No. 14-1312

In the Supreme Court of the United States

BRANDON ASTOR JONES,
Petitioner,

v.

GDCP WARDEN,
Respondent.

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

SUPPLEMENTAL BRIEF IN SUPPORT, AND MOTION TO DEFER CONSIDERATION, OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner Brandon Jones, a Georgia death row inmate, submits this Supplemental Brief to advise the Court of "new cases … [and] intervening matter[s] not available at the time of" his Reply Brief (Sup. Ct. R. 15.8). As a consequence of these new events, Jones now moves for deferral of consideration of his Petition for Certiorari ("Petition"); or if the Court is not inclined to defer, then it should either grant, vacate and remand ("GVR") his case to the Eleventh Circuit Court of Appeals, or hold his Petition pending disposition of a case that raises an identical question.

CHRONOLOGY OF EVENTS

Jones filed his Petition for Certiorari on April 29, 2015. The State filed an Opposition on June 3, 2015, and Jones filed his Reply on June 16, 2015. Jones's Petition presents three distinct questions (although as noted in our Reply, pp. 1-3, the State's Opposition did not dispute Jones's first and second Questions Presented). Jones's Petition has now been distributed for the Conference of September 28, 2015.

Subsequent to the filing of Jones's Reply, this Court has issued opinions, and the Eleventh Circuit has issued an Order, that bear directly on the first two Questions Presented in Jones's Petition. Moreover, a certiorari petition in a different case that has been relisted multiple times and raises the same issue as Jones's Question Three, has now been scheduled for consideration at this Court's September 28, 2015 Conference. These developments lead directly to this Supplemental Brief and the motion and arguments we make below.

Specifically:

1. In mid-June 2015, this Court appears to have resolved the Second Question Presented in Jones's Petition: whether, when a state appellate court has summarily denied review of a lower court's reasoned opinion denying habeas corpus relief, a federal habeas court must "look through" the summary denial to review the grounds stated in the last reasoned state court decision as this Court ruled in *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991) -- or whether *Ylst* has been silently overruled by *Harrington v. Richter,* 562 U.S. 86 (2011)?

First, one day prior to the filing of Jones's Reply, two members of this Court filed a concurring opinion in another Georgia capital habeas corpus case presenting the same *Ylst-Harrington* issue. Justice Ginsburg, joined by Justice Kagan, explained that the Eleventh Circuit "plainly erred" by "discarding *Ylst*" in favor of *Harrington* in any case where there has been a lower state court "reasoned decision." *Hittson v. Chatman, Warden*, 135 S. Ct. 2126, 2127 (2015) (GINSBURG, J., joined by KAGAN, J., concurring in the denial of *certiorari*). Justices Ginsburg and Kagan did not dissent regarding the disposition of Hittson's case, however, because they were "convinced that the Eleventh Circuit would have reached the same conclusion had it properly applied *Ylst*," and "moreover" because the same issue was pending in a petition for rehearing *en banc* to the Eleventh Circuit in the case of *Wilson v. Warden, GDCP*, which petition "affords the Eleventh Circuit an opportunity to correct

its error without the need for this Court to intervene." 135 S. Ct. at 2128.[1]

2. Then, three days after *Hittson* (and two days after Jones filed his Reply), a majority of this Court filed an opinion expressing the same view regarding *Ylst* that Justices Ginsburg and Kagan had detailed in *Hittson*. In the capital habeas case of *Brumfield v. Cain*, 135 S. Ct. 2269 (June 18, 2015), the Court explained that "[i]n conducting the § 2254(d)(2) [federal habeas corpus] inquiry, we, like the courts below, 'look through' the Louisiana Supreme Court's summary denial of Brumfield's petition for review and evaluate the state *trial* court's reasoned decision". 135 S. Ct. at 2276 (emphasis added) (citing *Johnson v. Williams*, 133 S. Ct. 1088, 1094 n.1 (2013), and *Ylst*, 501 U.S. at 806).[2]

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[1] In stark contrast to Justice Ginsburg's evaluation of *Hittson*–"that the Eleventh Circuit would have reached the same conclusion had it properly applied *Ylst*" (135 S. Ct. at 2128)—in Jones's case (as we explained in our Petition (pp. 29-35) and Reply (pp. 1, 4, and 5-12)), a proper application of § 2254(d) under *Ylst* must change the adjudication of Jones's third Question Presented: whether the state habeas court (and the Eleventh Circuit) unreasonably applied *Strickland v. Washington,* 466 U.S. 668 (1984), by relying on unavailable and unreliable aggravating evidence in its determination of prejudice. In other words, a proper application of 2254(d) under *Ylst* to the "last reasoned decision" in Jones's case *will* change the result for Jones. Indeed, that is plainly why the Eleventh Circuit panel amended its initial opinion in Jones's case, to adopt *Harrington* in place of *Ylst*, after Jones filed a petition for rehearing emphasizing the *Strickland* error. *See* Petition at 16-17; Reply at 1, 4. This materially distinguishes Jones's case from *Hittson*.

[2] The *Brumfield* dissent did not dispute this analysis, and when the dissent evaluated the merits, it too reviewed the reasons

3. Lastly (on the *Ylst/Harrington* question), on July 31, 2015, the Eleventh Circuit granted rehearing *en banc* in *Wilson*, just as Justices Ginsburg and Kagan had suggested in *Hittson*. *See* Order, *Wilson v. Warden, GDCP*, No. 14-10681-P (11th Cir. July 31, 2015) (attached to this Supplemental Brief as Supp. App. 1-2). Argument before the *en banc* court in *Wilson* is scheduled for October 20, 2015. Supp. App. 3.

4. Finally, a fourth recent event is the relisting (on June 19, 2015), for consideration at the September 28, 2015 Conference, of a long-pending petition for certiorari in *Maryland v. Kulbicki*, No. 14-848. That petition raises the same issue as Jones's third Question Presented. *See* argument III, *infra*. Even if no other action is taken, Jones's Petition should be held pending disposition of *Kulbicki*.

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actually given by the state *trial* court. *See Brumfield*, 135 S. Ct. at 2289 (THOMAS, J., dissenting).

I. THIS COURT SHOULD DEFER CONSIDERATION OF JONES'S PETITION PENDING THE ELEVENTH CIRCUIT'S RECENTLY ANNOUNCED *EN BANC* REVIEW.

In light of the *Hittson* and *Brumfield* opinions, it is now abundantly clear that the Eleventh Circuit's resolution of the *Ylst-Harrington* issue in Jones's case was wrong, and inconsistent with this Court's precedents and 28 U.S.C. § 2254. That erroneous resolution was necessary to the Eleventh Circuit's adverse decision on the *Strickland* merits in Jones's case. *See* n.1, *supra*.

In *Wilson*, the Eleventh Circuit will apparently revisit–and we hope fully correct–its position on the *Ylst-Harrington* question (which even the Respondent here has conceded was wrong, *see* Reply at 3-4). However, neither we nor this Court can be confident about the Eleventh Circuit's resolution until the *en banc* opinion is filed. Depending on what the *en banc* opinion says, *Wilson* could still leave in place the clear circuit split on the *Ylst-Harrington* question that calls for this Court's review in Jones's case (*see* Petition at 27-28). It would be premature for this Court to rule on Jones's petition until the Eleventh Circuit completes the *en banc* review suggested by Justices Ginsburg and Kagan in *Hittson*. Thus we move this Court to defer consideration of Jones's Petition (conserving judicial resources while preserving Jones's presentation of the issue) pending the Eleventh Circuit's *en banc* decision in *Wilson.* If the Circuit fully corrects its error, then vacation of its decision in this case, with a remand to reconsider the merits under the correct standard, may be appropriate. But it is premature to so conclude now.

Our motion to defer consideration of Jones's Petition pending the *en banc* decision in *Wilson* is appropriate and consistent with this Court's practice. *See, e.g.*, *Tolbert v. United States*, 460 U.S. 1079 (1983) (deferring consideration of petition for certiorari pending consideration of an *en banc* petition in the Circuit); *accord*, 1 West's Fed. Forms, Supreme Court, § 146 (5th ed. 1998), p. 607 ("Comment: …it is not unusual for the Court … to 'hold' a petition for certiorari pending the disposition of some other case … which might have a decisive or substantial impact on the outcome" and citing authorities); Stern & Gressman, Supreme Court Practice § 5.9 p. 340 (10th ed. 2013) ("Deferring Consideration of Petition").

II. IF THE COURT DENIES JONES'S MOTION TO DEFER CONSIDERATION, THEN IT SHOULD GRANT, VACATE AND REMAND IN LIGHT OF *BRUMFIELD*.

If the Court does not, as we request, defer consideration of Jones's Petition pending the Eleventh Circuit's *en banc* opinion in *Wilson*, then a GVR is appropriate in light of *Brumfield*'s ruling on the *Ylst-Harrington* error. *See* Petition at 3-4, 24-29. If the Court chooses this path (but we think it premature), then Jones's case should be remanded with instructions that the Eleventh Circuit reconsider the merits of his case in light of *Brumfield* and *Hittson*. The correct application of *Ylst* plainly requires reconsideration by the Circuit on the merits of Jones's third Question. *See* n.1, *supra*; Petition at 29-35; Reply at 5-12.

III. IN ANY CASE, THIS COURT SHOULD HOLD JONES'S PETITION FOR *KULBICKI*.

The third Question Presented in Jones's Petition is whether a habeas court may, in a *Strickland* analysis, consider as "aggravating evidence" information that would not have been available or admissible at the time of the original proceeding. Other Circuits have ruled that such information may not be considered (Petition at 31). But to the contrary, the Eleventh Circuit in Jones's case relied on (and ruled that the state habeas court had not unreasonably applied *Strickland* by relying on) a privileged defense investigator's file that was undoubtedly not available to the State at the time of Jones's resentencing hearing, and was full of nothing but unreliable, inadmissible hearsay in any case. *See* Petition at 18-19, 21, 32-35.[3]

This Court now has this same legal question presented in the pending petition for certiorari in *Maryland v. Kulbicki*, No. 14-848, recently relisted for consideration at this Court's September 28, 2015 Conference. The State of Maryland's Question in *Kulbicki* is whether the consideration of information "not available at the time of trial" by a court evaluating a claim of ineffective assistance of counsel on habeas review "violate(s) the core principles of *Strickland*." Petition for Writ of Certiorari in *Maryland v. Kulbicki*,

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[3] Thus, as we demonstrated in our Petition at 29-32, the state habeas court's decision was contrary to, and an unreasonable application of, this Court's clearly-established standards for *Strickland* review; and the Circuit's opinion created a cert-worthy split with the Sixth Circuit's contrary decision in *Harries v. Bell*, 417 F.3d 631, 640 (6th Cir. 2005).

No. 14-848 (filed Jan. 16, 2015), p. *i*. Maryland decries, just as Jones does, reliance on information "not available until years later." *Kulbicki* Petition at 18, 19; *see Jones* Petition at 18-19, 32-33.

Because Jones's third Question presents the same issue as *Kulbicki*, Jones's Petition should be "held" by this Court and not acted upon until *Kulbicki* is resolved.

CONCLUSION

Capital habeas petitioner Brandon Jones respectfully moves this Court to defer action on his Petition pending the Eleventh Circuit's *en banc* consideration of *Wilson,* as suggested by Justices Ginsburg and Kagan in *Hittson*. If that motion is denied, then the Court should grant, vacate and remand the judgment below, with instructions that Jones's case be reconsidered in light of *Brumfield*. Moreover, even if the foregoing two requests are denied, the Court should hold Jones's Petition on Question Three pending disposition of the *Kulbicki* certiorari petition.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 14-10681-P

[Filed July 30, 2015]

MARION WILSON, JR.,

Petitioner - Appellant,

versus

WARDEN, GEORGIA DIAGNOSTIC PRISON,

Respondent - Appellee.

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

Before ED CARNES, Chief Judge, TJOFLAT, HULL, MARCUS, WILSON, WILLIAM PRYOR, MARTIN, JORDAN, ROSENBAUM, JULIE CARNES, and JILL PRYOR, Circuit Judges.

BY THE COURT:

A petition for rehearing en banc having been filed, a member of this Court in active service having requested a poll on whether this case should be reheard en banc, and a majority of the judges of this Court in

active service having voted in favor of granting rehearing en banc,

It is ORDERED that this case will be reheard en banc. The panel's opinion is VACATED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Douglas J. Mincher	For rules and forms visit
Clerk of Court	www.ca11.uscourts.gov

July 30, 2015

MEMORANDUM TO COUNSEL OR PARTIES

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

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

For the purpose of the upcoming en banc rehearing in the above referenced case, the court desires for counsel to focus on their briefs on the following issues:

> Is a federal habeas court required to look through a state appellate court's summary decision that is an adjudication on the merits to the reasoning in a lower court decision when deciding whether the state appellate court's decision is entitled to deference under 28 U.S.C. §2254(d)?

APPELLANT'S EN BANC BRIEF TO BE SERVED AND FILED ELECTRONICALLY ON OR BEFORE THURSDAY, AUGUST 27, 2015 BY 5:00 p.m.

APPELLEE'S EN BANC BREIF SHALL BE SERVED AND FILED ELECTRONICALLY ON OR BEFORE MONDAY, SEPTEMBER 21, 2015 by 5:00 p.m. Any en banc reply brief shall be filed electronically on or before Thursday, October 1, 2015 by 5:00 p.m. NO EXTENSIONS WILL BE GRANTED. 20 copies of the en banc briefs should be filed (appellant's in blue covers, appellee's in red covers and any reply in gray covers). The parties are expected to insure that all other parties receive a copy of their briefs before the close of business on the day of filing. NO TIME FOR MAILING SHALL BE ALLOWED. The filing of an en banc amicus brief is governed by 11th Cir. R. 35-8.

All counsel are requested to submit 20 copies of their original panel briefs, appendix and supplemental authorities prior to 5:00 p.m., Thursday, August 27, 2015.

Oral argument will be conducted Tuesday, October 20, 2015, in Atlanta, Georgia at 9:00 a.m. Each party will be allotted 20 minutes per side for oral argument.

Sincerely,

DOUGLAS J. MINCHER, Clerk of Court

Reply to: Jenifer L. Tubbs (Calendar Clerk/Court Sessions Supervisor)
Phone #: 404-335-6131

BR-1 CIV Civil appeal briefing ntc issued