No. 20-7185

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ESPOSITO,
Petitioner,
-v-
BENJAMIN FORD, Warden,
Georgia Diagnostic and Classification Prison,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

CAPITAL CASE

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Respondent accuses Petitioner of seeking mere error correction under cover of manufactured legal issues that, on inspection, lack any substance. But the only sophistry before the Court is contained in Respondent's Brief in Opposition ("BIO"), which attacks arguments Petitioner has not raised and relies on unsupported factual assertions, and misleading and inaccurate citations to this Court's decisions.[1] As set forth in the Petition for Writ of Certiorari ("Petition") and further explained below, this case presents important questions warranting this Court's review.

I. The Eleventh Circuit's Opinion Illustrates Its Cavalier Disregard of *Wilson v. Sellers*.

Respondent claims that Petitioner's "true request" in the first Question Presented is "to limit [28 U.S.C.] § 2254(d) review of a state court decision to *only* the reasons provided by the state court" – a spurious argument, Respondent claims, because *Wilson* v. *Sellers*, 138 S. Ct. 1188 (2018) "did not hold that the courts of appeals cannot review the full record in assessing the state court's decision under § 2254(d)." BIO 22-23. In support, Respondent miscites *Shoop* v. *Hill*, 139 S. Ct. 504, 506 (2019), contending it "analyz[ed] whether the state court's *reasoned* opinion was 'so lacking in justification [as to be] beyond any possibility for fairminded disagreement,'" BIO 23, when this Court did not analyze the state court opinion and instead remanded because the federal appeals court had improperly relied on intervening decisions from this Court to find the state court decision unreasonable. *See Shoop*, 139 S. Ct. at 509.

[1] Respondent correctly observes that the Petition erroneously states that Mr. Esposito submitted a proposed order to the state habeas court. *See* BIO 16 n.8. Counsel apologize for this inaccuracy, but note that it has no bearing on the issues before the Court.

Petitioner has *not* argued that *Wilson* precludes a federal court from considering the record. Indeed, federal habeas courts often *must* consider the record in order to determine the reasonableness of a state court's application of this Court's clearly established law under § 2254(d)(1) (as, for instance, when assessing prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984)), or whether a state court's factual findings were unreasonable under § 2254(d)(2).[2]

Contrary to Respondent's spin, Petitioner has argued that *Wilson* requires federal courts to address "what the state court knew and did,"[3] and that the Eleventh Circuit, in this case and others, did not follow this simple directive.[4] Petitioner alleged numerous ways in which the state habeas court's opinion was unreasonably wrong on both the facts and the law. *See* Pet. 16; *see also* Supp'l. Br., *Esposito v. Warden*, No. 15-11384 (11th Cir. Jun. 11, 2018), at 3-26. The Eleventh Circuit did not address the bulk of these arguments. Instead, it ratified the state court decision not on the basis of what that court did, but on the basis of reasons the panel imagined.[5] These included the Eleventh

[2] In similar fashion, Respondent argues that Mr. Esposito has wrongly attacked this Court's observation that review of counsel's performance under *Strickland* is "doubly deferential." *See* BIO 22 (citing *Harrington* v. *Richter*, 562 U.S. 86, 105 (2011)). But the Petition does not challenge the application of "double deference" or even mention "double deference." Nor does it question that § 2254(d) imposes a deferential standard of review on federal constitutional claims decided on the merits in state court. Instead, Mr. Esposito takes issue with the Eleventh Circuit's reliance on *Richter* to affirm on the basis of reasons it manufactured. The Eleventh Circuit's citation to *Richter* would not be problematic but for the fact that the court used that language to untether itself from *Wilson*'s command that federal courts review the state court's actual reasoning.

[3] *Cullen v. Pinholster*, 563 U.S. 170, 171 (2011).

[4] This problem apparently is not limited to the Eleventh Circuit. Currently pending before the Court is a petition for writ of certiorari challenging the Fifth Circuit's failure to follow *Wilson*. *See* Pet. for Writ of Cert., *Sheppard v. Lumpkin*, No. 20-6786 (U.S. Dec. 21, 2020).

[5] Respondent claims Mr. 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*." BIO 20; *see also id.* at 24-25. Not true. Mr. Esposito argued that the Eleventh Circuit addressed only two of the many errors he identified as unreasonably wrong and even that limited analysis was flawed. *See* Pet. 15-19. For instance, the Eleventh Circuit agreed

Circuit's reliance on an argument repeatedly advanced by Respondent – that counsel's decision not to present the critical testimony of former girlfriend Courtney Veach was a reasonable defense strategy – when the state habeas court actually *rejected* that argument. *See* Pet. 7-8. Respondent's attempt to justify the Eleventh Circuit's rationale as simply the Eleventh Circuit "examin[ing] the state court's original deficiency determination and . . . not review[ing] the alternative holding," BIO 31 n.11, is mere makeweight.

This is not the only example of the Eleventh Circuit's substituting its own reasons for those of the state habeas court. For instance, in concluding that counsel reasonably chose not to present testimony of a forensic pathologist to discredit Petitioner's confession to FBI agents, the Eleventh Circuit reasoned that counsel "were permitted to make the strategic decision not to call an expert and instead challenge the state's forensic evidence through other means, and we cannot now second guess that strategy." App. 8. But the state habeas court actually ruled that counsel were not deficient for failing to present such testimony "especially given their strategic concerns about overemphasizing Petitioner's innocence and possibly allowing the admission of the videotaped confession as rebuttal."[6] App. 144. The videotaped confession, as the Eleventh Circuit found, would not have been admissible rebuttal evidence, App. 9, and, accordingly, trial counsel's

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that trial counsel performed deficiently in basing strategic decisions on the legally erroneous belief that Mr. Esposito's suppressed confession could be admitted in rebuttal, *see* App. at 9, but failed to acknowledge the state habeas court's similarly wrong and unreasonable reliance on the potential admissibility of the videotaped confession as grounds to find counsel's performance reasonable and non-prejudicial.

[6] Unlike the Eleventh Circuit, the state habeas court did not address counsel's failure to present forensic evidence undermining the confession and failure to present additional evidence demonstrating codefendant Woodward's greater culpability as separate issues. The state habeas court's reliance on counsel's "concerns about overemphasizing Mr. Esposito's innocence and possibly allowing the admission of the videotaped confession as rebuttal" applied to both alleged deficiencies. App. 144.

"strategic" concerns about opening the door to the confession were not reasonable.[7] The Eleventh Circuit, however, failed to acknowledge that the state habeas court was equally unreasonable in relying on that fear to support its conclusion that counsel performed competently. The Eleventh Circuit's failure to consider the state habeas court's unreasonable error, and its reliance on its own manufactured rationale, is precisely what *Wilson* prohibits.

In arguing against this Court's review, moreover, Respondent (like the lower courts) relies on factual claims belied by the record. Respondent, for instance, overstates counsel's investigation into codefendant Woodward's background, contending that the defense investigator "sought out Woodward's friends and former employers, and obtained correspondence between Woodward and former cell mates." BIO 8. *See also id.* at 28 ("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'"). But Guevara's investigation of Woodward was significantly impaired by time constraints imposed by counsel's lengthy delay in commencing the investigation (counsel began investigating six months before trial and 1.5 years after their appointment) and the challenges of investigating in multiple states. As a result, Guevara was unable to locate and talk to virtually all of the individuals he had identified as having relevant knowledge of Woodward's background and character. *See, e.g.*, D.20-2:24-26) (memorandum, dated June 19, 1998, identifying witnesses with knowledge of Woodward); D.19-022:14-25 (Guevara's time records after June 1998 indicating most of these witnesses were never contacted).

[7] "An 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).

Similarly, Respondent takes issue with Petitioner's "baseless" argument that the jury heard virtually nothing about the horrifying sexual, physical and emotional abuse he endured as a child. BIO 12 n.6. Respondent's claim relies on the fact that defense counsel did present a mitigation case at sentencing, but Respondent fails to acknowledge that virtually all this evidence was thoroughly dismantled by the prosecutor's skilled, though often improper, cross-examination – which was enabled both by defense counsel's inadequate preparation of their witnesses and their inexplicable failure to object to the prosecutor's misconduct.[8] *See* Opening Brief on Appeal, *Esposito v. Warden*, No. 15-11384 (11th Cir. Nov. 15, 2016), at 45-53 (discussing mitigation case in detail); D.56 at 53-62 (district court merits brief).

Respondent likewise attempts to bolster the State's claim that a large tree limb found lying against Mrs. Davis's body was the murder weapon (as Petitioner had said in the unrecorded FBI interrogation admitted at trial), contending that the tree limb "had '63 hairs that matched Davis's hair,'" BIO 5.[9] *See also* App. 5 (Eleventh Circuit observing that "[a] tree limb was found at the murder site, and hair was found on the limb. A forensic analyst testified that one branch contained 63 hairs that matched Davis's hair."). But the tree limb the State alleged was the murder weapon,

[8] Mr. Esposito argued that trial counsel were ineffective in failing to object to much of the prosecutor's cross-examination at sentencing on evidentiary grounds, *see* D.56:97-113, but was denied a COA to address this ineffectiveness sub-claim. The Eleventh Circuit, however, did not hesitate to rely on this inadmissible evidence to conclude Mr. Esposito was not prejudiced by his attorney's failure to investigate and present mitigating evidence. *See, e.g.*, App. 5 (noting that "[t]he jury heard that Esposito's mother obtained a restraining order against him, he had been involved in devil worship, . . . and he tortured animals and wrote letters about killing and raping," all hearsay and double-hearsay evidence introduced through cross-examining defense mitigation witnesses who had no personal knowledge of the alleged misconduct). As discussed in the second Question Presented, this is a direct consequence of the Eleventh Circuit's unfairly piecemeal approach to the granting of COAs on ineffective-assistance claims.

[9] *See also* BIO 11.

State's Exhibit 54,[10] did not have 63 hairs on it; rather, the forensic analyst found only five. *See* D.14-14 at 24-25; D.14-16:15. Instead, the 63 hairs purportedly matching the victim's plucked hair[11] were found on State's Exhibit 55, a small piece of wood the prosecutor argued (without evidentiary support) had broken off during the assault from the large limb he claimed was used to kill Mrs. Davis. *See* D.14-14 at 21-24.[12]

Respondent also argues that the state habeas court's prejudice determination "is irrelevant" because the court was never required to assess prejudice given its conclusion that counsel performed adequately. BIO 26-27. But the state habeas court *did* address prejudice on numerous

[10] *See, e.g.*, D.14-16 at 6 (arguing in guilt-phase closing that the tree limb used to "bash in the brains of a ninety year old lady"); D.14-24 at 76 (prosecutor arguing in sentencing-phase closing that "[h]e's macho man. Macho man picks up that tree limb. You've had it back there. Pick it up and feel how heavy it is. Feel how heavy it is and picture him taking that and crashing that into the skull of a 90 year old lady").

[11] Forensic analyst Teri Santamaria testified she microscopically compared washed hairs plucked during autopsy with unwashed evidence hairs. D.14-14:24 ("I had washed [the blood and debris] off of the known hairs. I would not have done that on the question hairs."). She did not explain how it was a reliable method of microscopic hair analysis to compare washed known hair with unwashed hair found at the crime scene.

[12] The Eleventh Circuit relied on an overblown assessment of the prosecutor's case in concluding that forensic evidence showing Davis was bludgeoned by a man-made item, and not the tree limb – evidence that Mr. Esposito adduced in state habeas proceedings – would not have made a difference because the jury "would be obliged to weigh that evidence against contradictory evidence suggesting that Davis was murdered with the tree limb." App. 8. According to the Eleventh Circuit, the latter included not only Mr. Esposito's confession to the FBI that he killed the victim with the tree limb, but "the forensic analysis testimony that Davis's hairs were found on the tree limb, and the autopsy doctor's testimony that her injuries were consistent with being hit by an item with bark on it," and "uncontradicted evidence—including footprints, palm prints, fingerprints, and a cigarette butt—[that] placed Esposito at the murder scene." *Id.*

But that "uncontradicted evidence" did not place Mr. Esposito at the murder scene. It placed him at some point in time in the car that was found many miles away in Alabama. The *only* evidence that Mr. Esposito was present at the murder scene was his confession, and counsel could have presented reasonably available evidence to discredit it, but failed to do so. The Eleventh Circuit's notion that the evidence of Mr. Esposito's guilt (at least with respect to relative culpability) was "overwhelming," App. 9, is inconsistent with the State's actual case.

aspects of Petitioner's ineffective-assistance claim and its piecemeal approach to prejudice was marred by unreasonable errors Petitioner identified in his briefing, though these errors were largely ignored by the Eleventh Circuit. The prejudice assessment required the courts to "assume that counsel *was deficient* . . . [and] to . . . ask only whether that *presumed deficiency* was prejudicial." *Grant* v. *Trammell*, 727 F.3d 1006, 1018 (10th Cir. 2013) (emphasis original).[13] But, because every court addressing Petitioner's ineffective-assistance claim has toggled back and forth between deficient performance and prejudice, no court has ever undertaken a proper prejudice determination that accorded appropriate weight to the substantial new evidence brought forth in state habeas proceedings regarding both relative culpability and Petitioner's highly mitigated background of abuse. Far from being "irrelevant," proper consideration of this evidence, together with the evidence presented at trial, would have established a reasonable likelihood that at least one juror, considering all the evidence, would have voted for a sentence less than death.[14]

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[13] *See, e.g.*, *Holsey* v. *Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1258 (11th Cir. 2012) ("[W]e will assume for present purposes that Holsey's trial lawyers rendered deficient performance . . . in regard to the sentencing phase" and "that an attorney rendering constitutionally effective performance would have presented at the sentencing phase the evidence that Holsey's trial lawyers actually did present at that phase plus all of the additional evidence that his collateral counsel submitted in the state collateral court."); *Tenny* v. *Dretke*, 416 F.3d 404, 407-08 (5th Cir. 2005) (noting commonplace approach of assuming deficient performance to address *Strickland*'s prejudice prong).

[14] *Strickland* prejudice can be shown even in highly aggravated cases. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 368, 418 (2000) (finding that counsel's failure to present mitigating evidence of Mr. Esposito's background of "abuse and privation" was prejudicial despite the highly aggravated circumstances of the offense – the elderly victim was bludgeoned to death with a mattock in his own home during a robbery – and the offender, whose crime was "just one act in a crime spree that lasted most of Williams' life," and included "evidence that, in the months following the murder . . ., Williams savagely beat an elderly woman [into a permanent vegetative state], stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw." *Williams*, 529 U.S., at 368, 418 (quoted portion from dissenting opinion of Rehnquist, C.J.) (quoting *Williams v. Taylor*, 163 F.3d 860, 868 (4th Cir. 1998)).

The Eleventh Circuit reached its result by ignoring this Court's clear directive in *Wilson* that federal courts must scrutinize the ruling actually rendered by the state court, instead of fabricating new reasons for validating that decision. Petitioner respectfully submits that his case presents a proper vehicle for this Court to address the Eleventh Circuit's continuing reluctance to follow *Wilson*'s command.

II. The Circuits Are Split Regarding Whether Certificates of Appealability May Be Granted on Only a Portion of a Petitioner's Ineffective-Assistance Claim.

Respondent seeks to transform the second Question Presented into an error-correction issue by claiming that Petitioner has "cite[d] to cases from other courts of appeals to support his argument but those were merely fact-specific *Strickland* determinations. Pet. 25." BIO. 33. The circuit court decisions cited on page 25 of the Petition, however, reflect a circuit split on the question of whether a COA grant on ineffective assistance brings up the entire ineffective-assistance claim, as the Seventh and Ninth Circuit have held,[15] or whether federal courts may instead piecemeal the claim and select only a portion based on selected alleged deficiencies of counsel. Respondent's suggestion that those cases are "merely fact-specific *Strickland* determinations" is absurd.

Respondent also insinuates that adopting the rule advanced by the Seventh and Ninth Circuits would create havoc because "petitioners typically raise many sub-claims of ineffective assistance of trial counsel" and endorsing that practice would "mean[] that no matter how specious or unfounded a claim of deficient performance, a court of appeals would be required to address it on appeal." BIO 32-33. This slippery-slope argument ignores the fact, well-illustrated in this case,

[15] *Browning v. Baker*, 875 F.3d 444, 471 (9th Cir. 2017); *Stevens v. McBride*, 489 F.3d 883, 894 (2007).

that claims that have been broadly alleged to ensure their preservation become more refined in the process of litigation. Petitioner clearly identified those aspects of counsel's ineffectiveness that he believed warranted further review by the Eleventh Circuit. *See, e.g.*, Application to Expand Certificate of Appealability, *Esposito v. Warden*, No. 15-11384 (11th Cir. May 4, 2015), at 20-33. The Eleventh Circuit's refusal to grant COA on those subclaims allowed it to rely on improper evidence that was introduced as a result of counsel's deficient, but unreviewed, performance, *see, e.g. supra* n.8, and precluded a proper determination of prejudice on the basis of all of counsel's deficiencies.

CONCLUSION

For the foregoing reasons, Petitioner 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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