No. 18-

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2018

SCOTTY GARNELL MORROW,
Petitioner

-v-

BENJAMIN FORD, Warden,
Georgia Diagnostic Prison,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI
Capital Case

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CAPITAL CASE

QUESTIONS PRESENTED

Question 1

In *Harrington v. Richter,* 562 U.S. 86 (2011), this Court announced that where a state court issues a summary denial of a habeas petitioner's claim unaccompanied by any reasoning, a federal court reviewing that claim under 28 U.S.C. § 2254(d) determines whether "any reasonable basis" could have supported the denial. If so, the federal court must defer to the state adjudication.

Last term, in *Wilson v. Sellers*, 584 U.S. __, 138 S. Ct. 1188 (2018), this Court rejected the Eleventh Circuit's expansive application of *Richter*, clarifying that *Richter*'s "any reasonable basis" inquiry is limited to the circumstances where no state court has issued a reasoned opinion in support of its adjudication. This Court further noted that where, as in Mr. Morrow's case, the last state court to adjudicate the merits of the claim did so in a reasoned opinion, review under § 2254(d) is "straightforward." *Id.* at 1192. The federal court "simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.*

The Eleventh Circuit's opinion affirming Morrow's denial of habeas relief, issued three weeks prior to *Wilson*, presents the following question:

> Where the last state court to review the merits of a state prisoner's habeas claim denied relief in a reasoned opinion, may a federal court assume the existence of fact-findings and clear error determinations not contained in the state court's opinion to conclude that the state court's adjudication is reasonable and therefore bars federal relief under § 2254(d)?

Question 2

This Court has long recognized the uniquely devastating nature of childhood sexual abuse, identifying repeated childhood sexual assault as "powerful" mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510, 535 (2003). Yet the Eleventh Circuit has a consistent practice of refusing to weigh, or sanctioning a state court's unreasonable discounting of, credible evidence of repeated childhood sexual abuse. This case, therefore, also presents the following question:

> Whether the Eleventh Circuit erroneously concluded that the Georgia Supreme Court reasonably determined that:
>
> > a) the fact that Morrow was "the victim of a series of rapes" as a child "would not have been given great weight by the jury," and
> >
> > b) Morrow's counsel did not perform deficiently in failing to discover this evidence because Morrow did not volunteer information about his sexual abuse?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Scotty Garnell Morrow ("Morrow") respectfully petitions for a writ of *certiorari* to review the judgment of the Court of Appeals for the Eleventh Circuit affirming his conviction and death sentence. The judgment of the Court of Appeals—issued three weeks prior to *Wilson v. Sellers*, 584 U.S. __ , 138 S. Ct. 1188 (2018)—misapplied 28 U.S.C. § 2254, deferring to the Georgia Supreme Court on the basis of findings never made in any state court. Morrow respectfully requests that this Court grant the writ, vacate the judgment below, and remand to the Eleventh Circuit with instructions to apply § 2254 in a manner consistent with this Court's directives in *Wilson*.

Furthermore, in evaluating the prejudice to Morrow's capital sentencing as a result of trial counsel's failure to investigate a large swath of his childhood, the Eleventh Circuit found that the Georgia Supreme Court could reasonably conclude that evidence of the repeated rapes that Morrow suffered as a seven-year-old "would not have been given great weight by the jury." Morrow also respectfully asks that this Court grant the writ to correct the Eleventh Circuit's pattern of discounting reliable evidence of childhood sexual abuse in capital cases.

OPINIONS BELOW

The Eleventh Circuit entered an opinion in Morrow's case on March 27, 2018. This opinion, reported as *Morrow v. Warden, Ga. Diagnostic Prison,* 886 F.3d 1138 (11th Cir. 2018), is reproduced in the appendix at Pet. App. 1. The unpublished order denying rehearing is reproduced in the appendix at Pet. App. 33.

The unpublished order of the federal district court denying relief is reproduced in the appendix at Pet. App. 105.

The opinion of the Georgia Supreme Court reversing the state habeas court's grant of sentencing-phase relief is reported as *Humphrey v. Morrow*, 289 Ga. 864 (2011), and is reproduced in the appendix at Pet. App. 173.

The order of the Superior Court of Butts County, Georgia, granting Morrow habeas relief as a result of the ineffective assistance of trial counsel is reproduced in the appendix at Pet. App. 200.

JURISDICTION

The Eleventh Circuit entered judgment on March 27, 2018. Pet. App. 1. It denied a petition for rehearing and rehearing *en banc* on May 22, 2018. Pet. App. 33. On August 9, 2018, Justice Thomas extended

the time within which to file a petition for writ of *certiorari* to and including October 19, 2018. *See* No. 18A148. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The questions presented implicate the Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right to… have the Assistance of Counsel for his defence." U.S. CONST. Amendment VI.

The questions also implicate the Fourteenth Amendment to the United States Constitution which provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law …" U.S. CONST. Amendment XIV.

The questions presented also regard the proper application of 28 U.S.C. § 2254, which provides, in pertinent part:

(d) 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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

The summer before second grade, Scotty Garnell Morrow moved from Georgia to New York City with his mother and sister to escape his father's abuse. In New York, seven-year-old Morrow was repeatedly anally raped by a teenage boy with whom he shared his home. His teachers and relatives immediately observed the behavioral symptoms that resulted. In the years that followed, Morrow was subjected to

violent beatings by his mother's boyfriend, and to relentless torment and bullying at home and at school. Morrow's trial counsel—and consequently his sentencing jury—were unaware of the violent physical and sexual assaults suffered by Morrow as a child in New York.

This evidence was presented to the state habeas court during a two-day evidentiary hearing. The court "undertook a searching inquiry into Morrow's childhood, and unequivocally found that Morrow was 'the victim of a series of rapes' while he was growing up in the New York area." Pet. App. 30. Consequently, the habeas court "concluded that trial counsel's failure to conduct a proper investigation into his life there rendered their performance deficient and prejudiced the outcome of Morrow's case." *Id.* On appeal, the Georgia Supreme Court reversed the grant of sentencing phase relief. Pet. App. 173.

Though Judge Wilson of the Eleventh Circuit, concurring in the judgment below, feared that the Georgia Supreme Court's reversal evidenced the court's "unwillingness to grapple with the intricacies of [Morrow's] case," Pet. App. 30-31, the Eleventh Circuit panel nevertheless deferred to the state court's adjudication under 28 U.S.C. § 2254(d). In an opinion issued three weeks prior to this Court's

decision in *Wilson v. Sellers*, 584 U.S. __, 138 S. Ct. 1188 (2018), the Eleventh Circuit found the Georgia Supreme Court's reasoned opinion to be reasonable under § 2254(d) by supposing the existence of fact-findings that *could have* supported that adjudication, but were in fact never entered by any state court. Morrow presented the court with an opportunity to redress its error after *Wilson* was decided in his Petition for Rehearing and Rehearing *En Banc*. Morrow's petition was denied. Pet. App. 33.

The Eleventh Circuit also departed from this Court's clear and longstanding guidance by endorsing the Georgia Supreme Court's dismissive treatment of Morrow's repeated childhood rapes. The Georgia Supreme Court reached the twin conclusions that: (a) trial counsel were reasonable in their investigation because Morrow and his family did not volunteer information about this painful and humiliating experience, and (b) even if counsel were deficient in failing to uncover this information, Morrow's repeated childhood rapes could not contribute to a finding of prejudice because jurors would not give this evidence "great weight." Pet. App. 189. As a result of these errors, Morrow "has not been accorded the thorough review of an ineffective

assistance of counsel claim that is contemplated under our Constitution." Pet. App. 30.

A. Trial Counsel's Investigation.

Morrow was arrested for the murders of his girlfriend, Barbara Ann Young, and her friend, Tonya Woods, and the aggravated assault of a second friend of Ms. Young's, LaToya Horne, on December 29, 1994. He immediately gave a statement admitting his responsibility. William Brownell, Jr. and Harold Walker, Jr. were appointed to represent Morrow in January 1995.[1] They met with Morrow "almost right away," and found him to be overwhelmed by remorse. He informed counsel that he was willing to plead guilty and spend the remainder of his life in prison. The District Attorney steadfastly refused to entertain plea negotiations.

In September 1995, nearly four years prior to trial, the trial court granted the defense funds with which to retain several independent experts, including a forensic social worker to assist in preparing the mitigation case. Despite counsel's acknowledged limitations in their

[1] Although both Brownell and Walker were experienced trial lawyers, "neither of them had previously taken a death penalty case to trial as defense counsel." Pet. App. 258 n.16.

ability to identify and gather mitigation evidence,[2] they never hired a mitigation specialist. Counsel made an initial attempt to locate a social worker but the search "ended up back-burnered" after counsel's initial choices were not immediately available. D.16-27 at 440.[3]

Trial counsel spent a substantial majority of their time and efforts from their appointment in 1995 through early 1999 engaged in motions practice, including a complex challenge to the underrepresentation of Hispanic persons in the jury pools. Notwithstanding counsel's vigorous motions litigation, they neglected crucial areas of the case: 1) the identification of appropriate experts to assist the defense[4] and 2) the

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[2] As part of counsel's proffer in support of their motion for funds with which to hire a forensic social worker, counsel emphasized that there is "simply a need in a case like this for somebody who is trained and knows how to look for the factors that the attorneys don't know to look for that become very important in the death penalty phase of a case like this." D.12-21 at 10-11.

[3] The state court record was made a part of the federal district court's docket below in *Morrow v. Warden*, No. 2:12-CV-0051-WBH, and can be accessed electronically via the PACER system. The docket entries are referred to herein as "D.[volume] at [page]."

[4] Counsel did retain a psychiatrist, Dr. Dave Davis, to perform Morrow's initial screening for competency, but provided him with no background information aside from those documents generated by the police in connection with the crime. Dr. Davis found Morrow "competent to stand trial" and concluded that Morrow suffered from a personality

investigation of Morrow's childhood and adolescence in the New York area after he moved away from Georgia with his family. There was no strategic reason to forego this investigation.

Counsel "really weren't even looking in th[e] direction" of childhood abuse. D.16-29 at 618. Instead, six months prior to trial, counsel sent Morrow a letter requesting "a list of individuals" to "testify at the sentencing phase of the trial," clarifying that "[t]hese are simply the individuals who would have good things to say about [him]." D.16-34 at 1023. Morrow complied. *Id.* at 1024-26.

Counsel, it turns out, did not hire *anyone* to prepare a social history report for Morrow. Eventually, in March 1999, counsel retained a psychologist, William Buchanan, to explore Morrow's mental state at the time of the crime. Dr. Buchanan's first substantive interview with Morrow did not occur until May 17, *two weeks* before trial. Unsurprisingly, Dr. Buchanan's evaluation was a "rushed endeavor" with "specific constraints" that "left questions regarding the … significance of [his] test results unanswered." Pet. App. 259-60.

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disorder that was "probably a result of his rather deprived early childhood." D.16-34 at 1054. Trial counsel performed no follow-up.

Similarly, counsel's first substantive meeting with their investigator, Gary Mugridge, occurred less than six weeks prior to trial. Mugridge, a forty year veteran of law enforcement, had *zero* capital mitigation experience. His understanding of what constituted mitigating evidence was, according to his own testimony, "rudimentary." D.16-24 at 181. Trial counsel nevertheless tasked Mugridge with identifying mitigation witnesses.

Mugridge interviewed Morrow's co-workers, friends, former girlfriends and pastors, who all spoke highly of him.[5] Through interviews with Morrow's mother and sister, Mugridge and counsel learned that Morrow and his family moved to the Northeast to escape his father's abusive behavior when he was seven years old, and that he spent the remainder of his childhood and adolescence in New York and New Jersey. Morrow's sister indicated that he "had a real hard childhood growing up." D.16-24 at 206.

Yet trial counsel did not pursue any of the leads provided by Morrow, his mother or his sister. Neither counsel nor Mugridge

[5] These witnesses knew Morrow only after he had returned to Georgia as an adult at age twenty.

contacted a single witness who knew Morrow in New York or New Jersey.[6] Counsel requested no records. In fact, obtaining Morrow's childhood records was "not something that [counsel] had requested or wanted" of Mugridge. D.16-24 at 212. Simply put, counsel's knowledge of Morrow's life circumstances ended at age seven and resumed at the point Morrow returned to Georgia as an adult.

B. The Trial.

Morrow's trial began on June 7, 1999. Morrow testified that he went to Ms. Young's house in an attempt to reconcile with her. As he pleaded with Ms. Young, her friend, Ms. Woods, told Morrow that he had been used for financial support and companionship while Ms. Young's "real man" served a prison term and that Morrow was no longer needed. Both women were laughing. Morrow then pulled a gun from his rear waistband and fired, shooting first at Ms. Woods. On June 26, 1999, the jury rejected a voluntary manslaughter defense and convicted Morrow of two counts of murder and other offenses.

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[6] Mugridge did ask Morrow's sister for the telephone number of Morrow's mentor in New Jersey. When she could not provide one, counsel abandoned the effort. D.16-24 at 187-88, 213. There is no evidence of an intention to contact any other witness outside of Georgia.

In his opening remarks at the sentencing phase, Mr. Walker promised jurors that:

> The evidence in this part of the case is going to be focused on Scotty Morrow, and we are going to be presenting evidence that takes you back basically to the very beginning … we're going to be presenting you with everything and then you decide how significant it is.

D.15-8 at 4561. To that end, counsel presented testimony that as a toddler, Morrow witnessed his father beating his mother. Counsel also presented Dr. Buchanan's testimony to explain Morrow's mental state at the time of the crime. The remaining penalty phase witnesses focused on Morrow's positive qualities, barely mentioning his childhood in the Northeast.[7]

[7] Morrow's supervisor at work testified that he was an "excellent" employee, a "pleasure to be around," and that the company received "more than three or four calls a week about Scotty going above and beyond the call of duty." D.15-8 at 4583. A deputy at the jail testified that Morrow was a "peace keeper" and "helpful" to other officers. *Id.* at 4589, 4591. Two pastors testified to the sincerity of Morrow's faith. D.15-9 at 4596-4601, 4613-15. Morrow's ex-wife and her current husband testified that Morrow was a "perfect father." *Id.* at 4647, 4650, 4657. His half-sister testified that Morrow was kind and loving and always concerned for her daughter. *Id.* at 4662-64. His ex-girlfriend testified that they had a good relationship and he had not been violent toward her. D.15-11 at 4781-83.

The jury sentenced Morrow to death on June 29, 1999. On appeal, the Georgia Supreme Court affirmed. *Morrow v. State*, 272 Ga. 691 (2000).

C. The State Habeas Proceedings And Order For A New Sentencing Trial.

Post-conviction counsel conducted a thorough investigation into Morrow's childhood in the Northeast. Counsel discovered that Morrow's mother moved with her children to her sister Emma's home in Brooklyn to escape abuse by Morrow's father in Georgia. The evidence showed that Morrow's aunt's home was already crowded with Emma's two sons, her boyfriend Snook, Snook's oldest son, and an ever-rotating combination of Snook's other four adolescent children. Habeas counsel uncovered "[c]redible evidence" that "Earl Green, one of Snook's sons, sexually assaulted [Morrow] in the basement on multiple occasions." Pet. App. 240.

Morrow's self-report[8] of his rapes was amply corroborated by the post-conviction evidence. Four witnesses who shared a home with

[8] Morrow recalled that "[Green would] bring me down in the basement, and he had a five-gallon bucket turned upside down, and stood me up on that. He had me pull my pants down, and he put Vaseline or something on himself. I remember him bending over me. I can't

Morrow independently recalled that he began to wet the bed, a hallmark of childhood sexual abuse, at the time of the rapes. D.17-29 at 2292, 2348, 2357, 2362-63; D.17-14 at 1993-94; D.17-31 at 2520. Morrow's school records document the onset of behavioral changes during his second grade year. D.17-25 at 2123-25, 2131, 2147. The state court record also contained unrebutted evidence that Green engaged in other violent and sexually predatory behavior, both contemporaneous with his assault on Morrow and thereafter. D.17-29 at 2359-60; D.17-30 at 2399-2513. Further, multiple experts testified that Morrow's self-report was credible, consistent with other symptoms he reported, and explanatory of his pretrial psychological testing. D.17-14 at 1993; D.16-22 at 53-80, 103-04. Lastly, Morrow's trial expert, Dr. Buchanan, testified that if trial counsel had provided him with "even some fraction" of the background information discovered by habeas counsel, including information about the sudden onset of Morrow's enuresis and his school records, he would have elicited the information about sexual assaults from Morrow himself. D.17-31 at 2520.

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remember the exact feeling, whether it was painful—I guess from trying to block it out for so long—and he penetrated me from behind." D.17-14 at 1993.

Habeas counsel also discovered evidence that Morrow was viciously beaten by his mother's married boyfriend, George May. May would make Morrow "take off [his] clothes and then hit [him] over and over with a belt. The beatings kept on until [May] was tired." D.17-29 at 2307-08.[9] Counsel also uncovered near-constant bullying and torment suffered by Morrow at the hands of other children at home and at school. D.17-29 at 2306, 2353, 2356-57; D.17-14 at 1995. The jurors who sentenced Morrow to death heard none of this information.

After an extensive evidentiary hearing, the state habeas court issued a detailed and thorough opinion granting Morrow a new sentencing trial. Pet. App. 279. The habeas court found, as a matter of fact, that Morrow was the "victim of a series of rapes" during his childhood in the Northeast. Pet. App. 240. The court noted that trial counsel failed to discover and present this "[c]redible evidence" of rape because they "did little to investigate [Morrow]'s life [in the Northeast]," despite "files contain[ing] glaring red flags." Pet. App. 240, 262, 267.

[9] In addition to Morrow's sister's unimpeached eyewitness testimony to this abuse, post-conviction counsel presented further corroborating testimony, D.17-29 at 2349, 2366, and the unimpeached conclusions of two experts, D.17-14 at 1998, 2024-26.

The court emphasized the "striking difference" between the evidence gathered by post-conviction counsel—which included "testimony and records documenting [Morrow]'s childhood in the New York City area"—and that of trial counsel. Pet. App. 239. The habeas court concluded that "[trial c]ounsel's failure to investigate this portion of [Morrow]'s life was not the result of a strategic judgment." Pet. App. 262. Rather, "counsel simply failed to appreciate the importance of diligently documenting their client's life, and so neglected to do so." *Id.*

Moreover, trial counsel's failures can "fairly be described as pivotal." Pet. App. 239. The state habeas court recognized that "given … [Morrow]'s deprived and abuse-laden life history, there is ample reason to believe [he] was prejudiced by counsel's failure to locate and include evidence of his childhood experiences in the New York area and the resultant effects on his functioning." Pet. App. 278.[10] Had the jury "heard the evidence that an adequate investigation by Trial Counsel would have developed, together with the factors already presented at trial … 'there is a reasonable probability that … the result of the

[10] This is especially true because Morrow's crime—"spontaneous," "hot-blooded," and "complete within the span of a couple moments"—was less aggravated than most capital crimes. Pet. App. 212-13.

proceeding would have been different.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). The habeas court concluded that "[i]t is not possible [] to have confidence in the outcome of [Morrow's] sentencing trial." Pet. App. 278-79.

D. The Warden's Appeal.

The Warden appealed the habeas court's grant of sentencing-phase relief and the Georgia Supreme Court reversed. Pet. App. 174. The Georgia Supreme Court did not find any of the habeas court's factual findings to be clearly erroneous. It concluded, however, that trial counsel's exclusive reliance on Morrow, his mother and sister to reveal the details of Morrow's life in the Northeast was "reasonabl[e]" and, similarly, that counsel's single abandoned attempt to obtain one set of Morrow's school records and contact Morrow's mentor constituted "reasonable attempts" at gathering mitigation evidence. Pet. App. 181, 185. The Georgia Supreme Court also recharacterized the habeas court's findings of fact that Morrow suffered violent sexual and physical assaults as "alleged rapes" that "would not have been given great weight by the jury" and "evidence of his having been mistreated by his mother's boyfriend." Pet. App. 188, 189, 190.

E. The Federal Habeas Proceedings.

Both the district court and the Eleventh Circuit ultimately deferred to the Georgia Supreme Court's determination that Morrow's counsel did not perform deficiently. The Eleventh Circuit agreed that "[c]ounsel made inquiries that would have uncovered the new mitigating evidence were it not for the silence of Morrow and his family." Pet. App. 18. The Eleventh Circuit likewise concluded that the Georgia Supreme Court "reasonably determined" that "[Morrow's] 'rapes would not have been given great weight by the jury'" and that "Morrow's new evidence of abuse by his mother's boyfriend would not have changed the sentence." Pet. App. 25.

Judge Wilson, concurring in the panel's judgment "[i]n light of [the court's] *mandatory deference* to the Supreme Court of Georgia's decision," Pet. App. 30 (emphasis added), nevertheless explained:

> [I]n my estimation, the Superior Court of Butts County's resolution of the issues presented here was far more thorough and considerate than the resolution reached by the Supreme Court of Georgia in its reversal of the Superior Court's opinion. The Superior Court … unequivocally found that Morrow was "the victim of a series of rapes" while he was growing up in the New York area. It in turn concluded that trial counsel's failure to conduct a proper investigation into his life there rendered their performance deficient and prejudiced the outcome of Morrow's case… We should not subject a habeas petitioner to death if he

> has not been accorded the thorough review of an ineffective assistance of counsel claim that is contemplated under our Constitution.

Id. Judge Wilson expressed his "fear that, in Morrow's case, the result we have reached is based on the Supreme Court of Georgia's unwillingness to grapple with the intricacies of his case." Pet. App. 30-31. He noted that trial counsel gave "short shrift" to "Morrow's time in New York and New Jersey and the sexual abuse that occurred there." Pet. App. 31. Judge Wilson concluded that "[i]t is hard to ignore that there could have been a recognizable impact on at least one member of the jury." *Id.*

Three weeks after the panel's decision, this Court issued its opinion in *Wilson v. Sellers*, 584 U.S. __, 138 S. Ct. 1188 (2018). That same day, Morrow filed a Petition for Rehearing and Rehearing *En Banc* asking the Eleventh Circuit to conduct its review of Morrow's claims in a manner consistent with *Wilson*'s directive to confine § 2254(d) review to the "particular reasons" contained in the last reasoned state court opinion. 138 S. Ct. at 1191. The Eleventh Circuit denied Morrow's petition. Pet. App. 33.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Opinion Conflicts With This Court's Decision In *Wilson*.

In *Wilson v. Sellers*, this Court re-affirmed that § 2254(d) review requires a "federal habeas court to train its attention on *the particular reasons*—both legal and factual—why state courts rejected a state prisoner's federal claims." 584 U.S. __ , 138 S. Ct. 1188, 1191-92 (2018) (quotations and citations omitted) (emphasis added). Where, as here, the last state court explained its "decision on the merits in a reasoned opinion," this should be "a straightforward inquiry." *Id.* at 1192. The "federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.* This Court has "affirmed this approach time and again." *Id.* (citing *Porter v. McCollum*, 558 U.S. 30, 39-44 (2009) (*per curiam*); *Rompilla v. Beard*, 545 U.S. 374, 388-392 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523-538 (2003)).

The error in this case is straightforward. In its 2016 *en banc* decision in *Wilson v. Warden*, the Eleventh Circuit advanced an expansive, and ultimately flawed, reading of *Harrington v. Richter*, 562 U.S. 86 (2011), holding that it was authorized to defer to findings or

theories that *could have supported* the last state court's summary denial of habeas relief, even where there was a reasoned decision from a lower state court. 834 F.3d 1227, 1235 (11th Cir. 2016). Here, at oral argument, the court suggested that it could even defer to such findings or theories where the state *supreme* court explained its decision in a reasoned opinion. *See* Pet. App. 44-45. And, true to form, the court did so—affirming Morrow's denial of relief on the basis of findings never made in any state court. Three weeks later, in *Wilson v. Sellers*, this Court specifically and unequivocally rejected the Eleventh Circuit's approach. Because *Wilson* demands that federal habeas review focus solely on the "particular reasons—both legal and factual"—offered by the "state courts," 138 S. Ct. at 1191-92, this Court should grant *certiorari*, vacate, and remand.

A. The Eleventh Circuit's Review Was Not Limited To The "Particular Reasons" That The State Court Rejected Morrow's Claims.

The Georgia Supreme Court, in its reasoned opinion reversing Morrow's grant of sentencing phase relief, reviewed the state habeas

court's findings of fact for clear error. Pet. App. 176.[11] It found none. The state habeas court's factual findings—adopted wholesale by the Georgia Supreme Court—are, therefore, the only operative facts for review pursuant to § 2254. *Id.* ("We [the Georgia Supreme Court] *adopt* the habeas court's findings of fact unless they are clearly erroneous.") (emphasis added).

The Eleventh Circuit, however, *assumed* otherwise. It deferred to the Georgia Supreme Court on the basis of findings of fact and determinations of clear error that it simply imputed to the Georgia Supreme Court, but that the court never, in fact, made. Pet. App. 45 (Judge William Pryor: "Well, insofar as [the Georgia Supreme Court's] conclusions would be there was no ineffective assistance of counsel and that's incompatible with the finding of the state habeas trial court, then we'd have to read that as [a clear error determination]. Wouldn't we?"). The court further magnified its error by applying the § 2254(e) presumption of correctness to these assumed findings—findings that *no* state court ever made. *See, e.g.,* Pet. App. 26 (faulting Morrow for his

[11] In Georgia, "it is well-settled that the 'clearly erroneous' standard for reviewing findings of fact is equivalent to the highly deferential 'any evidence' test." *Reed v. State*, 291 Ga. 10, 13 (2012).

failure "to rebut [the Georgia Supreme Court's] factual findings with 'clear and convincing evidence'"). The court's impermissible approach to § 2254 review—materially affecting its review of Morrow's claims—warrants reversal.

1. No State Court Found That Morrow Denied He Was Sexually Abused As A Child.

The Georgia Supreme Court excused counsel's failure to elicit Morrow's history of childhood sexual abuse, notwithstanding any "professional deficiencies," "because Morrow never revealed [his rapes] pre-trial." Pet. App. 178, 191. The Eleventh Circuit reasoned that the state court must have found that trial counsel expressly asked about childhood sexual abuse and that Morrow denied such a history. *See* Pet. App. 18-19 (relying on trial counsel's supposition, never cited by any state court); *see also* Pet. App. 72-73 (Judge Newsom: "[T]his statement in the Georgia Supreme Court's opinion that says, in effect, trial counsel asked the question were you sexually abused as a child and he said no … we'll call it a finding."). The Eleventh Circuit deferred to the Georgia Supreme Court on that basis, emphasizing that it "fail[ed] to understand what else counsel could have done to uncover the rape[s]." *Id.*

But the Georgia Supreme Court made no such finding.[12] No state court did. Rather, consistent with the state habeas court, the Georgia Supreme Court found only that Morrow "*never reported*" his childhood rapes. Pet. App. 188 (emphasis added).

The Eleventh Circuit's independent fact-finding here is critical. It is undisputed that trial counsel did not contact a single witness who knew Morrow in the Northeast or request any records relating to Morrow's childhood and adolescence. If, therefore, counsel never adequately questioned Morrow about his history of sexual abuse, then the basis for the Eleventh Circuit's deference—that it "fail[s] to understand what else counsel could have done"—is risible. For one thing, counsel could have *asked* Morrow.

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[12] To the extent the Eleventh Circuit puts any significance on the Georgia Supreme Court's statement that "Morrow never reported any such rapes pre-trial to his counsel or to the mental health experts who questioned him about his background, including his sexual history," Pet. App. 18, it is misplaced. The state court refers to the evaluation of Dr. Davis, who performed Morrow's initial screening for competency three years before trial, which included a few questions regarding adult sexual partners. *See* Pet. App. 180-81. Morrow's responses to those questions are included in Davis's report under the heading "Marital History." D.16-34 at 1052. This is plainly not a factual finding that Morrow actively denied his *childhood* sexual abuse.

Moreover, the Eleventh Circuit repeatedly emphasized that Morrow was "cooperative" and "forthcoming" and counsel "had no reason to doubt [his] honesty." Pet. App. 19. Given Morrow's level of cooperation, a constitutionally adequate investigation *would have* uncovered the evidence of childhood sexual abuse ultimately presented in post-conviction proceedings.[13] *See* D.17-31 at 2520 (Dr. Buchanan testifying that he "would have" uncovered this abuse if he had been provided "even some fraction" of the evidence discovered by post-conviction counsel). The Eleventh Circuit's independent fact-finding cannot salvage the Georgia Supreme Court's unreasonable rejection of Morrow's claims under § 2254(d). *Wilson*, 138 S. Ct. at 1192.

[13] The court's alternative conclusion that "[a] social worker would have been of little use in light of the primary witnesses' refusals to talk" is internally inconsistent and illogical. Pet. App. 22. It is precisely this scenario—where a defendant and his family are "cooperative and honest" and "offer[] up responses to anything [counsel] ask[s]," Pet. App. 19, 20, but have difficultly disclosing a traumatic, humiliating childhood experience—where an experienced social worker would be of greatest utility.

2. The Eleventh Circuit's Prejudice Determination Is Based On Findings Of Clear Error Never Made By The State Supreme Court.

The Eleventh Circuit's prejudice analysis is similarly flawed. The court ignores the actual state court findings of fact, instead relying on findings and clear error determinations that *could have* supported the Georgia Supreme Court's denial of relief. Most egregiously, the court refers to Morrow's "*alleged* rapes" and "*alleged* rapist." Pet. App. 19, 25 (emphases added). The court does so, presumably, because the Georgia Supreme Court's conclusion that the repeated rapes suffered by Morrow as a seven-year-old are insignificant to a jury's sentencing determination is otherwise patently unreasonable. But a federal habeas court is neither authorized to assume that the state supreme court made a silent finding of clear error nor entitled to substitute its own clear error determination.[14] Rather, pursuant to § 2254 and *Wilson*, the Eleventh Circuit was required to presume as correct the fact that Morrow was "the victim of a series of rapes"—the *only* state court determination on point—and assess the reasonableness of the "specific

[14] This is particularly true, where, as here, the lower court's fact-finding is supported by extensive corroboration. *See supra* at 13-14.

reasons given by the [Georgia Supreme Court]" in light of that fact-finding.

The Eleventh Circuit also misapplied § 2254 as to the finding of fact that Morrow's mother's boyfriend, George May, would make Morrow "strip naked and lie on a bed while [May] whipped him with his belt until he grew too tired to continue." Pet. App. 241-42. This finding of violent physical abuse was supported by ample evidence. *See supra* at n.9. The Georgia Supreme Court, however, dismissed this "evidence of [Morrow] having been *mistreated* by [May]," Pet. App. 190 (emphasis added), noting that "the testimony in the habeas court was somewhat inconsistent regarding the degree of harshness involved." Pet. App. 189 n.4.[15] Even assuming, *arguendo*, that there was some inconsistency,[16]

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[15] The Georgia Supreme Court alternatively dismissed this evidence as cumulative because "trial counsel did present testimony … that [May] had been abusive to Morrow's mother and had once cruelly mocked Morrow when he attempted to defend his mother …." Pet. App. 189. This conclusion, however, is unreasonable on its face: Why would evidence of May's single episode of domestic violence against Morrow's mother render additional evidence that May consistently and viciously abused Morrow less relevant?

[16] There was no inconsistency. Neither the Georgia Supreme Court nor the Eleventh Circuit noted any rebuttal to the eyewitness testimony of the abuse or the corroborating testimony from other witnesses. Moreover, the clarifying affidavit obtained by Respondent from the

this Court has consistently rejected such an "all-or-nothing" approach to mitigating evidence. *See, e.g.*, *Porter*, 558 U.S. at 42-44 (holding that it was unreasonable for the state court "to discount entirely" or "discount to irrelevance" mitigation evidence with isolated weaknesses).

The Eleventh Circuit deferred to the Georgia Supreme Court, however, on the ground that "Morrow *fail[ed] to rebut these factual findings [of inconsistency]* with 'clear and convincing evidence.'" Pet. App. 26 (emphasis added). The court assumed that the Georgia Supreme Court's statement regarding inconsistency constitutes a clear error determination worthy of § 2254 deference. Not so. Indeed, by definition, "somewhat inconsistent [testimony]" cannot satisfy the "highly deferential 'any evidence' test" to support a finding of clear error. *Reed*, 291 Ga. at 13. Again, the Georgia Supreme Court made no *findings* for Morrow to rebut. Appropriate consideration of Morrow's unpresented mitigation evidence—presuming as correct under § 2254(e)

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adult son of May only underscores the strength and credibility of Morrow's evidence. *See* D.18-11 at 3918-19 (recognizing that the whippings inflicted on Morrow were painful and noting that "[May] did whip us hard with a belt when we misbehaved…").

the operative fact findings of the state habeas court—warrants reversal in this case.

The Eleventh Circuit's repeated reliance on findings that "could have" supported the Georgia Supreme Court's decision—but, in actuality, did not—reflects the § 2254(d) test for reasonableness set out in *Richter*. 562 U.S. at 99-100. In deploying *Richter*'s analysis, the Eleventh Circuit improperly expanded the limitations on federal habeas relief beyond those contained in the plain text of § 2254. As *Wilson* made clear, "*Richter* does not control [where there is a reasoned state court decision]." 138 S. Ct. at 1195. Certainly not where the state *supreme* court explained its decision on the merits in a reasoned opinion. This Court should grant the writ, vacate the judgment of the Eleventh Circuit, and remand the case with instructions to perform a § 2254(d) review analyzing the "specific reasons" supporting the Georgia Supreme Court's denial of relief.

II. The Eleventh Circuit Has Consistently Flouted This Court's Longstanding Precedent, As Well As The Widely Accepted Findings Of The Scientific Community, In Its Handling Of Childhood Sexual Abuse Mitigation.

A. Morrow's Credible Evidence Of Repeated Childhood Rape May Not Be Discounted To Irrelevance.

Mr. Morrow was violently and repeatedly sexually abused as a child. Pet. App. 240. The state habeas court concluded that Morrow's "[c]redible evidence" of rape was "perhaps the most persuasive brand of mitigati[on]" offering "a direct link" between his "abuse and his crimes." Pet. App. 240, 275-76.[17] Incredibly, the Georgia Supreme Court dismissed Morrow's childhood rapes, finding that his history of sexual abuse "would not have been given great weight by the jury." Pet. App. 189. The court reasoned that Morrow's "own statement to a psychologist" was the "only direct evidence" of his rapes and, therefore, the expert's testimony carried less weight "in light of the weaker evidence upon which that testimony, in part, relied." Pet. App. 188-

[17] Dr. Buchanan testified that this information "would have helped the jurors understand" that "the traumas [Morrow] endured necessarily skewed [his] natural development and ultimately created [a] 'nice guy' tormented by internal chaos." D.17-31 at 2521.

89.[18] The Eleventh Circuit's conclusion—that this was a "reasonabl[e] determin[ation]" of the prejudice inquiry—is indefensible as a matter of fact and law. Pet. App. 25.

Repeated sexual abuse has long been recognized as uniquely devastating to the psychological and emotional development of a child. This Court has previously characterized "repeated [childhood] rape" as "powerful" mitigating evidence and precisely "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535 (citing *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)). Indeed, this Court has elsewhere observed:

> [A child rape] victim's fright, the sense of betrayal, and the nature of [his] injuries caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin. The attack was not just on [the victim] but on [his]

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[18] Neither the Georgia Supreme Court nor the Eleventh Circuit ever actually identified any weakness in the information upon which the experts relied, offered any reason to doubt the credibility of the four witnesses who independently recalled Morrow beginning to wet the bed at the age of seven, or suggested any reason to question the authenticity of Morrow's school records or the assailant's criminal records. *See supra* at 13-14 (documenting extensive corroboration).

Moreover, this is a startling conclusion. The testimony of an expert witness, in a recognized field of expertise, should not be accorded less weight simply because the reliability of *one* of the many and varied sources upon which the expert relied could be questioned.

> childhood … Rape has a permanent psychological, emotional, and sometimes physical impact on the child. We cannot dismiss the years of long anguish that must be endured by the victim of child rape.

Kennedy v. Louisiana, 554 U.S. 407, 435 (2008) (citations omitted). *See also id.* at 468 (Alito, J., dissenting) ("Long-term studies show that sexual abuse is 'grossly intrusive in the lives of children and is harmful to their normal psychological, emotional, and sexual development in ways which no just or humane society can tolerate.'") (citation omitted). "It is hard to ignore," Judge Wilson concluded in his concurrence below, that the evidence of Morrow's childhood sexual assaults "could have [made] a recognizable impact on at least one member of the jury." Pet. App. 31.

The Eleventh Circuit nevertheless deferred to the Georgia Supreme Court's prejudice determination because "Morrow offer[ed] no direct evidence of rape to bolster his allegations." Pet. App. 25. This is not the law. *See, e.g.*, *Wiggins*, 539 U.S. at 516-17, 533 (holding that evidence of Wiggins' childhood sexual abuse—where the only "direct evidence" of the abuse was his self-report[19] during state habeas

[19] Wiggins' self-report was supported by reliable corroborating circumstances, including eating disorders and absences from school

proceedings—was "powerful [mitigation] evidence"). Nor should it be. There is rarely "direct evidence" of child sexual abuse, particularly abuse that occurred decades earlier. Child sexual abuse is often witnessed by no one other than the victim and perpetrator. *See Kennedy*, 554 U.S. at 444 ("[The child victim] and the accused are, in most instances, the only ones present when the crime was committed.") (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987)). Male victims of childhood sexual abuse are especially unlikely to report their abuse. *See* Patrick J. O'Leary & James Barber, *Gender Differences in Silencing Following Childhood Sexual Abuse*, 17(2) Journal of Child Sexual Abuse 133, 137-38 (2008) (finding that only twenty-six percent of men, compared to sixty-four percent of women, told anyone about their childhood sexual abuse at or around the time the abuse occurred). Moreover, small children who are threatened by their attackers, as Morrow was, are unlikely to disclose the abuse under any circumstances. *See* D.17-14 at 1993. The mitigating value of credible,

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during the time he was being abused. The unrebutted corroborating evidence here rivals that in *Wiggins*. *See supra* at 13-14; *cf. Wiggins*, 539 U.S. at 555 (Scalia, J., dissenting) (noting that Wiggins, unlike Morrow, was "a serial liar").

corroborated childhood sexual abuse evidence cannot be conditioned on the unlikely presence of an eyewitness.

Yet, Morrow's case is no outlier. Despite this Court's clear guidance and the near-universal scientific consensus regarding the long-term effects of childhood sexual abuse, the Eleventh Circuit has a long history of dismissing this evidence in its *Strickland* prejudice analyses. For instance, the court has repeatedly discounted childhood sexual abuse mitigation because it occurred in the past, *during childhood*. *See, e.g., Anderson v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 881, 908–09, 911 (11th Cir. 2014) (concluding that the mitigating evidence that counsel failed to discover—including petitioner's "horrific history of child sexual abuse"—did not "satisfy *Strickland*'s prejudice prong" because "[a]lthough evidence of sexual abuse may constitute a mitigating circumstance, 'when a defendant is several decades removed from the abuse being offered as mitigation evidence its value is minimal'") (quoting *Callahan v. Campbell*, 427 F.3d 897, 937 (11th Cir. 2005)); *Henyard v. McDonough*, 459 F.3d 1217, 1246 (11th Cir. 2006) (same); *Newland v. Hall*, 527 F.3d 1162, 1217 (11th Cir. 2008) (same). The court has also dismissed childhood sexual abuse where no "direct

evidence" of the abuse existed. *See* Pet. App. 25; s*ee also Gissendaner v. Seaboldt*, 735 F.3d 1311, 1329-30 (11th Cir. 2013) (avoiding a prejudice determination but noting that counsel reasonably elected not to present evidence of sexual abuse where counsel "did not uncover any first-hand witnesses (*other than Gissendaner*) to the alleged incidents of sexual abuse") (emphasis added). The court has likewise overlooked childhood sexual abuse where the evidence would not "necessarily have changed *all of* [the relevant expert's] medical conclusions." *Cook v. Warden, Ga. Diagnostic Prison*, 677 F.3d 1133, 1138 (11th Cir. 2012) (emphasis added). Lastly, the court has ignored evidence of childhood sexual abuse altogether. *See, e.g.*, *Clark v. Attorney Gen., Fla.*, 821 F.3d 1270, 1278, 1285 (11th Cir. 2016) (no mention of "brutal and sadistic" sexual abuse evidence in prejudice analysis); *Krawczuk v. Sec'y, Fla. Dep't of Corr.*, 873 F.3d 1273, 1297 (11th Cir. 2017) (no mention of sexual abuse evidence in prejudice analysis).

The troubling implication of the Eleventh Circuit's post-*Wiggins* case law is undeniable: childhood sexual abuse is not mitigating in Alabama, Georgia, and Florida. Although, of course, "evidence of sexual abuse is sometimes not enough to tip the scales," *Wharton v. Chappell*,

765 F.3d 953, 978 (9th Cir. 2014), it should—*all the time*—receive the thoughtful consideration demanded by *Wiggins*, *Kennedy*, and the Constitution. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender … as a constitutionally indispensable part of the process of inflicting the penalty of death.") (citation omitted). This case, with an unequivocal factual finding that Morrow was "the victim of a series of rapes," presents an excellent vehicle for this Court to affirm that proper weight is due credible evidence of repeated childhood sexual abuse.

B. Trial Counsel's Failure To Uncover Childhood Sexual Abuse Must Be Attributed To Them Alone Where Counsel Fails To Ensure That A Professional With Sufficient Skill And Experience Conducts An Appropriate Background Investigation.

It is no surprise that trial counsel did not discover the evidence of Morrow's childhood sexual abuse. Counsel conceded, nearly four years before trial, that they "don't know [how] to look for [social history factors] that become very important in the death penalty phase of a case like this." D.12-21 at 10-11. Predictably, counsel "didn't consider the

possibility that [someone in the Northeast] would have information about [Morrow's sexual abuse]" and "really weren't even looking in that direction." D.16-29 at 618. Instead, counsel directed their investigator to remain in Georgia and focus on "recent" and "positive" witnesses. *Id.* at 618-19. Additionally, counsel never engaged a clinical social worker or mitigation specialist whose professional training would offer a greater ability to elicit such sensitive information. And yet, the Eleventh Circuit blamed Morrow for his "silence." Pet. App. 18.

But a defendant's "silence" as to horrific childhood sexual abuse in the face of superficial or non-existent questioning is not, and should not be, dispositive of the performance inquiry under *Strickland*. This Court has made clear that the failure to discover and present evidence of childhood rape is attributable to trial counsel where they do not ask the right questions or adequately pursue red flags. *Wiggins*, 539 U.S. at 525 (concluding that "had counsel investigated further, they might well have discovered the sexual abuse later revealed during state post-conviction proceedings"). Here, for instance, trial counsel had numerous indicia—"glaring red flags"— of sexual abuse available to them. Pet. App. 240-41, 267.

Moreover, the scientific consensus is unmistakable: reticence to discuss this type of traumatic childhood history is not only common, it is expected. *See, e.g.*, Tina B. Goodman-Brown et al., *Why Children Tell: A Model of Children's Disclosure of Sexual Abuse,* 27 Child Abuse & Neglect 525, 526 (2003) (highlighting numerous reasons for non-disclosure, including "[f]ears of retribution and abandonment, and feelings of complicity, embarrassment, guilt and shame"). Indeed, difficulty revealing details of childhood sexual abuse is one of the chief psychological effects of the abuse itself. *See* D.17-31 at 2520 (victims often "cut off or dissociate their emotions and even their memory … making the trauma bearable"). Significantly, male survivors of child sexual abuse face "barriers to disclosure," such as cultural perceptions of masculinity, which are "uniquely problematic." Scott D. Easton et al., *Barriers to Disclosure of Child Sexual Abuse for Men*, 15(4) Psychology of Men & Masculinity 460, 467 (2014); *see also* O'Leary & Barber, *supra* at 139 (noting that "[i]t was not uncommon … for men to report taking in excess of twenty years to talk about their experiences").

The Eleventh Circuit, nevertheless, has adopted, in effect, a "check-the-box" approach to investigating childhood sexual abuse. *See*

Pet. App. 65 (Judge William Pryor: "[I]f that's true, that [counsel asked Morrow about childhood sexual abuse], then that's the end of that claim. Isn't it? … It can't be deficient performance if that—if the question was asked."). The court has found trial counsel to have performed reasonably where counsel either conducted a superficial inquiry into sexual abuse or none at all. *See, e.g.*, *Anderson*, 752 F.3d at 905, 911 (upholding the state court's determination as to *Strickland*'s performance prong "in large part" because Anderson did not reveal his history of sexual abuse where "trial counsel simply left a questionnaire with Mr. Anderson to fill out on his own, which inquired into sensitive aspects of his background that might be embarrassing, such as child sexual abuse"); *Newland*, 527 F.3d at 1203-04. This approach, unreasonably shifting the burden of conducting a constitutionally adequate mitigation investigation to the defendant, comports neither with this Court's precedent nor the longstanding consensus regarding the psychology of child sex abuse survivors. *Strickland* demands more from trial counsel. *See, e.g.*, ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7, commentary, p. 112 (2003) (recognizing that obtaining information

about childhood sexual abuse "typically requires overcoming considerable barriers, such as shame, denial, and repression, as well as other mental or emotional impairments" and that this topic "may be extremely difficult for the client to discuss").

Where, as here, counsel concede that they are ill-equipped to conduct such a sensitive investigation *and* take no steps to remedy that inadequacy, their subsequent failure to uncover childhood sexual abuse evidence is attributable to them, and them alone. A grant of certiorari is necessary to correct this misapplication of *Strickland* and *Wiggins*.

CONCLUSION

Petitioner Scotty Garnell Morrow respectfully requests that this Court grant his petition for writ of *certiorari*, summarily vacate the decision below, and remand his case to the United States Court of Appeals for the Eleventh Circuit with instructions to reconsider his case in light of *Wilson v. Sellers*, 584 U.S. __, 138 S. Ct. 1188 (2018). In the alternative, Petitioner requests that this Court grant the writ and set Petitioner's case for full briefing and argument before the Court.

Respectfully submitted, this 19th day of October, 2018.

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