea Holt, had firsthand knowledge of abuse, and her testimony was limited to physical abuse Mr. Esposito and his mother suffered at the hands of his father and stepfather when Mr. Esposito was young. As the prosecutor stressed in closing, Mrs. Holt's testimony meant little because, having lost contact with Mr. Esposito when he was ten, her

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[2] Following Mr. Esposito's trial, Ms. Woodward was allowed to plead guilty in exchange for a life sentence. D.18-9:35. (Citations to the district court record will identify the docket and pdf page numbers. Citations to Eleventh Circuit filings will also refer to pdf page numbers.)

[3] Counsel were appointed early in the case, D. 13-1:15, but conducted virtually no mitigation investigation for the first year and a half. Indeed, it took them over a year to move for funds for an investigator, even though the case required investigation in multiple far-away states and counsel's practice precluded them from undertaking the investigation themselves. D.17-10:231; 17-11:271–72. Even then, they did not seek to hire an investigator to conduct the multi-state investigation until March 1998, just over six months prior to trial. D.13-16:2–3. Although the investigator, Hector Guevara, managed to conduct an impressive amount of work in this short time, he did not complete his investigation into the codefendant's background and spent only a brief period of time, on the eve of trial, investigating Mr. Esposito's life in North Carolina, where Mr. Esposito had lived between the ages of approximate three and ten, D.14-23:9, and where much of the new evidence in state habeas proceedings was unearthed, including a contemporaneous record of a visit to the emergency room for "sexual abuse" when Mr. Esposito was nine years old. *See* D.17-14:47 –50.

knowledge was limited and remote.[4] The remaining trial witnesses who touched on abuse could only state that Mr. Esposito told them he had suffered abuse when he was younger. Counsel, moreover, left their most important witness, Mr. Esposito's former girlfriend Courtney Veach, languishing overnight at the Atlanta airport and then, instead of taking steps to secure her testimony, counsel simply completed the trial without her. Consequently, the jury never heard her firsthand account of abuses Mr. Esposito's mother inflicted and their debilitating effect on Mr. Esposito.[5] *See* D.17-8:55–17-9:11 (state habeas testimony); D.17-21:62–74 (affidavit).

The trauma Mr. Esposito suffered left him profoundly unfit for young adulthood. Indeed, he spent more than half of the two years preceding this crime in psychiatric facilities and therapeutic group homes in New Jersey.[6] Yet, because defense counsel failed to conduct an adequate investigation, and did not present readily available, firsthand accounts of the abuses he suffered, the prosecutor was able to retool Mr. Esposito's mitigating background into a weapon against him, telling jurors repeatedly that Mr. Esposito was a "con artist" whose history of psychiatric treatment had in fact been a ploy to get the State of New Jersey to take care of him and

[4] Mr. Esposito was 21 at the time of the crime. D. 19-2:45.

[5] Counsel, for instance, could have asked for a brief continuance after their investigator failed to pick her up from the Atlanta airport. *See* D.17-8:86–89; 17-9:10–11. Under such circumstances, a brief continuance would have been likely and its denial would have created reversible error. *See, e.g.*, *Romine v. State*, 305 S.E.2d 93, 1023 (Ga. 1983) (vacating death sentence on ground that trial court improperly denied continuance to secure mitigation witness's attendance). The continuance would not have been for long—after spending the night at the airport, Ms. Veach emptied her bank account to take a 100-mile taxi ride to the courthouse the next morning before the jury retired to deliberate, but was told she had arrived too late to testify. D.17-8:88, 17-21:73.

[6] Mr. Esposito never learned how to drive, could not handle money, could not hold down a job, and, having learned from his mother's unyielding domination to depend entirely on others, could not function outside a psychiatric facility unless he had a more functional girlfriend taking care of him.

who was "trying to con you to allow him to live." D.14-24:70, 72. The prosecutor could make this argument only because trial counsel failed to support their mitigation case with available credible evidence, rather than limited, secondhand accounts based solely on Mr. Esposito's self-reporting.

Mr. Esposito's upbringing and its resulting damage left him a prime target for codefendant Woodward—like Mr. Esposito's mother, a deranged and domineering personality—whom Mr. Esposito met shortly before the crimes. As postconviction evidence showed, Ms. Woodward manipulated Mr. Esposito into leaving New Jersey with her and, after they ran out of money, was the driving force behind the couple's cross-country crime spree, which ended with their arrest in Colorado a short time later.

Once under arrest, Mr. Esposito took responsibility for the murders. He told FBI Special Agent Ronald Knight, who interviewed Mr. Esposito a few hours after the couple's arrest, that he alone killed Mrs. Davis—by hitting her in the head "several times" with a tree limb he had found on the ground—and that he alone had killed the Sniders with a tire iron. D.14-15:53–55; D.14-17:56–60. Mr. Esposito's confession to Special Agent Knight was the only evidence presented at trial regarding which of the codefendants had committed the murders.[7] Yet readily available forensic evidence introduced in state habeas proceedings, but not at trial, strongly indicates that

[7] Mr. Esposito gave a second videotaped confession to Georgia Bureau of Investigation agents, again taking responsibility for the killings. The trial court ruled it inadmissible but, at the prosecutor's prompting, erroneously agreed it could be used in rebuttal. *See James v. Illinois*, 493 U.S. 307 (1990) (holding that illegally obtained evidence may not be used to rebut third-party testimony). Nonetheless, in state habeas proceedings trial counsel claimed they did not present certain evidence because they feared "opening the door" to the suppressed videotape. *See, e.g.*, D.17-10:77–78. The state habeas court, in turn, validated that "strategy" as "reasonable," App. 130–31, even though "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (citing *Williams v. Taylor*, 529 U.S. 362, 395 (2000), and *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986)).

Mr. Esposito had falsely confessed to striking the fatal blows. Not only did the State's forensic testing reveal no blood on the tree limb ostensibly used to kill Mrs. Davis with multiple blows—a fact inconsistent with its use as a bludgeoning weapon—but Mrs. Davis's wound patterns reflected injuries caused by man-made objects, rather than a tree limb. *See* D.17-9:20-50; D.19-11:78. The jury heard none of this. Rather, at trial, counsel's only effort to cast doubt on Mr. Esposito's confession was eliciting from a State expert cross-examination testimony that the limb was not tested for DNA, D.14-4:9, information that did nothing to challenge the confession's credibility. The jury thus heard no evidence suggesting that Mr. Esposito's confession was inconsistent with the facts.

Moreover, trial counsel's inadequate investigation left them without any meaningful basis to argue that Ms. Woodward was more culpable. The only evidence counsel elicited in this regard was that Ms. Woodward did all the driving, handled most of the money, and talked more—evidence that had no bearing on her greater culpability or the possibility she actually committed the murders, though evidence of her domineering personality, violent conduct, volatile temper, and physical ability to commit the murders was readily available.

Counsel's failure to present readily available proof of Mr. Esposito's traumatic childhood and impairments, and his codefendant's greater culpability left the jury with virtually nothing to weigh against the prosecutor's aggravation. On October 2, 1998, two days after convicting Mr. Esposito on all counts, the jury sentenced him to death. D.13-6:4, 56. *See Esposito v. State*, 538 S.E.2d 55 (Ga. 2000) (affirming convictions and death sentence).

Following direct review, Mr. Esposito filed an application for writ of habeas corpus in Butts County Superior Court ("the state habeas court"). D.15-25; D17-2. In support, he presented live testimony from eight witnesses and submitted over 255 exhibits, including affidavit testimony

from people familiar with the physical, mental, and sexual abuse Mr. Esposito suffered throughout his childhood and youth, and his history of psychiatric hospitalizations and treatment, and records corroborating the testimony. D.17-8–D.24-26.[8]

Following the evidentiary hearing, the parties submitted proposed final orders. The habeas court issued a reasoned opinion denying two claims on the merits—ineffective assistance of counsel ("IAC") and an instructional challenge—and dismissing the remaining claims on procedural grounds. App. 103–149. While it adopted large portions of Respondent's proposed final order, the state habeas court rejected others.

Specifically, as is relevant here, the state habeas court did not include Respondent's suggested language justifying counsel's failure to present the compelling testimony of Mr. Esposito's former girlfriend Courtney Veach, who had flown from New Jersey to Atlanta at the defense's request, but was never picked up from the airport. *See supra* at 4. Yet, the Eleventh Circuit would later resurrect Respondent's rationale, rejected by the state habeas court, as a reasonable basis for the state habeas court's conclusion that counsel were not ineffective in failing to present Ms. Veach. Respondent's draft order proposed:

> [T]his Court finds that Petitioner's defense attorneys were not deficient in their presentation of life history mitigation. **This Court is not persuaded by this evidence and finds that Petitioner failed to prove that Mr. Kelly and Mr. Roberts were deficient or that Petitioner suffered any actual prejudice such that there is a reasonable probability that the outcome of the trial would have been different. With regard to the issue of trial counsel not calling Courtney Greco Veach as a witness at trial, this Court finds that Petitioner's defense attorneys were not deficient. The trial attorneys stated that they would not call a witness whom they had not had the chance to prepare. (HT 250). Because Petitioner's experienced criminal defense attorneys had a reasonable, strategic basis for not calling Ms. Veach, this Court finds that counsel's performance**

[8] These included a hospital record obtained in state habeas proceedings that documented an emergency room visit for "sexual abuse" when Mr. Esposito was nine years old. D.17-14:49. Further documentation of the visit was not available by the time state habeas counsel located this record. *Id.* at 48.

> **was objectively reasonable. . . . Because Petitioner cannot satisfy the first prong of the *Strickland* test, this Court will not address the prejudice prong.**

D.27-32:34 (bold-face identifying language excluded from state habeas order).

The state habeas court did not adopt this language. Instead, its final order stated:

> [T]his Court finds that Petitioner's defense attorneys were not deficient in their presentation of life history mitigation. *This Court further finds that even if the Court were to conclude that such presentation, including the failure to present the testimony of Dr. Lower and Courtney Greco Veach, was deficient, Petitioner has failed to establish that he suffered any actual prejudice such that there is a reasonable probability that the outcome of the trial would have been different.*

App. 131 (D.27-39:29) (italics identifying language state habeas court substituted for Respondent's proposed language).[9]

Following the state habeas court's order, Mr. Esposito sought a certificate of probable cause ("CPC") from the Georgia Supreme Court, which summarily denied the application. App. 102.

Mr. Esposito filed a timely habeas corpus petition in the United States District Court for the Middle District of Georgia, raising IAC at sentencing, among other claims. D.1. The sentencing-phase IAC claim was broken down into several sub-claims addressing counsel's failure to adequately investigate and present evidence demonstrating codefendant Woodward's greater culpability and Mr. Esposito's mitigating background; counsel's presentation of a brief, lackluster closing argument that provided no basis for the jury to impose a life sentence; counsel's failure to

[9] Dr. Lower was a mental health expert appointed by the trial court at the State's request, who, in a written report to the court, stated that Mr. Esposito's "frightful upbringing and the predictable results on his personality and adjustment could be considered in mitigation of punishment." D.13-5:54–56, D.17-14:19. Counsel's failure to present evidence that the State's own witness found Mr. Esposito's background mitigating allowed the prosecutor improperly to insinuate, while cross-examining the defense mental health expert Daniel Grant, that Dr. Lower had not identified any mental health problems. *See* D.56:59–60, 77–79.

object to a host of inadmissible, prejudicial evidence and prosecutorial misconduct; and counsel's agreement to let the jury make an extra-judicial crime-scene visit unaccompanied by Mr. Esposito, counsel, the trial court, or even a court reporter, but chaperoned by one of the State's law enforcement witnesses.[10] D.56:41–140.[11]

On December 10, 2014, the district court denied the petition, concluding *inter alia* that the state courts reasonably found counsel's representation adequate. D.67. It granted a certificate of appealability ("COA") to address whether counsel were ineffective in failing to investigate and present evidence to support the defense theories that Mr. Esposito was less culpable than Ms. Woodward and that his personal history was mitigating. D.67:88. The Eleventh Circuit expanded the COA to include counsel's ineffective assistance at sentencing summation, but denied expansion to address the other sentencing-phase IAC subclaims.[12]

Following briefing, on March 7, 2017, the Eleventh Circuit stayed proceedings pending this Court's decision in *Wilson v. Sellers*. Thereafter, the Eleventh Circuit allowed supplemental briefing to address *Wilson* and heard oral argument. On June 23, 2020, the court issued a *per*

[10] The crime scene visit took place the evening before guilt-phase deliberations. *See* D.14-14:59–67. The procedure counsel endorsed, permitting a jury view without *any* judicial oversight and monitored solely by a State law enforcement witness, was so "irregular," "troubling," and fraught with "special dangers" that the Georgia Supreme Court, on direct appeal, *sua sponte* addressed its impropriety and directed that the procedure "should not be used in the future." *Esposito v. State*, 538 S.E.2d 55, 59–60 (Ga. 2000). Although the jury view occurred before the close of the culpability phase of trial, Mr. Esposito argued that it prejudicially impacted his death sentence. *See, e.g.*, App. 198–99.

[11] Mr. Esposito also challenged counsel's ineffective representation at the motion for new trial stage and on appeal. *See id.* at 141–48.

[12] In his application to expand the COA, Mr. Esposito argued *inter alia* that a COA should be granted as to all sentence-impacting IAC claims given that prejudice under *Strickland* must be assessed by looking at all of counsel's errors in the aggregate. *See* App. 175–76 (COA Expansion Mot.). The Eleventh Circuit's limited COA expansion, App. 218–20, implicitly rejected this argument.

curiam opinion affirming the district court. *Esposito v. Warden*, 818 Fed. Appx. 962 (11th Cir. 2020) (App. 7).

The panel opinion noted *Wilson*'s directive that federal courts applying 28 U.S.C. § 2254(d) should "look through" a silent state court decision to the last reasoned decision on the issue, *Esposito*, 818 Fed. Appx. at 969, but then failed to follow *Wilson*'s command. Instead, it reverted to the approach this Court had repudiated in *Wilson*. The panel expressly relied on inapplicable language from *Harrington v. Richter*, 562 U.S. 86, 105 (2011), regarding federal habeas review of state court merits decisions that, unlike here, lack any articulated rationale. *See Esposito*, 818 Fed. Appx. at 970 (observing that "under 2254(d), 'the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard'") (quoting *Richter*). The panel, more importantly, largely ignored the habeas court's actual reasoning—which Mr. Esposito had shown was unreasonably wrong—and validated counsel's performance on the basis of speculative reasons the habeas court never expressed, including adopting the rationale suggested in Respondent's proposed order justifying counsel's failure to present the testimony of Mr. Esposito's former girlfriend Courtney Veach, a rationale the state habeas court had in fact *rejected*.

The panel also misapplied *Strickland* and progeny in assessing prejudice at sentencing. It relied on decisions considering the impact of counsel's deficiencies on a jury's *guilt* determination and failed to consider the cumulative impact of the evidence presented in state habeas proceedings and at trial to assess the likelihood that at least one juror would have voted for a sentence less than death.

Mr. Esposito's petition for panel and *en banc* rehearing was denied on September 15, 2020. This petition follows.

REASONS FOR GRANTING THE WRIT

I. This Case Exemplifies the Eleventh Circuit's Continuing Disregard of This Court's Clear Directive, Forcefully Reiterated in *Wilson v. Sellers*, that 28 U.S.C. § 2254(d) Requires Federal Courts to Focus on the Particular Legal and Factual Reasons Supporting the State Court's Rejection of a Habeas Petitioner's Federal Claims.

Mr. Esposito's case is but one of several Eleventh Circuit decisions that honor *Wilson* in the breach rather than the observance. *See, e.g.*, *Whatley v. Warden*, 927 F.3d 1150, 1182 (11th Cir. 2019) ("[W]e are not limited to the reasons the [state] 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 original).[13] Indeed, at least two other petitions for writ of certiorari currently pending before the Court present questions regarding the Eleventh Circuit's disregard of *Wilson*. *See Jenkins v. Dunn*, Sup. Ct. No. 20-6972; *Tollette v. Ford*, Sup. Ct. No. 20-6876.[14] The Eleventh Circuit's refusal to follow this Court's clear instruction about the focus of § 2254(d)'s inquiry reflects an antagonism towards federal court review of state court decisions that was already apparent in the line of decisions that led to this Court's grant of certiorari in *Wilson* and that has not abated since this Court issued its rebuke in *Wilson*.

[13] *See also Whatley v. Warden, Ga. Diagnostic & Classification Ctr.*, 955 F.3d 924, 925 (11th Cir. 2020) (Martin, J., dissenting from denial of rehearing *en banc*) (arguing that the panel decision conflicts with *Wilson* and post-*Wilson* circuit precedent "by suggesting that federal courts may look beyond the reasons a state court gives for denying habeas relief").

[14] The Eleventh Circuit's failure to follow *Wilson* has been presented in other petitions for writ of certiorari as well—including in Mr. Wilson's petition following this Court's remand in his case. *See Wilson v. Warden*, Sup. Ct. No. 18-8389; *see also, e.g.*, *Melton v. Inch, Sec'y, Fla. Dep't of Corr.*, Sup. Ct. No. 19-6558; *Meders v. Ford*, Sup. Ct. No. 19-5438.

As amended by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d) requires federal habeas courts to determine whether a state court's merits ruling "was contrary to or involved an unreasonable application of, clearly established [Supreme Court] law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." That statutory command "requires federal courts to 'focu[s] on what a state court knew and did . . . ." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011)).

Due to state-specific procedures, the last articulation of what the state court "knew and did" in habeas cases arising from Georgia state courts is often the state habeas court's reasoned order.[15] As a result, following the AEDPA's enactment, the Eleventh Circuit routinely applied § 2254(d) review to the state habeas court's reasoned decision when a summary CPC denial had left that decision undisturbed, an approach adopted from pre-AEDPA law.[16] *See, e.g., Johnson v. Upton*, 615 F.3d 1318, 1330 (11th Cir. 2010) (identifying state habeas court decision as the relevant state court merits decision on IAC claim, given summary CPC denial); *Bishop v. Warden, GDCP*, 726 F.3d 1243 (11th Cir. 2013) (applying 2254(d) analysis to state habeas order); *DeYoung v. Schofield*, 609 F.3d 1260 (2010) (same); *Brown v. Head*, 272 F.3d 1308 (2001) (same).

This practice came to an end, however, after the petitioner in *Jones v. GDCP Warden*, 746 F.3d 1170 (11th Cir. 2014), sought rehearing on the ground that the Eleventh Circuit panel had

[15] Georgia law requires state habeas courts to "make written findings of fact and conclusions of law" when issuing judgment. *See* O.C.G.A. § 9-14-49. A losing habeas petitioner has no right to an appeal and must seek a certificate of probable cause to appeal from the Georgia Supreme Court. O.C.G.A. § 9-14-52(b). A CPC will be granted only upon a showing of "arguable merit." Ga. Sup. Ct. R. 36.

[16] *See Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991) (instructing courts to presume that the later unexplained rulings leaving earlier reasoned decisions in place rely on the same ground and citing circuit cases so holding, including *Harmon v. Barton*, 894 F.2d 1268, 1272 (11th Cir. 1990)).

wrongly validated the state habeas court's unreasonable legal and factual determinations. *See* Reh'g Pet., *Jones v. GDCP Warden*, No. 11-14774 (11th Cir. Apr. 10, 2014). The original panel decision, consistent with Eleventh Circuit practice, had focused its IAC review on the state habeas decision (because the Georgia Supreme Court had summarily denied a CPC), and had determined that "the state habeas court's rejection of Jones's ineffective-assistance claims was not an unreasonable application of *Strickland*." *Id.* at 1174. In response to the rehearing petition, however, the panel substituted a new decision applying an entirely new approach that rendered the state habeas court's reasoning irrelevant:

> The Georgia Supreme Court's denial of the application for a certificate of probable cause to appeal was the final state-court determination of Jones's *Strickland* claim. . . . Though the Georgia Supreme Court did not give reasons for its decision, "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing that there was no reasonable basis for the state court to deny relief."
> . . .
>
> . . . [W]e look to the Georgia Supreme Court's action as the final state merits determination.

Jones v. Ga. Diagnostic & Classification Prison Warden, 753 F.3d 1171, 1182 (11th Cir. 2014) ("*Jones II*") (quoting *Richter*, 562 U.S. at 98). Untethered to a reasoned decision, the panel was free to devise its own rationale for the Georgia Supreme Court's ruling denying relief, and then deferred to that imagined state court decision.

The Eleventh Circuit in *Jones II* latched onto *Richter* as a means to avoid meaningful, albeit deferential, review pursuant to 28 U.S.C. § 2254(d). The court continued to apply *Richter* in this fashion to deny relief on the basis of made-up state court rulings,[17] even as this Court began

[17] *See, e.g.*, *Butts v. GDCP Warden*, 850 F.3d 1201, 1204 (11th Cir. 2017); *Lucas v. Warden, Ga. Diagnostic & Classification Prison*, 771 F.3d 785, 792 (11th Cir. 2014); *Hittson v. GDCP Warden*, 759 F.3d 1210, 1232–33 (11th Cir. 2014).

sending hints that the circuit had gotten off track in its review of habeas cases.[18] Even Respondent agreed with petitioners that the "look through" approach should apply; indeed, when the Eleventh Circuit took up the issue *en banc* in *Wilson v. Warden*, it was forced to appoint outside counsel as *amicus curiae* to defend the panel decision's application of *Richter*. *See Wilson v. Warden*, 834 F.3d 1227, 1232 (11th Cir. 2016) (*en banc*). Ultimately, a slim majority of the *en banc* court endorsed the approach first adopted in *Jones II*, over vigorous dissents. This Court granted certiorari. *Wilson v. Sellers*, 137 S. Ct. 1203 (2017).

In *Wilson*, this Court rooted its analysis in the text of § 2254(d) which, the Court explained, directs federal courts to focus on the reasons underlying the state court's ruling: "[D]etermining 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.'"[19] 138 S. Ct. at 1191–92 (quoting *Hittson*, 576 U.S. at 1029 (Ginsburg,

[18] In *Hittson v. Chatman*, 576 U.S. 1028, 1029 (2015), Justice Ginsburg, joined by Justice Kagan, had concurred in the denial of certiorari to address the Eleventh Circuit's new reliance on *Richter*, noting that the court had "plainly erred" in rejecting the "look through" approach set forth in *Ylst*, but concluding that the district court had applied the appropriate standard and that the pendency of Mr. Wilson's petition for *en banc* rehearing "affords the Eleventh Circuit an opportunity to correct its error without the need for this Court to intervene." Three days after *Hittson* issued, the Court emphasized that "[i]n conducting the § 2254(d)(2) inquiry, we, like the courts below, 'look through' the Louisiana Supreme Court's summary denial of [the] petition for review and evaluate the state trial court's reasoned decision . . . ." *Brumfield v. Cain*, 576 U.S. 305, 313 (2015).

[19] This Court has "affirmed this approach time and again." *Wilson*, 138 S. Ct. at 1192 (citing *Porter v. McCollum*, 558 U.S. 30, 39–44 (2009) (*per curiam*); *Rompilla v. Beard*, 545 U.S. 374, 388–92 (2005); and *Wiggins v. Smith*, 539 U.S. 510, 523–38 (2003)).

J., concurring in the denial of certiorari)). The Court rejected the Eleventh Circuit's new outlier[20] extension of *Richter*'s burden of showing "there was no reasonable basis for the state court to deny relief" to cases where the last adjudication on the merits silently left in place an earlier reasoned decision on the same issue. *Wilson v. Warden*, 834 F.3d at 1235 (quoting *Richter*, 562 U.S. at 98), *rev'd by Wilson v. Sellers*, 138 S. Ct. 1188. Rather, this Court explained, when the last decision on the merits has summarily left undisturbed an earlier state court merits ruling, a 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." *Wilson*, 138 S. Ct. at 1192. *Richter*, the Court explained, was limited to situations where "there was no lower court opinion to look to." *Id.* at 1195.

Despite this Court's rebuke, the Eleventh Circuit continues to employ its pre-*Wilson* approach. This Court is the only body that can ensure that the Eleventh Circuit complies with this Court's precedent.

Mr. Esposito's case presents an excellent vehicle for this Court's review of the Eleventh Circuit's disturbing trend. In his merits briefing before the district court, and in briefing to the Eleventh Circuit, he identified numerous ways in which the state habeas court's decision was based on unreasonably wrong legal and factual findings that warranted *de novo* review of his claims.[21] These included:

[20] As the Court noted, "every circuit to have considered the matter has applied the presumption, often called the 'look through' presumption, but for the Eleventh Circuit." *Wilson*, 138 S. Ct. at 1194.

[21] *See, e.g., Kernan v. Hinojosa*, 136 S. Ct. 1603, 1604 (2016) (under § 2254(d), state court merits rulings receive deferential, rather than *de novo*, review unless the state court decision was contrary to or involved an unreasonable application of Supreme Court law or was based on unreasonable factfinding).

- The state habeas court's reliance on counsel's legally insupportable fear of "opening the door" to a suppressed videotaped confession (which, under *James v. Illinois*, would have not been admissible as "rebuttal" evidence) to validate counsel's failure to present relevant evidence to establish codefendant Woodward's greater culpability and Mr. Esposito's abuse-filled upbringing (see *supra* at n.7) and to find that any deficiencies were not prejudicial;

- The state habeas court's express reliance on the prejudice standard set forth in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), which this Court has explained does not set forth the proper standard to assess prejudice under *Strickland*, *see Williams v. Taylor*, 529 U.S. 362, 391–95 (2000);

- The state habeas court's unreasonable failure to consider the evidence cumulatively in assessing whether Mr. Esposito was prejudiced at sentencing by counsel's deficient performance;

- The state habeas court's failure to consider the insubstantial nature of the evidence counsel presented for the ostensible purpose of establishing Ms. Woodward's greater culpability (that she did all the driving, handled the money, and did most of the talking), when compared with the reasonably available evidence counsel failed to investigate and present demonstrating her violent and erratic nature, her physical ability to commit the murders, and the unreliability of Mr. Esposito's confession;

- The state habeas court's failure to address counsel's investigative omissions or the evidence assembled after a thorough investigation in habeas proceedings in order to justify the work counsel performed; and

- The state habeas court's numerous unreasonable factual findings regarding counsel's presentation of evidence and preparation of witnesses,[22] including its telling mischaracterization of Mr. Esposito's mother as "negligent" or "neglectful," when the habeas record clearly established that her viciousness, cruelty, and uncontrollable rage and hatred, expressed verbally, physically, and sexually, were actively abusive, not negligent.

See generally Supp'l. Br., *Esposito v. Warden*, No. 15-11384 (11th Cir. Jun. 11, 2018), at 3–26.

[22] Counsel testified that they prepared witnesses in the evenings before their testimony, although their lengthy days in court left little time for actual witness prep, *see, e.g.*, Br. of Appellant, *Esposito v. Warden*, No. 15-11384 at 66–67 (11th Cir. Nov. 15, 2016), and preparing witness testimony the night before is hardly an illustration of competence. Indeed, it is reasonable to infer that whatever preparation was conducted was inadequate, given how ill-prepared virtually all of the witnesses were, as reflected in both their direct examinations and disastrous cross-examinations. Moreover, one of Mr. Esposito's attorneys actually suffered a heart attack during one evening in the middle of trial, although he received no medical attention at the time and only learned that he had suffered a heart attack at a subsequent doctor's visit. *See* D.17-11:28.

The Eleventh Circuit noted that *Wilson* required it to assess the reasonableness of the state habeas decision, but then a page later resurrected *Richter*, proclaiming that "under § 2254(d), 'the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.'" *Esposito*, 818 Fed. Appx. at 969–70 (quoting *Richter*, 562 U.S. at 105) (App. 7). The panel's analysis then largely ignored what the state habeas court had stated in its ruling and Mr. Esposito's arguments for why those findings were unreasonable.

The court instead inserted its own reasons for ratifying the state habeas court's ruling and then deferred to those fictitious grounds as reasonably supporting the state habeas decision—the precise approach that *Wilson* repudiated. For instance, the panel found that counsel's failure to present the testimony of former girlfriend Courtney Veach was a reasonable strategic decision:

> Although counsel intended to call Veach and planned to pick her up at the airport, the plan went awry when she could not be found, and as a result she arrived at the courthouse at the end of the penalty phase. By then, counsel had no time to prepare her to testify. At that point, counsel's decision not to call her as a witness was not unreasonable. That counsel may have been able to avoid the mishap with more careful planning and execution does not make their performance deficient under *Strickland*.

Esposito, 818 Fed. Appx. at 973–74 (App. 10). But the state habeas court never endorsed this reason for finding counsel's actions reasonable. To the contrary, it *rejected* language to this effect in Respondent's proposed order, *see supra* at 7-8, and in fact entertained the possibility that counsel's failure to present Ms. Veach's testimony was deficient: "[E]ven if the Court were to conclude that such presentation, including the failure to present the testimony of Dr. Lower and

Courtney Greco Veach, was deficient, Petitioner has failed to establish that he suffered any actual prejudice . . . ." App. 26.[23]

While the panel briefly addressed two overarching errors Mr. Esposito had identified as unreasonable determinations by the state habeas court—the court's improper reliance on *Fretwell*'s prejudice standard and on trial counsel's purported fear of "opening the door" to the suppressed videotaped confession (which would not have been admissible rebuttal)—its analysis was both incomplete and legally flawed.

With respect to the *Fretwell* issue, the panel excused the state habeas court's express reliance on *Fretwell* by adopting the very argument this Court rejected in *Williams*, that the state court's recitation of the correct *Strickland* standard demonstrated that the incorrect *Fretwell* standard had not tainted its prejudice assessment. *See Esposito*, 818 Fed. Appx. at 970 n.5 (App. 7); *Williams*, 529 U.S. at 397 (rejecting argument that the state court's correct recitation of the *Strickland* standard demonstrated that it had not in fact applied *Fretwell*'s improper standard); *see also id.* at 414–15 (O'Connor, J., concurring) (noting that, despite state court's proper prejudice inquiry, "[i]t is impossible to determine . . . the extent to which [its] error with respect to its reading of *Lockhart* affected its ultimate finding that Williams suffered no prejudice.").

And, while the panel agreed that the videotaped confession would not have been admissible for rebuttal purposes and thus third-party evidence would not have "opened the door" to its presentation, the court nonetheless concluded that Mr. Esposito had not shown prejudice "even assuming that counsel's mistaken belief about the admissibility of the confession rendered their

[23] The panel, moreover, made no mention of counsel's failure to present in mitigation psychologist Jerome Lower, appointed by the trial court on the State's motion, D.13-51:389–91, who had concluded that Mr. Esposito's "frightful upbringing and the predictable results on his personality and adjustment could be considered in mitigation of punishment," D.17-14:19.

representation deficient." *Esposito*, 818 Fed. Appx. at 972 (App. 9). But the panel wholly ignored that the state habeas court had *also* unreasonably relied on counsel's "mistaken" strategy in assessing prejudice. *See, e.g.*, App. 144 (state habeas court concluding that Mr. Esposito had not established prejudice from counsel's failure to present a forensic pathologist "especially given the possibility that the admission of such testimony would have opened the door to the videotaped confession, which trial counsel adamantly did not want to come into evidence"). Surely, if counsel's "ignorance of a point of law that is fundamental to his case . . . is a quintessential example of unreasonable performance,"[24] a state habeas court's identical ignorance cannot be deemed reasonable under § 2254(d).

The panel, in keeping with current Eleventh Circuit practice, did not "train its attention on the particular reasons—both legal and factual—why [the state habeas court] rejected [Mr. Esposito's] federal claims." *Wilson*, 138 S. Ct. at 1191–92 (citation omitted). Instead, the court deferred to a made-up ruling of its own creation. Its approach disregarded this Court's clear command in *Wilson* that § 2254(d) mandates federal habeas review of the state court's stated reasons and risks turning § 2254(d) into a rubber stamp for unreasonable state court rulings that it was not intended to be. *See, e.g.*, *Brumfield*, 576 U.S. at 314 (noting that "'[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review' and 'does not by definition preclude relief.'") (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

Mr. Esposito respectfully submits that the Court should grant certiorari to address this continuing, pernicious problem with the Eleventh Circuit's habeas corpus review of state court criminal cases. Alternatively, Mr. Esposito respectfully asks the Court to hold his case pending the

[24] *Hinton v. Alabama*, 571 U.S. 263, 274 (2014).

Court's consideration of other certiorari petitions raising the same or similar issues, such as *Tollette* and *Jenkins*.

II. The Eleventh Circuit's Piecemeal Approach to Ineffective-Assistance Claims Is Contrary to This Court's Precedent Defining "Prejudice" under *Strickland* as the Cumulative Effect of Counsel's Errors.

Mr. Esposito identified numerous acts and omissions of trial counsel he argued were objectively unreasonable and prejudicial at sentencing. The Eleventh Circuit (and the district court before it), however, treated each instance of alleged deficient performance as a separate IAC claim and granted a COA on only a portion of them. Then, even though Mr. Esposito highlighted the state court's failure to consider the cumulative impact of counsel's errors as an unreasonable application of *Strickland,* the Eleventh Circuit repeated that error, rather than correcting it.

This Court's decisions clearly establish that the impact of attorney error on a verdict must be considered in the aggregate. In *Strickland,* this Court held that an IAC claim requires proof that (1) counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and (2) "the deficient performance prejudiced the defense"—i.e. "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687 (emphasis added). "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id. Strickland* accordingly incorporates prejudice as a component of the constitutional *claim* of ineffective representation.

The portion of *Strickland* specifically explaining the prejudice component of the IAC inquiry (Section III(B)) mentions the word "errors," in the plural, a total of 16 times in the span of a few pages. *See id.* at 691–95. These include passages making it clear that the prejudice test assesses the impact of counsel's errors in the aggregate:

- "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the *errors* of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694.

- "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different." *Id.*

- "In making the determination whether the specified *errors* resulted in the required prejudice, a court should presume . . . that the judge or jury acted according to law." *Id.*

- "The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's *errors*. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the *errors*, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence . . . , the question is whether there is a reasonable probability that, absent the *errors*, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

- "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the *errors*, and factual findings that were affected will have been affected in different ways. . . . Taking the unaffected findings as a given, and taking due account of the effect of the *errors* on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the *errors*." *Id.* at 695–96.

If these passages left any doubt that prejudice must be assessed from the aggregate of counsel's errors, the *Strickland* Court observed that its definition of "prejudice" was rooted "in the test for materiality of exculpatory information not disclosed to the defense by the prosecution . . . and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness . . . ." *Id.* at 694 (citing *United States v. Agurs*, 427 U.S. 97, 112–13 (1976), and *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872–74 (1982)). As this Court later explained, in assessing "materiality," the suppressed evidence "is considered collectively, not item by item." *Kyles v. Whitley*, 514 U.S 419, 436 (1995).

This Court, moreover, has made clear that *Strickland*'s prejudice inquiry at sentencing requires courts to consider "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" and that a state court's failure to do so is an "unreasonable" application of *Strickland*. *Williams*, 529 U.S. at 398. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 41 (2009) ("To assess [prejudice at sentencing], we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'") (quoting *Williams*, 529 U.S. at 397–98); *see also Lee v. United States*, 137 S. Ct. 1958, 1966 (2017) (*Strickland* "demands a 'case-by-case examination' of the 'totality of the evidence'") (quoting *Williams*, 529 U.S. at 391, and *Strickland*, 466 U.S. at 695).[25]

As discussed below, the Eleventh Circuit's practice of granting COA on only a subset of a habeas petitioner's IAC claim and then failing even to consider the collective prejudice arising

[25] Although this Court's precedents appear to establish clearly that prejudice is determined by the collective impact of counsel's various errors, there remains a split in the circuits whether that is the case. *Compare, e.g.*, *Cargle v. Mullin*, 317 F.3d 1196, 1212 (10th Cir. 2003) (the "decision to grant relief on ineffective assistance grounds is a function of the prejudice flowing from all of counsel's deficient performance"); *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001) ("*Strickland* directs us to look at the 'totality of the evidence before the judge or jury' . . . . We therefore consider [counsel's] errors in the aggregate."); *Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999) (holding that courts should examine cumulative impact of trial counsel's errors across both trial and sentencing) *with Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006) ("[T]he cumulative effect of alleged trial counsel errors is not grounds for granting habeas relief."); *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998) ("[It has long been the practice of this Court individually to assess claims under *Strickland* . . . . To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now."); *see also* Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 Stan. L. Rev. 1581, 1651 (2020) (noting that "[l]ower courts are currently divided on whether the *Strickland* prejudice analysis must be applied in isolation to each individual alleged personal error that trial counsel made or whether trial counsel's errors may be considered cumulatively to establish prejudice. A determination of whether the trial was fundamentally unfair requires a cumulative approach.").

from that truncated IAC claim, as occurred here, are at odds with this Court's repeated explanation that prejudice under *Strickland* is assessed in the aggregate and is at odds with the practices in other circuits.

A. The Eleventh Circuit's Practice of Treating Aspects of Counsel's Alleged Ineffectiveness as Independent "Claims" and Selectively Granting COA on Only Some of Them Prevent Litigants from Establishing that Counsel's "Errors," in the Aggregate, Were Prejudicial and Is Contrary to the Requirement Set Forth in 28 U.S.C. § 2253(c) that a COA Should Issue Where a Petitioner Makes "a Substantial Showing of the Denial of a Constitutional Right."

The Eleventh Circuit construed Mr. Esposito's claim that his Sixth Amendment right to effective representation at sentencing was violated as multiple individual claims, each defined by distinct errors of counsel, and then granted COA on only a portion of them. The court's piecemeal approach precluded a proper assessment of prejudice before the merits of the Sixth Amendment claim was properly before the Court. The district court's grant of COA on a few aspects of counsel's challenged conduct, and the Eleventh Circuit's expansion of the COA to add an additional subclaim, demonstrated that reasonable jurists could disagree about the state court's rejection of the Sixth Amendment claim. *See* 28 U.S.C. § 2253(c). By denying a COA as to the full sentencing-IAC claim Mr. Esposito presented, however, the Eleventh Circuit, in essence, improperly assessed the merits on the remaining portions before they were properly before the court. *See, e.g.*, *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (noting that "[t]he COA inquiry . . . is not coextensive with a merits analysis" and that a court of appeals, in "sidestep[ping] [the COA] process by first deciding the merits of an appeal and then justifying its denial of a COA based on its adjudication of the actual merits, . . . is in essence deciding an appeal without jurisdiction").

This is a routine practice in the Eleventh Circuit. In *Presnell v. Warden*, for instance, the petitioner moved to expand the COA to include counsel's failure to object to prosecutorial misconduct, but the court denied the motion. *See* Mot. to Expand Certificate of Appealability at

21 n.8, *Presnell v. Warden*, No. 17-14322 (11th Cir. Dec. 1, 2017); Order (11th Cir. Feb. 16, 2018). Then, in its opinion denying relief, the Eleventh Circuit refused to consider counsel's failure to object to the prosecutor's closing argument because the district court had not included that issue in its COA grant, even though the Eleventh Circuit as well had excluded that subclaim from appellate review. *See Presnell v. Warden*, 975 F.3d 1199, 1227 n.54 (11th Cir. 2020). *See also, e.g.*, Certificate of Appealability Pet., *Floyd v. Sec'y, Fla. Dep't of Corr.*, No. 13-13566 (11th Cir. Oct. 23, 2013) (seeking COA on several sentencing-IAC subclaims); Order (11th Cir. Apr. 9, 2014) (granting COA on only two); Application for Expansion of Certificate of Appealability, *Johnson v. Upton*, No. 09-16090 (11th Cir. Feb. 9, 2010) (seeking, *inter alia*, COA as to counsel's ineffectiveness in investigating and presenting evidence of actual innocence); Order (11th Cir. Mar. 3, 2010) (granting COA on separate sentencing-IAC issue).[26] This practice is at odds not only

[26] The Eleventh Circuit has also mistakenly confused *Strickland*'s cumulative prejudice assessment with the "cumulative-error doctrine" and denied a COA on the ground that the court is under no obligation to "cumulate" non-prejudicial claims, *see, e.g.*, No. 19-13376, *Dinnall v. Sec'y, Fla. Dep't of Corr.*, 2020 U.S. App. LEXIS 28407 (11th Cir. Sept. 8, 2020); or that the "cumulative" prejudice claim was waived (even though it is part and parcel of a *Strickland* claim), *see, e.g., Wood v. Sec'y, Dep't of Corr.*, 793 Fed. Appx. 813, 817–18 (11th Cir. 2019). But, *by definition*, there is no such thing as a "harmless" *Strickland* error; rather, a court's conclusion that a petitioner has shown both deficient performance and prejudice constitutes reversible error. *See, e.g., Elmore v. Ozmint*, 661 F.3d 783, 851 n.40 (4th Cir. 2011) ("[I]t is unnecessary to conduct a *Brecht [v. Abrahamson*, 507 U.S. 619, 637 (1993)] harmlessness analysis on a *Strickland* or *Brady* claim that already has withstood the more onerous test for prejudice (*Strickland*) or materiality (*Brady*)."); *see also Kyles*, 514 U.S. at 436 ("[O]nce a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review."); Reply Br., *Esposito v. Warden*, No. 15-11384 at 35–38 (11th Cir. Jan. 18, 2017). Although random panels in the Eleventh Circuit occasionally suggest that a cumulative assessment is part of the *Strickland* analysis, the circuit's approach actually lacks consistency and this Court's guidance is needed. *Compare Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1269 (11th Cir. 2012) (noting that "the prejudice inquiry should be a cumulative one as to the effect of all of the failures of counsel that meet the performance deficiency requirement") *with Hunt v. Comm'r, Ala. Dep't of Corr.*, 666 F.3d 708, 731 (11th Cir. 2012) ("Even if we were to determine that clearly established federal law mandates a cumulative-effect analysis of ineffective-assistance claims, Hunt would not be entitled to relief: he has not shown that in this case the cumulative effect of counsel's alleged errors amounted to ineffective assistance.").

with the emphasis that *Strickland* and progeny have placed on the cumulative assessment of prejudice from all of counsel's *errors*, but also the statute governing COA grants, which instructs federal courts to issue a COA "if the applicant has made a substantial showing of the denial of *a constitutional right*," 28 U.S.C. § 2253(c)(2) (emphasis added)—here the right to effective representation at sentencing guaranteed under the Sixth and Fourteenth Amendments.

In recognition that a *Strickland* claim requires a holistic and cumulative consideration of counsel's errors, at least two circuits have expressly rejected the approach the Eleventh Circuit routinely takes. In *Browning v. Baker*, 875 F.3d 444 (9th Cir. 2017), the Ninth Circuit explained that "the court considers counsel's conduct *as a whole* to determine whether it was constitutionally adequate" and that the district court "distorted this inquiry by separating Brown's IAC argument into individual 'claims' of IAC corresponding to particular instances of [counsel's] conduct." *Id.* at 471 (emphasis original). This approach, the court found, was "misguided," because "the COA should have been crafted at a higher level of generality." *Id.* The court, accordingly, expanded the COA "to include whether [Browning] 'was denied effective assistance of counsel by his trial lawyer's wholesale failure to investigate and prepare for trial,'" a claim, the court observed, that "more appropriately frames the constitutional right Browning's petition contends was violated[.]" *Id.* The Seventh Circuit as well has observed that "we assess counsel's performance as a whole for purposes of granting certificates of appealability under 28 U.S.C. § 2253(c)(2), and thus a certificate identifying ineffective assistance of counsel brings up all of counsel's actions[.]" *Stevens v. McBride*, 489 F.3d 883, 894 (2007) (citing *Peoples v. United States*, 4032 F.3d 844, 848 (7th Cir. 2005)). Any other approach unfairly skews analysis of the Sixth Amendment claim in favor of the State by excising in advance of appellate review evidence that has bearing on the prejudice inquiry. *See, e.g.*, *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) ("For purposes of our

prejudice analysis, we accept [counsel's deficiency] and proceed to consider whether there is a reasonable probability that a jury presented with this additional mitigation evidence would have returned a different verdict.")

The practice of chopping single IAC claims into little pieces and then selecting only some of those parts for further review precludes full consideration of a petitioner's Sixth Amendment claim, before it is even properly before the court. Because this practice is inconsistent with both *Strickland* and progeny, and 28 U.S.C. § 2253(c)(2), Mr. Esposito respectfully submits that certiorari should be granted.

B. The Eleventh Circuit's Piecemeal Prejudice Assessment Violated *Strickland* and Progeny by Failing to Consider the Cumulative Impact of Counsel's Errors on Mr. Esposito's Death Sentence.

Having truncated the review of Mr. Esposito's sentencing-IAC claim by denying leave to appeal many of its components, the Eleventh Circuit then failed to conduct the cumulative prejudice analysis on the remaining subclaims that *Strickland* and *Williams*, among others, make clear should have been undertaken. This, even though Mr. Esposito had challenged the state habeas court's failure to assess prejudice in the aggregate as an unreasonable application of *Strickland*. *See* Supplemental Br. at 23–24, *Esposito v. Warden*, No. 15-11384 (11th Cir. Jun. 11, 2018).

Pursuant to the district court's and Eleventh Circuit's COA grants, three sentencing-IAC subclaims were before the Eleventh Circuit: counsel's inadequate investigation and presentation of evidence to show codefendant Woodward's greater culpability; counsel's inadequate investigation and presentation of mitigating evidence; and counsel's failure to present an appropriate penalty-phase closing argument. The court's prejudice analysis as to each of these claims was gravely flawed.

Regarding counsel's ineffectiveness with respect to evidence of Ms. Woodward's actual role, the Eleventh Circuit concluded that no prejudice could be shown given the "strong" and "overwhelming" evidence of Mr. Esposito's guilt,[27] citing in support cases that addressed ineffective representation with respect to guilt but not sentencing. *See Esposito*, 818 Fed. Appx. at 972–973 (citing *Fortenberry v. Haley*, 297 F.3d 1213, 1228 (11th Cir. 2002) and *United States v. Andrews*, 953 F.2d 1312, 1327 (11th Cir. 1992) (App. 8-9). As *Strickland* and other cases make clear, the prejudice inquiry at guilt and capital sentencing are distinct. *See, e.g., Strickland*, 466 U.S. at 596. The court made no effort to determine how counsel's deficient performance with respect to the relative culpability defense impacted Mr. Esposito's sentence, although Mr. Esposito's prejudice argument was directed solely at its sentencing impact. *See, e.g.*, Br. of Appellant at 42–45, *Esposito v. Warden*, No. 15-11384 (11th Cir. Nov 15, 2016).

With respect to the mitigation IAC subclaim, the Eleventh Circuit did not address prejudice at all, nor did it acknowledge that the state habeas court had entertained the possibility that trial counsel in fact had performed deficiently in failing to present the testimony of Mr. Esposito's former girlfriend Courtney Veach or the mitigating evaluation of the State's mental health expert, Dr. Lower. *See Esposito*, 818 Fed. Appx. at 973–974 (App. 9-10). Instead, as detailed in Section I

[27] The defense that Ms. Woodward was more culpable was aimed solely at sentencing, although the meager evidence the defense presented was introduced in the guilt-innocence phase of trial. As this Court has found, errors made at the guilt phase may be prejudicial or material only at sentencing. *See, e.g., Cone v. Bell*, 556 U.S. 449, 473–75 (2009) (recognizing that evidence that does not impact the guilt determination may nonetheless impact sentencing and noting the "critical difference between the high standard Cone was required to establish insanity . . . and the far lesser standard that a defendant must satisfy to qualify evidence as mitigating in a penalty hearing in a capital case"). The Eleventh Circuit, moreover, surely overstated the "overwhelming" nature of the evidence regarding relative culpability. The sole evidence of Mr. Esposito and Ms. Woodward's acts at the time of the murders was Mr. Esposito's confession to FBI agents. If jurors had been presented with evidence showing the confession was inconsistent with the facts, then the State's case could hardly be deemed so "overwhelming" as to preclude relief at sentencing.

supra, the court ignored the unreasonably wrong legal and factual findings supporting the state habeas court's no-deficiency determination as to the mitigation subclaim, and validated that determination with reasons of its own creation.[28]

Finally, with respect to the closing-argument subclaim, the Eleventh Circuit concluded that Mr. Esposito's argument that its inadequacy[29] was "the culmination of counsel's many failures up to that point and independently harmful" failed "for the same reason as his other claim of ineffective assistance in the penalty phase—that is, counsel's performance in investigating and presenting evidence in mitigation was not deficient under *Strickland*." *Id.* at 974 (App. 10).

The Eleventh Circuit thus failed entirely to consider the totality of evidence in determining whether counsel's numerous errors prejudiced Mr. Esposito at sentencing. Had the court properly considered the cumulative impact of counsel's errors, the court would have found that, despite the aggravation, there was a reasonable possibility that at least one juror would have voted for a sentence less than death. *See Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

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[28] The Eleventh Circuit's toggling between the deficient performance and prejudice prongs with respect to its review of the few IAC subclaims before it was another means by which it evaded conducting an appropriate prejudice review under *Strickland*. Indeed, decisions from this Court suggest that it is appropriate to assume deficient performance to determine how the totality of evidence presented at trial and in postconviction proceeding would likely have impacted sentence. *See, e.g.*, *Smith v. Spisak*, 558 U.S. 139, 151 (2010) ("We assume for present purposes that Spisak is correct that the closing argument was inadequate."); *Belmontes*, 558 U.S. at 20 (assuming deficient performance for purposes of prejudice analysis). In this case, however, the Eleventh Circuit did not consider any of the evidence of significant abuse Mr. Esposito suffered throughout his childhood and youth.

[29] The four-transcript-page closing argument made no effort to counter the prosecutor's passionate argument in favor of a death sentence; made minimal reference to the mitigation evidence presented at trial; suggested there was "two different John Espositos," and asked "the real John Esposito [to] please stand up?"; and in general did nothing to advance counsel's chosen defenses of lesser culpability, mental health problems, abusive upbringing, and redeeming qualities. *See* D.14-24:174–78.

CONCLUSION

For the foregoing reasons, Mr. Esposito respectfully asks the Court to grant certiorari. In the alternative, he asks the Court to hold this case pending its consideration of other pending petitions for certiorari raising comparable claims.

Respectfully submitted,

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No. 20-

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ESPOSITO,
Petitioner,

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic and Classification Prison,
Respondent

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5(a), I certify that a copy of the Petition for a Writ of Certiorari was sent via 1st Class Mail to the U.S. Supreme Court and a digital copy was sent to counsel for the Respondent by electronic mail on February 12, 2021. The parties have consented to electronic service. Respondent's counsel's name, address and telephone number are set forth below:

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