No. 20-7185

In the
Supreme Court of the United States

John Anthony Esposito,
Petitioner,

v.

Benjamin Ford, Warden,
Respondent.

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

BRIEF IN OPPOSITION

Christopher M. Carr
Attorney General
Andrew Pinson
Solicitor General
Beth A. Burton
Deputy Attorney General
Sabrina D. Graham
Senior Assistant Attorney General
Office of the Georgia
Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3239
sgraham@law.ga.gov
Counsel for Respondent

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 the petitioner's *Strickland* claim.

2. Whether the court of appeals correctly denied a certificate of appealability on the many remaining sub-claims of sentencing phase ineffective assistance under *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000).

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

OPINIONS BELOW

The decision of the Georgia Supreme Court in the criminal direct appeal is published at 273 Ga. 183, 538 S.E.2d 55 (2000) and is included in Petitioner's Appendix at 150-56.

The decision of the Butts County Superior Court denying state habeas relief is unpublished and is included in Petitioner's Appendix at 103-49.

The decision of the Georgia Supreme Court affirming denial of state habeas relief is unpublished and is included in Petitioner's Appendix 102.

The decision of the district court denying federal habeas relief is unpublished and is included in Petitioner's Appendix at 13-101.

The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of relief is unpublished but reported at 818 F. App'x 962 (11th Cir. 2020) and is included in Petitioner's Appendix at 1-10.

The order of the Eleventh Circuit Court of Appeals denying rehearing and rehearing en banc is unpublished and is included in Petitioner's Appendix at 11.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment in this case on June 23, 2020. Pet. App. at 1-10. A petition for writ of certiorari was timely filed in this Court on February 12, 2021. On February 19, 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 29, 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 John Anthony Esposito 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 [state court] decision to the last related state-court decision that does provide a relevant rationale." Esposito 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 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: an approach that is entirely consistent with this Court's decisions. *See* Pet. App. at 7-10.

Esposito also contends that the court of appeals should have granted his motion to expand the certificate of appealability (COA) to include all of his claims of sentencing-phase ineffective assistance of counsel. But Esposito's argument ignores the standard for granting a COA set out in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595 (2000). And under *Slack*, Esposito has not shown that his issue presents anything other than a request for factbound error correction. Certiorari review should be denied.

STATEMENT

A. Facts of the Crimes[1]

Esposito and his girlfriend Alicia Woodward left their residences in New Jersey and traveled to Lumberton, North Carolina in September of 1996.

[1] The Georgia Supreme Court (Pet. App. at 152), the Middle District of Georgia Court (*id.* at 13-19), and the Eleventh Circuit Court of Appeals (*id.* at 4-5) each summarized the facts of the crimes.

Pet. App. at 13. While in Lumberton, on September 19, 1996, Esposito and Woodward decided to rob and murder an elderly woman because they felt a younger woman would be a more difficult target. *Id.* at 13-14. Lola Davis, "a 90 year-old retired high school librarian," was chosen in a grocery store parking lot.[2] *Id.* at 14. Woodward approached Davis with a plea for help to escape her boyfriend. *Id.* Davis agreed to help and "Woodward directed Davis to a nearby location where Esposito entered Davis' automobile." *Id.* at 152. "Esposito removed one thousand dollars and Davis' checkbook from her purse, and Woodward drove Davis' automobile to a local bank where she cashed a check for three hundred dollars that she and Esposito had forced Davis to write." *Id.* Not satisfied with merely robbing Davis, they drove her to Georgia, "where Esposito led Davis into a hayfield, forced her to kneel, and beat her to death with tree limbs and other debris." *Id.* at 4. Esposito confessed that he killed Davis and stated, "'I don't have any remorse [about the murder]. I don't have a conscience.'" *Id.* at 4, 152.

Davis' body was found by a "cattle rancher overseer" the following day. *Id.* at 16. At the murder site, her "head was 'wedged and driven down into the tree root' and there was a large tree limb left on her body." *Id.* at 16 (citing D14-9:16, 56-57). The autopsy revealed that Davis suffered many injuries and died "from blunt force trauma to her head." *Id.* (citing D14-12:73). The doctor who performed the autopsy "testified that he could not be sure what type of object caused the trauma, but Davis's injuries were consistent with being hit by an item with bark on it, so it was possible that a

---

[2] Davis only left her home one day a week for a few hours because she was the sole caregiver for her 87 year-old husband "who suffered from Parkinson's disease and required constant assistance." *Id.* at 14.

tree limb was the murder weapon." *Id.* at 5. The tree limb that was "found at the murder site" had "63 hairs that matched Davis's hair" but was not "tested for DNA evidence." *Id.* The crime scene technician testified "that Davis's car contained fingerprints, palm prints, and footprints matching those belonging to Esposito and Woodward" and "a cigarette butt found in the car contained DNA … consistent with Esposito's DNA." *Id.* at 4. The pair were eventually arrested in Colorado's Mesa Verde National Park on October 2, 1996. *Id.* at 18

During the penalty phase of Esposito's trial, the evidence showed that before being arrested in Colorado, Esposito and Woodward traveled to Oklahoma, where they "abducted an elderly couple [the Sniders], illegally obtained money using the couple's bank card, and then drove the couple to Texas where Esposito beat them to death with a tire iron." *Id.* at 152. "The jury heard that Esposito [] confessed to murdering the couple and beating the wife until her brain matter appeared on the side of her face and her eye popped out of her head." *Id.* at 5. Finally, "an FBI agent also testified during the sentencing phase that Esposito had described his and Woodward's plan to abduct and murder yet another elderly woman for money." *Id.* at 152.

B. Proceedings Below

1. Trial Proceedings

a. Appointment of Experienced Counsel

Esposito was indicted in Morgan County, Georgia on December 2, 1996, for malice murder, felony murder, armed robbery, and hijacking a motor vehicle. D13-1:21-24. Prior to indictment, on October 10, 1996, Roy Robinson Kelly, III and W. Dan Roberts were appointed to represent Esposito. D13-

1:15; D13-7:5-6; D17-10:31-32. Both Kelly and Roberts had extensive experience in criminal defense and capital cases. D17-10:30-32; D17-11:5-7. At the time of representation, Kelly had been practicing criminal law for over twenty years and Roberts had been practicing for approximately thirty years. D17-10:30; D17-11:5. Prior to representing Esposito, Kelly was appointed to five death penalty cases, two of which went to trial. D17-10:30-31. Roberts had handled three death penalty cases and had tried numerous non-capital murder cases. D17-11:6-7, 39. Additionally, Kelly and Roberts had worked together as co-counsel on a death penalty trial two years prior to Esposito's case. D17-10:31-32; D17-11:6-7.

b. Esposito's Confessions and Motion to Suppress

Following his arrest on October 2, 1996, Esposito confessed to the murder of Davis on two separate occasions. His first confession was to Ronald E. Knight, a supervisory special agent with the Federal Bureau of Investigation (FBI). D14-15:42, 44-45, 49-55, 57-58, 62. Agent Knight testified that at the outset of the interview, Esposito stated: "This was all me. Alicia didn't do anything." D14-15:49. Esposito confessed that he and Woodward decided "from the start" that they were going to rob and murder an elderly person. *Id.* at 50. Esposito admitted that an elderly victim was chosen because "old people can't defend themselves. They don't have the motor skills to fight or run." D14-15:58. After arriving in Georgia, Esposito admitted he made Davis kneel to the ground and then he hit her several times with a tree limb and "killed her." *Id.* at 53-55. Esposito confessed: "I don't have any remorse. I don't have any conscience." *Id.* at 56.

During his first confession, Esposito also confessed to killing Larry and Marguerite Snider—Larry was ninety at the time and Marguerite was eighty-six. Pet. App. at 17-18 (citing D14-18:8-9). After robbing the Sniders, Esposito confessed that he used a tire iron to beat the elderly couple to death. Esposito confessed that killing Larry "wasn't too bad. I did not get any brains on my face or anything." D14-17:56. Esposito also confessed that he hit Marguerite "four times" with the tire iron "until he saw her 'skull, pop up.'" Pet. App. at. 18 (citing D14-17:57) (quotation marks omitted). After Esposito beat her to death, he explained that he dragged Marguerite and placed her "next to her husband" and "recalled seeing brain matter on the side of [Marguerite's] face" and her "eyes were open and one eye was looking at him and one eye was 'coming out of her head.'" D14-17:58. He also "confessed that 'he would never forget that sight… she was breathing real hard…not blinking' and '[y]ou could have thrown dirt in her eyes and she wouldn't have blinked.'" Pet. App. at 18 (quoting D14-17: 58) (quotation marks omitted).

"A few days later, Esposito gave a more detailed confession in a videotaped interview" with Agent Joe Wooten from the Georgia Bureau of Investigation (GBI). Pet. App. at 4; D13-14:44-51; D13-21:69-72. "He again admitted to murdering Davis. He confessed that he hit Davis with a tree limb and kicked her with his shoe." Pet. App. at 4.

Trial counsel filed a motion to "suppress both of his confessions." Pet. App. at 4. The first confession was deemed admissible by the trial court but the second confession was suppressed because "it violated Esposito's *Miranda* rights." *Id.* However the trial court ruled "that the illegally obtained confession could be introduced only if Esposito testified," but "the court

clarified that the state could use it for impeachment or rebuttal purposes." *Id.*

c. Culpability Investigation

Hector Guevara, an experience mitigation investigator, was referred to Esposito's defense team by the Georgia Indigent Defense Council, (GIDC). D17-10:47; D17-11:41-44; D19-27:23-32. Guevara sought out Woodward's friends and former employers, and obtained correspondence between Woodward and former cell mates. D19-22:14; D20-1:23; D20-2:18, 25. The defense team also consulted a DNA expert who assisted with cross-examination of the State's expert at trial. D17-10:73-74.

d. Background Investigation

Guevara met with Esposito numerous times and extensively interviewed him about his background. D20-2:45-80; D20-3:1-42. Additionally, Guevara made three trips to New Jersey and a trip to North Carolina to visit where Esposito had grown-up. D17-10:69; D19-22:5-15. Over the course of these trips, Guevara interviewed over 75 individuals, including Esposito's family, friends, teachers, school administrators, coaches, doctors, nurses, mental health professionals, social workers, local police officers, and recruiters for the National Guard and the U.S. Army Reserve.[3] D19-22:5-15; D20-1:25-28; D20-2:2-11, 21-31. These interviews were comprehensive, with many lasting multiple hours, and Guevara met repeatedly with several important

[3] Esposito provided his defense team with names of possible contacts and persons from his background. D19-27:4. Guevara interviewed all of these suggested individuals, as well as interviewing many dozens more. D19-22:5-15; D20-1:25-28; D20-2:2-11, 21-31. Guevara would take the names provided by Esposito and expand the list to find more individuals and further research Esposito's background. D17-10:49.

witnesses, to include Esposito's immediate family members and Esposito's ex-girlfriend.[4] D19-22:5-15; D20-3:46-78; D20-4:1-79; D20-5:1-5.

The defense team also requested and reviewed extensive background records, which included: medical and mental health records from several hospitals and treatment centers; records from several New Jersey police departments; the FBI and GBI reports of Esposito's crimes; Georgia police reports; Colorado police reports; crime scene reports; Esposito's Georgia jail records; records from the Division of Youth and Family Services; Esposito's school records, to include psychological evaluations, from the five schools that he attended; Esposito's enlistment and discharge records from the U.S. Army Reserve; his vital records from New Jersey; and various personal documents such as correspondence, drawings, and poems. D20-1:22-24; D:20-2:40-42.

Guevara met regularly with trial counsel and provided them with written reports and "copious notes" about his investigation. D17-10:52; D20-3:44-78; D20-4:1-79; D20-5:1-5. Trial counsel received a fourteen-page social history of Esposito's life, including but not limited to information on his parents' background; the domestic violence between his parents; his childhood abuse; his love/hate relationship with his mother; his story-telling habit; his allegation of sexual assault as a child; the moves between New Jersey and North Carolina; the emotional impact of his father's crimes;[5] his problems in school; his exposure to violence; his mother's compulsive and inappropriate behavior; his enlistment in the Army Reserve; his relationship

---

[4] Esposito admits that Guevara conducted an "impressive" investigation but still complains that everything the defense team did to prepare for sentencing was too little, too late. (Pet. 3 n.3)

[5] Esposito's father was convicted of murder. D14-21:87-88.

with Courtney Greco, and; his treatment in various mental health facilities. D19-27:33-46.

Guevara also provided the defense team with a ten page "Analysis of Mitigation Factors" in Esposito's case, as well as several other documents concerning mitigation theories. D19-27:23-32; D20-1:17-20, 63-67. Additionally, Guevara provided a timeline of Esposito's life history and mental health treatment. D20-1:2-16. The trial attorneys reviewed all of the information Guevara provided and the background records, and also interviewed Esposito and his family. D17-10:53; D19-21:50-69.

e. Mental Health Investigation

After obtaining Esposito's mental health records, and interviewing numerous mental health professionals who had treated Esposito over the years, the defense team retained an independent neuropsychologist—Dr. Daniel Grant. D17-10:57; D17-13:27-30; D14-24:21; D17-10:35, 57; D 20-1:22; D20-18:2-17. Grant was asked to "determine if there [were] any emotional development personality variables that may have bearing on [Esposito's] behavior" and "to see what mitigation factors could be determined." D17-10:57; D20-3:44-45, 72-78; D20-4:1-29. Grant administered a large number of tests to assess any psychological, emotional, behavioral, or neuropsychological dysfunctions. D14-24:20-21. Trial counsel provided Grant with everything he requested—to include Esposito's mental health records, hospital records, and school records. D17-10:73. Grant reviewed all of these records and also spoke with one of Esposito's prior therapists. D14-24:29.

f. Culpability Presentation

(a) Woodward

During the guilt phase of trial, trial counsel emphasized through the cross-examination of the prosecution's witnesses Woodward's dominance over Esposito by showing that Woodward rented the hotel room (D14-7:11-12); Woodward had been trying to obtain the Western Union money transfers (D14-7:86); Esposito weighed less than Woodward (D14-10:1); Woodward had purchased the bus tickets (D14-17:19-20); and Woodward did all the talking when they were in Oklahoma and with the park ranger that ultimately arrested the pair (D14-17:36; D14-18:64, 80). During sentencing, witnesses also testified that Esposito was a follower who could not make his own decisions, was incapable of functioning independently, and it was possible Esposito confessed to protect Woodward. D14-21:80; D14-23:34, 36, 38, 40; D14-24:6-7, 24-26, 36. To diminish the confession, trial counsel pointed out circumstances of the confession: that it was late, just before midnight; the FBI agent did not know when Esposito had last eaten a meal; and the confession was not videotaped for accuracy. D14-16:33.

(b) Forensic Evidence

The State presented evidence showing that the victim was bludgeoned with a tree branch. Dr. Randy Hanzlick, an expert in forensic pathology, testified that the injuries the victim sustained were consistent with being caused by something that had bark on it. D14-12:90; D14-13:1. Additionally, Teri Santamaria, an expert microanalyst, testified that the 63 hairs found on the tree branch were microscopically similar to the known hairs of the victim. D14-14:21-24.

In rebuttal, trial counsel showed the jury that there was no physical evidence tying Esposito to the crime scene. D14-16:24, 31. Through cross-examination, trial counsel established that the person who bludgeoned the victim with the tree limb may have left skin on the limb, but the State did not have DNA testing completed on the tree limb. D14-13:3; D14-14:13-14, 29. As Esposito admitted, trial counsel reminded the jury of this during closing argument. D14-16:25-26. Additionally, trial counsel argued that there were defensive wounds on the victim which did not match Esposito's confession that he had the victim kneel on the ground before he struck her. *Id.* at 35.

g. Mitigation Presentation

Trial counsel's mitigation presentation focused on Esposito's difficult background, his mental health issues, and his redeemable qualities. In support of this three-fold strategy, counsel presented evidence of Esposito's difficult life history—including the physical, verbal, and sexual abuse he suffered as a child—his dysfunctional family, abandonment by his mother, his ensuing mental health issues from his difficult childhood, and testimony from individuals regarding his non-violent nature and Christian conversion.[6]

(1) Background

Althea Holt, Esposito's aunt, testified that he was abused by his father and his step-father, that he was beaten often, that she saw signs of abuse, and that he was verbally mistreated. D14-23:4-6. Holt testified that there was "something wrong" with Esposito's mother and that his mother bathed him until he was a teenager. *Id.* at 6-7. Additionally, Holt testified that

[6] Esposito argues that the jury had "almost nothing" to consider in mitigation, but the trial transcript refutes this baseless claim. Pet. 3.

Esposito's mother would not allow him to have friends or "let him do anything." *Id.* at 5, 7.

John Crain, Esposito's high school coach and teacher, told the jury that Esposito's family was dysfunctional, that Esposito's mother did not care about him, that he had no mother figure, and that his mother kicked Esposito out of her home. D14-21:80, 83, 89. Crain also testified about a painful encounter at school between Esposito and the daughter of the man Esposito's father had murdered. D14-21:79; D14-22:15.

Annette Nolan, a psychiatric nurse who treated Esposito, testified that his mother had subjected him to considerable physical and sexual abuse and had abandoned him. D14-23:19. Sister DiCamillo, Esposito's teacher at Ancora Psychiatric Hospital, also informed the jury that Esposito's mother wanted nothing to do with him. Id. at 47-48. Angela Caraccillo, a therapist with a master's degree in clinical psychology who had treated Esposito at Transitional Residence Independent Services, also testified about his abusive childhood and that Esposito's mother did not deny the sexual abuse allegations; wanted nothing to do with him; had failed to teach him the skills needed to live in adult society; and provided no structure growing up. *Id.* at 59, 63, 76, 82. Finally, Dr. Daniel Grant, the defense's mental health expert, testified that Esposito had a long history of childhood sexual and physical abuse. D14-24:26, 36.

(2) Mental Health

To rebut the State's theory that Esposito was merely a "madman," trial counsel presented evidence that Esposito was a young boy with mental health issues. D17-10:59. Nolan testified that Esposito had been depressed,

suicidal, and had had feelings of worthlessness, helplessness, and hopelessness. D14-23:17. Sister DiCamillo explained to the jury that it required two psychologists and a judge to admit a patient into Ancora hospital. *Id.* at 47. She also testified that Esposito was a follower and that he did not initiate things himself. *Id.* at 48. Crain testified that Esposito had been in three psychiatric hospitals and that a court referral for psychological testing in the seventh grade characterized him as emotionally disturbed. D14-22:21, 25. Crain also testified that Esposito was a follower and an outcast. D14-21:81. Caraccillo told the jury that Esposito was in daily individual therapy sessions, that he would cut and burn himself, that he had dissociative spells and would black out, and that he was like a child emotionally. D14-23:58, 60, 62, 73, 82. She also testified about Esposito's repeated admissions to several of the psychiatric hospitals. *Id.* at 72-80.

Grant, the final witness, testified about Esposito's various psychological problems, including his simplistic, naive and immature attitudes about the world, his pervasive daydreaming and fantasies, and his excessive feelings of emptiness and identity confusion. D14-24:24. Grant explained that Esposito needed for people to provide him with direction and structure, that he was passive, submissive, dependent, and self-conscious, that he lacked initiative, and that he had an excessive need for attachment. *Id.* Additionally, Grant testified about Esposito's suicidal and self-destructive behavior and his inclination towards self-mutilation. *Id.* at 25. Grant also told the jury that Esposito's traumatic past may have caused him to have dissociative episodes, that he had aspects of borderline personality disorder and that, while he was not mentally ill under Georgia law, Esposito had a mental illness. *Id.* at 27-28, 36, 44, 51.

(3) Redeemable Qualities

In addition to the testimony about Esposito's troubled life and mental health issues, the trial attorneys also elicited mitigating testimony about his redeemable qualities. Judy Holloway, the chief jailer at Jasper County, testified that Esposito had been a good inmate for two years and that he had hugged her when he left the jail and thanked her for all that she had done. D14-20:71-73. Holt testified that she had never seen any bad in Esposito and that she loved him very much. D14-23:13. Nolan told the jury about Esposito's acceptance of Jesus as his Lord and Personal Savior, how he read the Bible with her, how he attended church, and how she believed that God had a prison ministry in store for Esposito. *Id.* at 17-22. Sister DiCamillo testified that Esposito was a respectful, model student and that he did well in a structured environment. *Id.* at 48. Caraccillo also informed the jury that Esposito was polite and respectful, that he did well in a structured environment, and that she never saw any aggression or physical problems in him. *Id.* at 61, 63-64.

h. Jury Verdicts and Sentences

On September 30, 1998, the jury found Esposito guilty on all counts of the indictment—malice murder, felony murder,[7] armed robbery, and hijacking a motor vehicle. Pet. App. at 152. Esposito was sentenced to death on October 2, 1998, for the malice murder charge, and the jury found beyond a reasonable doubt the following statutory aggravating circumstances: "that the murder was committed during the commission of an armed robbery and a kidnapping with bodily injury and that the murder was outrageously or

[7] The felony murder conviction was vacated by operation of law. Pet. App. at 152.

wantonly vile, horrible, or inhuman in that it involved depravity of mind." *Id.* Additionally, Esposito was sentenced to "life imprisonment for the armed robbery, and twenty years imprisonment for the motor vehicle hijacking." *Id.*

2. Motion for New Trial and Direct Appeal

Esposito filed a motion for new trial on October 29, 1998. Pet. App. at 152. After hearing the motion and argument of counsel on June 30, 1999, the trial court denied Esposito's motion for a new trial on September 16, 1999. *Id.*

On direct appeal to the Georgia Supreme Court, Esposito's convictions and sentence were affirmed on October 30, 2000, and his motion for reconsideration was denied on November 30, 2000. *Esposito v. State*, 273 Ga. 183 (2000).

This Court denied Esposito's petition for certiorari review on June 25, 2001. *Esposito v. Georgia*, 533 U.S. 935, 121 S. Ct. 2564 (2001), *rehearing denied*, 533 U.S. 970, 122 S. Ct. 15 (2001)

3. State Habeas Proceeding

Esposito filed a state habeas petition in the Superior Court of Butts County, Georgia on May 3, 2002, and his amended petition on November 6, 2006. D15-25; D17-2. Esposito's amended petition had 78 sub-claims of ineffective-assistance-of-trial-counsel. D17-2:4-10. After a three-day evidentiary hearing, and post-hearing briefing, the state habeas court entered an order denying relief on April 29, 2011. Pet. App. at 103-148.[8]

---

[8] Of note, Esposito states in his brief to this Court that he filed a proposed order but he did not. Pet. 7. The Warden filed a post-hearing brief and proposed order on February 11, 2008. Pet. App. at 107. Esposito filed his post-hearing brief one week later but chose not to file a proposed order. *Id.*

During state habeas, in support of his claim that trial counsel were ineffective during the sentencing phase, Esposito presented more evidence of his difficult childhood and his mental health problems, and a forensic expert who opined that the limb found next to Davis' body—and submitted as evidence at trial—may not have been the murder weapon. The state habeas court held up front that Esposito "failed to prove both the deficiency and prejudice prongs of the test for reviewing claims of ineffective assistance of counsel under the applicable standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)." Pet. App. at 117. The state habeas court specifically addressed some of Esposito's ineffective-assistance-of-trial-counsel claims and summarily denied others. Pet. App. at 117-44, 147. Regarding the three claims decided by the court of appeals, the state habeas court specifically addressed Esposito's ineffectiveness claim concerning culpability and mitigating evidence (Pet. App. at 123-37, 142-44) but summarily denied his claim regarding trial counsel's closing argument (*id.* at 146). More details regarding the state habeas court's reasonable decision will be discussed in the argument section below.

Esposito filed a notice of appeal in the Superior Court of Butts County on May 6, 2011 and an application for a certificate of probable cause to appeal ("CPC") in the Georgia Supreme Court on June 30, 2011. D27-40; D27-41. On March 19, 2012, the Georgia Supreme Court issued a summary denial of Esposito's CPC application. Pet. App. at 102.

Because Esposito filed his post-hearing brief late, the Warden filed a motion to strike his brief as untimely; however, the state habeas court denied the Warden's motion "in the interests of justice." *Id.* at 107-108.

4. Federal Habeas Proceeding

a. District Court

Esposito filed his federal petition for writ of habeas corpus on May 8, 2012. D1. In his petition, he raised his broad claim of ineffective assistance of trial counsel and enumerated 78 sub-claims. *Id.* at 8-22. On December 10, 2014, the federal habeas court denied relief. D67. In its order, the court granted a certificate of appealability ("COA") on two issues: "Whether trial counsel were ineffective in failing to investigate and present evidence to support their defense theories that Esposito was less culpable that (sic) Woodward and that his personal history of abuse and mental illness was mitigating." *Id.* at 88.

b. Court of Appeals

On May 4, 2015, Esposito filed a motion to expand the COA in the court of appeals. Pet. App. at 157. Regarding his trial-counsel-ineffectiveness claim, Esposito requested an expansion to include the following claims: (1) whether the state habeas court's overall determination of his ineffectiveness claims should receive AEDPA deference because the court quoted *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838 (1993); (2) whether the state habeas court reasonably determined trial counsel's sentencing phase closing argument was effective; and (3) whether the state habeas court reasonably determined that trial counsel were not ineffective for choosing not to object to "evidence elicited or introduced by the prosecution," the prosecutor's cross-examination of certain witnesses, and the prosecutor's "closing arguments." *Id.* at 175-205. The court of appeals granted Esposito's motion only with respect to whether the state court reasonably applied clearly established

federal law when it determined trial counsel were not ineffective in their presentation of mitigation evidence during closing argument. *Id.* at 218.

The court of appeals, in an unpublished decision, denied relief on June 23, 2020. *Id.* at 1. Contrary to Esposito's arguments, the court of appeals examined the reasons of the state habeas court in its § 2254(d) analysis. *Id.* at 7-10. The court rejected Esposito's attacks on the state court's decision regarding trial counsel's investigation and presentation addressing his culpability. *Id.* at 8-9. The court found the record supported the state court's decision given that counsel conducted a reasonable investigation of his co-defendant and the physical evidence, and Esposito's new witnesses—who still failed to show Esposito was not the killer—did not undermine counsel's reasonable investigation and presentation. *Id.* Regarding evidence of Esposito's background and mental health, the court of appeals again looked at the record and the state habeas court's deficiency determination and held it was reasonable given the thorough background investigation and reasonable choice of witnesses presented at trial. *Id.* at 9-10. Finally, because the state habeas court had summarily denied Esposito's claim that trial counsel's sentencing phase closing argument was ineffective, the court of appeals determined Esposito failed to prove there was a "no reasonable basis" for the court to reject this claim on the prejudice prong. *Id.* at 10. Because there was only one instance of deficient performance—the closing argument—the court of appeals rejected Esposito's argument that a cumulative *Strickland* prejudice analysis was required either by the state habeas court or the court of appeals. *Id.*

REASONS FOR DENYING THE PETITION

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

The court of appeals dutifully applied *Wilson*'s "look through" presumption in determining whether the state habeas court's decision complied with 28 U.S.C. § 2254(d). Esposito disagrees and argues that, while the court of appeals specifically stated it was applying *Wilson's* "look through" presumption, in reality it ignored the state habeas court's opinion and supplied its own "fictitious" reasons in denying his *Strickland* claims. Pet. 17. Esposito is wrong, and his own arguments prove it. After recapping the history that led to this Court's decision in *Wilson*, Esposito eventually admits that the court of appeals did examine the state habeas court's reasons, but that he merely disagrees with the court of appeals' factbound application of *Strickland*. Pet. 18-19. Thus, his complaints about the court of appeals' decision is nothing more than a request for this Court to grant review to make factbound error correction of the state habeas court's denial of his *Strickland* claims, which does not warrant this Court's review.

A. Esposito's general disagreement with the court of appeals' application of *Wilson* fails to reveal a conflict.

This Court held in *Wilson* that, when conducting § 2254(d) review of a state court decision, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and "presume that the unexplained decision adopted the same reasoning." *Wilson*, 138 S. Ct. at 1192. Although the court of appeals has repeatedly stated—in this case and others—that it is applying *Wilson*'s "look through" presumption, Esposito generally complains that the court is doing

so in name only. But the court of appeals has in fact consistently reviewed the reasons given by the state court in this case—and in all other cases. *See, e.g., 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); *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). In doing so, of course, the court of appeals has *also* reviewed the full record in each case, which can confirm that the state court's decision was not an unreasonable application of the law or determination of the facts. But this manner of review is entirely in line with *Wilson* and the AEDPA. The focus of the § 2254(d) standard is the reasonableness—both in fact and law—of the state court's determination of a claim, which naturally includes a review of the record to ensure that the decision to deny habeas relief was not unreasonable.

Most of Esposito's general complaint about the court of appeals is rooted in a retelling of what led to this Court's decision in *Wilson*. While perhaps helpful in a contextual manner, it is certainly not proof that the court of appeals is ignoring this Court's holdings. Esposito's actual "evidence" supporting that assertion is limited to the court of appeals' choice of authority quoted in its recitation of the overall standard to be applied for *Strickland* claims in § 2254(d) cases. Specifically, Esposito faults the court for quoting portions of *Harrington v. Richter* by claiming that *Richter* should only apply to state court summary denials—not reasoned state court denials. The alleged offending quote is the following:

> When analyzing a claim of ineffective assistance under § 2254(d), this Court's *review is 'doubly' deferential* on counsel's performance. *Harrington v. Richter*, 562 U.S. 86, 105 []. Thus, 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." *Id.*

Pet. App. at 7 (emphasis added). But the "doubly deferential" standard arose before *Richter,* and in a case with a reasoned state court opinion. In *Yarborough v. Gentry*, 540 U.S. 1, 6, 124 S. Ct. 1, 4 (2003), Gentry had challenged trial counsel's performance on direct appeal. *Id.* The California Court of Appeal issued a reasoned opinion, and this Court explained that "judicial review of [trial counsel's performance] is therefore highly deferential--and *doubly deferential* when it is conducted through the lens of federal habeas." *Id.* (emphasis added). This principle has been reiterated in cases where there was no reasoned state court opinion—e.g. *Richter*—and cases where there were reasoned opinions—e.g. *Burt v. Titlow*, 571 U.S. 12, 15, 134 S. Ct. 10, 13 (2013) ("the Sixth Circuit failed to apply that *doubly deferential* standard by *refusing to credit a state court's reasonable factual finding* and by assuming that counsel was ineffective where the record was silent") (emphasis added). Thus, the court of appeals' reliance on the "doubly deferential" language, and ensuing explanation, from *Richter* was not in conflict with *Wilson.*

This brings the argument to Esposito's true request—to limit § 2254(d) review of a state court decision to *only* the reasons provided by the state court. But this argument misconstrues both *Wilson* and *Richter. Wilson* addressed only the narrow question of whether a federal habeas court must "look through" a state court's summary affirmance to review a lower state court's reasoned opinion; it did not hold that the courts of appeals cannot

review the full record in assessing the state court's decision under § 2254(d). This Court has repeatedly cautioned the federal courts of appeals against fashioning a holding from a given case that reaches beyond the Court's answer to the question presented in the case. *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").

In *Harrington v. Richter,* 562 U.S. 86, 102, 131 S. Ct. 770 (2011), this Court held that AEDPA deference was due even to summary dispositions. Specifically: "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 in a prior decision of this Court." *Richter*, 562 U.S. at 102. Contrary to Esposito's suggestion, this Court has not limited this 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).

The court of appeals has not ignored *Wilson*, and Esposito's general disagreement with how *Wilson* should be applied presents no issue worthy of this Court's certiorari review.

B. Esposito's specific disagreement with the court of appeals' decision is nothing more than a request for factbound error correction.

Esposito identifies several specific state court determinations that he argues were unreasonable that the court of appeals ignored. However, Esposito's real complaint is not that the court of appeals failed to analyze the state court's decision on these issues but instead that it merely did not decide them in his favor. That reduces Esposito's arguments to a bare request for factbound error correction by this Court.

1. The court of appeals' review of the state habeas court's legal determinations do not conflict with *Wilson* and are not wrong.

Esposito argues that three overarching legal determinations by the state habeas court were not properly addressed by the court of appeals under *Wilson*. Esposito claims the court of appeals did not "train its attention" on the state habeas court's reasons. Pet. 19. However, Esposito later admits that the court addressed these issues and reveals his true argument—that the court of appeals did not reach what he considered to be the right conclusion. This type of general disagreement—which does not conflict with *Wilson* or the other circuits—is merely a request for error correction from this Court. This is not an appropriate ground for this Court's certiorari review and even if it were, the court of appeals' decision is not wrong.

a. *Wilson* does not hold that if the state habeas court makes one questionable point, the entire decision should be stripped of AEDPA deference.

One of the many reasons the state habeas court denied Esposito's ineffective-assistance claim was that it credited trial counsel's testimony that the possible admission of Esposito's suppressed confession influenced trial counsel's decisions regarding how to address Esposito's culpability. As

Esposito admitted, the court of appeals addressed this issue. Pet. 18. The court acknowledged that evidence of Esposito's alleged innocence should not have opened the door to his suppressed confession—thereby showing that the court of appeals was examining the state court's reasons. However, contrary to Esposito's arguments, the state court's decision is not a three-legged table—i.e. if you knock out one leg, the whole table falls down. Because the state court's decision did not turn entirely on this stated reason (*see* Pet. App. at 142-43), the court of appeals noted other reasons in the record in support of the state court's decision, which included trial counsel's reasonable investigation of culpability and choice of witnesses to present at trial (*id.* at 8-9). As this Court recently 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.'" *Shinn v. Kayer*, ___ U.S. ___, 141 S. Ct. 517, 524 (2020) (emphasis in original) (quoting *Wetzel v. Lambert*, 565 U. S. 520, 525, 132 S. Ct. 1195 (2012) (per curiam)). Again, the court of appeals did not ignore the state court's decision; it merely assessed its reasonableness in light of the record as a whole.

b. The state habeas court did not apply the wrong prejudice standard.

Next, Esposito argues that the state habeas court used the wrong prejudice standard reviewing his *Strickland* claims when the court quoted from *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838 (1993) in its final order. But again, Esposito admits that the court of appeals addressed this issue, and so his disagreement is really with the court's factbound resolution of it. Pet. 18. The court of appeals "noted at the outset" that Esposito argued that the "state habeas court applied the wrong prejudice standard" from

Lockhart that the 'result of the proceeding was fundamentally unfair or unreliable.'" Pet. App. at 7. The court of appeals then specifically determined that, while the state court's decision "arguably [] suggested" the *Lockhart* standard in the beginning, "[t]hroughout its order, the court explained that Esposito was required to show a 'reasonable probability' that, absent his counsel's deficiencies, the 'outcome of [his] trial' would have been different." *Id.* (citing *id.* at 132-44). Esposito's disagreement with the court of appeals' conclusion—based on the plain language of the state court's order (*see id.* at 132-44)—that the state habeas court applied the proper prejudice standard, is no more than a request for factbound error correction.

c. The state habeas court's prejudice determination is irrelevant.

Finally, Esposito argues that the state habeas court failed to consider the evidence cumulatively in assessing the prejudice prong of his sentencing-phase *Strickland* claim.[9] Pet. 16. The state habeas court held that trial counsel were not deficient in their performance during the sentencing phase

[9] First, simply because a state habeas court does not mention a specific analysis in denying a *Strickland* claim does not mean it was overlooked. State courts do not have to know or mention this Court's precedent and are presumed to know and follow the law. Here, the state habeas court held up front that: "This Court finds that Petitioner failed to prove both the deficiency and prejudice prongs of the test for reviewing claims of ineffective assistance of counsel under the applicable standards set forth in *Strickland v. Washington*. 466 U.S. 668 (1984)." Pet. App. at 117. Additionally, the Court held after setting forth the applicable standard of review that trial counsel was not deficient and "[t]his Court also finds that Petitioner failed to establish that, but for alleged errors or omissions by counsel, there is a reasonable probability that the result of the proceeding would have been different." *Id.* at 121 (citing *Strickland*, 466 U.S. at 694). While the state habeas court did not conclude its discussion of Esposito's sentencing phase *Strickland* claim with a prejudice analysis, that does not mean the court's overall denial of prejudice in the beginning does not suffice.

of trial. Pet. App. at 121. Therefore, the state habeas court was not required to conduct any prejudice analysis under *Strickland*. *See Strickland*, 466 U.S. at 697 ("there is no reason for a court deciding an ineffective assistance claim …to address both components of the inquiry if the defendant makes an insufficient showing on one"). The court of appeals held that the state court's deficiency determination was not unreasonable under *Strickland* and, other than trial counsel's closing argument (which the court assumed was deficient performance), there were no deficient-performance errors to accumulate under the prejudice prong. *Id.* at 10 ("This cumulative prejudice argument fails 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*."). So, again, Esposito has not shown that court of appeals "failed to train" its attention on the state court's order, but only that he disagrees with the court of appeals' factbound decision.

2. The court of appeals' review of the factual findings of the state habeas court also do not conflict with *Wilson*.

Esposito's next set of arguments concern the state habeas court's treatment of the new culpability and mitigating evidence that he presented during his state habeas proceeding. Pet. 16. The court of appeals specifically addressed the state habeas court's findings and conclusions regarding his culpability and mitigating claims and found they were not unreasonable. *See* Pet. App. at 7-9. Again, Esposito has not shown that the court of appeals disregarded this Court's holding in *Wilson*, but that the court of appeals just disagreed with Esposito's arguments attacking the reasonableness of the state court's decision.

Regarding Esposito's culpability, the court of appeals examined the state court's reasons for determining trial counsel were not ineffective. Pet. App. at 9. For example, Esposito presented affidavits attacking Woodward's character to support his claim that she was the killer.[10] The state habeas court did not agree that his evidence proved counsel were ineffective, explaining that, "based on the evidence presented at the habeas hearing, trial counsel reasonably investigated and presented a defense theory of relative culpability and reasonable doubt." Pet. App. at 142. The state habeas court found that "the defense team investigated [] Woodward's background and her role in the crime spree." *Id.* at 143. And trial counsel presented its "theory of relative culpability at trial by cross-examining the State's witnesses about [] Woodward's role in the crimes and [] emphasizing her apparent leadership role" and by arguing the absence of Esposito's DNA at the murder site." *Id.* at 143. The court of appeals held that the state court "reasonably applied *Strickland* in concluding that Esposito failed to show that trial counsel conducted a deficient investigation into Woodward's background." Pet. App. at 9. In support of the state court's decision, the court of appeals pointed out that defense investigator Guevara investigated "Woodward's past by speaking with her friends, family, and employers" and "interviewed Esposito's friends and family about her." *Id.* at 9. The court of appeals held that the "fact that Guevara could have discovered other witnesses who knew Woodward is not enough to establish that counsel's investigation was deficient." *Id.* This makes clear that the court of appeals was examining the state court's

[10] Notably, Esposito failed to show that these affiants had any first-hand knowledge about the relationship of Esposito and Woodward during their cross-country crime spree.

determination that "trial counsel reasonably investigated and presented a defense theory of relative culpability and reasonable doubt." Pet. App. at 142. The fact that the court of appeals did not recount every factual finding and legal conclusion in its opinion does not mean the court was not applying *Wilson*'s "look through" presumption.

Similarly, the court of appeals examined the state court's determination that trial counsel were not deficient in their investigation and presentation of mitigation evidence. The state habeas court set out in detail the defense team's investigation of Esposito's background and mental health investigation and presentation. Pet. App. at 125-136. The state habeas court held that—even considering Esposito's new mitigating evidence—he failed to prove counsel's investigation and presentation was deficient. *Id.* at 127-28, 133-34. Regarding the background investigation, the state court held that: "the defense team thoroughly researched [Esposito's] background (*id.* at 125); the "hindsight allegation by current counsel that 'more' could have been done [was] insufficient" (*id.* at 127); and "that trial counsel were not deficient for not uncovering every potential witness" (*id.* at 128). In like manner, the state habeas court also held that trial counsel's mental health investigation was reasonable, which included Esposito's "medical and mental health records from the various facilities that had treated him," interviews with numerous mental health professionals at these hospitals," and also "retained an independent forensic psychologist and neuropsychologist, Dr. Daniel Grant," to evaluate Esposito for trial. *Id.* at 132-33. The state court held "that the trial attorneys were reasonable in their preparation of [] Grant" and refused to credit "Grant's [state habeas] testimony that he was not provided with sufficient records." *Id.* at 134.

The state court went through the same type of analysis for the presentation portion of trial counsel's performance. *Id.* at 128-32, 134-37. The court held that counsel reasonably chose which mitigation strategy and witnesses to present. *Id.* at 130-31, 135-36. The court found counsel presented evidence of: Esposito's "redeemable qualities"; the "physical, verbal, and sexual abuse that [he] suffered as a child, his neglectful mother, and his dysfunctional family"; and his "recurring thoughts and nightmares stemming from this abuse," his feelings of "detach[ment] and estrange[ment] from people," his "fear[] [of] rejection and criticism," and his "dissociative episodes." *Id.* at 130-31.

In reviewing the state court's decision, the court of appeals took specific note of the state court's holdings: "In rejecting this claim, the state habeas court concluded that Esposito's trial counsel's investigation and presentation was adequate, and their failure to uncover every potential witness did not render their representation deficient." *Id.* at 9. The court of appeals briefly recounted trial counsel's investigation and presentation—making note of much the same evidence relied upon by the state habeas court. *Id.* at 9-10, 124-37. Based upon the state court's decision, and the record in support, the court of appeals concluded that "[c]ounsel's decisions to call certain witnesses but not others were made after a thorough investigation into Esposito's childhood abuse and mental illness" and Esposito "failed to show that the state habeas court's rejection of this claim was an unreasonable application of *Strickland*.[11] *Id.* at 10. Nothing in the court of appeal's opinion suggests that it ignored the state court's decision.

[11] Esposito complains that the court of appeals made up a reason not endorsed by the state habeas court for trial counsel's decision not to present

* * * *

In sum, Esposito's claim that the decision below conflicts with *Wilson* fails to present an issue worthy of certiorari review. The state habeas court held that Esposito was represented by competent counsel that conducted a thorough investigation for the sentencing phase and made sound decisions regarding the evidence presented. The court of appeals properly examined this decision under *Wilson* and § 2254(d) and determined it was reasonable. Esposito's mere disagreement with the court of appeals' decision is not a proper basis for certiorari review.

II. The court of appeals' denial of a portion of Esposito's motion to expand the certificate of appealability does not conflict with this Court's precedent or create a circuit split.

Esposito argues that the court of appeals' denial of the portion of his motion to expand his COA to include all of his sentencing phase *Strickland* claims conflicts with this Court's precedent and creates a circuit split. Esposito is wrong, and in making this argument, he asks for a whole new

---

Esposito's ex-girlfriend Courtney Veach. Pet. 7-8, 17. Again, Esposito misconstrues the court of appeals decision. The state habeas court plainly held that trial counsel were not deficient in their presentation of witnesses at the sentencing phase. Pet. App. at 130. Alternatively, the state habeas court held that even it were to assume counsel was deficient, Esposito failed to prove prejudice. *Id.* at 131. In reviewing this portion of Esposito's claim, the court of appeals examined the state court's original deficiency determination and did not review the alternative holding. *Id.* at 10. Because the state habeas court had not given a specific reason in support of finding trial counsel were not deficient regarding Veach, the court of appeals properly examined the record and determined there was support for the state court's decision. *Id.* The court of appeals did not fabricate reasons in support of the state court's decision; it merely determined that the record and the law did not reveal the state court's decision to be unreasonable. *Id.*

standard for not only determining whether to expand a COA, but also for deciding *Strickland* claims. These arguments do not warrant review.

To obtain a COA under 28 U.S.C. § 2253(c), a habeas prisoner must make a "substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Under the controlling standard, a petitioner must "show [] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). This Court has explained that "where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

In state and federal habeas actions, petitioners typically raise many sub-claims of ineffective assistance of trial counsel. Here, for instance, Esposito alleged 78 sub-claims of ineffective-assistance-of trial-counsel in his amended state habeas petition. D17-2:4-10. These claims were not organized into guilt/innocence and sentencing-phase allegations; however, some clearly only applied to one phase of trial while others covered both phases. *Id.* Seventy-eight sub-claims were raised again in Esposito's federal habeas petition in the same manner. D1:8-22. In his motion to expand the COA, Esposito requested—"on the basis of the cumulative effect of counsel's deficiencies"—that "a COA should issue to address the remaining IAC claims impacting sentencing, as discussed below." Pet. App. at 175-76. It is unclear from either Esposito's petition or his motion to expand whether the claims

"discussed below" in Esposito's motion included every sentencing phase claim raised in his federal habeas petition. Regardless, Esposito specifically identified many additional allegations of ineffective assistance during the sentencing phase in his motion. *Id.* at 186-205.

Ignoring *Slack* and *Strickland*, Esposito argues that the court of appeals should have granted his motion to expand to consider on appeal every allegation of deficiency during the sentencing phase, because counsel's performance should be considered cumulatively. This means that no matter how specious or unfounded a claim of deficient performance, a court of appeals would be required to address it on appeal. This eviscerates the *Slack* "reasonable jurists" standard and ignores *Strickland*'s mandate to assume counsel performed reasonably unless a petitioner proves otherwise. *See*, *e.g.*, *Strickland*, 466 U.S. at 689, 690 ("a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"; "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). There is no precedent from this Court, or any other court of appeals,[12] that requires a court of appeals to grant a COA for every allegation of deficient performance.

Additionally, Esposito argues that the court of appeals should have granted a COA on each of his sentencing-phase *Strickland* claims to assess prejudice cumulatively. However, the requirement for a prejudice analysis, cumulative or otherwise, requires either proof, or an assumption, of deficient performance: "The defendant must show that there is a reasonable

[12] Esposito cites to cases from other courts of appeals to support his argument but those were merely fact-specific *Strickland* determinations. Pet. 25.

probability that, *but for counsel's unprofessional errors*, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). And while *Strickland* states that it may be easier to assume deficiency and determine prejudice, it does not *require* the assumption. This means that a court of appeals is not required to grant a COA for a cumulative prejudice analysis of a petitioner's ineffective-assistance claims where trial counsel did not perform deficiently and reasonable jurists could not debate the correctness of this issue.

Here, the state habeas court determined that trial counsel did not perform deficiently during the sentencing phase of Esposito's trial. The district court held this was debatable for two claims of ineffective assistance and the court of appeals expanded the COA to include one more related claim. Pet. App. at 218. But the district court and court of appeals plainly did not determine that reasonable jurists could debate the correctness of the remainder of Esposito's allegations of ineffective performance during the sentencing phase. Because this is a factbound question, which is not even addressed by Esposito, this issue does not warrant review review.

In short, the court of appeals was under no duty to grant Esposito a COA for every sub-claim of sentencing-phase ineffective assistance. The court did as instructed in *Slack* and *Strickland* and granted the COA only as to claims that reasonable jurists could debate without surrendering the presumption of counsel's reasonable performance. Certiorari review should be denied.

CONCLUSION

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

Respectfully submitted.

/s/ *Sabrina D. Graham*
Sabrina D. Graham
Christopher M. Carr
Attorney General
Andrew Pinson
Solicitor General
Beth A. Burton
Deputy Attorney General
Sabrina D. Graham
Senior Assistant Attorney General
Office of the Georgia
Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3239
sgraham@law.ga.gov
Counsel for Respondent