No. 16-6855

In The Supreme Court of the United States

MARION WILSON,

Petitioner,

v.

ERIC SELLERS, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF PETITIONER

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CAPITAL CASE
QUESTION PRESENTED

Did this Court's decision in *Harrington v. Richter*, 562 U.S. 86 (2011), silently abrogate the presumption set forth in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) – that a federal court sitting in habeas proceedings should "look through" a summary state court ruling to review the last reasoned decision – as a slim majority of the *en banc* Eleventh Circuit held in this case, despite the agreement of both parties that the *Ylst* presumption should continue to apply?

PARTIES TO THE PROCEEDING

All the parties to the proceeding are listed on the cover of the brief.

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The decision of the *en banc* Court of Appeals is reported as *Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016) (*en banc*) (Joint Appendix ("JA") 304-94). The panel decision vacated by the *en banc* Court of Appeals is reported as *Wilson v. Warden*, 774 F.3d 671 (11th Cir. 2014) (JA 238-61). The unpublished decision of the United States District Court for the Middle District of Georgia denying habeas corpus relief is available at 2013 WL 6795024 (M.D. Ga. Dec. 19, 2013) (JA 88-237). The order of the Georgia Supreme Court denying a certificate of probable cause to appeal (JA 87) is unreported, as is the order of the Butts County Superior Court denying habeas relief (JA 30-86).

JURISDICTION

The *en banc* Court of Appeals entered its judgment on August 23, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the application of 28 U.S.C. § 2254(d), which states:

> 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.

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STATEMENT OF THE CASE

I. The crime and Wilson's role in it

Marion Wilson was convicted and sentenced to death for the 1996 murder of Donovan Parks, an off-duty state correctional officer, in Baldwin County, Georgia. Wilson was nineteen years old at the time of the crime. The evidence showed that on the evening of March 28, 1996, Wilson's co-defendant, Robert Butts, solicited a ride from the victim at a Milledgeville Wal-Mart. Butts sat in the front passenger seat of the victim's car while Wilson sat in the back seat. *Wilson v. State*, 525 S.E.2d 339, 343 (Ga. 1999). As Wilson later explained to police, Butts pulled a sawed-off shotgun and ordered the victim to turn over his wallet and exit the car. Butts then exited the passenger side, ordered the victim to lie down, and shot and killed him. *Id.*;

Doc. 9-17 at 117-22, 132-33.[1] Butts was arrested after Wilson's statement to police.

On April 17, 1996, Det. Russell Blenk corroborated the essential points of Wilson's account in an interview with Baldwin County Jail inmate Randy Garza. Garza, who knew Butts and had spoken with him in jail, reported that Butts admitted soliciting a ride from the victim, pulling the shotgun, ordering him from the car, and killing him while Wilson remained in the back seat. Doc. 14-7 at 63-64. Two other inmates, Horace May and Shawn Holcomb, likewise reported that Butts had confessed to being the shooter. *See* Doc. 12-11 at 26-28. In his own police interview, Butts denied any involvement with the crime. Doc. 10-5 at 21-59.

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[1] The entire state court record was furnished to the District Court by electronic filing by Respondent in *Wilson v. Humphrey*, Case No. 5:10-CV-489 (M.D. Ga.), and is available on PACER. References to the record correspond to the PDF documents which comprise the record as filed by Respondent. The first number in a reference is the document number of Respondent's Notice of Filing, followed by the number of the document filed with that particular Notice. The page number reference is to the page number of the PDF document.

For example, as noted above, Wilson gave a detailed, recorded statement to police on April 2, 1996. A redacted version was played for the jury, and the transcript of that version is available at Doc. 9-17 at 114 – Doc. 9-18 at 5. This refers to Document 9, Respondent's Notice of Filing, the 17th and 18th PDF documents filed under that Notice, and the page numbers of those PDF documents. The unredacted police transcript of the same statement was entered into evidence in state habeas proceedings and is available at Doc. 14-7 at 65-98.

II. A plea offer with twenty-year parole eligibility rejected

Under Georgia's accomplice liability law, Wilson faced a murder conviction and three sentencing possibilities: life with parole eligibility; life without parole eligibility; or death. In light of the evidence of Wilson's culpability relative to Butts', however, the prosecution offered to allow Wilson to plead guilty in exchange for two consecutive, parolable life sentences, plus twenty years, with a possibility of parole after service of twenty years. Doc. 8-16 at 2-5. Wilson declined the offer. *Id.* at 6-8.

III. The trial: conflicts, ignorance, confusion and (multiple) missed opportunities

A. Counsel's conflicts

Attorneys Thomas O'Donnell and Phillip Carr were appointed to defend Wilson. O'Donnell told the trial court that he had tried a number of capital cases, Doc. 8-12 at 6, but he later admitted in state habeas testimony that neither he nor Carr had any actual capital trial experience or training, Doc. 12-8 at 31-32, 35. O'Donnell's wife was a local prison warden and knew the victim as a corrections officer, Doc. 8-14 at 2, and O'Donnell later testified that members of the local corrections community "pressur[ed] [him] about the case" daily. Doc. 8-13 at 15-16. Carr's wife had also worked at a local state prison. Doc. 8-14 at 3. Neither of Wilson's lawyers revealed these connections to the court or Wilson until two months before trial, but the trial

court took no action. O'Donnell also concealed his appointment as a Special Assistant Attorney General, which, according to a warning from the Attorney General's Office to O'Donnell, should have terminated his further participation in the case. *See* Doc. 12-8 at 57, 60; Doc. 16-13 at 56.[2]

B. Ignorance leads to exclusion of the best defense evidence

Wilson went to trial in November, 1997, asserting a "mere presence" defense based on Wilson's statements as corroborated by Butts' confessions to jail inmates Garza, May, and Holcomb. To establish the admissibility of those confessions, however, defense counsel were required to – but did not – follow a simple procedure announced a year earlier in *Turner v. State*, 476 S.E.2d 252 (Ga. 1996). *Wilson*, 525 S.E.2d at 344-45. As a result of counsel's failings, the prosecution convinced the trial court to exclude Butts' confessions, Doc. 9-19 at 29-35, and Wilson was convicted.[3]

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[2] When this conflict finally came to light, O'Donnell was removed as direct appeal counsel. Carr remained as appellate counsel. Carr later was convicted of child molestation and statutory rape, Doc. 25-5, and had his law license suspended. *In re Carr*, 646 S.E.2d 252 (Ga. 2007).

[3] Later, at Butts' trial, the prosecution used the same three witnesses to establish that Butts, not Wilson, was the shooter. *See Butts v. State*, 546 S.E.2d 472, 478 (Ga. 2001). The Georgia Supreme Court also found as a matter of fact that Butts was the triggerman. *Id.* at 477.

C. A twenty-three page defense case at sentencing

At the penalty phase, the prosecution presented a lengthy case in aggravation spanning 324 transcript pages and featuring twenty-two (22) witnesses who described Wilson's purported gang involvement and history of juvenile impulsiveness and violence.

The defense case was paltry. A psychiatrist, Dr. Kohanski, spent eight (8) transcript pages, mentioning Wilson's: impulsive and aggressive behavior in elementary school; his excessive dependence on his mother; his "chaotic" and unsupervised "home life"; his mother's failure to have him evaluated for ADHD; his exposure to his mother's drug-using and abusive boyfriends; and his eventual affiliation with a gang as his surrogate family. Doc. 10-5 at 100-08. Wilson's mother, Charlene Cox, provided five (5) more transcript pages on Wilson's lack of an involved father and her desire that he be spared death. *Id*. at 126-31. An investigator, Bill Thrasher, gave the remaining ten (10) pages of testimony describing his conversations with Garza and May, who confirmed Butts' admissions to shooting the victim. *Id*. at 79-89.

In closing argument, O'Donnell said Wilson had not "led any kind of life but a bad one," Doc. 10-6 at 21, credited the prosecution's evidence, *see id.* at 29, and told jurors that Wilson's status as the non-triggerman was "the only reason why you should spare his life." *Id*. at 36-37. With the aggravating evidence unchallenged, and with virtually no affirmative mitigation case to

consider, the jury returned a death sentence. The Georgia Supreme Court affirmed. *Wilson v. State*, *supra*.

IV. State habeas proceedings

Wilson sought state habeas relief, alleging under *Strickland v. Washington*, 466 U.S. 668 (1984), that trial counsel performed unreasonably by failing to investigate, develop, and present available mitigating evidence and evidence rebutting the prosecution's case in aggravation, and that a competent investigation would have yielded a wealth of mitigating evidence at sentencing.

A. Trial counsel's confused and desultory preparation

As described *supra*, O'Donnell and Carr were burdened by conflicts and bereft of capital defense experience or training. Between them counsel invested 92 hours preparing for trial, most of which was devoted to the guilt/innocence phase. Doc. 8-11 at 10; Doc. 14-12 at 78-86. Because each lawyer believed the other was responsible for mitigation investigation, no meaningful investigation was conducted. The only witnesses counsel consulted for sentencing phase were Wilson's mother and two mental health professionals, Dr. Kohanski and Dr. Maish.[4] While counsel obtained school, psychological, and juvenile records filled with leads to

[4] Doc. 12-8 at 44-45; Doc. 12-6 at 115; Doc. 16-13 at 72-74.

critical witnesses and obvious lines of inquiry,[5] no one pursued these leads.[6] A recommendation from both Dr. Kohanski and Dr. Maish that Wilson undergo neuropsychological testing for possible brain damage likewise was ignored. Doc. 12-9 at 59; Doc. 16-10 at 91, 93.[7]

B. Prejudice

In contrast to the defense case at trial, the mitigation evidence presented to the state habeas court provided a comprehensive, vivid, and compelling account, drawn from more than twenty (20) witnesses and multiple records, of Wilson's lifelong history of privation and mental health difficulties. In brief, the evidence concerning Wilson's background showed:

- Wilson's mother was treated for venereal disease, drank alcohol, and injected herself with valium while pregnant. Doc. 12-10 at 57-58, 100.
- As an infant, Wilson lived in a "shotgun" shack without water, electricity, or heat. *Id*. at 85, 91; Doc. 12-7 at 36.

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[5] *See*, *e.g*., Doc. 12-14 at 7 – Doc. 12-15 at 4; Doc. 12-15 at 20-31; Doc. 12-16 at 2-3, 59 – Doc. 12-17 at 18; Doc. 12-17 at 19-32; Doc. 12-17 at 33 – Doc. 12-19 at 95.

[6] Doc. 16-13 at 72.

[7] Counsel also obtained authorization to hire a sociologist to assess Wilson's background and gang involvement, but did not utilize the services of such an expert. Doc. 8-11 at 3; Doc. 14-2 at 96.

- Later residences were squalid, with bottles of urine, trash, rotten food, and dog feces littering the floor. Doc. 12-7 at 44-45; Doc. 12-10 at 71-72, 75, 85; Doc. 12-11 at 7.

- Wilson's mother had a series of boyfriends who used drugs and alcohol, and were physically violent toward her and her son. Doc. 12-7 at 47-48, 50; Doc. 12-10 at 61, 63, 65-66, 77, 91, 94; Doc. 12-11 at 6-8, 74.

- To address Wilson's behavioral problems, elementary school officials urged his mother to permit treatment for ADHD and placement in special education classes, but a boyfriend forbade it. Doc. 12-10 at 74-75, 93-94, 97-98.

- Wilson frequently fled home and found comfort with children he met on the streets. *Id*. at 77-79, 81.

- A social services specialist who encountered Wilson at age fifteen, Doc. 12-9 at 51, reported that his mother had "very limited parenting or coping skills," did not see to his basic needs, such as food, and left him "almost completely unsupervised." *Id*.; Doc. 12-7 at 69.

- An experienced Department of Juvenile Justice administrator testified that "every risk factor I can think of is present in Marion's case." Doc. 12-7 at 131, 142.

Equipped with the results of a competent background investigation, Dr. Kohanski (the trial psychiatrist) testified that Wilson's behavior was consistent with post-traumatic stress disorder, Doc. 12-9 at 63-64, and ADHD, *id*. at 66, and that he had been a victim of physical neglect and physical and emotional abuse. *Id*. at 71-72. She also agreed with a neuropsychologist, Dr. Herrera, as did Dr. Maish, that Wilson's frontal lobe was impaired. *Id*. at 66; Doc. 12-10 at 21. The impairment was explained by Dr. Herrera who said that probably as the result of prenatal toxin exposure and a chaotic upbringing Wilson had organic brain impairments which interfered with "important adaptive abilities, such as planning, judgment, impulse control and decision-making." Doc. 12-9 at 97.

C. The state habeas court's order denying relief

The state habeas court's order rejecting Wilson's ineffective assistance of counsel claim consisted largely of non-specific platitudes and perfunctory phrases. As to the new mental health psychiatric testimony, including the evidence of brain damage, the court wrote that it would not have changed the outcome of sentencing. Doc. 18-4 at 24, 38. The court wrote that the ample, first-hand testimony of lay mitigation witnesses "would have been inadmissible on evidentiary grounds, cumulative of other testimony, or otherwise would not have, in reasonable probability, changed the outcome of the trial." *Id.* at 23. For the most part, the court failed to specify what testimony

was inadmissible (or why it was inadmissible). The court also wrote that previously unpresented testimony from Wilson's teachers regarding their first-hand observations of him as their student was "speculative," "inadmissible," or "cumulative." *Id*. at 24. Even the remaining (unspecified) admissible evidence, the court wrote, was "largely based on hearsay or speculation or was cumulative of testimony elicited [at sentencing]." *Id*. at 25.

D. The Georgia Supreme Court's denial of a certificate of probable cause to appeal

Wilson filed an Application for Certificate of Probable Cause to Appeal (CPC) in the Georgia Supreme Court. He set forth his *Strickland* claims, reminding the court that under Georgia Supreme Court Rule 36, the Application "*will* be issued where there is arguable merit." Doc. 18-6 at 7 (emphasis in original). Under Georgia law, the Georgia Supreme Court was bound to "accept the habeas court's factual findings and credibility determinations unless clearly erroneous." *Turpin v. Lipham*, 510 S.E.2d 32, 37 (Ga. 1998). The Georgia Supreme Court denied the Application, stating: "Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur." Doc. 18-9.

V. Federal habeas corpus proceedings

A. District Court: Mitigation investigation "difficult to defend"

Wilson filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Georgia. As to the ineffective assistance claim, the district court concluded that "the conduct of Wilson's trial attorneys with regard to their investigation and presentation of mitigation evidence is difficult to defend." JA 88-89. The district court found a number of the state habeas court's factual and legal findings to be inconsistent with the record. For example, despite the superior court's findings to the contrary, the state habeas hearing evidence was undisputed that there was confusion among Wilson's trial attorneys as to who was responsible for developing the case in mitigation (with each claiming it was the other's responsibility). As a consequence of that confusion, counsel only cursorily explored their client's past by talking to Wilson, his mother, and girlfriend. Counsel ignored literally dozens of potential witnesses who were either known to counsel or easily identifiable from records in trial counsel's possession. JA 125. The district court also held that the state court determination that trial counsel made a reasonable strategic decision not to request funds for neuropsychological testing (in defiance of strong recommendations of testing from the two experts they did consult) was reached by ignoring the totality of the evidence and thus "distort[ed] reality." JA 143. However, the district court ultimately denied

relief (but issued a certificate of appealability), concluding that "even if trial counsel were deficient in their development of mitigation evidence, Wilson has not established that he was prejudiced." JA 187, 236.

B. Court of Appeals: The initial panel refused to "look through" to the reasoned state decision

An Eleventh Circuit panel affirmed. JA 238-61 [*Wilson v. Warden*, 774 F.3d 671 (11th Cir. 2014)]. The panel opinion, authored by Judge William Pryor, concluded that, based on circuit precedent, the "one line decision of the Supreme Court of Georgia denying Wilson's certificate of probable cause is the relevant state court decision for our review because it is the final decision 'on the merits.'" JA 249. The summary nature of the Georgia Supreme Court's CPC denial, in the panel's view, triggered the applicability of this Court's decision in *Harrington v. Richter*, 562 U.S. 86 (2011). This, in turn, made the state superior court's reasoned decision irrelevant, and turned the federal habeas inquiry into whether "there was any 'reasonable basis for the [Supreme Court of Georgia] to deny relief.'" JA 249 (quoting *Richter*). The panel then offered a series of reasons, different from the superior court's given rationale, that "[t]he Supreme Court of Georgia could have reasonably concluded" that CPC should be denied and affirmed the district court's denial of Wilson's federal petition. *See, e.g.*, JA 251 (the Georgia Supreme Court "could have reasonably concluded" that Wilson's "new evidence presented a 'double-edged sword'").

C. A bare majority of the *en banc* court affirms

On Wilson's motion, rehearing *en banc* was granted. Because the Warden agreed with Wilson that federal courts reviewing Georgia state habeas decisions should focus their inquiry on "the reasoned opinion of the superior court" rather than the summary CPC denial by the Supreme Court of Georgia, the court appointed Adam Mortara as *amicus curiae* to defend the panel decision. JA 309 [*Wilson v. Warden*, 834 F.3d 1227, 1232 (11th Cir. 2016) (*en banc*)]. Following briefing and oral argument before the full court, a 6-5 majority concluded – as had the panel – that: (1) the Georgia Supreme Court's one-line "summary denial [was] an adjudication on the merits" for § 2254(d) purposes (JA 311);[8] and, (2) as the "'last state-court decision on the merits,'" the court was required to review it as opposed to the reasoned decision of the habeas court. JA 311 (quoting *Greene v. Fisher*, 565 U.S. 34, 40 (2011)).

The majority correctly stated that the Georgia Supreme Court is obligated to issue a CPC if any of the habeas petitioner's claims have "arguable merit." JA 311 (quoting Ga. Code Ann. § 9-14-52(b)). But it then stated that because the Georgia Supreme Court "thoroughly reviews the evidence and the petitioner's arguments" with "the aid of the complete record and transcript" in deciding whether there is any arguable

[8] The Warden agreed with Wilson that the denial of a CPC by the Georgia Supreme Court was *not* an adjudication on the merits. JA 309.

merit, the state court "does not avoid adjudicating a habeas appeal" when it summarily denies a CPC. JA 312. The court acknowledged that the Georgia state courts and Georgia practitioners routinely refer to appellate review following the denial of habeas relief in the superior courts as discretionary, but said "discretionary" in Georgia means something "different from traditional certiorari review." The majority understood Georgia law to require issuance of a CPC upon a showing of arguable merit. JA 315. Thus, the denial of a CPC is "both discretionary" and an "'adjudication on the merits.'" JA 316.[9] As such, the Georgia Supreme Court's CPC denial was the "final state court adjudication on the merits," and thus the subject of the court's review. JA 317.

Next, the *en banc* majority addressed whether it was required by *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), to "look through" the summary CPC denial to the state habeas court's reasoned opinion. With *Richter* as its guide, the majority held that it was not. First, the majority observed that "[n]othing in . . . *Richter* suggests that its reasoning is limited to the narrow subset of habeas petitions where there is no reasoned decision from any state court." JA 318. Thus, there was

[9] The court also allayed the concerns expressed by the Georgia Attorney General's Office that treating the Georgia Supreme Court's "silent denial" of a CPC may "eradicate a procedural bar relied upon by a state court below." JA 316. Instead, the majority explained that its new rule would operate as a one way ratchet that could help the State's interests, but not harm them. *Id*. ("A summary denial of a certificate of probable cause to appeal is not on the merits for any claim that was procedurally barred below.").

no basis to adopt "two divergent analytical modes – one when there is no previous reasoned decision below and another for when there is." *Id*. Distinguishing *Ylst*'s maxim that "silence implies consent," 501 U.S. at 804, the majority said that *Ylst* only controls summary denials of claims deemed procedurally barred in the reasoned opinion. The majority said it made sense in that context "to assume that a summary affirmance rests on the same *general* ground." JA 320 (emphasis in original).

The majority then concluded that because this Court and the federal courts of appeals may summarily affirm for different reasons than those offered by a lower court, "federal courts should not . . . assume that the summary affirmances of state appellate courts adopt the reasoning of the court below." JA 323. The majority rejected Wilson's and the Warden's contention that if a Georgia Supreme Court CPC denial rests on reasons different from those explained in the state court's reasoned opinion, it could (and does) say so. To the *en banc* majority, that view would inject an inappropriate "opinion-writing" requirement. JA 325. Finally, the majority declared that both the numerous courts of appeals which have reached the opposite conclusion and the two Justices of this Court who have stated their contrary views on this issue, *see Hittson v. Chatman*, 135 S. Ct. 2126 (Ginsburg, J., joined by

Kagan, J. concurring in the denial of certiorari),[10] read "*Ylst* too broadly and *Richter* too narrowly," and had thus failed to give state court decisions the "benefit of the doubt" that AEDPA requires. JA 332.

Five judges dissented in two separate opinions, both noting that all other courts of appeals to decide the issue had chosen to look through summary orders when doing so provided access to a reasoned state court decision. Both relied on this Court's practice of applying the *Ylst* "silence means consent" presumption in similar contexts, including the Georgia capital post-conviction cases of *Sears v. Upton*, 561 U.S. 945 (2010) (looking through Georgia Supreme Court's summary denial to superior court's reasons for denying ineffective assistance of counsel claim), and *Foster v. Chatman*, 136 S. Ct. 1737 (2015) (looking through Georgia Supreme Court's summary denial to superior court decision to determine if the denial of a certificate of probable cause to appeal rested on state or federal grounds). JA 336-37, 383-84. The dissenting judges also believed that principles of comity and federalism were best respected by utilizing the "look through" procedure given: the structure of Georgia's collateral review system requiring reasoned decisions at the superior court level; the Georgia Supreme Court's practice of issuing reasoned CPC denials when it

[10] In *Hittson*, which was issued while the petition for rehearing *en banc* was pending in Wilson's case, Justice Ginsburg, relying on *Ylst*, stated that "[t]here is no reason not to 'look through' [summary state court] adjudications . . . to determine the particular reasons why the state court rejected the claim on the merits." 135 S. Ct. at 2128.

agrees with the result but disagrees with the lower court's reasons; and, the Georgia Supreme Court's continued practice of issuing summary CPC denials throughout the seven years since this Court looked through such an order in *Sears*. JA 382-89.

This Court granted certiorari.

SUMMARY OF THE ARGUMENT

Dissatisfied that federal habeas practice had come to devalue the traditional role of state courts in adjudicating federal constitutional claims, Congress enacted AEDPA. The single most significant AEDPA reform was § 2254(d)'s provision aimed at making the decisions of state courts the central focus of federal habeas review. This aim encourages and puts a premium on considered state-court exposition of the reasons for decisions adjudicating federal claims. But an obstacle to its achievement was soon perceptible. Some state appellate courts, for their own reasons of workload reduction and administrative efficiency, preferred to decide some number of federal claims without opinion or in unrevealing conclusory opinions. *Ylst*'s "look through" methodology provided the necessary and effective means for surmounting this obstacle. It made § 2254(d) work whenever § 2254(d)'s ultimate aim was at all workable. The Eleventh Circuit *en banc* majority ruling in this case – which treats reasoned state court opinions as completely irrelevant when there is a

subsequent summary state court adjudication – dismembers *Ylst*. In so doing, it disserves AEDPA, disrespects state court decisions, and deprives federal habeas petitioners, respondents, and judges alike of the benefits of a focused, consistent, responsible adjudicative process. It serves no valid purpose and should be reversed.

Furthermore, the *en banc* majority's holding harms habeas petitioners most deserving of merits review by federal courts. In any case in which a state habeas court reasonably denied relief, § 2254(d) already mandates judgment for the state. The only cases that would be affected by the *en banc* majority's approach are those where relief was *unreasonably* denied by the state habeas court. The *en banc* majority requires federal courts to imagine and defer to a "reasonable" decision no state court ever made. Under this rule, persons like Wilson will never receive a ruling that their federal claims were anywhere properly (or even reasonably) adjudicated. Instead, they will get a ruling that they *might have been*. For this class of faultless habeas petitioners, the Court of Appeals' rule guarantees denial of the protections of the "Great Writ." On the other hand, if this Court rejects the *en banc* majority rule there is no disadvantage to the State. A federal court determination that a state court decision fails to meet the requirements of § 2254(d) does not guarantee a habeas petitioner any form of relief. It only insures that the merits of the petitioner's claims will be considered. The State will have a full opportunity to argue that the claim(s) lack merit.

Nothing in AEDPA, *Richter*, or any of this Court's other decisions supports the rule adopted by the *en banc* majority and no interested party – state courts, federal courts, habeas petitioners, or habeas respondents – is better off under that regime. It serves no valid purpose, and this Court should reverse the judgment below.

ARGUMENT

Over twenty-five years ago, this Court endorsed the "maxim" that "silence implies consent, not the opposite," and established that state post-conviction appellate courts entertaining collateral challenges to criminal judgments "generally behave accordingly, affirming without further discussion when they agree, not when they disagree, with the reasons given below." *Ylst*, 501 U.S. at 804. While *Ylst* involved procedural bars, *id.* at 801-02, its "look through" method has been widely adopted by federal courts – including this Court – as an effective, easy-to-use tool for analyzing summary state appellate court decisions under 28 U.S.C. § 2254(d).

Over the objection of both parties below, a 6-to-5 majority of the *en banc* Eleventh Circuit read *Richter* to require abandonment of the "look through" doctrine in cases where a state post-conviction appellate court summarily denies a CPC. Rather than examining the reasoned state court decision that preceded the appellate court's action, the *en banc* majority held the only

relevant inquiry was what arguments "could have supported" the denial of a CPC. While *Richter* did not address the propriety of looking through to a reasoned order, because there was no such order in that case, the Court of Appeals held *Richter* governed in order to avoid "two divergent analytical modes–one when there is no previous reasoned decision below and another for when there is." JA 318.

The Court of Appeals' aversion to different "modes" for different circumstances is unfounded. Willfully ignoring the reasoning of a lower state court deprives federal courts and parties of the best evidence for answering the inquiries under § 2254(d). It also disregards the resource-allocation choices of states, such as Georgia, that concentrate responsibility for deciding post-conviction claims primarily in trial level courts.

I. Section 2254(d)'s purpose is best served and its results are most accurate when the federal court applying it has access to a reasoned state court decision

A. A purposeful paradigm shift

Before AEDPA, federal habeas review of state prisoners' claims occurred almost entirely without regard for the state court processes that preceded it. Questions of law and mixed questions of law and fact were decided *de novo*. *See*, *e.g.*, *Miller v. Fenton*, 474 U.S. 104, 112 (1985); *Brown v. Allen*, 344 U.S. 443

(1953). Factual determinations by a state court could be upset by a federal court under a variety of common circumstances. *See* 28 U.S.C. § 2254(d) (1994) (superseded); *Townsend v. Sain*, 372 U.S. 293 (1963). And the central dispositive question was whether the prisoner had convinced the federal court that he or she was "in custody in violation of the Constitution . . . of the United States." 28 U.S.C. §§ 2241(c)(3) (superseded), 2254(a); *O'Neal v. McAninch*, 513 U.S. 432, 442 (1995); *Brown v. Allen*, *supra*.

AEDPA shifted this paradigm through two fundamental and related reforms. First, it moved the state court's decision on the merits of a prisoner's claim from the margin to the center of federal habeas review. *See*, *e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011); *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002) (per curiam). Second, it limited a federal court's power to grant habeas relief to cases in which the prisoner shows *both* a constitutional violation satisfying § 2254(a), and that the state court's decision finding otherwise was either "contrary to" a holding by this Court, or "objectively unreasonable" in its application of the law or its determination of the facts. 28 U.S.C. § 2254(d) (1996); *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014); *Williams* (*Terry*) *v. Taylor*, 529 U.S. 362, 409 (2000).

This modification of habeas practice was animated by respect for state courts as the primary adjudicators of federal constitutional rights in criminal cases.

"AEDPA's requirements reflect a 'presumption that state courts know and follow the law.'" *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (quoting *Visciotti*, 537 U.S. at 24).[11] Consistent with that "presumption," § 2254(d) elevated state courts' analyses and conclusions from trivial matters that could be ignored to "the cynosure of federal review." *O'Brien v. Dubois*, 145 F.3d 16, 20 (1st Cir. 1998).

B. By design, the focus of review under § 2254(d) is on what the "state court knew and did"

Respect for state courts and the decisions they produce is the core principle of § 2254(d). However, loyalty to this principle "'does not imply abandonment or abdication of judicial review,' and 'does not by definition preclude [habeas] relief.'" *Brumfield v. Cain*, 135 S. Ct.

[11] *See also Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) ("AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights."); *Pinholster*, 563 U.S. at 182 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) ("This understanding of the text is compelled by 'the broader context of the statute as a whole,' which demonstrates Congress' intent to channel prisoners' claims first to the state courts."); *Williams* (*Michael*) *v. Taylor*, 529 U.S. 420, 436-37 (2000) ("[S]tate judiciaries have the duty and competence to vindicate rights secured by the Constitution in state criminal proceedings."); 142 Cong. Rec. S3447 (daily ed. Apr. 17, 1996) (statement of Sen. Hatch) ("There is simply no reason that federal courts should have the ability to virtually retry cases that have been properly adjudicated by our State courts.").

2269, 2277 (2015) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). Habeas relief remains available after proper inquiry by a federal court.

The terms of that inquiry are set by the statute, which bars habeas relief on "any claim that was adjudicated on the merits in State court proceedings unless" the adjudication that "resulted in" the state court's "decision": "was contrary to . . . clearly established federal law," § 2254(d)(1); or "involved an unreasonable application of[] clearly established federal law," § 2254(d)(1); or "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," § 2254(d)(2). These categories cover the spectrum of serious analytical missteps and deviations from decision-making norms that may occur in a state court's adjudication of a prisoner's claim. Where one or more such defects is present, and the federal court is convinced the prisoner has proved constitutional error under § 2254(a), habeas corpus relief is available. *See Wilson v. Corcoran*, 562 U.S. 1, 5-6 (2010) (per curiam); *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010).

For purposes of determining whether a state court decision exhibits such a defect, this Court's "cases emphasize that review under § 2254(d)(1) focuses on what a state court knew and did." *Pinholster*, 563 U.S. at 182; *see also Greene*, 565 U.S. at 38 (quoting *Pinholster*); *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) (explaining that a state court adjudication will survive § 2254(d) "so long as neither the reasoning nor the result of the state-court decision contradicts" this Court's

cases). AEDPA directs a federal court's inquiry, not simply to the reasonableness of the state court *outcome*, but to the reasonableness of subsidiary findings and determinations which *produced* that outcome – *i.e.*, whether the state court adjudication "*involved* an unreasonable application of . . . law" or "*was based on* an unreasonable determination of the facts. . . ." § 2254(d)(1) & (2) (emphases added). *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied.").

With only one exception – *Richter*, discussed *infra* – this Court's own § 2254(d) analyses have consistently adhered to the "what the state court knew and did" approach. In some cases, that inquiry has uncovered problems serious enough to rebut the presumption of state court competence and justify a grant of habeas relief.[12] In others, the same inquiry has yielded the

[12] *See Brumfield v. Cain*, 135 S. Ct. 2269 (2015) (vacating Fifth Circuit's denial of relief after careful, detailed examination of record and governing standard revealed dispositive state court factual findings were unreasonable under § 2254(d)(2)); *Lafler v. Cooper*, 566 U.S. 156, 173 (2012) (granting relief under § 2254(d)(1) after finding state court "failed to apply *Strickland*," incorrectly focused on whether prisoner's plea had been "knowing and voluntary," "made an irrelevant observation about counsel's performance at trial and mischaracterized [prisoner's] claim"); *Porter v. McCollum*, 558 U.S. 30, 42 (2009) (per curiam) (finding Florida Supreme Court's decision "unreasonable" because that court "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing"); *Panetti*, 551 U.S. at 952-53 ("The state court's denial of certain of petitioner's motions rests on an implicit finding: that the procedures it provided were adequate to resolve the competency claim. . . .

opposite result, confirming the soundness – or at least the reasonableness – of the state court's adjudication.[13]

[T]his determination cannot be reconciled with any reasonable application of the controlling standard. . . ."); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 257-58 (2007) (state court's "formulation of the issue" and inattention to "the fundamental principles established by [this Court's] most relevant precedents, resulted in a decision that was both 'contrary to' and 'involved an unreasonable application of, clearly established Federal law' "); *Rompilla v. Beard*, 545 U.S. 374, 388-89 (2005) (Pennsylvania state post-conviction court's superficial review of trial counsel's investigation "fail[ed] to answer the considerations" relevant to the *Strickland* deficient performance inquiry, and was therefore "objectively unreasonable"); *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (Maryland Court of Appeals unreasonably applied *Strickland* where its reasoning showed it had "merely assumed that [trial counsel's] investigation was adequate"); *Penry v. Johnson*, 532 U.S. 782, 796, 803-04 (2001) (observing that "[t]he Texas court did not make the rationale of its holding entirely clear," then holding that, "to the extent the [state court] concluded that the substance of the jury instructions given at Penry's . . . hearing satisfied our mandate in *Penry I*, that determination was objectively unreasonable"); (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 397 (2000) (finding § 2254(d)(1) satisfied because "[t]he Virginia Supreme Court's own analysis of prejudice" showed it "mischaracterized at best the appropriate rule," and "failed to evaluate the totality of the available mitigation evidence").

[13] *See Woods v. Etherton*, 136 S. Ct. 1149, 1153 (2016) (per curiam) (reversing grant of relief because reasoning and determinations of "state habeas court" had not adequately been "afforded the benefit of the doubt"); *White v. Wheeler*, 136 S. Ct. 456, 461 (2015) (per curiam) (reversing grant of relief where Kentucky trial court's ruling reflected "diligen[ce]" and "care," and Kentucky Supreme Court's decision affirming that ruling was therefore objectively reasonable); *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015) (reversing grant of relief and explaining that "[e]valuation of" California Supreme Court's harmlessness determination "requires consideration of the trial court's grounds for rejecting Ayala's [underlying] *Batson* challenges"); *Titlow*, 134 S. Ct. at 17

(reversing grant of relief under § 2254(d)(2) where content of Michigan Court of Appeals' opinion demonstrated it "was well aware of" relevant facts and had "correctly recognized" a proposition overlooked by the federal court); *Nevada v. Jackson*, 133 S. Ct. 1990, 1992-93 (2013) (per curiam) (reversing grant of relief and setting forth two-paragraph discussion demonstrating reasonableness of Nevada Supreme Court's analysis and conclusions); *Parker v. Matthews*, 567 U.S. 37, 42 (2012) (per curiam) (reversing grant of relief after close analysis of Kentucky Supreme Court's opinion revealed a "ground . . . sufficient" to justify rejection of prisoner's claim notwithstanding that court's additional reliance on a separate "ground of questionable validity"); *Wetzel v. Lambert*, 565 U.S. 520, 525 (2012) (per curiam) (vacating grant of relief and remanding with instruction to examine whether "*each* ground supporting the state court decision [could be] found to be unreasonable under AEDPA"); *Hardy v. Cross*, 565 U.S. 65, 70 (2011) (per curiam) (reversing grant of relief after describing specific findings made and conclusions reached by Illinois Court of Appeals, and determining that "the state court identified the correct Sixth Amendment standard and applied it in a reasonable manner"); *Bobby v. Dixon*, 565 U.S. 23, 27 (2011) (per curiam) (discussing and quoting extensively from Ohio Supreme Court decision and rejecting Sixth Circuit's determination "that the Ohio Supreme Court's decision contained three . . . egregious errors"); *Cavazos v. Smith*, 565 U.S. 1, 5, 8 (2011) (per curiam) (quoting key findings from state court opinion, and holding that "Ninth Circuit plainly erred in concluding that the jury's verdict was irrational, let alone that it was unreasonable for the California Court of Appeal to think otherwise"); *Felkner v. Jackson*, 562 U.S. 594, 597 (2011) (per curiam) (reversing grant of relief where court of appeals "did not discuss any specific facts or mention the reasoning of the other three courts that had rejected Jackson's claim"); *see also*, *e.g.*, *Renico v. Lett*, 559 U.S. 766, 778 (2010) ("[T]he Michigan Supreme Court's decision upholding the trial judge's exercise of discretion – while not necessarily correct – was not objectively unreasonable."); *Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (per curiam) ("Contrary to the Ninth Circuit's description, the state court did not 'ignor[e]' the faulty instruction. It merely held that the instruction was not reasonably likely to have misled the jury. . . ."); *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (reversing

Under AEDPA, the state court's investment of time and effort is never ignored as it was before AEDPA. Instead, the state court adjudication remains the center of attention and frames the parties' arguments and the federal court's analysis. This Court's method of focusing on "what the state court knew and did" is entrenched as the correct approach to § 2254(d) analysis for any case in which it can be carried out.

C. *Richter* did nothing to lessen the presumptive focus on "what the state court knew and did"

In *Richter*, this Court decided how a federal habeas court should address a summary state disposition "unaccompanied by an explanation" and where no other state court had addressed the claim. The Court held that § 2254(d) applied. Because it is impossible in such cases to "determine what arguments or theories supported . . . the state court's decision," *Richter* authorized federal courts to imagine for themselves what "could have supported" the decision, and to use the imagined rationale to inform an analysis "[u]nder § 2254(d)." *Id*. at 102.

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grant of relief where "[t]he California court's opinion cited state case law setting forth the correct federal standard . . . and concluded that counsel's performance was not ineffective. That conclusion was supported by the record."); *Visciotti*, 537 U.S. at 25 (reversing grant of relief while referring to and quoting extensively from "California Supreme Court's lengthy and careful opinion").

In this case, the *en banc* majority justified its refusal to look through the Georgia Supreme Court's CPC denial and consult the lower court's reasoned order on a three-step analysis built around *Richter*. *First*, *Richter* permits § 2254(d) review even in the absence of a reasoned decision by a state court. JA 317 ("When the last adjudication on the merits provides no reasoned opinion, federal courts review that decision using the test announced in *Richter*."). *Second*, habeas practice should not accommodate more than one approach to § 2254(d) review of state court decisions. JA 318 ("There is no basis in the Act or *Richter* for two divergent analytical modes – one when there is no previous reasoned decision below and another for when there is."). And *third*, *Richter*'s "could have supported" approach therefore occupies the field, and must be applied to the summary CPC denial irrespective of the reasoned state habeas court order from which Wilson sought leave to appeal. *Id*. ("Nothing in the Act or *Richter* suggests that its reasoning is limited to the narrow subset of habeas petitions where there is no reasoned decision from any state court."). The first of these points is uncontroversial, but the second and third reflect disregard both for this Court's § 2254(d) jurisprudence beyond *Richter*, and for the unique context out of which *Richter* emerged.

The Court of Appeals' first mistake was its insistence on the need to avoid "two divergent analytical modes – one when there is no previous reasoned decision below and another for when there is." JA 318. If

having two such "modes" were truly a problem demanding the solution imposed below, surely this Court would have noticed and said so by now. This Court has not. In more than a dozen cases in which the § 2254(d) analysis included an assessment of the reasonableness of a state court decision since *Richter*, this Court has never failed to consult and reference the actual content of the state court's reasoned order. *See* note 13, *supra*. Thus, this Court's own decisions demonstrate adherence to an analysis which "focuses" whenever possible "on what a state court knew and did," *Pinholster*, 563 U.S. at 182, while reserving *Richter*'s "could have supported" approach for the rare case in which it is necessary.[14]

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[14] Since *Richter* this Court has made only three references to that decision's language authorizing reconsideration of "arguments or theories [that] . . . could have supported[] the state court's decision," and all three support Petitioner's position. The first reference came in *Pinholster*, which, like *Richter*, concerned a claim that had been "summarily denied" by the California Supreme Court, and therefore required a § 2254(d) analysis built only on reasons that "could have supported" the state court's decision. 563 U.S. at 177-78, 188. The second reference appeared just over a year after *Richter* in *Wetzel v. Lambert*, 565 U.S. 520 (2012) (per curiam), where this Court quoted the relevant sentence from *Richter*, affirmatively replaced "or, as here, could have supported," with an ellipsis, and remanded the case to the Third Circuit for more careful consideration of "*each* ground supporting the state court decision. . . ." 565 U.S. at 524-25 (emphasis by the Court). And the most recent reference came in *Brumfield*, which cited *Richter* for the proposition that a federal habeas court must "defer to hypothetical reasons [a] state court might have given for rejecting [a] federal claim *where there is no 'opinion explaining the reasons* relief has been denied.'" 135 S. Ct. at 2282-83 (emphasis added).

It is unsurprising that *Richter* has not dominated § 2254(d) review in the manner employed by the Eleventh Circuit. *Richter* presented a narrow question of first impression: "Does AEDPA deference apply to a state court's summary disposition of a claim . . . ?" *Harrington v. Richter*, 559 U.S. 935 (2010) (order granting certiorari). That question had special salience for California (where the case originated) whose idiosyncratic state habeas corpus scheme allowing prisoners to file habeas petitions initially in appellate courts[15] made it a uniquely prolific producer of *truly* "summary" dispositions, *i.e.*, merits dispositions of claims unaccompanied by *any* statement of reasons from *any* court.[16]

Because so many cases from such a populous state would be affected, the issue before the Court was an all-or-nothing proposition. *Either* § 2254(d) methodology could be adapted to the California Supreme Court's practice of summarily denying state habeas relief in

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[15] *See*, *e.g.*, *Carey v. Saffold*, 536 U.S. 214, 221 (2002) (observing that "California's collateral review system differs from that of other States in that it does not require, technically speaking, appellate review of a lower court determination. Instead it contemplates that a prisoner will file a new 'original' habeas petition.").

[16] *See* Brief of California Attorneys for Criminal Justice and California Academy of Appellate Lawyers as *Amici Curiae* in Support of Respondent, *Harrington v. Richter*, No. 09-587, at 8-10 (reporting, *inter alia*, that over 99% of the more than 3,800 "original proceedings" disposed of by the California Supreme Court during fiscal year 2007-2008 were resolved by "summary" order); Brief of Law Professors and Legal Scholars as *Amici Curiae* in Support of Respondent, *Harrington v. Richter*, No. 09-587, at 5-26 (demonstrating that, contrary to unsupported claims by States as *Amicus Curiae*, large scale use of truly summary dispositions was a practice virtually unique to California).

cases where there was no reasoned decision by any state court,[17] *or* the vast majority of cases involving such dispositions would be exempt from § 2254(d). Due to the delicate balance of state and federal interests reflected in § 2254(d), it is no wonder that this Court authorized the "could have supported" approach.

Given the circumstances from which it arose, and this Court's own consistent practice in numerous cases spanning more than a decade and a half, *Richter* did not abandon the "focus[] on what the state court knew and did." Yet the Eleventh Circuit *en banc* majority justified its holding by writing "[n]othing in the Act or *Richter* suggests that its reasoning is limited to the narrow subset of habeas petitions where there is no reasoned decision from any state court." JA 318. That is backwards. To the extent "the Act" informs the question, it directs federal courts to evaluate a state court's subsidiary findings and reasoning in light of the standards set by § 2254(d). That is what this Court has done in every case except *Richter*. And, as for *Richter* itself, *everything* about it indicates that it was aimed at cases in which there is no reasoned decision from any state court. Those were the circumstances that came before this Court, and that was the question as this Court framed it in the second paragraph of the opinion: "The first inquiry this case presents is

[17] Not all persons seeking habeas relief in California file directly in the California Supreme Court. As this Court noted in *Saffold*, *supra*, in many cases prisoners file initially in a lower court and then seek appellate review of that decision (though dubbed an original petition) in a higher court. 536 U.S. at 221-22.

whether [§ 2254(d)] applies when state-court relief is denied without an accompanying statement of reasons." *Richter*, 562 U.S. at 780.

II. When the Georgia Supreme Court has issued an unreasoned CPC denial, § 2254(d)'s purpose and application is best effectuated using the "look through" method established in *Ylst*

The circumstances presented by this case are materially different from what this Court confronted in *Richter*. Georgia's system is nothing like California's and neither necessitates nor justifies resort to *Richter*'s decision-making-by-hypothetical. The design and operation of Georgia's system dictates that the surest method of maintaining fidelity to "what the state court knew and did" is to look through a CPC denial and evaluate the reasoned decision of the state habeas court.

A. Georgia's state habeas scheme consistently produces written, reviewable records of what its courts "knew and did"

Unlike California, Georgia *has* designed and implemented a system that invests substantial time and resources in the taking of evidence and the production of reasoned lower court decisions. Applying *Richter*'s "could have supported" method in states like Georgia has the effect of *excluding* "what the state court knew

and did" from consideration in the vast majority of § 2254(d) analyses.

The foundation of the Georgia state habeas scheme has been in place since 1967 when the legislature substantially expanded the availability of collateral review to correspond with the expansion of federal habeas review of state court judgments.[18] Recognizing that modern state habeas review can "include many sharply contested issues of a factual nature," the state legislature specified that "only the superior courts have jurisdiction of such cases." O.C.G.A. § 9-14-40(b); *see also*, *e.g.*, *McCorquodale v. Stynchcombe*, 236 S.E.2d 486, 488 (Ga. 1977). Consistent with that specification, which remains in place today, Georgia's statutory scheme assigns the bulk of the responsibility for considering and adjudicating collateral challenges to the state's trial level habeas courts. Those courts are vested with "exclusive jurisdiction" to hear habeas challenges. O.C.G.A. § 9-14-43. They are empowered to "receive proof by depositions, oral testimony, sworn affidavits, or other evidence." O.C.G.A. § 9-14-48(a). They are directed to "review[] the pleadings and evidence offered at the trial of the case," and then to "make written findings of fact and conclusions of law

[18] *See* O.C.G.A. § 9-14-40(a)(1) & (2) (1967) (explaining that General Assembly expanded "the scope of state habeas corpus" in response to federal court expansion of habeas corpus in order to strengthen "state courts as instruments for the vindication of constitutional rights.").

upon which the judgment is based." O.C.G.A. § 9-14-49.[19]

As the Warden emphasized in a submission to the *en banc* Eleventh Circuit, "the actual practice of law," under this scheme routinely involves substantial investments of time and resources by the parties and the state habeas court:

> In a capital state habeas proceeding, the parties spend years in discovery, conduct an evidentiary hearing during which an extensive record of evidence is created, and thoroughly brief the issues to the state habeas court. O.C.G.A. § 9-14-49 expressly requires habeas courts to "make written findings of fact and conclusions of law upon which the judgment is based" and if the court fails to do so, "the case must be vacated and remanded with instruction to the habeas court to enter a new order that complies with O.C.G.A. § 9-14-49." *Thomas v. State*, 284 Ga. 327, 328 (2008). These opinions can take years after briefing before they are issued and are, most often, quite lengthy in capital cases.

JA 296 [Warden's 28(j) letter at 4].

Whereas the state habeas courts saw their responsibilities for taking evidence and generating specific,

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[19] *See also*, *e.g.*, *Baden v. Ochoa-Hernandez*, 771 S.E.2d 898, 899 (Ga. 2015) (vacating state habeas court's summary order for lack of "written findings of fact and conclusions of law upon which the judgment is based," and remanding "for issuance of an order in compliance with § 9-14-29"); *Hughes v. Sikes*, 546 S.E.2d 518, 520 (Ga. 2001) (similar).

reasoned decisions expand and solidify after 1967, the role of the Georgia Supreme Court moved decidedly in the other direction. In 1975, the state legislature ended the practice of allowing state habeas petitioners to appeal an adverse judgment directly to the Georgia Supreme Court. *See Reed v. Hopper*, 219 S.E.2d 409, 411 (Ga. 1975).[20] In its place, the Georgia legislature enacted O.C.G.A. § 9-14-52, which instituted "a discretionary review process" under which a state habeas petitioner must secure a CPC before an appeal will be "authorize[d]." *Smith v. Nichols*, 512 S.E.2d 279, 281 (Ga. 1999).[21] Under this discretionary review system, the Georgia Supreme Court has largely left the business of entertaining full merits appeals in habeas cases. In the recent decade between 2003 and 2012, it granted a CPC – the jurisdictional prerequisite to such an appeal – in less than 7% of the cases that came before it.[22]

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[20] *See also* Wilkes, Donald E., *The Great Writ Hit: The Curtailment of Habeas Corpus in Georgia Since 1967*, 7 John Marshall L.J. 415, 440-41 (2014) (explaining that 1975 amendment broke with more than a century of practice permitting direct appellate review as of right following denial of state habeas relief).

[21] Pursuant to Rule 36 of the Georgia Supreme Court Rules, a CPC "will be issued where there is arguable merit, provided there has been compliance with O.C.G.A. § 9-14-52 (b)." *See Reed*, 219 S.E.2d at 411 (characterizing a CPC "as a prerequisite to appeal in a habeas case decided adversely to a petitioner"); *Fullwood v. Sivley*, 517 S.E.2d 511, 514 (Ga. 1999) (declaring CPC requirement to be "jurisdictional"). As discussed *infra*, this standard has important implications if the Eleventh Circuit *en banc* majority's holding is upheld.

[22] This figure was calculated using the Annual Report: Georgia Courts, which is available via online archive at http://www.

In sum, Georgia's habeas scheme – by design and in operation – concentrates the bulk of the work and the dispositional responsibility in the trial level state habeas courts. Where a CPC is denied (as it is in more than 93% of cases), the state habeas court's order stands as the official, authoritative articulation of the facts found, the rules and methods utilized, and the conclusions reached during the state judicial system's adjudication of the prisoner's claims.

Richter offered this Court no such record of what the state court knew and did, and was therefore the wrong source for the Eleventh Circuit *en banc* majority to consult when deciding how to approach cases involving reasoned lower court decisions. The right source – one both tailor-made for a scheme like Georgia's and well-suited to safeguard the interests of all participants in a habeas case – is *Ylst*.

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georgiacourts.org/content/annual-reports. Published each year by the Judicial Council of Georgia, the Annual Report provides statistics on filings in and dispositions by the Georgia Supreme Court across a variety of case categories. The calculation represented here was derived from the published data for "Habeas Corpus Applications" covering the years 2003 through 2012. During that period, the Georgia Supreme Court granted 263 CPC applications, denied 2,793, dismissed 780, and disposed of an additional 106 by "Other" means. Altogether, the 263 CPC grants constituted 6.671% of total CPC dispositions.

B. The "look through" method offers the right combination of administrability, accuracy, and fidelity to Georgia's scheme and the decisions it produces

In *Ylst*, this Court faced the challenge of trying "to determine whether an unexplained order . . . rests primarily on federal law." 501 U.S. at 802. "The question [wa]s not an easy one" because unwritten disagreements within the issuing court may make "the basis of the decision . . . not merely undiscoverable but nonexistent." *Id*. at 802-03. Furthermore, "many formulary orders are not meant to convey *anything* as to the reason for the decision." *Id.* (emphasis by the Court). Thus, "[a]ttributing a reason is . . . both difficult and artificial." *Id.* This Court found a solution by "applying the following presumption: Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Id.* at 803. That presumption "assists . . . not only administrability but accuracy as well." *Id.*

Although *Ylst* concerned application of the procedural default doctrine, *id*. at 803, the advantages offered by its presumption have also made it attractive to federal courts applying § 2254(d). To date, the practice of looking through to the last reasoned state court decision for § 2254(d) purposes has been adopted by

every court to consider the issue, other than the court below.[23]

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[23] *See*, *e.g.*, *Malone v. Clarke*, 536 F.3d 54, 63 n.6 (1st Cir. 2008) ("The highest state court . . . summarily denied [petitioner's] claim, . . . therefore, we 'look through' to the last reasoned decision,' which is the decision of the Massachusetts Appeals Court") (citations omitted); *Rosario v. Ercole*, 601 F.3d 118, 126 n.3 (2d Cir. 2010) ("Because the state court [of] appeals did not address the ineffective assistance of counsel claim, we look to the trial court's analysis of the issue."); *Bond v. Beard*, 539 F.3d 256, 290 (3d Cir. 2008) (because the state supreme court did not "explicitly" rule on *Strickland*'s prejudice prong, "we should review the [state post-conviction court's] decision since it either represents the state courts' last reasoned opinion on this topic or has not been supplemented in a meaningful way by the higher state court"); *Grueninger v. Director, Virginia Dept. of Corrections*, 813 F.3d 517, 525 (4th Cir. 2016) (rejecting state's request to apply *Richter* and choosing instead to " 'look through' the Supreme Court of Virginia's summary refusal to hear Grueninger's appeal and evaluate the [state habeas court's] reasoned decision on [his] claim"); *Woodfox v. Cain*, 772 F.3d 358, 369 (5th Cir. 2014) ("Under AEDPA, 'we review the last reasoned state court decision.' Using the 'look through' doctrine, we 'ignore – and hence, look through – an unexplained state court denial and evaluate the last reasoned state court decision.' ") (citations omitted); *Lint v. Prelesnik*, 542 Fed. Appx. 472, 476 (6th Cir. 2013) (citing *Guilmette v. Howes*, 624 F.3d 286, 289 (6th Cir. 2010)) (applying § 2254(d) after observing that, "to determine the proper state-court opinion to review, this court must 'look through' the summary decisions of the Michigan Supreme Court and the Michigan Court of Appeals to the last reasoned state-court opinion"); *Wooley v. Rednour*, 702 F.3d 411, 421 (7th Cir. 2012) ("When a state collateral review system issues multiple decisions we typically consider 'the last reasoned opinion on the claim' – here the opinion of the Illinois Appellate Court."); *Worthington v. Roper*, 631 F.3d 487, 497 (8th Cir. 2011) ("[W]hen a state appellate court affirms a lower court decision without reasoning, we 'look through' the silent opinion and apply AEDPA review to the 'last reasoned decision' of the state courts."); *Murray v. Schriro*, 745 F.3d 984, 1006 (9th Cir. 2014) ("Because

This Court, too, has used the "look through" method in its own post-*Richter* applications of § 2254(d). In *Premo v. Moore*, 562 U.S. 115 (2011), decided the same day as *Richter*, this Court examined an ineffective assistance of counsel claim whose rejection in post-conviction proceedings had been "affirmed without opinion" by the Court of Appeals of Oregon. *Moore v. Palmateer*, 26 P.3d 191 (Or. App. 2001). The Court directed its § 2254(d) analysis, not to the summary order of the state appellate court, but to the reasoned decision (and the underlying record) of the "state post-conviction court." *Premo*, 562 U.S. at 128-32. Likewise, in *Woods v. Etherton*, *supra*, decided last Term, this Court reversed a grant of habeas relief by the United States Court of Appeals for the Sixth Circuit by looking not to the denial of permission to appeal by two state appellate courts but to the order of the state trial level habeas court to which the Sixth Circuit should have given "the benefit of the doubt." 136 S. Ct. at 1153.

Moreover, although this Court has (until now) never had occasion to apply § 2254(d) in a Georgia

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the Arizona Supreme Court's decision did not provide the reasoning underlying its decision [to deny petitioner's] *Batson* [claim], we must look through the Arizona Supreme Court's decision to the state trial court's decision as the reasoned decision."); *Martinez v. Hartley*, 413 Fed. Appx. 44, 47 n.3 (10th Cir. 2011) ("If the last state court to render a judgment on a claim did so in a cursory or unexplained manner . . . [we] apply a 'look through' rule, which essentially looks past the last state court decision to the last reasoned state court decision.").

case, it has twice looked through unreasoned CPC denials and found reversible error in the reasoned decisions of Georgia state habeas courts. First, in *Sears*, the Court acknowledged that the Georgia Supreme Court had "summarily denied review of [Sears'] claims," then immediately declared that it was "plain from the face of the state court's [habeas] opinion" that it had erred in its application of *Strickland*. *Sears*, 561 U.S. at 946. Last Term's decision in *Foster* also involved a reasoned state habeas order followed by a summary CPC denial. This Court was even more explicit in its reliance on the "look through" method. After observing that a CPC denial by the Georgia Supreme Court "would seem to be a decision on the merits," *Foster*, 136 S. Ct. at 1746 n.2, the Court emphasized that "it is perfectly consistent with this Court's past practices to review a lower court decision – in this case, that of the Georgia habeas court – in order to ascertain whether a federal question may be implicated in an unreasoned summary order from a higher court." *Id.* at n.3.

The ubiquity of "look through" usage in this Court and the courts of appeals is unsurprising. It is simple, well understood, easy to apply, and consistent with AEDPA. It allows both litigants and courts in habeas cases to avoid the job of speculating about what the state court decision may or may not have been. It is no accident that this Court has informed its own § 2254(d) analyses with reasoned state court decisions whenever they have been available. Such decisions are the *best* evidence of what a state court knew and did. They are

therefore the most useful sources from which to determine whether a state court's decision "*involved* an unreasonable application of . . . law," (§ 2254d)(1), or "*was based on* an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2) (emphasis added).

Moreover, looking through a CPC denial does nothing to offend the Georgia Supreme Court or disrupt the state habeas scheme in which it operates. That scheme was expressly designed for the "state judiciary to concentrate its resources on" the production of reasoned decisions in the trial level habeas courts. *Richter*, 562 U.S. at 99. Georgia law further contemplates – and the Georgia Supreme Court readily accepts – that most of those decisions will not be scrutinized on appeal. Thus, if anything, looking through to the product of a Georgia state habeas court's work poses far *less* risk to comity and federalism than does the Eleventh Circuit *en banc* majority's singular insistence upon ignoring reasoned state court decisions.

C. Georgia's own procedures would prohibit the artificial and speculative approach envisioned by the Court of Appeals

According to the Eleventh Circuit *en banc* majority, *Richter* dictates that a prisoner in Wilson's position "must establish that there was no reasonable basis for the Georgia Supreme Court to deny his certificate of probable cause." JA 318. The majority further insisted that "no reasonable basis" review is *not* informed by the state habeas court's reasoned order. *See*, *e.g.*, JA

320 ("But it does not follow that a summary affirmance rests on the same *specific* reasons provided by the lower court.") (emphasis in original); JA 321 ("An appellate court might affirm because it agrees with the disposition of a claim for a different reason."). Taken together, these rulings purport to establish that a Georgia summary CPC denial both erects a barrier to a federal court's consideration of legal or factual defects in the underlying state habeas court order, and provides the federal court with a blank canvas on which to project (and defer to) its own hypothetical reasons for the state court to have denied a prisoner's constitutional claims. Georgia law makes clear, however, that a CPC denial is not so easily severed from the state habeas order that precedes it. And as this Court's jurisprudence makes equally clear, § 2254(d) review of a Georgia CPC denial is neither as accommodating nor as advantageous to the Warden as the Court of Appeals appeared to envision.

1. Georgia law links the CPC eligibility analysis to the findings in the state habeas court's order

Georgia's purposeful concentration of responsibility for fact development and decision making is reflected in its rules for habeas appellate review. While the Georgia Supreme Court decides whether "there is arguable merit" mandating issuance of a CPC, *see* Ga. Sup. Ct. R. 36, it does not do so free of restraint. Rather, "[t]he proper standard of review requires that [the Georgia Supreme Court] accept the habeas court's

factual findings and credibility determinations unless clearly erroneous. . . ." *Terry v. Hamrick*, 663 S.E.2d 256, 257-58 (Ga. 2008); *see also*, *e.g.*, *Kennedy v. Primack*, 791 S.E.2d 819, 820 (Ga. 2016) (same).

This "clearly erroneous" standard ensures that the determinations detailed in a state habeas court's order *will* supply the factual foundation for any further analysis undertaken by the Georgia Supreme Court. And that, in turn, means that a federal habeas court evaluating a CPC denial would have no choice but to do the very thing the Eleventh Circuit *en banc* majority attempted to outlaw: *look through* to the state habeas court's order. In light of Georgia's own rules, proceeding any other way would guarantee a "most improbable assessment of what actually occurred." *Ylst*, 501 U.S. at 804.[24]

2. Section 2254(d) analysis of a CPC denial must turn on the reasonableness of the Georgia Supreme Court's refusal to find "arguable merit"

The Eleventh Circuit *en banc* majority insisted that Wilson (and others similarly situated) be required

[24] As this Court observed in *Pinholster*, 563 U.S. at 182-83, "[i]t would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court." It would be equally strange to direct a federal court to analyze a state court's adjudication while willfully blinding itself to materials relied upon by that state court – including the findings of another state court whose judgment was under review.

to demonstrate that "'there was no reasonable basis for the [Georgia Supreme Court] to deny relief.'" JA 346 (quoting *Richter*, 562 U.S. at 98). Proper framing of the inquiry for meeting that standard is critical. In the context of a Georgia CPC denial, the "relief" denied by the state court is full merits review on appeal, *not* a new trial or sentencing hearing. And the standard by which the Georgia Supreme Court decides whether to grant or deny that relief is whether the prisoner's claim has "'arguable merit,'" *not* whether he or she has proven the claim's actual merit. JA 311 (quoting Ga. Sup. Ct. R. 36).

As the Court of Appeals acknowledged, there is a qualitative difference between the standards applied and the depth of review undertaken at the CPC stage as compared to the post-CPC merits review stage. *See* JA 313 ("That the Georgia Supreme Court may choose to conduct a more probing review of appeals after granting a certificate of probable cause does not mean that a denial of a certificate of probable cause is not also on the merits."). And as this Court demonstrated in *Brumfield*, attention to such a qualitative difference in the legal standards applicable to different modes of state court review is an indispensable part of a § 2254(d) analysis.

In *Brumfield*, the habeas petitioner's *Atkins v. Virginia* claim was rejected by the Louisiana state court on the ground that he had failed to make the showing necessary to satisfy the "low . . . threshold for an evidentiary hearing" set by state law. 135 S. Ct. at 2281. Under that standard, a hearing was required when a

prisoner "put forward sufficient evidence to raise a 'reasonable ground' to believe him to be intellectually disabled," *id*.; "put at issue the fact of mental retardation," *id*. at 2274; or raised a "reasonable doubt" about intellectual disability. *Id*. Accepting the "propriety of the legal standard the [state] trial court applied," *id*. at 2276, this Court concentrated its § 2254(d) analysis on whether the state court decision to deny an evidentiary hearing – and in so doing dispose of the *Atkins* claim – was reasonable in light of the legal standard the state court was obligated to apply. *Id.*

The Court held that the state trial court's decision was based on a set of unreasonable factual determinations. This was *not* because Brumfield's allegations conclusively proved the *actual merits* of his *Atkins* claim, but because the state court's ruling indicated that it had failed to appreciate the *possibility* of intellectual disability – which was the touchstone under state law – reflected in the evidence and allegations put before it.[25] Later, responding to the dissent, the Court acknowledged the existence of evidence undercutting Brumfield's *Atkins* claim, but made clear that,

[25] *See, e.g.*, 135 S. Ct. at 2278 ("To conclude, as the state trial court did, that Brumfield's reported IQ score of 75 somehow demonstrated that he could not possess subaverage intelligence therefore reflected an unreasonable determination of the facts."); *id*. at 2278-79 ("The state court therefore could not reasonably infer from this evidence that any examination Dr. Jordan had performed was sufficiently rigorous to preclude definitively the possibility that Brumfield possessed subaverage intelligence."); *id*. at 2279 ("The record before the state court contained sufficient evidence to raise a question as to whether Brumfield met these [diagnostic] criteria.").

given the low standard by which the state court was obligated to judge his request for an evidentiary hearing, that evidence could not change the outcome of the § 2254(d) analysis.[26] What made the state court decision in *Brumfield* unreasonable was its failure to recognize the *possibility* that the *Atkins* claim had merit, which was all that the applicable state law standard required.

The methodology utilized by this Court in *Brumfield* necessarily informs the § 2254(d) analysis of a CPC denial by the Georgia Supreme Court. Like the evidentiary hearing threshold in *Brumfield*, the standard for issuance of a CPC in Georgia is lower than the standard for setting aside a judgment of conviction or sentence. Pursuant to Georgia Supreme Court Rule 36, a CPC "will be issued where there is arguable merit[.]" "Arguable merit" is different from "actual merit," and has been defined in Georgia as not "wholly frivolous." *Davis v. State*, 332 S.E.2d 668, 668-69 (Ga. Ct. App. 1985). That it is possible to satisfy the former yet fall short of the latter is well established. *See*, *e.g.*, *Smith v. State*, 222 S.E.2d 357, 360 (Ga. 1976) ("Assuming that the defendant's contention that the lineup was suggestive has arguable merit, considering the totality of the

[26] *See* 135 S. Ct. at 2281 ("It is critical to remember . . . that in seeking an evidentiary hearing, Brumfield was not obligated to show that he was intellectually disabled, or even that he would likely be able to prove as much. Rather, Brumfield needed only to raise a 'reasonable doubt' as to his intellectual disability to be entitled to an evidentiary hearing.").

circumstances, we find no substantial likelihood of misidentification.").

The difference between Georgia's standards for granting a CPC and granting relief from a judgment of conviction manifests not only in the *strength* of the proof required but also in the *perspective* from which the proof must be evaluated. By definition, a claim may be *arguable* even if it is not ultimately strong enough to win. *See*, *e.g.*, *Buck*, 137 S. Ct. at 774 ("That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable."). And whether a claim is arguable must be assessed from the vantage point of, and while drawing reasonable inferences in favor of, the party proposing to argue it. A prisoner seeking to meet the "arguable merit" standard is entitled, by commonsense operation of the standard itself, to the benefit of the doubt, while a prisoner proceeding under a more demanding standard is not. *Cf. Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (both lower courts erred in denying a certificate of appealability without giving "full consideration to the substantial evidence petitioner put forth," and "[i]nstead . . . accept[ing] without question the state court's evaluation" supporting an adverse judgment).

The significance of this arrangement for § 2254(d) purposes is that a denial of relief influenced by a state court's failure to extend the benefit of the doubt when that benefit is legally owed may be unreasonable even though it would be perfectly reasonable to deny relief in the absence of that obligation. *Brumfield* prevailed

for exactly that reason. The proof of intellectual disability that he offered to the state court may have been relatively weak, but it was still enough to meet the low standard set by state law for a hearing. The state court's failure to draw favorable inferences from, and see the potential in, the proffer Brumfield made rendered its decision unreasonable.

The same principles hold true for § 2254(d) review of a summary CPC denial by the Georgia Supreme Court. Because state law mandates issuance of a CPC where a claim has "arguable merit," at the CPC stage, the Georgia Supreme Court must give effect to any non-frivolous interpretation of the evidence and arguments by allowing the appeal to proceed. Where even one non-frivolous interpretation is shown to exist, a denial of "relief," *Richter*, 562 U.S. at 68, in the form of refusal to issue a CPC, is unreasonable under § 2254(d) for the same reason that the Louisiana state court's termination of review by refusing an evidentiary hearing was judged to be unreasonable in *Brumfield*. And, in cases where the CPC denial was unreasonable, the federal court would proceed to review the petitioner's claims unconstrained by § 2254(d). *See*, *e.g.*, *Panetti*, 551 U.S. at 948.

In this case, although the majority below rightly observed that "Wilson must establish that there was no reasonable basis for the Georgia Supreme Court to deny his [CPC]," JA 318, the discussion that followed showed no sign of recognizing or accounting for the significance of the "arguable merit" standard that bound the state court. If anything, the opposite appears to be

true. For example, the Court of Appeals repeatedly characterized the Georgia Supreme Court's denial of a CPC as a "summary affirmance," and implied that a CPC denial differs from a merits affirmance after a CPC grant only on the assertedly inconsequential basis that the latter involves a reasoned opinion while the former does not. JA 320-23. That view was reinforced when the Court of Appeals later added that, "[w]hen the reasoning of the state trial court was reasonable, there is necessarily at least one reasonable basis on which the state supreme court could have denied relief and [the federal court's] inquiry ends." JA 327.

By these and similar statements, the Eleventh Circuit *en banc* majority elided the two distinct steps of Georgia's appellate procedure, and effectively read the "arguable merit" standard out of the process. That approach is at odds with Georgia's own state habeas design and with the § 2254(d) methodology demonstrated by this Court in *Brumfield*. Those authorities make clear that the § 2254(d) question in a CPC-denial case is whether the Georgia Supreme Court unreasonably failed to find even "arguable merit" in the prisoner's allegations. That is a different, and materially less deferential inquiry, than the one contemplated by the *en banc* majority.

III. The harm done when a federal court chooses to ignore the stated reasoning of a state court is well illustrated by this case

When ruling on the underlying claim at issue in this case – that Wilson's trial counsel failed to develop and present compelling mitigating evidence – the state habeas court concluded that: (1) counsel's performance was not deficient (a determination soundly rejected by the district court and not disturbed by the initial panel opinion or the *en banc* court); and (2) counsel's failure to present the new evidence put forward at the state court hearing was not prejudicial. The primary basis for the state court's no-prejudice finding, repeated several times in slightly varying formulations, was the court's belief that "the testimony proffered in support of the claim would have been inadmissible on evidentiary grounds, cumulative of other testimony, or otherwise would not have, in reasonable probability, changed the outcome of the trial." JA 61; *see also* JA 62, 63. The state court did not explain precisely what testimony offered by the numerous lay witnesses (teachers, social workers, and other persons who knew Wilson and his mother) was inadmissible (or why). Georgia's standards for the admission of mitigating evidence are even broader than this Court's already expansive holdings. *See Barnes v. State*, 496 S.E.2d 674, 688 (Ga. 1998) ("Georgia provides a defendant with more protection than that provided under *Lockett* [*v. Ohio*, 438 U.S. 586 (1978)]).").[27] Some of the evidence

[27] The Court in *Barnes* went on to say that "evidentiary rules may be trumped by a defendant's need to introduce mitigating

was "cumulative" only in the sense that it provided graphic details of the profound abuse and neglect Wilson endured that was referred to in general terms in the truncated testimony of Dr. Kohanski and Wilson's mother at trial. But the witness testimony and social history records introduced at the habeas evidentiary hearing provided precisely the kind of vignettes and details that this Court has previously found persuasive. *See, e.g.*, *Williams*, 529 U.S. at 395-96, n.19.

As for the neuropsychological testing results demonstrating organic brain damage (which the trial experts recommended and trial counsel failed to pursue), the state habeas court wrote that Wilson could not show counsel's omissions were prejudicial. JA 64, 81-82 (noting evidence of guilt and evidence in aggravation). However, the state court failed to acknowledge this Court's decisions finding prejudice for failing to present similar testimony in cases where the capital defendant was clearly the actual killer and there was extensive aggravating evidence. *See, e.g.*, *Rompilla*, 545 U.S. at 393 (trial counsel's failure to offer evidence of organic brain damage resulted in prejudice even though Rompilla repeatedly stabbed his victim and then set him on fire and where Rompilla had a significant history of prior violence); *Wiggins*, 539 U.S. at 536 (prejudice from trial counsel's failure to offer extensive

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evidence"; that "no unnecessary restrictions should be imposed on mitigation evidence that a defendant can introduce in the sentencing phase regarding his individual character and background"; and that "all doubt should be resolved in favor of admissibility given the enormity of the [death] penalty." *Id.* at 688-89.

mitigating evidence, including Wiggins' limited intellectual capacities, where Wiggins robbed an elderly woman, ransacked her apartment and drowned her in a bathtub); *Williams*, 529 U.S. at 398 (prejudice from trial counsel's failure to offer evidence that Williams had an IQ in the borderline mentally retarded range, suffered repeated head injuries, and might have organic mental impairments where Williams killed a man with a mattock simply for his refusal to lend Williams "a couple of dollars" and subsequently committed two separate violent assaults on elderly victims, leaving one woman in "a vegetative state").[28]

The initial panel below addressed this aspect of the *Strickland* claim by speculating about the Georgia Supreme Court's reasons for denying CPC. JA 249 (quoting *Richter*) ("Instead of deferring to the reasoning of the state trial court, we ask whether there was any 'reasonable basis for the [Supreme Court of Georgia] to deny relief.' ").[29] Untethered from the reasoned state court opinion, the panel opined that the Georgia Supreme Court could have reasonably concluded that

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[28] In *Sears*, this Court recognized that a Georgia state habeas court failed to properly apply the *Strickland* prejudice inquiry in several respects similar to the manner in which the prejudice analysis was conducted in Wilson's case. The state habeas court in *Sears* discounted evidence of frontal lobe abnormalities because some mitigation evidence had been presented at sentencing and the court believed prejudice could only be shown in cases in which little or no mitigation evidence was presented. 561 U.S. at 954-55.

[29] The panel failed to note the "any arguable merit" standard for granting a CPC and proceeded and acted as if the Georgia Supreme Court engaged in full merits review of Wilson's claim.

the unpresented lay witness testimony might have "'humanized'" Wilson as it "offered more detailed accounts of Wilson's home life." JA 251. But the evidence was also a "'double-edged sword'" because of admissions that Wilson was "disruptive" in school, impulsive, had a bad attitude, and because of some inconsistencies in Wilson's accounts of the abuse and neglect. JA 251. As for the failure to present evidence of organic brain damage, the panel hypothesized that the Supreme Court of Georgia might have found no prejudice because the neuropsychologist who presented evidence at the state habeas hearing used his own "interpretive standards . . . instead of accepted, authoritative standards." JA 252. The state habeas court, however, did not make either a determination that Wilson's evidence was "double-edged" or that the neuropsychological evidence should be discounted due to any alleged idiosyncrasies in the neuropsychologist's methodology.[30] The panel finally observed that the Georgia

[30] The reason it did not do so is likely because the Warden offered no substantive proof during the state habeas proceeding that Wilson's expert (Dr. Herrera) deviated from accepted practice in the field. While counsel for the Warden did ask questions about norms for some of the tests used based on several textbooks, Dr. Herrera insisted that the norms cited were not authoritative or binding and further testified that the norms he used were obtained from other generally accepted and respected peer reviewed research. *See*, *e.g.*, Doc. 16-1 at 146-47; Doc. 16-2 at 4-6, 12-13, 21-26. The Warden did not present testimony from an expert witness asserting any defect in Dr. Herrera's methodology. Furthermore, some of the more robust results demonstrating organicity, *i.e.*, Wilson's scores on the Wisconsin card-sorting test (a particularly sensitive test for detecting frontal lobe impairment) demonstrated impairment under both the norms cited and those used by

Supreme Court could have looked at the "overall mix of evidence, aggravating and mitigating, old and new and reasonably determined that a jury would still have sentenced Wilson to death." JA 254.[31]

The import of the rule adopted by the *en banc* majority is clear. In all cases in which the *en banc* court's refusal to "look through" is dispositive, it will necessarily be the case that the state trial court incorrectly (and unreasonably) adjudicated the habeas petitioner's federal claim. This is so because the analysis is superfluous unless the superior court's decision was unreasonably wrong. If it was not, then that court's decision (as distinguished from the summary order of an appellate court) must be respected by federal courts under § 2254(d) and the State will prevail. But habeas petitioners whose claims were unreasonably rejected by the lower state court will be denied consideration of the merits of their claims by any federal court. Rather they will receive only what Wilson got from the panel in this case: a determination that a state appellate court hypothetically adjudicated his claims reasonably, as opposed to a ruling that any state court in fact did so. And this, in turn, means that those individuals with

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Dr. Herrera. Additionally, two other mental health professionals (a psychiatrist and a psychologist) reviewed Dr. Herrera's test results and also concluded that Wilson had significant brain impairment. *See* Doc. 12-9 at 60; Doc. 12-10 at 21-22, 33-39.

[31] The *en banc* court did not address these issues. Following the *en banc* decision, which remanded the case back to the panel, the panel reinstated without modification its initial opinion denying relief. JA 395-96 [*Wilson v. Warden*, 842 F.3d 1155 (11th Cir. 2016)].

meritorious constitutional claims that were (demonstrably) unreasonably rejected by a state court will be denied "the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

Conversely, if this Court rejects the Eleventh Circuit *en banc* majority rule, there is no parallel untoward effect. A ruling by a federal court that a reasoned state court's decision failed to satisfy § 2254(d) is insufficient by itself to produce relief in federal habeas corpus proceedings. Rather, it entitles the petitioner to consideration of the merits of his or her federal claims by the court. In the final analysis, if the claim lacks merit, then the State will prevail.

In sum, the guaranteed result of a decision by this Court endorsing the Eleventh Circuit *en banc* majority rule is that faultless petitioners with meritorious constitutional claims will be denied proper consideration of those claims by both the state and federal courts. On the other hand, if this Court rejects that rule, States will not be deprived of the opportunity to defend against habeas petitioners' federal claims on the merits. They will still have a full opportunity to do so in both state and federal court. To choose the former consequence over the latter would attribute to AEDPA precisely the kind of "seemingly perverse" effect decried by Chief Justice Rehnquist in *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998).

CONCLUSION

The judgement of the United States Court of Appeal for the Eleventh Circuit should be reversed.

Respectfully submitted,

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