No. 20-7932

In the
Supreme Court of the United States

Virgil Delano Presnell,
Petitioner,

v.

Benjamin Ford, Warden,
Georgia Diagnostic and Classification Prison,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied *Wilson v. Sellers*, ___ U.S. ___, 138 S. Ct. 1188 (2018), when it specifically reviewed the state court's reasons for denying Presnell's ineffective-assistance claim and also examined the record to determine whether the state court's decision was reasonable.

2. Whether the state court unreasonably applied *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), when it denied Presnell's claim that trial counsel were ineffective for not uncovering and presenting evidence of fetal alcohol syndrome at his resentencing trial.

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The decision of the Butts County Superior Court denying state habeas relief is unpublished and is included in Petitioner's Appendix 4.

The decision of the Georgia Supreme Court affirming denial of state habeas relief is unpublished and is included in Petitioner's Appendix 5.

The decision of the district court denying federal habeas relief is unpublished and is included in Petitioner's Appendix 3.

The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of relief is published at 975 F.3d 1199 (11th Cir. 2020) and is included in Petitioner's Appendix 2.

The order of the Eleventh Circuit Court of Appeals denying rehearing and rehearing en banc is unpublished and is included in Petitioner's Appendix 1.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment in this case on September 16, 2020. Pet. App. 2. A petition for writ of certiorari was timely filed in this Court on April 30, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a … have the Assistance of Counsel for his defence.

The Fourteenth Amendment, Section I, of the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law … .

28 U.S.C. § 2254(d) provides:

> 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.

INTRODUCTION

Petitioner Virgil Delano Presnell tries, but fails, to manufacture a conflict with *Wilson v. Sellers*, ___ U.S. ___, 138 S. Ct. 1188, 1192 (2018), which held that a "federal court should 'look through' the unexplained [state court] decision to the last related state-court decision that does provide a relevant rationale." Presnell argues that the court of appeals defied *Wilson*, ignored the state habeas court's order, and made up its own fact findings in denying relief on Presnell's claim that trial counsel were ineffective for failing

to uncover and present evidence that he suffered from fetal alcohol syndrome (FASD). Presnell is wrong. The state court set out the mitigation investigation performed by the defense team and summarized the evidence presented during Presnell's resentencing trial. *See* Pet. App. 4 at 30-43. Then, the state court determined in summary fashion that Presnell had failed to prove either prong of the *Strickland* standard. The court of appeals reviewed those legal determinations under AEDPA's standard, and that review properly included review of the record to determine whether it supported the state court's decision. That was not contrary to *Wilson*—which did not preclude federal courts from reviewing the state court record to determine whether the state court decision under review was reasonable. Instead, the court of appeals correctly reviewed the state court's decision asking if there was any reasonable way to agree with the state court. *See generally Shinn v. Kayer*, 141 S. Ct. 517, 523-25 (2020). This approach is entirely consistent with this Court's decisions.

STATEMENT

A. Facts of the Crimes

On May 2, 1976, Presnell surveilled an elementary school in Cobb County where he masturbated in his car while watching L.S. (age eight) and A.F. (age ten)[1] through binoculars as they walked home down a wooded trail. *See Presnell v. State*, 241 Ga. 49, 50 (1978); *see also* Pet. App. 6 at 4.[2]

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[1] The victims are referred to in the same manner used by the court of appeals.

[2] The pincites refer to the sequential page number for the individual appendices, which can be found at the bottom of the page.

Presnell returned the next day with a sleeping bag, a rug, a jar of lubricant and rope, and waited for A.F. and L.S. *See Presnell*, 241 Ga. at 50. While the girls were walking down the trail, Presnell grabbed them from behind, "taped their mouths shut," and threatened to kill them with a gun "if they did not cooperate." *Id.*; Pet. App. 6 at 4.

The children were forced into Presnell's car and while he was driving, he forced his penis into A.F.'s mouth and digitally penetrated her. *Presnell*, 241 Ga. at 50. He took the children into the woods with his rug and jar of lubricant. *Id.* He forced them to remove their clothing and had A.F. lie on the rug. Pet. App. 6 at 4. He then removed his clothes and raped A.F. *Id.* "Her vagina was torn" and she was bleeding. *Id.*

Presnell then took L.S. toward his car, but she managed to run away. *Id.* He found her at a nearby creek and pushed her into the water as she kicked in an effort to escape. *Id.* When the kicking stopped, Presnell took L.S. out of the water. *Id.* According to the autopsy reports, L.S. died by drowning. *Id.* She had bruises on her neck and back. *See Presnell*, 274 Ga. at 247.

Presnell returned to A.F. and brought her to the creek where he again placed his penis into her mouth. Pet. App. 6 at 4. He then locked her into the trunk of his car. *Id.* Fortunately he had a flat tire and as a result, he dropped A.F. off in another area of the woods while he drove to his mother's house to fix the tire. *Id.* A.F. heard the sound of a nearby gas station where she went and got help. *Presnell*, 274 Ga. at 247.

B. Proceedings Below

1. First State and Federal Proceedings

In 1976, Presnell was convicted of the murder of L.S. as well as the kidnapping with bodily injury and forcible rape of A.F. and was sentenced to death. *Presnell v. State*, 243 Ga. 131, 132 (1979). The Georgia Supreme Court affirmed Presnell's convictions and sentence of death for the murder of L.S but vacated the conviction for kidnapping with bodily injury. *Id.* at 132-33; *see also Presnell v. Georgia*, 439 U.S. 14, 99 S. Ct. 235 (1978). Presnell was denied state habeas relief but was granted federal habeas relief as to his death sentence based on an improper closing argument by the State during sentencing. *Presnell v. Zant*, 959 F.2d 1524 (11th Cir. 1992).

2. Resentencing Proceedings

Presnell's resentencing trial was held on February 22, 1999. D6-18:1.[3] He was represented by experienced criminal defense counsel, Steve Schuster and Mitch Durham, who had each represented several defendants in death penalty cases. D6-119:32.

a. Mitigation Investigation[4]

With assistance from the Multi-County Public Defender's Office, trial counsel hired a death penalty experienced investigator, Andrew Pennington; mitigation specialist, Toni Bovee; and neuropsychologist, Dr. Robert Shaffer, who collectively investigated the circumstances of the crime, the conditions of

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[3] Citations to the record refer to the Electronic Court Filing (ECF) number associated with the document followed by the page number given at the bottom of the page.

[4] The court of appeals and the state habeas court each set out in more detail the mitigation investigation. *See* Pet. App. 1 at 20-25; Pet. App. 4 at 34-40.

Presnell's upbringing, and his mental health to present a cohesive mitigation theory at Presnell's resentencing trial. *See* Pet. App. 4 at 34-40. Trial counsel also obtained and reviewed Presnell's medical records, prison records (including his prison medical file), criminal history, Central State Hospital records, and school records. Pet. App. 4 at 35; D6-77:51, 69-71, 73-74, 88-90; D6-78:252, 313-20, 377-78, 393-98; D6-79:651-57; D6-80:747-814, 864-95; D6-81:1157-1213; D6-82:1396-1527. Trial counsel also investigated Presnell's original trial and corresponding post-conviction proceedings including hiring Dr. Harry Porter, the psychiatrist who evaluated Presnell before his original trial. D6-77:72; D6-78:236; D6-79:531, 648; D6-81:1031-34; D6-83:2279.

From the Central State Hospital records, trial counsel learned that Presnell had "undergone a full psychological evaluation and was diagnosed with antisocial personality disorder and sexual deviation, but was found to be functioning within the normal range," was reported to be of average intelligence, and "that the results of an electroencephalogram (EEG) were normal." Pet. App. 1 at 23 n.28; D6-119:36 (citations omitted); D6-79:633. The records also stated that Presnell showed "no real signs of guilt" for his crimes and that he admitted to drowning L.S. intentionally. Pet. App. 4 at 36 (citation omitted).

Trial counsel, along with their investigator Pennington, and mitigation specialist Bovee, obtained a social history of Presnell through interviews with him and his family members including: his mother, Lois Samples; his maternal aunts, Peggy McQurter and Lillian Shepard; his son, Brian Presnell; his ex-wife, Debrah Gilliand, and his step-father, Willie Samples. Pet. App. 4 at 37-38; D6-77:45-46, 56-58, 60, 63-65, 108, 134-36; D6-78:174-83, 191, 204-06, 215-222, 251-52, 260-63, 297-303, 312-20; D6-79:574-49; D.6-

80:817; D6-82:1771-84, 1793-96. Notably, Lois informed Bovee that during her pregnancy with Presnell, which she described as normal, she smoked a pack of cigarettes a day and "she did not drink except socially." *Id.*

b. Mental Health Investigation

Shaffer "assembled a complete history of Presnell" and "focused on head injuries, complications during pregnancy and birth; verbal, physical or sexual abuse; parental alcoholism; and mental and emotional problems." Pet. App. 4 at 39; D6-78:197-198. Shaffer: reviewed documents regarding Presnell's education, birth, and medical history, prior mental health evaluations, and Bovee's interviews of Presnell's mother and aunt Lillian; spoke with Bovee about her interviews of Presnell's family; learned of Presnell's early childhood educational experiences through Presnell's former teachers and other school personnel; and conducted interviews with Presnell, his mother, and aunt, Lillian Shepard. D6-31:70-71, 107, 112, 133; D6-77:59-60, 69, 72-73, 138; D6-78:174, 191, 223-30, 308; D6-79:570-647.

Shaffer also administered a battery of tests to Presnell including testing Presnell for brain injuries. D6-31:112; D6-78:228-30. Presnell's prior intellectual testing "demonstrated scores mostly in the borderline to low average range"; however, Shaffer noted that Presnell's intelligence scores from his testing were "slightly better" than previous tests. D6-78:229. Other tests showed that Presnell had trouble with reality perception and showed some symptoms of dissociation, which was consistent with reports that Presnell lived in a world of "excessive fantasy, confusion of waking and dreaming states, and isolated experiences of auditory hallucination." D6-78:229; *see* D6-31:119, 121.

Shaffer diagnosed Presnell with a pedophilic disorder and minimal brain dysfunction. D6-31:121, D6-78:223-30. In preparing Shaffer to testify, trial counsel also independently researched Shaffer's diagnosis. Pet. App. 4 at 39 (citation omitted); D6-80:837-47; D6-82:1779, 1783-84, 1790, 1791, 1793-95; D6-78:347-49.

Trial counsel also conferred with Porter about his 1976 pre-trial evaluation of Presnell in addition to sending him more documents for review. D6-77:72; D6-79:531, 648; D6-81:1031-34; D6-83:2279. During his 1976 evaluation, Porter interviewed Presnell on numerous occasions as well as his mother and his aunt Lillian. D6-79:668; D6-81:1037. Porter learned about Presnell's dysfunctional childhood. D6-79:668-69, 676-78, 681-84. Porter also addressed Presnell's state of mind at the time of the crime in his 1976 evaluation. *Id.* at 665-67, 697-99. Presnell informed Porter that he drowned L.S. because "he was concerned that she would get away and tell someone before he had a chance to get away," explaining, "I don't know why but I held her down in the water until I thought she had quit breathing." *Id.* at 666, 672. Porter noted that Presnell realized his behavior was wrong and that "he would be arrested and punished if caught." *Id.* at 666.

Porter also diagnosed Presnell with pedophilia. D6-79:664-65; D.6-81:1039, 1041. Porter opined that Presnell's "deviated sexual urges and his need to dominate children are likely to resurface in his behavior from time to time, and in this sense he does represent a danger to others." D6-79:665. Importantly, he concluded that the success of treating Presnell's sexual deviations "are not great" because Presnell "does not really find the 'symptoms' distasteful, but rather finds them gratifying." *Id.*

Trial counsel also obtained the testimony and diagnosis of psychologist Dr. Joel Norris, Presnell's mental health expert from his initial state habeas proceedings. *Id.* at 1255; D6-81:1234-57.

c. Sentencing Phase Presentation[5]

Trial counsel's strategy for the sentencing phase was "to create a lingering doubt in the jurors' minds as to whether L.S.'s killing was accidental" and to plead for mercy. Pet. App. 1 at 25. The accidental drowning theory was addressed during cross-examination of State witnesses and during opening and closing arguments. *See id.* at 27-34, 46-48. Below, the Warden focuses on the mitigating evidence regarding Presnell's dysfunctional childhood and resulting mental health issues that was presented at trial.[6]

(1) State Presentation

At trial, the State's initial presentation of its case-in-chief included evidence regarding the crime. Additionally, the State presented a similar incident during which Presnell grabbed a ten-year-old girl walking from school, took her into a wooded area with the intent to rape her, told her not to scream, and slapped her in the face when she did. *See* D6-29:194-96. Fortunately, the girl managed to escape. *Id.* The State also admitted into

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[5] The court of appeals and the state habeas court's opinions also detail the evidence presented at trial. *See* Pet. App. 1 at 34-48; Pet. App. 4 at 41-43.

[6] Presnell's brief implies throughout that the jury was unaware of his dysfunctional childhood and mental health issues; however, that is not the case as will be shown below.

evidence a book entitled, *Radiant Identities*, featuring "naked young girls," which Presnell tried to order in prison. *Id.* at 260-63; D6-33:93.

(2) Defense Presentation

During their case-in-chief, trial counsel presented six witnesses—four relatives and mental health expert Schaffer.

(a) Lay Witnesses

The first witness presented by trial counsel was Dulcie Shrider, the district records manager for the Atlanta Public School System. D6-30:72-91. Shrider testified that Presnell's school records indicated that he transferred to a number of schools, and had numerous changes in his home address and listed guardian. *Id.* at 82-87. She testified that Presnell was in Kindergarten for three years and his poor academic performance culminated in him only reaching the sixth grade at age 15. *Id.* at 84-85. Presnell was then placed in—not promoted to—high school because of his age and size. *Id.* at 85. Trial counsel tendered Presnell's school records following Shrider's testimony. *Id.* at 74-78.

Next, trial counsel presented Presnell's aunt, Lillian Shepard. D6-30:129-64. Shepard testified that Presnell's mother had him when she was 17 years old. *Id.* at 134-35. He lived in cramped conditions and was raised by people with limited financial means. *Id.* She testified that the family was constantly moving, splitting up, and being evicted from their various residences. *Id.*

Shepard recounted the influence of her brother, James Edwards, on her early life. D6-30:142-48. She testified that Edwards was injured at a young age after which he became violent and started sexually abusing her and her

sisters. *Id.* at 142-45. She also testified that Edwards "probably had the opportunity" to sexually abuse Presnell because Presnell "might have slept with James" while they were living in their three-room duplex. *Id.* at 137, 143. She stated that Edwards was subsequently convicted of molesting his own daughter. *Id.* at 146.

Shepard testified that Presnell's father was absent from Presnell's life for 13 years and that when he was around, he never meaningfully interacted with him and was physically and mentally abusive. *See id.* at 150-52. She also explained that Presnell's mother was not substantially present in Presnell's life because she "worked the whole time" to provide for the family. *Id.* at 148. As a result, Presnell spent a lot of time with Shepard and her sister, Brenda. *Id.* at 149. They played house with Presnell and "dressed him up like a little girl." *See id.* Shepard asked the jury to spare Presnell's life. *Id.* at 153-54. Trial counsel then tendered a certified copy of Edwards' conviction for child molestation and two counts of incest. *Id.* at 173-84.

Next, trial counsel called Willie Samples, Presnell's step-father, and Brian Terry, Presnell's son. D6-60:185-94, 197-214. They testified that they had visited Presnell in prison and he showed remorse for his actions. *Id.* at 187-90, 193-94, 199. They spoke of their close relationship with Presnell and asked the jury to spare his life. *Id.* at 190, 192-94, 197-99, 201-10.

Trial counsel's final lay witness was Presnell's mother, Lois Samples. D6-31:5-61. Lois testified that she was the second oldest of six siblings. *Id.* at 7-10. She described her father as immature and stated that her mother ran the household. *Id.* at 10. She testified that her family moved frequently because her father was in constant search for work. *Id.* at 12-13.

Lois testified that she and her sisters were sexually assaulted by their brother when they were children. *Id.* at 22-24. She dropped out of school at age 16, married Presnell's father, and gave birth to Presnell a few months later. *Id.* at 13. She was not ready to become a mother and recounted an incident when Presnell fell off a bed when he was six weeks old. *Id.* at 18-19. During that time, Presnell and Lois were living in a three-bedroom house with eight of Lois' family members while Presnell's father was out of the country. *Id.* at 13-14. She further testified that she shared a bed with Presnell until he was either eight or nine years old. *Id.* at 14.

Lois testified that Presnell's father came back into the country and that she followed him to Michigan for a brief period of time. *Id.* at 15-16. She described Presnell's father as an alcoholic who was "always rough with [Presnell], impatient," and stated that she argued with Presnell's father "a lot." *Id.* at 16, 29. She left Presnell's father for the first time after she discovered he was having an affair. *Id.* at 16. The couple remarried a few years later. *Id.* at 24. She told the jury that Presnell's father was absent most of Presnell's life, and when he was present, he was physically and verbally abusive. *Id.* at 16, 24-26.

Lois also told the jury about how she was often absent during Presnell's childhood because she worked long hours to provide for her family. *Id.* at 16-21. She discussed how Presnell moved from school to school and house to house as a child. *Id.* at 21, 26. She told the jury that Presnell may have slept in the same bed as her brother, Edwards, the convicted child molester, while she rented an apartment closer to work. *Id.* at 20.

Lois described Presnell's poor academic performance and stated that he dropped out of school. *Id.* at 26-29. It was at this time that Lois said Presnell

started stealing cars for which he was later imprisoned. *Id.* at 29-30. Presnell later moved into a halfway house and during Presnell's stay there, an employee was accused of sexually assaulting some of the children at the facility. *Id.* at 38-39.

Lois testified about the progress Presnell had made since his arrest noting that he had become a father, received his GED, and read numerous books. *Id.* at 33. She told the jury how much Presnell, her only child, meant to her and asked them to spare her son's life. *Id.* at 33-34, 42.

(b) Expert Witness

Shaffer, Presnell's psychologist, explained that he had obtained a "thorough history" of Presnell's background from records and witness interviews covering Presnell's medical, mental health, and educational history; additionally, Shaffer conducted a series of tests on Presnell including a neuropsychological battery. D6-31:70-73, 97, 101-02, 104-05, 107-20.

Shaffer told the jury that Presnell's family "seem[ed] to have difficulties with their history and sexual boundaries," postulating that such behavior may be linked to a combination of genetics and behavioral assimilation. *Id.* at 74-75, 77-79, 83. Shaffer testified that the information regarding Edwards' sexual assault and incest "contribut[ed] to a sexualized atmosphere in the home that [ ] Presnell grew up in." *Id.* at 78. Shaffer also informed the jury that for his evaluation, he took into account: alcoholism within Presnell's family; the physical and verbal abuse suffered by Presnell and his mother at the hands of Presnell's father; sexual assaults within the family; and Presnell's parents' carelessness and bad parenting. *Id.* at 79-82, 84, 100.

He also presented evidence from Presnell's mental health records including psychological tests administered in school. These records showed signs of minimal brain dysfunction and abnormal knowledge of adult sexual behavior. *Id.* at 86-87, 91-92. Presnell's test results showed that he functioned at the upper limits of the mentally defective range of intelligence and performed several years below his academic grade level. *Id.* at 88-89.

Shaffer testified that Presnell's school records indicated that he repeated the same grades many times and was eventually socially promoted to high school because "he was just too big to be in elementary school." *Id.* at 92-93. Shaffer explained that there were patterns of failing grades throughout the school records which were consistent with Presnell having a developmental delay. *Id.* at 93. Shaffer discussed how one's development is effected by exposure to role models those of whom in Presnell's life "were either child molesters or incest perpetrators or . . . hostile and abusive [men who] didn't support good boundaries between family and sexuality." *Id.* at 94-96, 100-103.

Shaffer also told the jury that Presnell was placed in a foster home where one of the adult supervisors was accused of molesting one of the boys in the home. *Id.* at 102. Shaffer concluded that such acts affected Presnell's brain development and demonstrated to Presnell that the only way to "be a man" was to be aggressive or sexually deviant. *Id.* at 100, 103-04. Shaffer testified that Presnell sleeping in the same bed as his mother and aunt for most of his childhood was abnormal and that Presnell's idea of sexuality was confused because Presnell slept in the same room with his aunts and uncle where sexual activities took place. *Id.* at 96, 99. He further told the jury that Presnell: always played with girls; read romance magazines with sexually

explicit content; played with dolls; was dressed up in girl's clothing by his aunts; and was called "sissy" by his father for these behaviors. *Id.* at 99. Shaffer opined that Presnell's relationship with his aunts confused his notions of sexual and gender relationships. *Id.* at 98-100.

Shaffer also presented evidence from psychological tests administered to Presnell by himself and the State. *Id.* at 107-20. The results of the tests revealed excessive emotionality and confusion of fantasy and reality. *Id.* at 111-12. They further indicated possible brain impairment in the frontal brain process and borderline to low average range of intellectual functioning equivalent to that of the average nine-year-old "from a typical American family." *Id.* at 113-15, 117-18.

Based on all of this information including Presnell's social history, psychological testing, and the clinical interviews, Shaffer diagnosed Presnell with pedophiliac disorder and minimal brain dysfunction. *Id.* at 121.

d. State's Rebuttal

In rebuttal, the State presented its own mental health experts, Dr. Robert Storms, a forensic psychologist, and Dr. Alicia Smith, a forensic psychiatrist. D6-32:27-143. They testified that their evaluations of Presnell showed no evidence of dysfunction in the sense of serious brain damage. *Id.* at 47-48. Rather, they opined that Presnell was a pedophile with antisocial/borderline personality traits whose crime evidenced careful planning and was not impulsive. *Id.* at 87-88, 119-125, 141-42.

e. Sentence

On March 16, 1999, the jury sentenced Presnell to death finding the following aggravating circumstances beyond a reasonable doubt: 1) that

Presnell murdered L.S. while engaged in the commission of the capital felony of aggravated sodomy against A.F.; and 2) that the L.S. murder was outrageously and wantonly vile, horrible, and inhuman as it involved torture and depravity of mind. D6-6:2246-49.

3. Second Direct Appeal Proceedings

On February 12, 2001, Presnell appealed his death sentence to the Georgia Supreme Court. D6-39. Presnell's death sentence was affirmed and this Court denied certiorari review. Pet. App. 6; *Presnell v. Georgia*, 535 U.S. 1059, 122 S. Ct. 1921 (2002).

4. Third State Habeas Proceedings

On October 16, 2002, Presnell—represented by new counsel—filed his third state habeas petition challenging his 1999 sentence of death. D6-49, 67. Presnell claimed that trial counsel were ineffective with their investigation and presentation of mitigating evidence during his resentencing trial. D6-119:30. As part of that claim, Presnell alleged trial counsel were ineffective for failing to uncover and present evidence that he suffered from fetal alcohol syndrome disorder (FASD).

The state habeas court held an evidentiary hearing during which the Warden presented the live testimony of Presnell's trial attorneys, Schuster and Durham. D6-77:8-154. Presnell presented no live witnesses. *Id.* at 3. He presented testimony only through affidavits. *Id.* at 3-7. Almost 20 years after the crimes, Presnell's mother, Lois, in her affidavit, stated that she was binge-drinking during her pregnancy. D6-84:2459-2464. As a result, Presnell's state habeas experts added another diagnosis of fetal alcohol syndrome as a cause for his pedophilia, which was not discovered by any of

his previous evaluators. *Id.* at 2294-2391. Notably, no other lay witness corroborated this claim by Lois. *Id.* at 2425-90.

Following the evidentiary hearing, arguments of counsel, and post-hearing briefs, the state habeas court denied relief. Pet. App. 4. The state habeas court analyzed Presnell's ineffective assistance of counsel claim regarding the alleged failure to present further mitigating evidence under *Strickland*'s prongs of deficient performance and prejudice, and determined that neither prong was met. *Id.* at 30-31, 43-44. The state court set out in detail the investigation performed by the defense team and the evidence presented at trial. *Id.* at 30-43. The court did not specifically mention Presnell's FASD claim but did find that Bovee, the mitigation specialist, "learned that [Presnell's] mother smoked a pack of cigarettes a day and 'did not drink except socially' during the time she was pregnant with [Presnell]." *Id.* at 37.

The state court's legal determination of the *Strickland* prongs were more summary in nature. In determining the deficiency prong, the court held that after "carefully examin[ing] the performance" of trial counsel and "thoroughly review[ing] the affidavits submitted by [Presnell]," trial counsel "investigated [Presnell's] background and marshalled the facts of that background" through the presentation of "a lengthy and detailed social history at [his] resentencing trial." *Id.* at 43-44. This led the court to conclude that "counsel conducted sufficient investigation into, and presentation of, mitigating evidence at [Presnell's] re-sentencing trial" and "counsel's conduct falls within the wide range of reasonable professional conduct, and that counsel's decisions were made in the exercise of reasonable professional judgment." *Id.* at 44. Regarding prejudice, the court reasoned that "much of the information

gathered [by Presnell] and presented in challenge to [his sentence of death was] cumulative of the information counsel gathered for [Presnell's] re-sentencing hearing" and any noncumulative information "[did] not rise to the level of Constitutional concern." *Id.* at 44. Therefore, the court held that that Presnell "failed to establish that the outcome would have been different had counsel advanced any of the theories [Presnell] now raises." *Id.*

The Georgia Supreme Court summarily denied Presnell's CPC application on November 6, 2006. D6-125.

5. Third Federal Habeas Proceedings

Presnell filed federal habeas petition on June 1, 2007, amended on February 12, 2008, and again raised his FASD ineffective-assistance-of-counsel claim. D1; D13. The district court denied relief but granted Presnell's application for a certificate of appealability on one claim: "whether Defense Counsel were constitutionally ineffective in failing to discover that Petitioner suffered from FASD." Pet. App. 1 at 8.

In a 69 page order, the court of appeals affirmed the district court's denial of relief. Pet. App. 1. The court of appeals thoroughly reviewed the claim, set out the record in great detail, noted the summary nature of the state court's legal determination, and held the decision was reasonable under § 2254 review. *Id.* at 1-69.

REASONS FOR DENYING THE PETITION

The court of appeals 28 U.S.C. § 2254 review of the state habeas court's order does not conflict with this Court's precedent.

The court of appeals correctly applied § 2254 and this Court's precedent in reviewing the state habeas court's denial of Presnell's sentencing phase

Strickland claim. Presnell's contrary arguments misconstrue this Court's precedent and the court of appeals' review of the state court order.

A. *Wilson* did not bar federal courts from reviewing the record to determine whether the state habeas court's decision was reasonable.

Presnell argues that the *Wilson* Court rejected the court of appeals' understanding that a federal court should "'consider hypothetical theories that could have supported' a state court's adjudication" for a reasoned opinion as contemplated in *Harrington v. Richter* in which there was no reasoned opinion. Pet. at 12.[7] Presnell further claims that this Court thus "barr[ed] 'a federal habeas court [from] imagin[ing] what might have been the state court's supportive reasoning,' *Wilson v. Sellers* [], and instead require[ed] a court to 'simply evaluate[] deferentially the specific reasons set out by the state court,' *Hittson v. Chatman*[]." Pet. at 12-13 (citations omitted) (some brackets in original). However, the *Wilson* Court never held that a federal court was "barred" from reviewing the record to determine whether the state court's decision was reasonable. Instead, the Court answered only the narrow question presented: whether a federal habeas court must "look through" a state court's summary affirmance to review a lower state court's reasoned opinion. *Wilson*, 138 S. Ct. at 1190. Presnell's alleged conflict between this Court and the court of appeals is therefore illusory.

In *Harrington v. Richter,* 562 U.S. 86, 102, 131 S. Ct. 770 (2011), this Court held that AEDPA's deferential standard applied even to summary

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[7] Presnell does not provide a citation for this quotation and the Warden was unable to locate this specific quote from *Wilson v. Sellers*, *Wilson v. Warden*, 834 F.3d 1227 (11th Cir. 2016) or *Richter*, but does not dispute that this topic was discussed in all three decisions.

dispositions. "Under § 2254(d), a habeas court must determine what arguments or theories supported or …could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Richter*, 562 U.S. at 102. Contrary to Presnell's suggestion, this Court has not limited this holding to summary state court opinions. *See*, *e.g.*, *Shoop v. Hill*, ___ U.S. ___, 139 S. Ct. 504, 506 (2019) (analyzing whether the state court's *reasoned* opinion was "'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement'") (quoting *Richter*, 562 U.S. at 103).

Moreover, the *Wilson* dissent indicates that Presnell's view of *Wilson* is mistaken. That dissent explained that the majority *rejected* Wilson's attempt to redefine *Richter* as only allowing a federal court to "imagine" "hypothetical" reasons in support of a state court's decision where there are no underlying fact-findings by the state court. *Wilson*, 138 S. Ct. at 1199 (quotation marks omitted). Instead, "a federal court sometimes may consider on its own motion *alternative bases for denying habeas relief* apparent in the law and the record, but it does not generally bear an obligation to do so." *Id.* (emphasis added). In conclusion, Justice Gorsuch stated that "what was true before remains true today: *a federal habeas court should look at all the arguments presented in state and federal court and examine the state court record*." *Id.* at 1204. (emphasis added).

The court of appeals correctly applied *Wilson*, and Presnell's general disagreement with how *Wilson* should be applied in this particular case does not warrant further review.

B. *Wilson* does not bar implicit fact-findings.

Presnell also argues that the court of appeals' decision to credit "implicit" fact findings in the state court's order is in conflict with this Court's precedent because "*Wilson* did not carve out an exception for 'implicit' factual findings." Pet. at 18-20. But the *Wilson* Court did not address "exceptions" for § 2254 review; it addressed only the "presumption" that a higher court's "unexplained decision adopted the same reasoning" as the lower reasoned state court opinion." *Wilson*, 138 S. Ct. at 1192. And this "presumption" may be rebutted "by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed." *Wilson*, 138 S. Ct. at 1192. Just as important, "federal courts have no authority to impose mandatory opinion-writing standards on state courts." *Johnson v. Williams*, 568 U.S. 289, 300, 133 S. Ct. 1088, 1095 (2013). In short, the Court's holding in *Wilson* approved reviewing the full state court record in determining whether a state-court decision meets § 2254's deferential standard.

This Court has repeatedly cautioned the federal courts of appeals against fashioning a holding from a given case that reaches beyond the Court's answer to the question presented in the case. *See, e.g., Lopez v. Smith*, ___ U.S. ___, 135 S. Ct. 1, 4 (2014) (per curiam) (rejecting the Ninth Circuit's attempt to create a holding from the Court's precedent where "[n]one" of the Court's decision "address[ed]" the "specific question presented by this case"). What is more, in case after case, this Court has relied upon additional reasons not provided by state courts in reasoned decisions to affirm the denial of relief under § 2254(d). *See*, *e.g.*, *Woods v. Etherton*, ___

U.S. ___, 136 S. Ct. 1149, 1152-53 (2016) (per curiam) (providing additional reasons in support of the state court's reasoned rejection of Etherton's ineffective-assistance claim under *Richter*'s "fairminded jurist" standard); *White v. Wheeler*, 577 U.S. 73, 136 S. Ct. 456 (2015) (per curiam) (supplying reasons under *Richter*'s "fairminded jurist" standard in support of the state courts' determination that a jury was not unconstitutionally excused by the trial court); *Burt v. Titlow*, 571 U.S. 12, 20-24, 134 S. Ct. 10, 16-18 (2013) (reviewing the "record as a whole" and relying upon additional evidence to support the state court's determination of Titlow's ineffective-assistance claim). Presnell's view of *Wilson* and this Court's precedents is simply inaccurate.

C. Presnell's disagreement with the court of appeals' decision is nothing more than a request for factbound error correction.

Finally, Presnell asks this Court to review the court of appeals' deference to an implicit fact-finding by the state court regarding his *Strickland* claim. This issue does not warrant review. First, that fact-finding does not control Presnell's entire FASD ineffective-assistance claim. Second, even if it did, the court of appeals' decision is fully supported by the record. Third, this Court does not sit to review fact-findings, implicit or otherwise. Certiorari review should be denied.

1. The court of appeals correctly affirmed the state court's no deficiency decision.

After 28 years of litigation comprised of two sentencing trials and a state and federal habeas proceeding—which included numerous mental health expert evaluations by several experts and repeated interviews with Presnell's mother—Presnell presented his FASD diagnoses for the first time

in his successive state habeas proceeding. Presnell faulted trial counsel for failing to uncover this diagnosis for use in his resentencing trial. In denying relief, the state habeas court set out the defense team's qualifications (Pet. App. 4 at 32-34), the defense team mitigation investigation (*id.* at 34-40), and trial counsel's resentencing presentation (*id.* at 41-43). Immediately following, the court stated that it had reviewed Presnell's new evidence and summarily held: "This Court finds that [Presnell's] counsel conducted sufficient investigation into, and presentation of, mitigating evidence at [Presnell's] re-sentencing trial. This Court finds that counsel's conduct falls within the wide range of reasonable professional conduct, and that counsel's decisions were made in the exercise of reasonable professional judgment."[8] Pet. App. 4 at 44.

In similar fashion, but with marginally more detail, the court of appeals summarized the record. First, the court summed up the evidence—both that in guilt and sentencing—which was presented during Presnell's first trial in 1976. Pet. App. 1 at 13-20. Second, the court "introduce[d] Defense Counsel

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[8] The state habeas court did not specifically address Presnell's FASD ineffectiveness claim. However, as this Court has explained, "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Richter*, 562 U.S. at 98. Additionally, this Court has held that "when a state court issues an order that summarily rejects without discussion all the claims raised by a defendant, including a federal claim that the defendant subsequently presses in a federal habeas proceeding, the federal habeas court must presume (subject to rebuttal) that the federal claim was adjudicated on the merits." *Johnson v. Williams*, 568 U.S. 289, 293, 133 S. Ct. 1088, 1091 (2013).

and the team they assembled, set out the investigatory steps they took in preparing for the retrial, and recount[ed] what their investigation revealed." *Id.* at 12, 20-25. And third, the court detailed what "took place at the retrial." *Id.* at 12, 25-49.

Looking at the record as a whole, and considering the state court's decision under § 2254, the court of appeals correctly approached the issue of performance by asking if there was any reasonable way to agree with the state court. *See generally Shinn*, 141 S. Ct. at 523. The court concluded there was and noted the portions of the record that supported the state court's summary legal determination of the *Strickland* performance prong. After reviewing the record, the court of appeals stated that trial counsel's mitigation investigation "[was] about as thorough as any other investigation we have seen." Pet. App. 1 at 62. The court then summarized that investigation:

> Defense Counsel hired multiple professionals … a third attorney …an investigator …a mitigation … [and] two mental health professionals: a neuropsychologist, Dr. Shaffer, and a psychiatrist, Dr. Porter. Defense Counsel acquired and reviewed records from [Presnell's] 1976 trial, … records of the 1980 state habeas corpus proceeding, including records of the mental health evaluations conducted for that proceeding; records associated with prior incarcerations and records related to [Presnell's] incarceration …including records of mental health evaluations conducted at the prison; and school and medical records. …Defense Counsel consulted with [prior] attorneys who represented [Presnell] …[and] interviewed [Presnell]; Lois; [Presnell's] former wife …[Presnell's] son …[Presnell's] aunts …[Presnell's] cousin, … and one of [Presnell's] former victims …Finally, Defense Counsel had Dr. Shaffer and Dr. Porter evaluate [Presnell's] intelligence and mental health.

Id. at 62-63. Based on all this, "the court of appeals was not persuaded …that Defense Counsel was objectively unreasonable for failing to elicit from Lois that she was binge drinking during the entire time of her pregnancy with Petitioner." Pet. App. 1 at 62. Especially given that "it took nearly twenty-eight years—from August of 1976 to March of 2004—for Lois's drinking to surface." *Id.* at 63.

Alternatively, the court of appeals assumed that Lois would have informed counsel of her drinking habits but still found the record supported the state court's conclusion that counsel did not perform deficiently. Pet. App. 1 at 64. The court correctly pointed out that Presnell's mental health "experts had plenty of information with which to evaluate Petitioner." *Id.* In addition to the "wealth of information" the experts had about Presnell's background, after Shaffer received the mitigation specialist's notes that Lois stated "she did not drink except socially" during pregnancy, Shaffer interviewed Lois. *Id.* at 55 (quotation marks omitted). Moreover, Shaffer sent counsel a fax that said he would look into Presnell's "mother's 'pregnancy and birth complications,' if any, and any 'alcoholism' his mother or father had exhibited." *Id.* at 56. Thus, the court of appeals stated "[i]t was reasonable for Defense Counsel to rely on Dr. Shaffer to decide whether the Defense Team needed to inquire further about Lois' 'social' prenatal drinking." *Id.* at 64-65.

Presnell argues that the court of appeals erroneously found that the state habeas court "implicitly" found that the mitigation specialist asked Lois about her pregnancy drinking because of the note. In footnote 55, the court stated that "[i]mplicit in the Superior Court of Butts County's adjudication of the FASD claim is the finding that in 1998 Bovee did, indeed, ask Lois about

prenatal alcohol consumption." Pet. App. 1 at 58 n.55. This was certainly not an unreasonable connection given that the state habeas court specifically quoted Bovee's note about Lois' social drinking and ultimately held counsel's performance was not deficient. Pet. App. 4 at 37, 43-44. Moreover, given the court of appeals' alternative determination, this footnote is hardly pivotal to the performance assessment. The court of appeals correctly upheld the state court's determinations related to performance.

2. The court of appeals correctly affirmed the state court's no prejudice decision.

Similar to its legal determination of the deficiency prong, the state habeas court denied the prejudice prong in summary fashion:

> The Court finds that much of the information gathered and presented in this challenge to [Presnell's] conviction is cumulative of the information counsel gathered for [Presnell's] re-sentencing hearing. The information contained that is not cumulative does not rise to a level of Constitutional concern…. [Presnell] has failed to establish that the outcome would have been different had counsel advanced any of the theories [Presnell] now raises.

Pet. App. 4 at 44. The court of appeals determined this was reasonable as to the FASD ineffectiveness claim because part of the evidence Presnell relied on lacked credibility. Presnell disagrees and asks this Court to engage in a credibility debate, but that is not a proper basis for this Court's review.

Even if it were, the court of appeals' decision was correct. As noted by the court of appeals, Lois testified in her affidavit that she was "binge drinking" during the "*entire time"* she was pregnant with Presnell. Pet. App. 1 at 51. However, the court found this unbelievable given that during her pregnancy, Lois lived in a small one bedroom apartment with her husband and later with eight other relatives—none of whom testified in their

affidavits that they witnessed her drinking alcohol. *Id.* at 66-68. Presnell claims this is unsupported because Lois stated in her affidavit that she drank alone. But even if Lois did live alone for a small portion of her pregnancy, she was not alone during the "entire time" she was pregnant. Presnell's nitpicking at the court of appeals' order reveals nothing of importance.

Presnell also argues that because his most recent mental health experts testified that the psychological testing supported a FASD diagnosis, the court of appeals was in error to agree there was no prejudice based on the lack of Lois' credibility. However, Presnell's experts' opinion was that his testing was "consistent" with brain damage from FASD with no other factual support than Lois' latest affidavit testimony. Pet. at 24. As the court of appeals correctly pointed out, jurors look at the connections between evidence, and where a connection is based on less than credible evidence, it can sour their view of the whole theory. Just as important, the State's experts testified that Presnell did not have brain damage, and both sides diagnosed pedophilia. Contrary to Presnell's implications, this is not a case where the jury was left to wonder about the negative influences in Presnell's life. Instead, they were given a full picture by the defense team, but they simply did not find it outweighed the aggravated nature of his crimes. Presnell has fallen far short of proving that the "state court's decision is so obviously wrong that its error lies 'beyond any possibility for fairminded disagreement.'" *Shinn*, 141 S. Ct. at 523 (quoting *Richter*, 562 U. S. at 103).

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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