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DAILY REPORT

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Full 11th Circuit Hears Capital Case in Which State, Inmate Agree

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A RARE SITTING of the full U.S. Court of Appeals for the Eleventh Circuit on Tuesday presented an even rarer event: a death row inmate and the Georgia attorney general's office agreeing on something.

The capital case was the lone matter before 11 judges, who sit en banc a few times a year. There was no discussion of the facts of the murder for which Marion Wilson Jr. is facing execution, or his lawyers' claims that the jury that sentenced him to death didn't hear enough about his difficult childhood. Instead, the lawyers and judges debated a procedural question with the small potential to make a difference in a lot of cases.

At issue is how federal courts examine habeas rulings by state courts, particularly when a state trial judge has ruled in a case and the state supreme court has affirmed that ruling without comment.

The Eleventh Circuit has in several cases said that in such a scenario federal judges should focus on the unexplained state supreme court decision. That means federal judges need only to identify a reasonable basis—a very deferential standard—for the state high court's ruling.

But both Wilson's attorneys and the AG's office disagree, apparently seeing strategic value in federal judges reviewing state trial



L to R: Sabrina Graham and Brian Kammer

courts' rulings in habeas cases. With the parties on the same side, the Eleventh Circuit brought in a lawyer who teaches habeas corpus at the University of Chicago to argue in defense of the Eleventh Circuit's recent approach.

Wilson is on death row for the 1996 murder of Donovan Parks in Milledgeville. According to court rulings, Parks was found dead, shot in the head, minutes after Parks, Wilson and a cohort, Robert Earl Butts, entered Parks' vehicle in a nearby Wal-Mart parking lot.

At his trial the next year, Wilson was represented by two court-appointed

attorneys, Thomas O'Donnell Jr. and Jon Philip Carr. They argued that Wilson was merely a bystander to Butts' crimes. The jury convicted Wilson of murder and voted for a death sentence. The Georgia Supreme Court affirmed on direct appeal.

Represented by new counsel, Wilson filed his petition for habeas corpus in state court. They claimed that his trial lawyers had been ineffective because they failed to investigate his background thoroughly and to present adequate evidence of mitigation at his sentencing. Wilson's new lawyers contended that good lawyers would have interviewed

teachers, social workers and relatives to find mitigation evidence from Wilson's childhood.

The new lawyers pointed to evidence that teachers had thought Wilson had potential but lacked guidance from parental figures; that some of his childhood homes lacked running water and electricity and were littered with containers full of urine; and that his grandfather and his mothers' boyfriends had physically abused him.

At an evidentiary hearing, Wilson's trial lawyers testified that they had been confused about who was responsible for the background investigation. O'Donnell, whose bar listing indicates he practices in Sandersville, did not respond to a call seeking comment. Carr is serving a prison sentence for child molestation.

Houston County Superior Court Judge Edward Lukemire denied the habeas petition, saying that the lawyers' performance had not been deficient and, even if it had been, it did not hurt Wilson's chances for a life sentence. Lukemire said that some of the new evidence would have been inadmissible at trial because it was based on "hearsay or speculation." Wilson appealed to the Georgia Supreme Court, which denied Wilson's application for a certificate of probable cause without explanation.

Wilson turned to the federal courts, where U.S. District Judge Marc Treadwell denied his federal habeas petition. Treadwell said the trial lawyers' work on investigation and presentation of mitigation evidence was "difficult to defend" but said he was satisfied that any errors by his lawyers didn't make a difference in the result.

An Eleventh Circuit panel of Chief Judge Ed Carnes and Judges William Pryor Jr. and Adalberto Jordan upheld that ruling in December. Pryor wrote for the panel that the new evidence presented at the habeas hearing about Wilson's life would mostly have been redundant of evidence Wilson's trial counsel presented to the jury through Wilson's mother and a forensic psychiatrist. Pryor added that the new evidence would have presented a "double-edged sword" in that it would have revealed unhelpful information

about Wilson, such as that he was disruptive and had a bad attitude in school.

Prompting the en banc review, Pryor's opinion said that the relevant state-court decision for the federal courts' review was the Georgia Supreme Court's one-line denial of Wilson's certificate of probable cause. He pointed to the federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which says a federal court may not grant a habeas corpus application "with respect to any claim that was adjudicated on the merits in state court proceedings"—unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established federal law."

Citing a 2011 U.S. Supreme Court decision, *Harrington v. Richter*, Pryor said the lack of explanation in Wilson's state Supreme Court ruling meant the Eleventh Circuit only needed to find a "reasonable basis" for the state high court's decision. That is a deferential standard of review that allows federal appellate judges to rule based on any possible argument for the state, as long as it was reasonable.

The court subsequently granted Wilson's petition for en banc review, meaning at least six of the judges agreed the case should be reheard. The full court asked the parties to focus on whether the federal courts should be reviewing the Georgia Supreme Court's decision or the lower court decision denying state habeas relief.

Wilson's lawyers cited a decision issued by the U.S. Supreme Court in June, *Brumfield v. Cain*, as well as a 1991 Supreme Court decision, *Ylst v. Nunnemaker*. Those cases meant, Wilson's lawyers have argued, that by taking the state Supreme Court ruling as the operative decision, the Eleventh Circuit panel incorrectly considered how a state court hypothetically could have rejected Wilson's habeas claim. Instead, they argued, why the Houston County judge's order rejecting his claim was the relevant decision.

Wilson's lawyers argued that the state habeas judge was unreasonable to conclude that Wilson's trial counsel's failure to introduce mitigation evidence didn't hurt him. It was unreasonable, they said, because the state habeas judge mistakenly believed

that evidence would have been inadmissible at trial.

Appearing for Wilson on Tuesday, Brian Kammer of the Georgia Resource Center urged the judges to assume that in issuing an unexplained decision, the Georgia Supreme Court adopts the reasoning of the lower court decision. "Silence implies consent," said Kammer.

Kammer faced tough questioning from Pryor, the author of the panel decision, who noted that appellate courts can affirm a lower court ruling for any reason. Kammer also was pressed by Carnes and Judge Stanley Marcus, although those two judges both said they thought the issue was a close one.

Although the state agreed with Kammer on the procedural question, it has argued that the panel should nonetheless uphold the state habeas ruling. On Tuesday, Carnes asked Senior Assistant Attorney General Sabrina Graham why the state had sided with the inmate on the procedural question, given its acknowledgment in a brief that the approach taken by the panel was a reasonable one.

Graham explained that state habeas rulings may contain findings that the state may want down the line, such as a determination that the inmate has defaulted on a claim. "I think it is a very confusing issue," she added.

Adam Mortara of Bartlit Beck Herman Palenchar & Scott in Chicago argued as amicus curiae in defense of the panel's approach. He has told the court that it is "offensive" to assume that a state supreme court adopts in its entirety a lower court decision that it affirms, especially given that AEDPA is based on principles of deference to state court decisions. On Tuesday, Mortara said that *Ylst*, the 1991 U.S. Supreme Court decision relied on by the parties, deals with a different statutory provision.

Jordan said the difficulty was that the Eleventh Circuit was faced with U.S. Supreme Court decisions in cases with procedural scenarios different from that before the court now.