IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-10681 CAPITAL CASE

MARION WILSON, JR.,

Petitioner-Appellant,

v.

WARDEN Georgia Diagnostic Prison,

Respondent-Appellee.

On Appeal From the United States District Court
for the Middle District of Georgia, Macon Division

PETITION FOR REHEARING AND REHEARING *EN BANC*

David J. Harth
David E. Jones
PERKINS COIE LLP
1 East Main Street, Suite 201
Madison, WI 53703
Telephone: 608-663-7460
Facsimile: 608-663-7499

Brian Kammer
(Georgia Bar No. 406322)
GEORGIA RESOURCE CENTER
303 Elizabeth Street, NE
Atlanta, Georgia 30307
Telephone: 404-222-9202
Facsimile: 404-222-9212

ATTORNEYS FOR APPELLANT
MARION WILSON, JR.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARION WILSON, JR., Petitioner-Appellant	)	
v.	)	No. 14-10681
WARDEN, Georgia Diagnostic Prison, Respondent-Appellee	)	

CERTIFICATE OF INTERESTED PERSONS

Counsel hereby certifies that the following have an interest in the outcome of this case:

Bina, Gabrielle E., Counsel for Petitioner-Appellant

Bradley, Steven, Trial Prosecutor

Bright, Fred, Trial Prosecutor

Burton, Beth, Deputy Attorney General, Counsel for Respondent-Appellee

Carr, Jon Philip, Trial Counsel for Appellant

Chatman, Bruce, Warden, Georgia Diagnostic Prison

George, Hon. Hulane, Trial Judge, Superior Court of Baldwin County

Georgia Resource Center

Graham, Sabrina, Counsel for Respondent-Appellee

Greb, Emily J., Counsel for Petitioner-Appellant

Helms, Christopher, State Habeas Counsel for Respondent-Appellee

Humphrey, Carl, former Warden, Georgia Diagnostic Prison

Jones, David E., Counsel for Petitioner-Appellant

Kammer, Brian S., Counsel for Petitioner-Appellant

Koop, Lissa R., Counsel for Petitioner-Appellant

Lukemire, Hon. Edward D., State Habeas Judge

Nero, Autumn N., Counsel for Petitioner-Appellant

O'Donnell, Thomas J., Jr., Trial Counsel for Appellant

Olens, Samuel S., Georgia Attorney General

Parks, Donovan Cory, Deceased

Pekarek Krohn, David R., Counsel for Petitioner-Appellant

Perkins Coie LLP

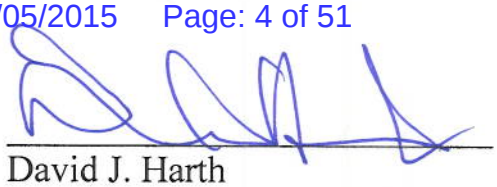
Prior, Hon. William A., Jr., Trial Judge, Superior Court of Baldwin County

Setters, James M., Trial Counsel for Appellant

Taylor, John, State Habeas Counsel for Appellee

Treadwell, Hon. Marc T., United States District Court for the Middle District of Georgia, Federal Habeas Judge

Wilson, Marion, Jr., Appellant



David J. Harth

ATTORNEY OF RECORD FOR
MARION WILSON, Jr.

CERTIFICATION OF COUNSEL[1]

We express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

Johnson v. Williams, 133 S. Ct. 1088 (2013)

Harrington v. Richter, 131 S. Ct. 770 (2011)

Sears v. Upton, 561 U.S. 945 (2010)

Ylst v. Nunnemaker, 501 U.S. 797 (1991)

Price v. Allen, 679 F.3d 1315 (11th Cir. 2012)

Adkins v. Warden, Holeman CF, 710 F.3d 1241 (11th Cir. 2013)

Madison v. Comm'r, Ala. Dep't of Corrs., 677 F.3d 1333 (11th Cir. 2012)

Powell v. Allen, 602 F.3d 1263 (11th Cir. 2010)

McGahee v. Ala. Dep't of Corrs., 560 F.3d 1252 (11th Cir. 2009)

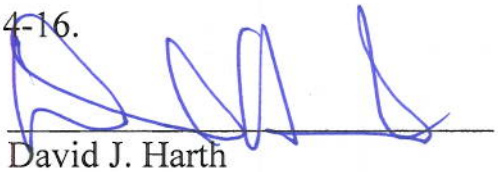
Sweet v. Sec'y, Dep't of Corrs., 467 F.3d 1311 (11th Cir. 2006)

We further express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

[1] *See* 11th Cir. R. 35-5(c).

(1) Whether a federal habeas court must review the "last reasoned decision" as opposed to later unexplained decisions when determining whether the standards for habeas relief have been met. *Price v. Allen*, 679 F.3d 1315, 1320 n.4 (11th Cir. 2012) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 803-05 (1991)); *contra* Opinion at 13.

(2) Whether it is proper to reject the prejudicial effect of a failure to present mitigation evidence without considering the context in which that evidence would be presented and by unreasonably concluding that such evidence presented a "double-edged sword." *Contra* Opinion at 14-16.



David J. Harth

ATTORNEY OF RECORD FOR
MARION WILSON, Jr.

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1. Is the panel's opinion, which did not look through the Supreme Court of Georgia's summary denial of Wilson's certificate of probable cause to the last reasoned state-court decision in determining the state court's reasoning in not finding ineffective assistance of counsel, contrary to *Johnson v. Williams*, 133 S. Ct. 1088 (2013) and *Ylst v. Nunnemaker*, 501 U.S. 797 (1991)?

2. Was it improper for the panel to dismiss the proffered mitigation evidence as a "double-edged sword" without consideration of the context in which it would be presented and where the cited negative evidence was already before the jury?

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

On November 5, 1997, Wilson was convicted in the Superior Court of Baldwin County, Georgia of malice murder of Donovan Parks, felony murder, and a number of other charges. He was sentenced to death for malice murder and received various sentences for the other charges. The felony murder conviction was vacated by operation of law. The Supreme Court of Georgia affirmed on direct appeal, *Wilson v. State*, 525 S.E.2d 339 (Ga. 1999).

After a petition for writ of certiorari in the U.S. Supreme Court was denied, Wilson sought state post-conviction relief. On February 22-23, 2005, the Superior Court of Butts County, Georgia ("Superior Court") held an evidentiary hearing

primarily devoted to Wilson's ineffective assistance of counsel claims in the penalty phase preparation and presentation. Wilson presented the testimony of his trial counsel, law enforcement officers, family members, teachers, social services workers, and others. Respondent-Appellee presented documentary materials and live testimony of two witnesses. In a December 1, 2008 order, the Superior Court denied the petition. Doc.18-4. The Supreme Court of Georgia, in a one-sentence order, summarily denied Wilson's application for certificate of probable cause to appeal on May 3, 2010. Doc.18-19. Wilson thereafter petitioned the U.S. Supreme Court for a writ of certiorari, which was denied. Doc.18-17.

On December 17, 2010, Wilson filed his federal habeas petition in the district court. Doc.1. The district court denied the petition and granted a certificate of appealability on Wilson's claim of ineffective assistance of counsel during the penalty phase. Doc.51 at 108-09. Wilson appealed. Doc.57.[2] After briefing was complete, a panel of this Court heard oral argument on December 2, 2014. On December 15, 2014, the panel issued an opinion affirming the district court, stating that "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." Opinion at 13 (internal quotation marks omitted). In determining whether the state court's decision was an

[2] Wilson also filed a motion seeking to expand the certificate of appealability, which this Court denied. Doc.59.

unreasonable application of *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Strickland v. Washington*, 466 U.S. 668 (1984), the panel opinion repeatedly referred to what the "Supreme Court of Georgia could have reasonably concluded" by its one-line decision. Opinion at 14, 16, 17. In reviewing the mitigation evidence, the panel found that the Supreme Court of Georgia could have reasonably concluded that the new evidence proffered by Wilson in his state evidentiary hearing would be a "double-edged sword," having a damaging effect on the jury's view of Wilson that would have undercut any mitigation value. *Id.* at 14-15. The panel summed up its reasoning by stating the "Supreme Court of Georgia could have looked at the overall mix of evidence, aggravating and mitigating, old and new, and reasonably determined that a jury would have still sentenced Wilson to death." *Id.* at 18.

STATEMENT OF FACTS

The evidence presented by habeas counsel showed that Wilson was able to overcome his deplorable upbringing when given proper structure, attention, and supervision, but that such structure was consistently snatched away from him. For example, there was detailed evidence and testimony that:

- During Wilson's childhood, including when Wilson was an infant, Wilson and his mother, Charlene Cox, lived in a series of squalid houses, some with no water, electricity, or heat. Doc.12-7 at 35-36; Doc.12-10 at 71, 85, 91. One house had rotten food and garbage littered on the floor and "liter soda bottles

filled with urine lined up all around the walls of their place." Doc.12-11 at 7; Doc 12-10 at 72. Another had dog feces on the floor. Doc.12-7 at 44-45.

- Wilson and Cox lived with a series of Cox's boyfriends, who were physically abusive to Cox and Wilson. Doc.12-7 at 43, 50; Doc.12-10 at 65-66, 76, 91, 93, 96; Doc.12-11 at 6-8. Wilson reported this to the Department of Family and Children Services ("DFCS"). Doc.12-16 at 12 ("[Child] says boyfriend . . . had hit him"). These men also drank excessively, abused drugs, and exhibited sexual behavior in Wilson's presence. Doc. 12-10 at 63, 77, 94.
- Wilson thrived when living in a nurturing environment provided by his aunt, Evelyn Gibbs. Doc.12-10 at 80-81, 88; Doc.12-11 at 4. But just as Wilson seemed to be on a healthy trajectory, Cox moved him out. Doc.12-10 at 80-82.
- Wilson also thrived at the Georgia Youth Development Center ("YDC"). Because of the promise he showed at the YDC, *he was released early*. Doc.12-8 at 7-9. But in violation of state law, he was unsupervised during his release for over a year, and the employee who failed to assign the case was reprimanded. *Id.* at 9-10, 13. Because Wilson was unsupervised, no one took notice of his difficulties (e.g., driving without a license, getting into scuffles), and his community placement was not revoked, as it should have been. *Id.*
- Teachers remembered Wilson as having potential that went unrealized because of his appalling home life. One teacher remembered Wilson as "a child

who needed a lot of love and attention" and who was "starving for some loving care in his life." Doc.12-9 at 8. Another believed "if Marion had had better early home life circumstances and had been afforded appropriate treatment, attention, guidance, supervision and discipline in his early years, there is a good chance that Marion would not have fallen onto the wrong path, nor failed in his struggle to keep his life from spinning out of control." *Id.* at 41.

- Wilson attended college at Georgia Military College, where he wrote an essay acknowledging that he had always been "in and out of trouble," but that he had "finally found the determination to put [his] brain to good use." *Id.* at 23. He wrote that "[n]ow that I've found out that I can learn, I'm eager to learn all that I can." *Id.* One of his teachers testified that "[i]n my interaction with Marion, I saw someone who was struggling to break away from his past and who had the real potential to do so. I saw a side of Marion Wilson that was tender and good, despite his harsh upbringing and criminal past." *Id.* at 21.

While all of these facts were readily available to trial counsel, they failed to put forward any credible mitigation theory and instead argued only that the jury's residual doubt regarding Wilson's involvement in the crime should prevent them from imposing the death penalty.

ARGUMENT AND CITATION OF AUTHORITY

The panel opinion suffers from two problems that compel an *en banc* rehearing. First, in considering what the Supreme Court of Georgia *could have* reasonably concluded instead of what the Superior Court *actually* concluded regarding Wilson's claim, the panel issued an opinion contrary to *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) and *Johnson v. Williams*, 133 S. Ct. 1088 (2013). Those cases make clear that it must be determined whether the *last reasoned state-court decision*—and not a later one-line summary denial—was an unreasonable application of clearly established federal law.

Second, the panel erred by not considering the context in which the mitigation evidence would be presented to the jury. In dismissing much of the mitigation evidence, the panel wrongly found that the mitigating value would be undercut by further revelations about Wilson's problematic childhood. But that misses the context within which that evidence would be presented by competent counsel and fails to acknowledge that damaging evidence from Wilson's childhood was already in evidence. The mitigation evidence tells a consistent story that when given the proper structure, Wilson was able to overcome his upbringing, but that structure was consistently taken from him.

I. The Panel Opinion Is Contrary to Precedent of the Supreme Court of the United States

Instead of considering whether the decision of the Superior Court was an unreasonable application of federal law, the panel considered whether the Georgia Supreme Court, based on a one-line decision, could have reasonably concluded that the failure to present mitigation evidence did not prejudice Wilson's defense. This approach is contrary to U.S. Supreme Court precedent, which requires that in reviewing whether state court decisions are unreasonable applications of clearly established federal law, the decision to consider is the "last reasoned state-court decision." *Johnson*, 133 S. Ct. at 1094 n.1; *Ylst*, 501 U.S. at 804.

Ylst v. Nunnemaker addressed whether an unexplained order could be considered a decision on the merits, to be considered in a later federal habeas proceeding. 501 U.S. at 801. In that case, the California Court of Appeal had affirmed the conviction of Nunnemaker, rejecting a *Miranda* claim because of a state procedural bar. *Id.* at 799. A series of petitions for collateral relief were then filed in each level of California state court, each summarily denied without any explanation. *Id.* at 800. Nunnemaker then filed a petition for habeas relief, including his *Miranda* claim, in federal district court. *Id.* The district court found that federal review of the *Miranda* claim was barred because of the state procedural default. *Id.* The Ninth Circuit reversed because the decision of the California Supreme Court did not "clearly and expressly" rely on the state

procedural default. *Id.* at 801.

The Supreme Court reversed the Ninth Circuit, finding the unexplained decision by the California Supreme Court was not a decision on the merits, which would have lifted the state procedural bar. *Id.* at 802, 806. The Court noted that because members of a court may not agree on its rationale "the basis of [an unexplained] decision is not merely undiscoverable but nonexistent." *Id.* at 803. The Court instead looked to "the last *explained* state-court judgment . . . ." *Id.* at 803-05 (emphasis in original). The Court then reviewed the initial denial of the *Miranda* claim by the California Court of Appeal on direct review, "look[ing] through the subsequent unexplained denials . . . ." *Id.* at 806. Thus, the Court recognized that when reviewing a state court decision, it is proper to consider the last *reasoned* decision, not simply the last state court judgment.

In *Johnson v. Williams*, the Supreme Court made clear that *Ylst* applied not only to state procedural default, but to habeas review of state court decisions generally. 133 S. Ct at 1091, 1094 n.1. In *Johnson*, the issue was what level of deference to give to the state court opinion under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Id.* at 1091. Williams, the petitioner in *Johnson*, was the getaway driver for a robbery that resulted in the fatal shooting of the store's owner. *Id.* at 1092. During jury deliberations, the trial judge dismissed a juror who may have been unwilling to apply the felony-murder rule. *Id.* With an

alternate juror substituted in, the jury convicted Williams. *Id.* Williams appealed her conviction, arguing violations of both the Sixth Amendment and state law. *Id.* at 1093. The California Court of Appeal affirmed Williams' conviction, though it "never expressly acknowledged that it was deciding a Sixth Amendment issue." The California Supreme Court denied relief in a one-sentence order. *Id.*

After failing to obtain relief through state habeas proceedings, Williams filed a federal habeas petition in federal district court. *Id.* The district court "applied AEDPA's deferential standard of review for claims previously adjudicated on the merits and denied relief." *Id.* The Ninth Circuit recognized that "[i]t has long been the practice of federal habeas courts to 'look through' summary denials of claims by state appellate courts and review instead the last reasoned state-court decision." *Williams v. Cavazos*, 646 F.3d 626, 635 (9th Cir. 2011) (citing *Ylst*, 501 U.S. 797; *Kennedy v. Lockyer*, 379 F.3d 1041, 1052 (9th Cir. 2004)) *rev'd on other grounds sub nom. Johnson*, 133 S. Ct. 1088. As such, the Ninth Circuit found, based on the decision of the California Court of Appeal, that the Sixth Amendment violation had not been decided by the state court. *Id.* at 638. Therefore, the Ninth Circuit reviewed the Sixth Amendment issue de novo, agreeing with Williams that the trial court violated her right to a fair trial by dismissing the juror. *Id.* at 642.

The Supreme Court approved of the Ninth Circuit's approach of looking through the summary denial by the California Supreme Court to "the last reasoned

state-court decision to address" the juror's dismissal, *Johnson*, 133 S. Ct at 1094 n.1, but found that while the California Court of Appeal decision had not explicitly addressed the constitutional issue, Williams had not overcome the presumption that it had been considered by the court, *id.* at 1095-96. Importantly, as the Ninth Circuit had done, the Supreme Court looked through the summary decision to the last-reasoned decision. *Id.* at 1097-99 ("[T]he Ninth Circuit erred by finding that the California Court of Appeal overlooked Williams' Sixth Amendment claim.").[3] Therefore, *Johnson* reaffirmed that in applying federal habeas standards, including those introduced in AEDPA, the appropriate state court decision to review is the last reasoned state court decision.

The case the panel relies on for its view that an unexplained summary opinion can encompass every hypothetical reasoning, *Harrington v. Richter*, 131 S. Ct. 770 (2011), does not support the panel's view. Unlike *Ylst* and *Johnson*, which each had a reasoned opinion to consult, the only state court opinion regarding the constitutional claim at issue in *Harrington* was an unexplained summary opinion. *Id.* at 784. *Harrington* holds that in such a case, the unexplained order is still a decision "adjudicated on the merits," such that the strictures of AEDPA review

[3] This approach was also taken in *Sears v. Upton*, 561 U.S. 945 (2010). In Sears, both the majority and dissent looked through a summary denial by the Georgia Supreme Court to analyze the reasoning used by the decision of the Superior Court. *Id.* at 953 (considering the "two errors in the state court's analysis of Sears' Sixth Amendment claim"); *id.* at 957 (Scalia, J. dissenting).

apply. *Id.* *Harrington*, however, notes that the presumption that there has been adjudication on the merits can be overcome. *Id.* at 785 (citing *Ylst*, 501 U.S. at 803). The portion of *Ylst* cited by *Harrington* explains exactly what that presumption is: "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." *Ylst*, 501 U.S. at 803. Therefore, *Harrington* recognized that when a reasoned decision exists, it should be reviewed, as it is presumed that the later unexplained decision rests on the same ground.

Considering what the Supreme Court of Georgia *could have* reasonably concluded, instead of what the Superior Court *did* conclude, is not an issue of semantics. The view of the panel of what the Georgia Supreme Court could have reasonably concluded is an improper post hoc insertion of the panel's own view that goes far beyond the reasoning of the Superior Court.

While the panel viewed the mitigation evidence as "a double-edged sword," Opinion at 14-15, the Superior Court did not reject it on this basis, Doc.18-4 at 21-23. Specifically, the panel dismissed the prejudicial effect of failing to introduce mitigating testimony of Wilson's teachers and social service workers on the grounds that the testimony would have been undermined by evidence that it believed would also have come in. Opinion at 15. As detailed in briefing, however, the Superior Court rejected this evidence for a wholly different reason,

finding that it would not have been admissible as speculative or hearsay. Appellant's Br. at 47-50.

By considering how a state court *could have* rejected Wilson's habeas claim instead of how the state court *actually* rejected the claim, the panel was able completely to avoid consideration of the merits of Wilson's argument: that it was unreasonable to conclude that the failure to introduce mitigation evidence was not prejudicial because of a mistaken belief that it was inadmissible.

II. The Panel's Conclusion That Mitigation Testimony of Teachers and Social Service Workers Was a Double-Edged Sword Is Not Reasonable

Aside from improperly importing a rationale not relied upon by the Superior Court, the panel's conclusion that new mitigation evidence from teachers and social service workers "presented a 'double-edged sword,'" Opinion at 14 (quoting *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1324 (11th Cir. 2013) (*en banc*)), and "would have been undermined by other new evidence that 'almost certainly would have come in with [the new lay testimony],'" *id.* at 15 (quoting *Wong v. Belmontes*, 558 U.S. 15, 20 (2009)), is not a reasonable conclusion in light of the evidence presented to the jury.

The panel reasoned that mitigation testimony of Wilson's teachers would have ushered in "school records [that] stated that Wilson had an 'I don't care attitude,' and that he was physically and verbally aggressive to teachers and students, lacked self-control, and blamed others for his misconduct." *Id.* But the

panel failed to acknowledge that this very evidence was already put in front of the jury and, as a result of trial counsel's incompetence, stood unrebutted. Dr. Kohanski testified generally at trial about Wilson's school records, opening the door to them, regardless of whether the teachers testified. *See* Doc.10-5 at 100. Moreover, the jury heard about Wilson's negative character traits through Dr. Kohanski—including that Wilson displayed "aggressive" and "inappropriate" behavior in elementary school, prompting a request for a psychological evaluation, and had "difficulty staying on task," *id.* at 101—and through the State's twenty-two sentencing phase witnesses who testified at length about Wilson's juvenile criminal history and gang affiliation, *see* Opinion at 5-7. Therefore, any evidence of Wilson's "aggressive" behavior and "lack[] [of] self-control" that the panel claims would have come in had Wilson's teachers testified, was already before the jury, but without mitigating evidence to counteract it. *Id.* at 15.[4]

In further support of its "double-edged sword" conclusion, the panel reasoned that "the lay witnesses' testimony that Wilson was physically abused and neglected would have been undermined by . . . school and medical records that

[4] Even if trial counsel might have uncovered some negative evidence that would not otherwise have come in during the sentencing phase, "[c]ompetent counsel should have been able to turn some of the adverse evidence into a positive" in support of mitigation, which "might well have helped the jury understand" Wilson. *Sears*, 561 U.S. at 951; *see also Porter v. McCollum*, 558 U.S. 30, 43-44 (2009) (It was unreasonable to reject evidence of military service that included that petitioner had AWOL several times, where "[t]he evidence that he was AWOL is consistent with" the mitigation theory in the case).

described Wilson as 'healthy,' 'clean,' 'well dressed,' 'well developed,' and 'well nourished.'" Opinion at 15-16. As noted above, Dr. Kohanski relied upon these records for her testimony and thus the door was already open to them. *See* Doc.10-5 at 100. The panel further found that mitigation testimony from social service workers would have opened the door to "[a] report from the Department of Family and Children Services recommend[ing] that Wilson remain in his mother's care," which "a representative from the Department testified" would not have been made "if the home had been unsafe or Wilson had been deprived of food or necessities." Opinion at 15. Simply because one DFCS record showed, at one point in time, a recommendation that Wilson remain in his mother's care does not undercut the mountain of *consistent* evidence within those same records—not requested by trial counsel—that demonstrated he endured a deprived and neglectful upbringing.[5] For example, the proffered habeas evidence included a "Child Abuse and Neglect Report" from DFCS that indicated "Maltreatment." Doc.12-16 at 48; *see also id.* at 35 ("Child at risk when in home."). In fact, there was a recommendation by the Juvenile Court that Wilson be placed in foster care, but DFCS had no foster home

[5] *See* Doc.12-16 at 10 ("Child told Doris mother does not meet needs in way of clothing, shoes, food."); *id.* at 12 ("Child sometimes alone with [Cox's] boyfriend—says boyfriend drinks . . . & had hit him."); *id.* at 14 ("Receive[d] report of child neglect on Ms. Cox."); *id.* at 35 ("Child's mother is not adequately supervising child . . . ."); *id.* at 37 ("[Cox] is ineffective in providing a secure, stable home with appropriate care for Marion."); *id.* at 40 ("Child ran away again & claims he does not have basic needs of food, shelter, supervision.").

in which to place him. Doc.12-7 at 74-75; *see also* Doc.12-9 at 53.

The mitigation evidence rejected by the panel, far from being a double-edged sword, tells a consistent story that when given the proper structure, Wilson was able to overcome his upbringing, but that structure was consistently taken from him. As indicated by his early release from the YDC, Mr. Wilson "responded well to structure." Doc.12-8 at 6-9. That is why lack of supervision by those charged with his care was so devastating. *Id.* at 12-14. Had Wilson received that supervision, he could have been steered in the right direction. *Id.* at 14 ("There were just too many indicators in there that given the proper supervision, he was trying to make something of himself . . . ."); *id.* at 80 ("[I]f he could just get some structure and would settle down, he could do all right."); *see also id.* at 122-23.[6] With these insights, the jury would have understood that Wilson was struggling to break away from a devastating past, and just needed help to complete that break.

CONCLUSION

For the foregoing reasons, Mr. Wilson requests that the panel grant Further, Mr. Wilson urges the Court to convene *en banc* to consider the panel opinion's unreasonable analysis and disregard for Supreme Court precedent.

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[6] This is consistent with the observations of other witnesses that Wilson flourished in structured environments. *See, e.g.*, Doc.12-10 at 81 (Wilson "did very well" when living with his aunt, where there were "rules to follow and responsibilities to fulfill."); Doc.12-9 at 39-40 (Wilson "showed great academic potential when given the appropriate amount of attention, supervision and discipline"); *id.* at 20 (Wilson "had the potential to do tremendous things if he had had . . . support").

Respectfully submitted this 5th day of January, 2015.

David J. Harth
David E. Jones
PERKINS COIE LLP
1 East Main Street, Suite 201
Madison, WI 53703
Telephone: 608-663-7460
Facsimile: 608-663-7499

Brian Kammer, Bar No. 406322
GEORGIA RESOURCE CENTER
303 Elizabeth Street, NE
Atlanta, Georgia 30307
Telephone: 404-222-9202
Facsimile: 404-222-9212

ATTORNEYS FOR APPELLANT
MARION WILSON, Jr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARION WILSON, JR., Petitioner-Appellant	)	
v.	)	No. 14-10681
WARDEN, Georgia Diagnostic Prison, Respondent-Appellee	)	

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic mail on counsel for Respondent at the following address:

Beth Attaway Burton
Sabrina Graham
Georgia Department of Law
40 Capitol Square, SW
Atlanta, Georgia 30334
bburton@law.ga.gov
sgraham@law.ga.gov

Dated: January 5, 2015

Patricia E. Dean

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

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December 15, 2014

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 14-10681-P
Case Style: Marion Wilson, Jr. v. Warden
District Court Docket No: 5:10-cv-00489-MTT

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the CRIMINAL JUSTICE ACT must file a CJA voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for a writ of certiorari (whichever is later).

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Jan S. Camp at (404) 335-6171.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Jan S. Camp
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-10681

D.C. Docket No. 5:10-cv-00489-MTT

MARION WILSON, JR.,

Petitioner–Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent–Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

(December 15, 2014)

Before ED CARNES, Chief Judge, and WILLIAM PRYOR and JORDAN, Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

Marion Wilson, Jr., a Georgia prisoner sentenced to death for the murder of Donovan Corey Parks, appeals the denial of his petition for a writ of habeas corpus. Wilson argues that he was deprived of a fair trial because his counsel

provided ineffective assistance during the penalty phase of his trial. In state postconviction proceedings, Wilson argued that his trial counsel were constitutionally ineffective because they failed to discover and introduce mitigating evidence. The state trial court ruled that Wilson's claim of ineffective assistance of counsel failed, and the Supreme Court of Georgia declined to review that decision. Because the Supreme Court of Georgia could have reasonably concluded that counsel provided Wilson effective assistance, we affirm the denial of Wilson's petition for a writ of habeas corpus.

I. BACKGROUND

We divide our discussion of the background in two parts. First, we discuss the facts of Parks's murder and the evidence presented at Wilson's trial. Second, we discuss the additional evidence presented during Wilson's state habeas proceeding.

A. Wilson is Convicted of Malice Murder and Sentenced to Death.

In 1996, Marion Wilson, Jr. and Robert Earl Butts killed Donovan Parks in Milledgeville, Georgia. *Wilson v. State*, 525 S.E.2d 339, 343 (Ga. 1999). Wilson and Butts approached Parks in a Wal-Mart parking lot to ask for a ride. *Id.* Wilson, Butts, and Parks then entered Parks's automobile. *Id.* A few minutes later, Parks's dead body was found nearby on a residential street. *Id.* Parks's clothing was saturated with blood, and he had a "gaping" hole in the back of his head. His skull

was filled with metal shotgun pellets and a spent shotgun shell, which suggested that he was shot at close range.

After officers arrested Wilson, he told the officers that after Parks got in the automobile, Butts pulled out a sawed-off shotgun and ordered Parks to drive around. *Id.* According to Wilson, Butts later told Parks to exit the automobile and lie on the ground, after which Butts shot Parks in the back of the head. *Id.* Wilson and Butts drove Parks's automobile to Atlanta in an attempt to locate a "chop shop" to dispose of the automobile. *Id.* They were unable to find a "chop shop" so they purchased gasoline cans, drove to Macon, and burned the automobile. *Id.* Police later searched Wilson's residence and found a "sawed-off shotgun loaded with the type of ammunition used to kill Parks" and notebooks filled with handwritten gang creeds and symbols. *Id.*

At trial, Wilson was represented by two appointed attorneys, Thomas O'Donnell Jr., who served as lead counsel, and Jon Philip Carr. *Wilson v. Humphrey*, No. 5:10-CV-489 (MTT), 2013 WL 6795024, at *10 (M.D. Ga. Dec. 19, 2013). They argued that Wilson was "mere[ly] presen[t]" during Butts's crimes, *id.* at *34, but the jury convicted Wilson "of malice murder, felony murder, armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a crime, and possession of a sawed-off shotgun," *id.* at *2.

During the penalty phase, defense counsel argued that the jury should not sentence Wilson to death because there was residual doubt about his guilt. *Id.* at *16. They presented evidence that Butts gave inconsistent statements to the police and that Butts confessed to three other inmates that he was the triggerman. Trial counsel again tried to convince the jury that Wilson was "mere[ly] presen[t]" during the crimes.

Trial counsel introduced testimony from Wilson's mother, Charlene Cox. She testified that Wilson had a difficult childhood and did not deserve to die even though he had a history of criminality. She explained that Wilson's father played no role in Wilson's upbringing, that she supported Wilson by working low-wage jobs, and that Wilson had an 18-month-old daughter.

Trial counsel also introduced testimony from Dr. Renee Kohanski, a forensic psychiatrist. *Id.* at *20. Kohanski relied on the records defense counsel requested from agencies, schools, and medical facilities, and interviewed Wilson to create a "cursory" social history, but she did not conduct an independent investigation of Wilson's background. *Id.* at *20–21. Kohanski testified that Wilson had a difficult, sickly, and violent childhood. She explained that Wilson was so aggressive as a child that his elementary school performed a psychological assessment of him. *Id.* at *25. The assessment found that Wilson had difficulty staying on task, a poor self-image, and an "excessive maternal dependence." *Id.* Kohanski told the jury

that school officials also requested a medical evaluation because they suspected that Wilson suffered from an attention deficit disorder, but testing was never performed. *Id.* She testified that Wilson had no parental support or male role model, and that, by age 9 or 10, he fended for himself on the streets and joined a gang as a substitute for a family. *Id.* Kohanski told the jury that Cox's boyfriends "came and went" and frequently used drugs. *Id.* Kohanski testified about one "not . . . uncommon event" in which six- or seven-year-old Wilson witnessed Cox's "common law" husband hold a gun to Cox's head. *Id.*

On cross-examination, both Cox and Kohanski testified about unfavorable background evidence. Cox admitted that Wilson was incarcerated for every day of his daughter's life, *id.* at *26, and that Cox had difficulty raising Wilson and sometimes needed police assistance to control Wilson. Kohanski told the jury that Wilson is of average intelligence and suffers from no known brain damage, but that he was in two car accidents as a child and she "would have been interested to see [brain imaging scans from] that time" to look for brain damage. She also testified that, regardless of any possible brain damage, Wilson knew right from wrong at the time of the murder.

The prosecution then presented evidence of Wilson's extensive criminal history. The jury heard that, from the age of 12 years, Wilson was "either out committing crimes or . . . incarcerated somewhere." *Id.* at *22. The jury heard that

Wilson had been charged with first degree arson, criminal trespass, and possession of crack cocaine with intent to distribute, and that in a period of eleven weeks Wilson was charged with ten misdemeanor offenses. *Id.* at *22–24. The jury heard that, as a 15-year-old, Wilson shot a stranger, Jose Valle, in the buttocks because he "wanted to see what it felt like to shoot somebody," and that Wilson sold crack cocaine to Robert Underwood and then shot him five times and "casually walked off." *Id.* at *22–23. The jury also heard testimony that Wilson was charged with cruelty to animals after he "shot and killed a small dog for no apparent reason." *Id.* at *23.

The prosecution also presented evidence of Wilson's violence and gang activity. The jury heard that Wilson threatened a neighbor, saying "I'll blow . . . that old bitch's head off"; Wilson committed unprovoked attacks on his schoolmates; and Wilson attacked one of the employees during his incarceration at Claxton Regional Youth Development Center. *Id.* at *22–23. The jury heard details of an incident in which a "belligerent" Wilson and five others were shouting at students in a parking lot at Georgia College. *Id.* at *23. When police arrived, Wilson rushed one of the officers and had to be subdued with pepper spray when he attempted to grab the officer's gun. *Id.* The jury heard portions of Wilson's post-arrest interrogation in which he confessed that he was the "God damn chief

enforcer" of the Milledgeville FOLKS gang, a rank he achieved by "fighting and stuff like that." *Id.* at *24.

At the close of testimony, the trial court instructed the jury to consider all of the evidence from both the guilt and penalty phases of trial. After deliberating for less than two hours, the jury sentenced Wilson to death for the crime of malice murder. *Id.* at *26. The Supreme Court of Georgia affirmed Wilson's conviction and sentence on direct appeal. *Id.* at *2.

B. Wilson Petitions for a Writ of Habeas Corpus and Introduces Mitigation Evidence that His Trial Counsel Failed to Present.

Wilson filed a petition for a writ of habeas corpus in a state court, in which he argued that his trial counsel had been ineffective because they failed to investigate his background thoroughly and to present adequate mitigation evidence at his sentencing. *Id.* at *13; *see Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Wilson argued that effective counsel would have interviewed teachers, social workers, and relatives to find mitigation evidence from Wilson's childhood. *Wilson*, 2013 WL 6795024, at *13. He argued that sufficient counsel would have discovered the names of potential witnesses in the records that his trial counsel possessed but never read. *Id.* at *15.

At an evidentiary hearing, Wilson's trial counsel testified that they were "confus[ed]" about who was responsible for investigating Wilson's background. *Id.* at *12. Lead counsel O'Donnell testified that he told Carr and an investigator,

William Thrasher, to "go out and investigate [Wilson's] background." *Id.* at *17. But Carr testified that he "was not involved in as much of the mitigation stage" because he believed O'Donnell was responsible for the investigation. *Id.* at *11. Thrasher testified that he was not "directed to conduct [an] investigation into . . . Wilson's life history for mitigating information." *Id.* at *12.

Wilson introduced evidence that the social services, school, and medical records in the possession of Wilson's trial counsel contained mitigating information about Wilson's childhood homes and physical abuse by parental figures, and names of potential mitigation witnesses. *Id.* at *17–18. Trial counsel failed to explore any of the potential leads or witnesses found in the records. *Id.* at *17. Trial counsel testified that they relied on Kohanski to read the records and construct a social history of Wilson's life. They also testified that they were aware of the information in Wilson's records, but they made the strategic decision to focus on residual doubt instead of bringing in that evidence because it "would basically convince the jury that [Wilson] probably was the trigger man."

Wilson introduced 127 exhibits and 9 witnesses that were either directly from or referenced in the records, or could have been discovered through investigation of references in the records. *Id.* at *26. Wilson introduced lay testimony from his former teachers, family members, friends, and social workers.

Id. at *26–29. He also introduced expert testimony from neuropsychologist Dr. Jorge Herrera and Kohanski. *Id.* at *29–30.

Wilson argued that the lay testimony could have been used to explain Wilson's disruptive childhood behavior and portray Wilson as someone who never stood a chance. Teachers testified that Wilson was a "tender and good" boy who "had a lot of potential" and "loved being hugged," and that if Wilson had "been afforded appropriate treatment, attention, guidance, supervision[,] and discipline in his early years, there is a good chance" he would not be on death row. Family members and friends testified that some of Wilson's childhood homes lacked running water and electricity and were littered with containers full of urine. *Id.* at *26. They also testified that Cox's live-in boyfriends "slapp[ed]," "punch[ed]," and "once pulled a knife on" Wilson and that, for a period of a few months, Wilson and Cox lived with Cox's father, who beat Wilson with a belt. *Id.* at *29. Social workers testified that Wilson's young life included every "risk factor" they could think of, *id.* at *28, and that Wilson responded well to structure but his childhood was entirely unstructured, *id.* at *27.

Wilson argued that the expert testimony could have been used to explain Wilson's poor judgment skills and lack of impulse control. Herrera testified that his neuropsychological testing found that Wilson had "mild to severe impairments in brain function[], with severe impairment localized in the frontal lobes." *Id.* at

*30. Herrera opined that "Wilson's association with [Butts] on the night of the crime and his failure to intervene at the time is consistent with the concrete thinking and judgment problems associated" with Wilson's brain injuries. Kohanski confirmed Herrera's assessment and testified that Herrera's testing should have been performed before Wilson's trial. *Id.* at *30. Kohanski testified that Wilson's frontal lobe injuries "indicate[] that [he] . . . is a highly suggestible individual, easily led by others in certain situations."

The state trial court ruled that Wilson did not receive ineffective assistance of counsel. The state trial court ruled that trial counsel's performance was not deficient and, alternatively, that Wilson suffered no prejudice. *Wilson*, 2013 WL 6795024, at *31. Wilson filed an application for certificate of probable cause to appeal the denial of his petition, which the Supreme Court of Georgia summarily denied.

Wilson petitioned for a writ of habeas corpus in the district court, which denied him relief. The district court ruled that the decision of the state trial court as to prejudice did not involve an unreasonable application of clearly established federal law and that the material findings of fact were reasonable. *Id.* at *38. The district court granted Wilson a certificate of appealability.

II. STANDARD OF REVIEW

We review *de novo* the denial of a petition for a writ of habeas corpus. *Fotopoulos v. Sec'y, Dep't of Corr.*, 516 F.3d 1229, 1232 (11th Cir. 2008). "Under [the Antiterrorism and Effective Death Penalty Act of 1996], a federal court may not grant a habeas corpus application 'with respect to any claim that was adjudicated on the merits in State court proceedings,' 28 U.S.C. § 2254(d), unless the state court's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' § 2254(d)(1)." *Johnson v. Upton*, 615 F.3d 1318, 1329 (11th Cir. 2010) (quoting *Berghuis v. Thompkins*, 560 U.S. __, 130 S. Ct. 2250, 2259 (2010)). "[T]his standard [is] 'a highly deferential' one that 'demands that state-court decisions be given the benefit of the doubt.'" *Id.* (quoting *Renico v. Lett*, 559 U.S. 766, 130 S. Ct. 1855, 1862 (2010)). The decision of a state court is "contrary to" federal law only if it "contradicts the United States Supreme Court on a settled question of law or holds differently than did that Court on a set of materially indistinguishable facts." *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1355 (11th Cir. 2009) (internal quotation marks and citation omitted). The decision of a state is an "unreasonable application" of federal law if it "identifies the correct governing legal principle as articulated by the United States Supreme Court, but unreasonably applies that principle to the facts of the petitioner's case,

unreasonably extends the principle to a new context where it should not apply, or unreasonably refuses to extend it to a new context where it should apply." *Id.* "The question under [the Act] is not whether a federal court believes the state court's determination was correct but whether that determination was unreasonable—a substantially higher threshold." *Id.* (internal quotation marks and citation omitted).

"[A]n unreasonable application of federal law is different from an incorrect application of federal law." *Harrington v. Richter*, 562 U.S. 86, __, 131 S. Ct. 770, 785 (2011) (internal quotation marks and citation omitted) (emphasis omitted). "To obtain habeas relief 'a state prisoner must show that the state court's ruling on the claim being presented in the federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1286 (11th Cir. 2012) (quoting *Harrington*, 131 S. Ct. at 786–87). When we evaluate a petition of a state prisoner, we "'must determine what arguments or theories supported or, [if none were stated], could have supported[] the state court's decision; and then [we] must ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court].'" *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1326 (11th Cir. 2013) (en banc) (alterations in original) (quoting *Reese*, 675 F.3d at 1286–87).

III. DISCUSSION

As an initial matter, 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." *Newland v. Hall*, 527 F.3d 1162, 1199 (11th Cir. 2008); *see also Jones v. GDPC Warden*, 753 F.3d 1171, 1182 (11th Cir. 2014). 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." *Harrington*, 131 S. Ct. at 784.

Wilson argues that his trial counsel were ineffective because they failed to investigate his background and present mitigation evidence at his sentencing. To obtain relief, Wilson must establish both that his trial counsel's "performance was deficient, and that the deficiency prejudiced [his] defense." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 2529 (2003). Unless he establishes both requirements, "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. And "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Id.* at 697, 104 S. Ct. at 2069.

To establish prejudice, Wilson had to prove "that [his] counsel's errors were so serious as to deprive [him] of a fair trial." *Id.* at 687, 104 S. Ct. at 2064. Wilson

challenged his trial counsel's performance during the penalty phase of his trial, so he had to establish that "there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S. Ct. at 2069. To decide whether there is a reasonable probability of a different result, "we consider 'the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41, 130 S. Ct. 447, 453–54 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 397–98, 120 S. Ct. 1495, 1515 (2000)) (alteration in original).

The Supreme Court of Georgia could have reasonably concluded that Wilson failed to establish that he was prejudiced. The Supreme Court of Georgia could have reasonably concluded that Wilson's new evidence would not have changed the overall mix of evidence at his trial. His new evidence presented a "double-edged sword," *Evans*, 703 F.3d at 1324, and was "largely cumulative" of evidence trial counsel presented to the jury, *Holsey v. Warden, Ga. Diag. Prison*, 694 F.3d 1230, 1260–61 (11th Cir. 2012).

The Supreme Court of Georgia could have reasonably concluded that the balance of the evidence at Wilson's trial would have been unaffected by the new

lay testimony. The teachers' testimony might have "humanized" Wilson, and other lay witnesses' testimony might have offered more detailed accounts of Wilson's home life, but that testimony was a "double-edged sword." *Evans*, 703 F.3d at 1324. The teachers' "mitigation" testimony would have also revealed that Wilson was "disruptive" in school, and the social service workers' "mitigation" testimony would have added that one of the investigations into Wilson's home life was terminated prematurely because Wilson was incarcerated.

The lay witness' testimony would have been undermined by other new evidence that "almost certainly would have come in with [the new lay testimony]." *Wong v. Belmontes*, 558 U.S. 15, 20, 130 S. Ct. 383, 386 (2009). Reports in Wilson's school records stated that Wilson had an "'I don't care' attitude," and that he was physically and verbally aggressive to teachers and students, lacked self-control, and blamed others for his misconduct. A report from the Department of Family and Children Services recommended that Wilson remain in his mother's care, and a representative from the Department testified that the Department would "certainly not" have made that recommendation if the home had been unsafe or Wilson had been deprived of food or necessities. And the lay witnesses' testimony that Wilson was physically abused and neglected would have been undermined by the witnesses' uncertainty, Wilson's repeated denials that he was physically abused

as a child and school and medical records that described Wilson as "healthy," "clean," "well dressed," "well developed," and "well nourished."

The Supreme Court of Georgia could have reasonably concluded that the balance of the evidence at Wilson's trial also would have been unaffected by the new expert testimony. Herrera assessed Wilson using his own interpretive standards for the neuropsychological tests he administered on Wilson, instead of accepted, authoritative standards. Herrera testified that Wilson's test scores for attention, ability to focus, distractability, and impulsiveness were considered "normal" under the accepted, authoritative standards. Because Herrera recommended against neurological imaging, his conclusion that Wilson had frontal lobe damage was based on only Herrera's unique interpretation of the tests. And the state court could have ruled that Kohanski's new conclusions were unreliable because they were based on Herrera's unreliable results.

Herrera's and Kohanski's expert testimony conflicted with other evidence. They testified that a person with Wilson's test results would be susceptible to suggestion and more of a follower than a leader. But other evidence established that Wilson had risen to the rank of "God damn chief enforcer" of the Milledgeville FOLKS gang and was the "clear leader of the group" during the incident at Georgia College.

The Supreme Court of Georgia could have also reasonably concluded that Wilson's new evidence was "largely cumulative" of the evidence trial counsel presented to the jury. *Holsey*, 694 F.3d at 1260–61. The evidence presented at trial and the new evidence "tell the same story," *id.* at 1267, of an unhealthy child, who came from an unstable home and received no parental supervision. The jury heard that, from the age of 9 or 10, Wilson lived on the streets in a difficult neighborhood. His father figures "came and went" and frequently used drugs. One such father figure held a gun to Wilson's mother's head in view of Wilson. Wilson struggled with his identity and joined a gang as a substitute for family. The jury also heard humanizing characteristics, such as Cox's plea to spare Wilson's life for the sake of his 18-month-old daughter, and that Wilson's biological father had no role in Wilson's life. And Kohanski testified that she would have liked to see images of Wilson's brain to confirm that he did not have a brain injury.

The Supreme Court of Georgia could have reasonably concluded that the new evidence "tells a more detailed version of the same story told at trial," *id.* at 1260–61. Wilson's new evidence revealed more details of his difficult background and included additional humanizing stories and speculation about brain damage. The only new revelation at Wilson's evidentiary hearing was that the men in Wilson's life abused him. But the evidence of this abuse "was relatively limited in scope and . . . [not] descripti[ve]." *Id.* at 1282; *cf. Cooper v. Sec'y of Dep't of*

Corr., 646 F.3d 1328, 1337, 1349 (11th Cir. 2011). Reasonable jurists could rule that this evidence was "largely cumulative" of the other evidence of Wilson's neglectful childhood. *Holsey*, 694 F.3d at 1260–61.

The Supreme Court of Georgia could have looked at the overall mix of evidence, aggravating and mitigating, old and new, and reasonably determined that a jury would have still sentenced Wilson to death. The jury at Wilson's trial heard a large amount of graphic, aggravating evidence, and it would be reasonable to conclude that Wilson's new evidence was as hurtful as it was helpful, and largely cumulative of the evidence presented at trial. We cannot say that the decision of the Supreme Court of Georgia to deny Wilson's petition was "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1).

IV. CONCLUSION

We **AFFIRM** the denial of Wilson's petition for a writ of habeas corpus.

ED CARNES, Chief Judge, concurring:

I join all of the Court's opinion but write separately to emphasize how heavily Wilson's criminal history weighs on the aggravating side of the sentencing scale. The weight on that side of the scale is an important factor that must be taken into account in determining whether the failure to present all available mitigating circumstance evidence was prejudicial. See Bobby v. Van Hook, 558 U.S. 4, 11–13, 130 S. Ct. 13, 19–20 (2009); Reed v. Sec'y, Fla. Dep't. of Corr., 593 F.3d 1217, 1240–41 (11th Cir. 2010); Hall v. Head, 310 F.3d 683, 705–06 (11th Cir. 2002).

There is nothing inaccurate in the Court's two-paragraph summary of the evidence that the jury heard about Wilson's history of criminal behavior. Still, the district court's more detailed and chronological recounting of that history, drawn from the evidence presented to the jury at sentencing, is worth quoting. It shows how continuously and relentlessly anti-social and violent Wilson was, beginning with his commission of arson when he was 12 years old and culminating in capital murder seven years later:

> The State's 22 witnesses in the sentencing phase of Wilson's trial testified regarding Wilson's lengthy criminal history and gang affiliation. The jury heard Wilson [D.O.B. July 29, 1976] started committing serious felonies when he was twelve and since then was "either out committing crimes or . . . incarcerated somewhere."

On January 31, 1989, twelve-year-old Wilson and two other boys started a fire in a vacant duplex apartment in Glynn County. The residents of the attached unit were home at the time. All three boys were charged with first degree arson and criminal trespass.

John J. Schrier testified he and his mother lived next door to Wilson in Glynn County in 1989. After Schrier's mother, an elderly heart patient, complained that [twelve- or thirteen-year-old] Wilson was harassing her and her dogs, Schrier asked Wilson to leave his mother and her dogs alone. Wilson responded, "I'll blow you and that old bitch's head off."

Former McIntosh County Sheriff's Deputy Robert Wayne Hoyt testified that on December 16, 1991, fifteen-year-old Wilson shot Jose Luis Valle, a Mexican migrant worker. Brian Keith Glover testified he and his two cousins were with Wilson the night he shot Valle. According to Glover, they were standing in the parking lot of a convenience store when Valle, a stranger to them all, walked past and into the store. Wilson announced he was going to rob Valle and that he "wanted to see what it felt like to shoot somebody." Wilson, who had a pistol, approached Valle as he left the store. When Valle raised his arms in the air and turned to run, Wilson shot him in the buttocks. Glover testified that approximately one week after the incident, Wilson, who was again carrying a gun, threatened him because of the statement Glover gave law enforcement about Valle's shooting. Glover's cousin, Oscar Woods, corroborated Glover's story. The charges against Wilson were dead-docketed because the authorities were unable to locate Valle after he was discharged from the hospital.

After Wilson was charged with shooting Valle, he was incarcerated at the Claxton Regional Youth Development Center ("Claxton RYDC"), where he attacked Steve Nesmith, a youth development worker. Nesmith testified Wilson assaulted him, kneed him in the groin, grabbed his legs, and shoved him into a steel door. After a struggle, another worker and a detainee helped Nesmith subdue Wilson. Nesmith testified that during the two years he worked at the Claxton RYDC, Wilson was the only detainee who ever attacked him.

Daniel Rowe testified he attended school with Wilson. In January 1993, [sixteen-year-old] Wilson and another boy attacked him at school as he was drinking from a water fountain. Later the same day, the two again attacked him.

Corporal Craig Brown of the Glynn County Police Department testified that on June 9, 1993 [sixteen-year-old] Wilson shot and killed a small dog for no apparent reason. Juvenile Court Administrator Phillip Corbitt testified Wilson was charged with cruelty to animals and, at a June 25, 1993 arraignment, admitted shooting the dog.

On June 10, 1993, the day after he was charged with shooting the dog, Wilson was charged with possession of crack cocaine with intent to distribute.

A little more than one month later [and three days shy of his seventeenth birthday], Wilson shot Robert Loy Underwood. Underwood testified that on July 26, 1993 he drove into a neighborhood to look for day labor. While there, he purchased crack cocaine from two boys. As he drove away, something struck him in the head. When he turned to see what had hit him, he saw Wilson,

who was pointing a pistol at him. Wilson then shot five times into the cab of Underwood's truck. One bullet struck Underwood in the head; another traveled through his arm and lung before lodging in his spine. Underwood said Wilson then "turned around and just casually walked off." Underwood was hospitalized for six days. Wilson was charged with the shooting, and Underwood identified Wilson as the shooter during the juvenile proceedings.

Detective Ted McDonald with the Glynn County Police Department testified Wilson gave a statement in which he claimed he acted in self-defense when he shot Underwood. However, according to McDonald, Underwood's wounds were not consistent with Wilson's claims of self-defense. Juvenile Court Administrator Corbitt testified Wilson admitted shooting Underwood during a juvenile court hearing.

Sergeant Brandon Lee, an officer with the Georgia College Department of Public Safety in Milledgeville, testified that on May 25, 1995, not quite two months after Wilson's release from the Milledgeville YDC, he found [eighteen-year-old] Wilson and five others in a Georgia College parking lot shouting at college students. When Lee asked them to leave the campus, Wilson, whom Lee described as the obvious leader of the group, became belligerent. The group then moved to another parking lot two blocks away where they got involved in another verbal confrontation with students. When campus police arrived and again asked the group to leave the campus, Wilson began shouting "gang language" in Lee's face and refused to leave. As Lee tried to place Wilson under arrest, Wilson charged another officer and attempted to grab the officer's handgun. A

> struggle ensued, and Wilson ultimately had to be pepper sprayed. After the confrontation, Wilson was arrested and charged with failure to leave campus as directed by an officer and felony obstruction of an officer. Wilson pled guilty to the charges and was banned from the campus.
>
> Steven Roberts, formerly a law enforcement officer with the Georgia College Department of Public Safety, testified that on August 1, 1995, Wilson [who had just turned nineteen] was charged with driving the wrong way on a one-way street and, because he ran when officers approached his car, obstruction of an officer. Roberts also testified he saw Wilson on the Georgia College campus on September 28, 1995. Knowing he had been banned from the campus, Roberts approached [nineteen-year-old] Wilson to arrest him for trespassing. When instructed to place his hands on the car, Wilson ran.
>
> Maxine Blackwell, Solicitor of Baldwin County State Court, testified Wilson had been charged with approximately ten misdemeanor offenses during an eleven week period in 1995 and was sentenced to serve 60 to 120 days in a detention center.

(Bracketed material added; citations to record and footnotes omitted.)

Wilson's wholehearted commitment to antisocial and violent conduct from the age of 12 on not only serves as a heavy weight on the aggravating side of the scale, it also renders essentially worthless some of the newly proffered mitigating circumstance evidence. For example, a number of Wilson's teachers signed affidavits, carefully crafted by his present counsel, claiming that Wilson was "a

sweet, sweet boy with so much potential," a "very likeable child," who was "creative and intelligent," and had a "tender and good side." One even said that Wilson "loved being hugged." A sweet, sensitive, tender, and hug-seeking youth does not commit arson, kill a helpless dog, respond to a son's plea to quit harassing his elderly mother with a threat "to blow . . . that old bitch's head off," shoot a migrant worker just because he "wanted to see what it felt like to shoot someone," assault a youth detention official, shoot another man in the head and just casually walk off — all before he was old enough to vote.

Without provocation Wilson shot a human being when he was fifteen, shot a second one when he was sixteen, and robbed and shot to death a third one when he was nineteen. Those shootings and his other crimes belie the story that his present counsel put forward in the affidavits from his former teachers, which are part of the new mitigating circumstance evidence. See Bobby v. Van Hook, 558 U.S. 4, 12, 130 S.Ct. 13, 19 (2009) ("[T]he affidavits submitted by the witnesses not interviewed shows their testimony would have added nothing of value.').

Given Wilson's lifelong commitment to violent crime, and his utter indifference to human life, reasonable jurists could easily conclude, as the Georgia Supreme Court did, that there is no reasonable probability of a different result if his trial counsel had discovered and presented the additional mitigating circumstance evidence that he claims they should have.