No. ____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2020

VIRGIL DELANO PRESNELL,
Petitioner

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic Prison,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI
Capital Case

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-Capital Case-

QUESTION PRESENTED

Does *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), permit a federal habeas court to assign "implicit" factual findings to a state court's order when applying 2254(d)'s limitations on relief, or must it rely only upon the specific findings and conclusions offered by the state courts when adjudicating the petitioner's claims?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

This petition arises from a habeas corpus proceeding in which the petitioner, Virgil Delano Presnell, was the petitioner before the United States District Court for the Northern District of Georgia, as well as the petitioner-appellant before the United States Court of Appeals for the Eleventh Circuit. Mr. Presnell is a prisoner sentenced to death and in the custody of Benjamin Ford, Warden of the Georgia Diagnostic and Classification Prison ("Warden"). The Warden and his predecessors were the respondents before the United States District Court for the Northern District of Georgia, and the respondent-appellee before the United States Court of Appeals for the Eleventh Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Virgil Delano Presnell respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

In *Wilson v. Sellers*, this Court directed federal courts reviewing a habeas petitioner's claims pursuant to 28 U.S.C. § 2254 "to train [their] attention *on the particular reasons*—both legal and factual—why state courts rejected a state prisoner's federal claims." 138 S. Ct. 1188, 1191–92 (2018). In his state and federal habeas proceedings, Mr. Presnell claimed that his counsel provided ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), by failing to adequately investigate and present evidence of his fetal alcohol spectrum disorder (FASD), which left him with profound psychological, physiological, and functional disabilities. He presented affidavit testimony from his mother, Lois, admitting that she binge-drank alone throughout her pregnancy. D.6-84:2460. The state habeas court issued fact findings and legal conclusions in rejecting Mr. Presnell's claim, but did not make any finding concerning Lois's testimony.

In reviewing Mr. Presnell's claim, however, the Eleventh Circuit interjected its own fact findings (some of which it deemed "implicit"), defending counsel's performance and proclaiming that Lois was not credible, so Mr. Presnell cannot have suffered any prejudice. No state court ever rendered those findings. *Wilson* required the Eleventh Circuit to defer to state court findings, not contrive "hypothetical theories," *Hittson v. Chatman*, 576 U.S. 1028 (2015) (GINSBURG, J., concurring in denial of certiorari), to support its denial of relief. Because the Circuit acted outside the scope of its authority and sought to make an end run around *Wilson*, this court should grant *certiorari*, reverse, and remand to the Eleventh Circuit for proceedings consistent with this Court's precedent.

OPINIONS BELOW

The Eleventh Circuit entered an opinion in Mr. Presnell's case on September 16, 2020. The decision, reported as *Presnell v. Warden*, 975 F.3d 1199 (11th Cir. 2020), is reproduced in the appendix as Pet. App. 1. The order denying rehearing is included in the appendix as Pet. App. 2.

The United States District Court for the Northern District of Georgia's order denying habeas relief is reproduced in the appendix as Pet. App. 3.

The Superior Court of Butts County's order denying habeas relief is attached as Pet. App. 4. The Supreme Court of Georgia's opinion affirming the denial is reproduced in the appendix as Pet. App. 5.

The Supreme Court of Georgia's denial of Mr. Presnell's direct appeal is reproduced in the appendix as Pet. App. 6.

JURISDICTION

The Eleventh Circuit entered judgment on September 16, 2020, Pet. App. 1, and denied a timely petition for rehearing and rehearing *en banc* on December 1, 2020, Pet. App. 2.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions:

The Sixth Amendment to the United States Constitution, which provides: "In all criminal proceedings, the accused shall enjoy the right…to have the Assistance of Counsel for his defence."

The Eighth Amendment to the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution, which provides: "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."

STATEMENT OF THE CASE

A. BACKGROUND OF THE CASE

The facts relevant to this petition began before Virgil Presnell's birth on December 29, 1953, in Atlanta, Georgia. D.6-84:2403.[1] Mr. Presnell's mother, Lois Samples, was a 17-year-old high school dropout who became pregnant with him almost immediately after marrying Delano Presnell, a soldier whom she had known for six months. *Id.* at 2402, 2460. Delano was an alcoholic, and he and Lois drank together

[1] Record citations in this petition refer to the district court record in *Presnell v. Warden*, Case 1:07-cv-01267-WBH (N.D. Ga.), and are in the following form: district court docket number–attachment number: page number range according to the original document (*i.e.*, not the ECF-generated page number). For example, "D.6-84:2460" refers to Respondent's notice of filing at docket entry 6, attachment 84, page 2460.

regularly despite her pregnancy. *Id.* at 2403. Within the first few months of their marriage, Delano began going out in the evenings to drink and meet other women. *Id.* at 2402, 2460. "I would just have to sit at home…while I was pregnant," Lois recalled, "and so I would have a few drinks by myself wondering who my husband was with." *Id.* at 2460. Lois "[drank] the entire time [she] was pregnant with Virgil." *Id.* She remembered one incident in particular:

> I was still pregnant [and] Delano was out and I was real [sic] mad so I asked the neighbor to buy me a pint of bourbon. I drank the whole pint of bourbon and then the neighbor bought me another pint of bourbon.

Id.; *see also ibid.* at 2402-03.

Lois's drinking did not abate until around the time of Virgil's birth. *Id.* at 2403. By then, he had suffered profound organic brain damage that left him permanently impaired with fetal alcohol spectrum disorder ("FASD"), arresting the development of his mind, judgment, impulse control, and emotions at the equivalent of a child of only **nine** years of age.

B. 1976 TRIAL AND SUBSEQUENT PROCEEDINGS

On August 26, 1976, Mr. Presnell was convicted of malice murder, kidnapping, rape, and kidnapping with bodily injury in Cobb County, Georgia, and sentenced to death. *Presnell v. State*, 551 S.E. 2d 723, 728 (Ga. 2001).

Following state and federal post-conviction proceedings, the United States District Court for the Northern District of Georgia granted Mr. Presnell habeas relief as to his death sentence because of the prosecutor's improper closing argument, and ordered a resentencing trial. *Presnell v. Zant*, No. 1-85-CV-02934-RLV (N.D. Ga. 1990). The Eleventh Circuit Court of Appeals affirmed relief on April 15, 1992. *Presnell v. Zant*, 959 F.2d 1524 (11th Cir. 1992).

C. THE 1999 RESENTENCING TRIAL

Mr. Presnell's case returned to Cobb County for a resentencing trial. The trial court appointed J. Stephen Schuster and Mitchell Durham to represent Mr. Presnell. Counsel hired mitigation specialist Tony Bovée to plumb Virgil's background. When Bovée first met with Lois on October 19, 1998 —only four months before Virgil's resentencing—Lois informed Bovée that she drank "socially" during her

pregnancy. D.6-78:176. Lois testified that neither Bovée nor counsel followed up on this admission. *See id.* ("[n]one of these people asked me…about how I drank while I was pregnant with [Virgil].").

Counsel retained a clinical psychologist, Robert Shaffer, to evaluate Virgil. D.6-31:70. Dr. Shaffer administered a partial neuropsychological battery. D.6-78:228. Virgil's test scores revealed "moderately severe brain impairment," but Dr. Shaffer, lacking knowledge of Lois's binge-drinking, could only speculate that these deficits were "characteristic more of head injury and specific learning disability rather than [intellectual disability]." *Id.*

From February to March 1999, the superior court conducted the resentencing trial. Lois testified on Virgil's behalf, but she did not mention her prenatal alcohol abuse. Counsel also called Dr. Shaffer, who told the jury that Virgil was a pedophile. D.6-31:124-25. Dr. Shaffer described pedophilia as an intractable "major mental illness" like "schizophrenia, multiple personality disorder, bipolar disorder, or manic depressive syndrome." *Id.* at 124.

The case was submitted to the jury. On March 16, 1999, the jury returned a death sentence. D.6-35:6; D.6-6:2246-49.

The Supreme Court of Georgia affirmed the sentence on July 16, 2001. *Presnell v. State*, 551 S.E. 2d 723 (Ga. 2001).

D. STATE HABEAS PROCEEDINGS

On October 16, 2002, Mr. Presnell filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia. During state habeas proceedings, the full picture of Virgil's brain damage and dysfunctional, highly sexualized background came into focus. Mr. Presnell's new habeas counsel retained a social worker, Nancy Smith, who prepared a complete social history based on fulsome interviews and more complete background records. Smith discovered the "significant history of mental illness, mental retardation, and cognitive impairments" on both sides of his family; Mr. Presnell's "limited intellectual capabilities and marked adaptive behavior deficits"; and the rampant sexual abuse and dysfunction in the family, *inter alia.* D.6-84:2395-96. Most important, habeas counsel's investigation revealed that Lois binge-drank regularly throughout her pregnancy.

Habeas counsel retained a neuropsychologist, Dr. Ricardo Weinstein, who—unlike Dr. Shaffer—evaluated Mr. Presnell with the knowledge of his repeated and extreme exposures to alcohol *in utero.*

Id. at 2294-97. He conducted a full neuropsychological and psychosocial evaluation of Mr. Presnell, *id.* at 2295-97, and confirmed that he suffers from FASD,[2] *ibid.* at 2295-2323.

According to Dr. Weinstein, Mr. Presnell's scores on the neuropsychological and intelligence testing were consistent with FASD, and demonstrate "severe impairments in functioning, especially in those abilities associated with the frontal lobes." *Id.* at 2309. Dr. Weinstein confirmed "significant brain dysfunction" by, *inter alia*, administering an EEG, which showed abnormal frontal lobe activity. *Id.* at 2331.[3] He also established that Virgil's intellectual functioning was

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[2] According to Dr. Weinstein, "[i]t is immediately apparent from [Lois's] affidavit…that both the extent and pattern of her drinking while pregnant with Mr. Presnell dramatically increased the likelihood that Mr. Presnell would suffer the neuropsychological consequences associated with FASD." *Id.* at 2307. "Bourbon was [her] drink of choice,'" "she drank alcohol for 'the whole time' that she was pregnant with Virgil," and she "was a binge-drinker, consuming large quantities of strong liquor in a very short period of time." D.6-84:2307-08. "It is not so much the total amount of alcohol that is consumed, but rather, the *high number of drinks consumed on one occasion*, producing a high peak blood alcohol concentration, that appears to be a greater risk factor for" FASD. *Id.* at 2306-07 (emphasis added).

[3] Dr. Albert Johnstone, a psychologist and professor in neurological surgery who performs EEGs for clinical evaluations, also

profoundly compromised. His intelligence test yielded a verbal IQ of 78 and a performance score of 109 – a 31-point spread that "occurs in less than 1% of the population," is "associated with brain dysfunction," and renders the full-scale IQ score of 90 "an inaccurate measure of Mr. Presnell's cognitive abilities."[4] *Id.* at 2315. The results of the Woodcock-Johnson III test of Cognitive Abilities and Tests of Achievement ("WJS-III") established that Virgil "has the cognitive abilities of a child of 8 years and 11 months" old. *Id.* at 2317.

Finally, Dr. Weinstein observed that Mr. Presnell displayed the "secondary disabilities" associated with children with FASD. *Id.* at 2309. He had "limited ability to listen to and comprehend what was being said to him," *id.* at 2308, and "limited ability to carry out tasks that others his own age would be able to perform," *ibid.* at 2308-09. He

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confirmed that the EEG data were "consistent with a clinical presentation of Fetal Alcohol Syndrome." D.6-84:2342-49.

[4] Virgil obtained "significantly lower IQ scores" "during his developmental period," including one score of 68 and several in the 70s; and that those scores accurately reflect his cognitive limitations. D.6-84:2318. This accords with his "dismal educational history," D.6-84:2318, including early evaluations that he "be put in a class for mentally retarded children." *Id.*

was also an impulsive and hyperactive child "who could not stay focused on anything[.]" *Id.* at 2309.

The habeas court heard this evidence in an evidentiary hearing on June 2, 2004. The court denied relief on December 30, 2005. In denying relief, the state habeas court engaged in no discussion of the new evidence, dismissing it as either "cumulative" or "not ris[ing] to a level of Constitutional concern." Pet. App. 4 at 43-44. Without making **any** specific findings regarding the habeas evidence, the court concluded "that Petitioner has failed to establish that the outcome would have been different had counsel advanced any of the theories Petitioner now raises." *Id.* at 44.

Mr. Presnell timely filed an application for a certificate of probable cause to appeal the habeas court's order in the Supreme Court of Georgia. It was denied without opinion on November 6, 2006.

E. FEDERAL HABEAS PROCEEDINGS

Mr. Presnell filed a timely petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254(d) in the United States District Court for the Northern District of Georgia on June 1, 2007. D.1. On May 22, 2017, the district court denied his petition. D.76. The court granted a

certificate of appealability ("COA") as to his claim that his counsel had provided constitutionally ineffective assistance of counsel by ignoring red flags leading to evidence that Lois binge-drank alcohol during her pregnancy, leaving him permanently impaired by FASD. D.86. Mr. Presnell moved to expand the COA on February 16, 2018.

On March 21, 2018, the Eleventh Circuit stayed its consideration of Mr. Presnell's appeal pending this Court's decision in *Wilson v. Sellers*. After briefing and oral argument, and following this Court's issuance of its decision in *Wilson*, the Eleventh Circuit affirmed the lower courts' denial of relief on September 16, 2020. The court denied reconsideration on December 1, 2020.

REASONS FOR GRANTING THE WRIT

In 2018, this Court reversed the *en banc* Eleventh Circuit Court of Appeals's decision in *Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016). The Eleventh Circuit had concluded that a federal habeas court could "consider hypothetical theories that could have supported" a state court's adjudication of the petitioner's constitutional claims when evaluating a habeas petition under 28 U.S.C. § 2254(d). This Court rejected that approach, barring "a federal habeas court [from]

imagin[ing] what might have been the state court's supportive reasoning," *Wilson v. Sellers*, 138 S. Ct. 1188, 1194-95 (2018) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991)), and instead requiring a court to "simply evaluate[] deferentially the specific reasons set out by the state court," *Hittson v. Chatman*, 576 U.S. 1028 (2015) (GINSBURG, J., concurring in denial of certiorari):

> [W]hen the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion[,] [] a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable. We have affirmed this approach time and again.

Wilson, 138 S. Ct. at 1192 (citations omitted); *see also Hittson*, *supra* ("*Richter* makes clear that where the state court's real reasons can be ascertained, the § 2254(d) analysis can and should be based on the actual 'arguments or theories [that] supported ... the state court's decision.'") (citing *Harrington v. Richter*, 562 US 86, 102 (2011)).

Yet the Eleventh Circuit opinion in Mr. Presnell's case, issued only two years after *Wilson*, engaged in precisely the analysis that *Wilson* proscribes. In denying Mr. Presnell's claim that his resentencing counsel were ineffective for failing to sufficiently investigate and present the evidence of Lois's prenatal binge-drinking, the Circuit relied

on its own factual findings and credibility determinations—even justifying some of its findings as "implicit" in the state court's decision, despite those findings being contradicted by the record. The panel's overreach conflicts with the decisions of this Court in *Wilson*, *Ylst, Richter*, and *Strickland*, *supra*. This Court should grant *certiorari* to address the Eleventh Circuit's continued failure to adhere to its decision in *Wilson*.

A. THE CIRCUIT'S FACTUAL FINDINGS WERE NEITHER AUTHORIZED NOR CORRECT.

The habeas court's analysis of Mr. Presnell's *Strickland* claim was broad and limited, but was nevertheless an opinion on the merits[5] to which *Wilson* obligated the Eleventh Circuit to defer. Instead of deferring to the state court's decision, however, the Eleventh Circuit went far beyond the scope of the order. The Circuit found that Mr. Presnell's FASD diagnosis rested on Lois's testimony "that she consumed alcohol during the entire time she was pregnant with

[5] Mr. Presnell does not concede that any of the lower court opinions in his case were reasonable within the meaning of § 2254(d), or that they reasonably applied clearly-established federal law.

Petitioner"[6]; and, accordingly, that "the credibility of the diagnosis would depend on Lois's credibility." Pet. App. 1 at 66. In a finding nowhere to be found in the state court's decision, the Circuit determined that a jury "would have been unlikely to believe Lois's claim that she drank alcohol during her entire pregnancy, and Petitioner can therefore not show [*Strickland*] prejudice." *Id.*

The Circuit premised its assessment of Lois's credibility on its belief that "[t]hroughout her pregnancy, she and the rest of her family lived in a three-room apartment." *Id.* Therefore,

> [i]f Lois drank throughout her pregnancy, if she was a binge drinker, someone in her family would have known about it…Eight members of her immediate family stayed [in the apartment]: her parents; four sisters (Sarah, Patricia, Lillian, and Brenda); a brother, James; and her. During the first four or five months of her pregnancy, [her husband] Delano was there too, raising the number of occupants to nine.

Id. The court then concluded, citing no evidence, that "[n]o one in Lois's family, who lived together in close quarters during the relevant time, can corroborate her alcohol consumption during pregnancy.…The

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[6] This is incorrect. As Mr. Presnell explains *infra*, the credibility of the diagnosis also depends on the symptoms and effects of FASD, to which Mr. Presnell's expert witnesses testified. Lois's confession is not the only evidence of Mr. Presnell's FASD; it is merely the foundation.

failure to produce any corroborating testimony destroys Lois's credibility." *Id.* at 68.

The Circuit errs twice: first, in disregarding *Wilson*, which prohibited it from substituting its own fact findings and judgments for those of the state courts; and second, in misreading the record. Because the panel's findings contradict this Court's precedent and are clearly erroneous, *certiorari* should issue.

1. This Court Must Defer to Fact-findings, Not Render Them in the First Instance.

The panel's opinion is replete with findings of fact regarding both prongs of Mr. Presnell's *Strickland* claim. The panel disposes of *Strickland* prejudice by discrediting Lois for a purported lack of corroboration. *See, e.g.,* Pet. App. 1 at 68 ("No one in Lois's family, who lived together in close quarters during the relevant time, can corroborate her alcohol consumption during pregnancy."); *ibid.* at 67 ("if [Lois's family members] could have corroborated Lois's claim [that she binge-drank during her pregnancy], habeas defense counsel certainly would have them swear to its truth."). The panel disposes of the *Strickland* performance prong by concluding that "in 1988 [counsel's

investigator Toni] Bovée did, indeed, ask Lois about prenatal alcohol consumption." *Id*. at 58 n. 55.

The panel's approach echoes what *Wilson* rejected only two years ago. As this Court explained to the Circuit:

> The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a prisoner who challenges (in a federal habeas court) a matter "adjudicated on the merits in State court" to show that the relevant state-court "decision" (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Deciding whether a state court's decision "involved" an unreasonable application of federal law or "was based on" an unreasonable determination of fact requires the federal habeas court to "train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims," and to give appropriate deference to that decision.

138 S. Ct. 1188, 1191-92 (2018) (emphasis added) (citations omitted).

In other words, the Circuit was required to defer to the specific findings – or, as this Court put it, the "particular reasons" – that the state court provided in its adjudication of Mr. Presnell's claim, not on its own "hypothetical theories," *Hittson*, *supra*, for denying relief. But nowhere in the habeas court's opinion is Lois's affidavit critiqued, let alone found so untrustworthy and incredible that it would not have been considered mitigating by a single juror. Nothing contradicted

Lois's testimony that she binge-drank while she waited at home for her wayward husband during her pregnancy.

The Eleventh Circuit was not free to disregard *Wilson*, substitute its own factual findings for those of the state habeas court, and deny relief on both *Strickland* prongs on that basis. Mr. Presnell respectfully requests that this Court grant *certiorari* to address the Eleventh Circuit's continued refusal to adhere to *Wilson*.

2. *Wilson* Also Bars "Implicit" Factual Findings.

The Eleventh Circuit also circumvented *Wilson* by asserting that some of its new findings were "implicit" in the state habeas court's order. For instance, the habeas court's sole finding with respect to counsel's investigation of Lois's binge-drinking was that "Ms. Bovee learned that Petitioner's mother smoked a pack of cigarettes a day and 'did not drink except socially' during the time she was pregnant with Petitioner." Pet. App. 4 at 37. From this, the Eleventh Circuit found:

> **[i]mplicit in** the Superior Court of Butts County's adjudication of the FASD claim is the finding that in 1988 [counsel's investigator Toni] Bovee did, indeed, ask Lois about prenatal alcohol consumption. The Superior Court of Butts County **implicitly** made this finding when it explained that Bovee interviewed Lois[.]

Id. at 58 n. 55 (emphases supplied).

The habeas court never found, implicitly or otherwise, that counsel had *followed up on* Lois's assertion that she "drank socially." The habeas court found only what Mr. Presnell himself alleged: that counsel *did* learn that Lois "drank socially" while pregnant. The habeas court found that their investigation was reasonable, but did not answer – implicitly or otherwise – the question of whether they actually failed to investigate further, as reasonable capital counsel must do. This inquiry was the heart of Mr. Presnell's *Strickland* claim.[7]

Again, the Circuit's approach echoes what *Wilson* rejected. The Eleventh Circuit sought to overcome *Wilson* by disguising its fact-findings as "implicit" when they were neither implicit nor supported by the record. *Wilson* did not carve out an exception for "implicit" factual

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[7] It is here where counsel's deficiencies lie. Given Lois's admission that she drank "socially" during her pregnancy, no reasonable counsel would fail to inquire further into the extent of Mr. Presnell's prenatal exposure to alcohol. Had counsel conducted a reasonable investigation, they would have learned the scope of Lois's drinking—which, in turn, would have alerted their expert to the need to explore whether Mr. Presnell suffered from FASD. Their performance was clearly deficient. *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003) ("[i]n assessing the reasonableness of an attorney's investigation…a court must consider not only the quantum of evidence already known to counsel, *but also whether the known evidence would lead a reasonable attorney to investigate further*.").

findings. This Court was clear: federal habeas courts must defer to the "specific" findings made by state courts. *Wilson*, 138 S. Ct. at 1192. The Eleventh Circuit was not free to disregard *Wilson*, substitute its own factual findings for those of the state habeas court, and deny relief on that basis.

3. There Is No Reason to Doubt Lois's Credibility.

The problem with the panel's findings was not merely that they violated *Wilson*. It was also that they were incorrect. Lois did not live in the same apartment as her family for her entire pregnancy; she lived in the same apartment **building** as her family for **a portion of** her pregnancy. The family only shared an apartment at the very end of her pregnancy, when the damage to her son's developing brain was already done.[8] D.6-84:2449, 2460.

The panel also discredited Lois because the affidavits of Lillian (Lois's sister) and Delano (her ex-husband) do not "contain[] the words

[8] After Lois and Delano married, they moved into a duplex. Later, when Lois's family was unable to pay the rent on their apartment, they moved into the *neighboring* apartment in the duplex. Lois's sister Lillian explained: "[Our house] was like a duplex. We started out as a duplex. My mother and all of us lived on one side, and Lois lived on the other side." D.6-30:130-31.

'alcohol,' 'drinking,' 'binge drinking,' or 'bourbon,' Lois's 'drink of choice.'" Pet. App. 1 at 67. According to the Circuit, "if Lillian and Delano could have corroborated Lois's claim [that she binge-drank during her pregnancy], habeas defense counsel certainly would have them swear to its truth." *Id.*

It should come as no surprise that Lillian and Delano's affidavits do not address Lois's solitary drinking. She often drank while she was at home *alone*, waiting for Delano to come home. *See* D.6-84:2460 ("In the evenings I would wait for Delano to come home but he was always out with his buddies drinking and meeting women. I would just have to sit at home, while I was pregnant, and so I would have a few drinks by myself wondering who my husband was with."). His absence was the reason for Lois's binge-drinking. Delano was in no position to observe or retroactively assess how much his wife was drinking during his nighttime ramblings. Further, the Circuit's reliance on Lois's sister Lillian's affidavit ignored that she was only 6 or 7 years old during the relevant time period. It is hardly surprising that Lois was not staying up late at night drinking with a small child, particularly when they did not reside in the same home.

The panel's findings were simply not supported by the record. There is no reason to doubt Lois's veracity, and the state court made no such finding.

B. LOIS'S TESTIMONY WAS CREDIBLE.

When evaluating whether resentencing counsel's deficient performance prejudiced Mr. Presnell, the Eleventh Circuit breached the bounds of *Wilson* once again. The Circuit determined that a jury "would have been unlikely to believe Lois's claim that she drank alcohol during her entire pregnancy, and Petitioner can therefore not show [*Strickland*] prejudice." Pet. App. 1 at 66.

Underlying the Circuit's skeptical assessment of Lois's credibility is the conclusion that Mr. Presnell does not have FASD. But the state court never made that finding, and it contradicts the record. The state court found only that Mr. Presnell is not intellectually disabled, and that the FASD evidence presented during habeas proceedings was "cumulative" of the evidence presented during the 1999 resentencing proceeding. Pet. App. 4 at 47. *Wilson* barred the Eleventh Circuit from issuing its own factual determination regarding the validity of the diagnosis.

With its myopic focus on Lois's credibility alone, the Circuit missed an important point: the FASD diagnosis did not rest solely on Lois's testimony. Rather, the experts who diagnosed Mr. Presnell with FASD rested their diagnoses on the fact that Mr. Presnell displays the symptoms and features of FASD. It is the diagnosis that brings together – and makes sense of – the disparate symptoms that Mr. Presnell exhibited. If the jury had heard the evidence of Mr. Presnell's significant impairments that align with the FASD diagnosis, they would have believed Lois's testimony that she binge-drank during her pregnancy. There would be no other way for him to contract FASD.[9]

[9] The Circuit assumes that Mr. Presnell's claim must fail unless Lois's testimony is corroborated beyond all doubt for any and every factfinder. But that is not what *Strickland* requires. He need not demonstrate that Lois's testimony would have convinced 12 jurors beyond a reasonable doubt that she binge-drank during pregnancy and poisoned her son in the womb. In Georgia, non-unanimity in a death verdict results in a life sentence. *See* O.C.G.A. § 17-10-31.1(c); *Miller v. State*, 229 S.E.2d 376, 377 (Ga. 1976). Accordingly, the prejudice test is whether "a reasonable probability [exists] that at least one juror would have struck a different balance" if they had heard the omitted evidence. *Wiggins*, 539 U.S. at 537. All Mr. Presnell was required to show is that Lois's testimony – and the FASD diagnosis that arose from it – would have convinced *a single juror* that he deserved a sentence less than death. *Id.* This he has done.

As the experts explained during the state habeas proceedings, Virgil's FASD left him with severe physiological and psychological disabilities, permanently arresting the development of his mind, judgment, impulse control, and emotions at the equivalent of that of a child under the age of ten. The results of the neuropsychological and intelligence testing were consistent with FASD: they reflected "severe impairments in functioning, especially in those abilities associated with the frontal lobes." D.6-84:2309. These deficits were "manifest all through his life and are reflected in his psycho-social developmental history by the description of his lack of maturity, emotional, behavioral and learning problems in school, social inadequacies and poor judgment." *Id.* And witnesses who knew Mr. Presnell during his youth testified regarding their observations of the secondary disabilities associated with FASD, including impulsivity, hyperactivity, and "limited ability to listen to and comprehend what was being said to him," *inter alia. Id.*

If Lois had simply said that she drank during her pregnancy, but Mr. Presnell had no corresponding deficits, the situation facing the jurors and the courts would have been much different. But that was not

the case. Mr. Presnell presented the Court with ample evidence of the severe effects of Lois's prenatal binge-drinking. Mr. Presnell's brain damage both corroborates Lois's alcohol consumption and evinces its consequences. The Circuit's contrary finding was barred by *Wilson* and was clearly erroneous.

CONCLUSION

Because the Eleventh Circuit continues to flout *Wilson*, this Court should grant the petition for writ of *certiorari*, reverse, and remand Mr. Presnell's case to the Eleventh Circuit.

Respectfully submitted, this the 30th day of April, 2021.

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