No. 02-311

IN THE

Supreme Court of the United States

KEVIN WIGGINS,
Petitioner,

v.

SEWALL SMITH, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONER

DONALD B. VERRILLI, JR.*
IAN HEATH GERSHENGORN
MICHAEL B. DESANCTIS
AMY L. TENNEY
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, DC 20005
(202) 639-6000

Counsel for Petitioner

* Counsel of Record

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MISCELLANEOUS

REPLY BRIEF

The State refuses to come to grips with the question this case actually presents: whether the Fourth Circuit misconstrued the rule of *Strickland v. Washington* in holding that a lawyer's decision to stop investigating potential mitigation evidence in a capital case is "virtually unchallengeable" once the lawyer knows rudimentary facts about the client's background, even though that knowledge would *not* support a reasonable professional judgment to terminate investigation. *See* Pet. at i (Question Presented). Rather than confront this question, the State and its supporting *amici* attack legal arguments petitioner has not advanced, rely on "factual findings" the state courts did not make, and ignore the parts of the record that refute their *post hoc* characterization of counsel's sentencing "strategy." Ironically, if any party's perception is affected by the "distorting prism of hindsight" in this case (Resp. Br. at 1), it is the State's.

The State and its *amici* contend, for example, that petitioner's claim requires acceptance of the sweeping rule that counsel must always investigate mitigation completely (no matter how unlikely the effort is to bear fruit) and must always present that evidence to the sentencer (irrespective of its persuasive force). *See* Resp. Br. at 45; U.S. Br. at 29-30. That is a caricature. Wiggins is entitled to relief under *Strickland*'s carefully circumscribed rule that "strategic choices made after less than complete investigation are reasonable" only insofar as "reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). He is entitled to relief under that rule because the Maryland Court of Appeals applied the rule unreasonably (within 28 U.S.C. § 2254(d)(1)), and based its decision on an unreasonable determination of the pertinent facts (within 28 U.S.C. § 2254(d)(2)), when it upheld a "tactical" choice by Wiggins' lawyers to shut down their mitigation investigation and instead "retry the factual case" at the sentencing stage, JA 485. That decision was not a reasonable professional

judgment *in light of the facts they knew at the time.*

Any reasonably competent attorney possessing the information contained in Wiggins' social service records would have realized that a powerful case in mitigation was potentially available, and would have developed that case prior to making definitive judgments about how best to defend Wiggins at sentencing. Nor can the termination of the investigation be justified by a decision to focus on principalship. Up until the day before the sentencing hearing, Wiggins' lawyers had intended to put on a mitigation case if their bifurcation motion had been granted. Whether that motion had been granted or denied, Wiggins' lawyers were in no position either to make a powerful mitigation case or to decide whether to do so. The tactical choice by Wiggins' lawyers to "retry the factual case" was unreasonably uninformed, and it deserves no deference.

Because the choice on the part of Wiggins' counsel to abandon their investigation into mitigation is indefensible, the State pretends that the choice never happened. Specifically, the State defends the judgment of the Maryland Court of Appeals on the basis of that court's ruling that Wiggins' counsel was fully informed about available mitigation evidence, and thus cannot be faulted for investigating inadequately. But the factual finding on which the state court's conclusion rests has been proved erroneous by clear and convincing evidence. *See* Pet. Br. at 35-36; 28 U.S.C. § 2254(e)(1). As the social service records themselves make clear, the Maryland court was wrong when it stated that Wiggins' lawyers had learned the facts of his nightmarish upbringing from "social service records that recorded instances of physical and sexual abuse." Pet. App. 121a. The Court of Appeals made no other finding that would support the conclusion that Wiggins' lawyers knew the key mitigation facts. Indeed, Wiggins' lawyers plainly did not know those facts: for example, they made no mention of the mitigation evidence in their proffer in support of their motion to bifurcate

sentencing, an omission that would be inexplicable if the lawyers were aware of this evidence. Moreover, the state postconviction trial court - which heard the testimony on which the State now relies (Resp. Br. at 21-22, 33-34) - found that Wiggins' lawyers did not know the mitigation facts contained in the social history. *See infra* pages 13-14. The State's contrary assertion in this Court is thus pure conjecture that flies in the face of the credibility conclusions of the state judge who heard the evidence. To the extent the Maryland Court of Appeals' judgment rests on the factual finding that Wiggins' lawyers knew the facts of their client's background (as opposed to the legal conclusion that counsel had no duty to investigate), it is objectively unreasonable, and relief is warranted under 28 U.S.C. § 2254(d)(2).

Even if Wiggins' lawyers had not defaulted on their obligation to investigate, their sentencing tactics would nevertheless violate *Strickland*'s bedrock requirement of competent performance. The gist of the State's argument is that Wiggins' lawyers reasonably chose to forgo mitigation evidence and to concentrate instead on defeating the State's effort to prove Wiggins was a principal in the first degree. But Wiggins' lawyers did not pursue that strategy. Far from it. They put on an expert witness whose sole function was to offer mitigation evidence - namely that Wiggins would shed any violent tendencies once imprisoned for life. That testimony not only diverted attention from the principalship issue, but also introduced the idea that Wiggins might be violent - the very notion the State now claims Wiggins' lawyers structured their presentation to avoid. Moreover, Wiggins' lawyers expressly invited the members of the jury to look beyond principalship and consider Wiggins' "difficult life" as well as the facts of the crime in making their sentencing judgment. When counsel subsequently failed to introduce any evidence that would have allowed the jury to take up that invitation, they telegraphed that there was no mitigation case to be made on Wiggins' behalf. Counsel's

neglect of mitigation cannot, therefore, be justified on the ground that it would have been inconsistent with concentrating on the principalship issue and avoiding distractions.

Finally, Wiggins was prejudiced by his counsel's performance. The State's principal response - that Wiggins cannot show prejudice because his evidence is double-edged - is an unsupported generality that would foreclose virtually all ineffective assistance claims based on a failure to investigate and present mitigation evidence. The State's position is, in any event, foreclosed by *Williams v. Taylor*, 529 U.S. 362 (2000), which rejected a nearly identical claim.

I. THE DECISION OF THE MARYLAND COURT OF APPEALS IS AN OBJECTIVELY UNREASONABLE APPLICATION OF *STRICKLAND* AND IS BASED ON AN UNREASONABLE FACTUAL DETERMINATION.

A. The Decision by Wiggins' Lawyers to Retry Guilt to the Exclusion of Mitigation Was Not Supported by a Reasonable Professional Judgment.

Wiggins is entitled to relief under 28 U.S.C. § 2254(d)(1) because the Maryland Court of Appeals applied *Strickland* in an "objectively unreasonable" manner. *See Williams v. Taylor*, 529 U.S. at 409 (opinion of Justice O'Connor for a majority of the Court construing 28 U.S.C. § 2254(d)(1)).

Strickland clearly established that a tactical decision made by defense counsel after less than complete investigation is reasonable only "to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 691. The Maryland Court of Appeals and the Fourth Circuit departed sharply from *Strickland*'s clear rule in concluding that, in the Fourth Circuit's words, counsel's desire to "avoid[] conflicting arguments supported limited investigation into social history." Pet. App. 23a; *id.* at 121a-122a, 126a (Maryland Court of Appeals). Whatever its force as a reason not to *present*

evidence, the desire to avoid conflicting arguments cannot justify the decision by Wiggins' lawyers to abandon their effort to *investigate* Wiggins' mitigation case. Information Wiggins' lawyers possessed in the Spring of 1989 contained leads suggesting that a powerful mitigation case might be available to them. Any competent attorney would have realized that tracking down those leads was necessary information to make an informed choice among possible defenses, or even to evaluate whether multiple defenses could be used effectively. Wiggins' lawyers, however, failed to follow up on any of those leads, shutting down their efforts at precisely the point when competent capital counsel would have put the mitigation investigation into high gear.

The State does not dispute that Wiggins' counsel would have violated minimum professional standards had they undertaken no investigation into mitigation whatsoever. Nor could such a position be defended. It is self-evident that without conducting any investigation into possible avenues of mitigation, counsel cannot possibly fulfill the bedrock obligation to make reasonable strategic choices about how best to defend a client, much less advise the client competently about available options. *See Williams*, 529 U.S. at 396 (discussing "obligation to conduct a thorough investigation of the defendant's background"). Yet what happened here was worse. Wiggins' lawyers shut down their mitigation investigation *after* obtaining the social services records, even though a reasonable lawyer, having reviewed those records, would have known that further investigation would probably produce a powerful mitigation case. If it would have been unreasonable not to commence the investigation, then it was even more unreasonable to stop the investigation once counsel reviewed the records because the prospect that investigation would yield strong mitigation evidence was significantly better after counsel obtained the records than it was before.

Thus, there is no merit to the State's suggestion that the records were a basis for halting investigation, rather than a

demand to press ahead. *See Neal v. Puckett*, 286 F.3d 230, 236-37 (5th Cir. 2002) (assessing "what additional leads [counsel] had, and what results he might reasonably have expected from these leads"), *cert. denied*, 123 S. Ct. 963 (2003). There is a world of difference between the clues in those records and the ultimate mitigation case they foreshadowed. For example, the social services records suggest that Wiggins was under severe physical and emotional stress during his years in foster care: he displayed emotional difficulties as he was bounced from one foster home to another, he had a difficult relationship with Mrs. Miner, and he had frequent and lengthy absences from school. Lodging Materials ("LM") 54-95, 126, 131-36, 140, 147, 159-76. The records did not mention that one foster mother repeatedly bit him or that Wiggins for years had been repeatedly sexually molested and raped by his foster father, Mr. Miner. Pet. App. 177a-179a. Nor did they mention that, having escaped the sexual horrors that he had endured at the Miners' residence, he eventually was placed in the Blackwells' home only to be repeatedly gang-raped by the Blackwells' teenage sons. Pet. App. 175a-176a, 190a.

Similarly, while the records describe the single specific instance of neglect that prompted the State to place Wiggins in foster care, LM 159, they do not indicate how frequently or how long Wiggins' mother left her children untended and unfed. Nor do the records describe the squalor, brutality, and depravity of Wiggins' home life – that he lived in filth and picked food from trash cans, that his own mother burned and beat him, that he repeatedly was exposed to his mother having sex in the same bed as the children, and that he repeatedly witnessed the rape and sexual molestation of his sister. Pet. App. 167a-171a. Getting the true picture required following up on the clues the social services records held.

In short, the records provided hints, but only hints, that Kevin Wiggins might well be a person whose life experience would have triggered "the belief, long held by this society, that defendants who commit criminal acts that are attributable

to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (internal quotation marks and citation omitted). Thus, once counsel obtained the records, they could not reasonably limit their investigation into mitigation until they had investigated the clues those records contained. Indeed, it would be perverse to conclude that obtaining these records discharged counsel's obligation to investigate mitigation, for such a ruling would mean that the more the initial steps in an investigation suggest that helpful evidence may be available, the more justifiable it is for counsel to abandon pursuit of that evidence. *Strickland* cannot stand for that absurd proposition. Yet that is precisely what the Fourth Circuit concluded when it held that counsel had rendered adequate performance merely because they were aware of "a *possible* avenue of mitigation." Pet. App. 20a (emphasis added).

The State seeks to avoid this conclusion by dismissing it as the product of inappropriate hindsight. But Wiggins' *Strickland* claim does not center on a *post hoc* showing that trial counsel failed to uncover additional mitigation evidence. Instead, it focuses "on the facts of the particular case, viewed as of the time of counsel's conduct," *Strickland*, 466 U.S. at 690, and evaluates that conduct "from counsel's perspective at the time." *Id.* at 689. It is this test – the very test mandated by *Strickland* – that Wiggins' lawyers fail. Their performance must be judged on the basis of what they knew in the Spring of 1989 after they obtained the social services records. On the basis of the facts they knew then, the decision to truncate investigation into mitigation evidence was not a reasonable professional judgment. Counsel needed to make an informed decision about how best to defend their client against a death sentence. They knew from the social services records that Wiggins could well have had a powerful mitigation case. But they did not know how strong that case would be or of what it would consist. Yet they chose at that point to abandon their

investigation and to focus instead on "retrying the factual case," JA 485, thereby rendering impossible a reasoned decision as to which line of defense was most promising.

Viewing the matter from counsel's "perspective at the time," the "tactical" explanation the State now offers for cutting the mitigation investigation short is neither reasonable as a matter of professional judgment nor plausible as a matter of fact. If, as the State contends, defense counsel's reason for not presenting mitigation evidence about Wiggins' upbringing was the fear that it would undermine the attack on principalship, then they would not have abandoned their investigation into mitigation until the trial judge denied the motion to bifurcate the penalty phase at the outset of the sentencing hearing. Up to that point, Wiggins' lawyers had every reason to build the most powerful mitigation case possible. Yet they did not do so, and consequently had nothing more in hand at sentencing than a patently inadequate psychologist's report on the results of IQ and personality testing that had been given to Wiggins in April 1989.[1] Whether the motion was granted or denied, counsel's failure to investigate left them in no position to inform the jury – or to make a reasoned strategic judgment *whether* to inform the jury – about the aspects of Wiggins "disadvantaged background" that would make him "less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. at 319. It is thus inexplicable that the State would now defend the conduct of Wiggins' lawyers by pointing to Mr. Schlaich's testimony that his sentencing strategy was to

[1] The psychologist, Dr. Stejskal, saw Wiggins on two occasions for the purpose of administering intelligence and personality tests. JA 349. His testimony would have been no substitute for a personal history of the kind contained in the report produced during postconviction proceedings. Indeed, it would have been patently deficient to offer the disembodied diagnosis of a "personality disorder" (which is all the proffer indicated Dr. Stejkal was prepared to offer) without offering the evidence of Wiggins' nightmarish upbringing in order to persuade jurors to view his impairments as reducing his moral culpability and not a matter of his own doing.

"attempt to retry the factual case" and that he was "sure" that he made the decision to follow that course "before the trial on the facts." Resp. Br. at 20 (quoting JA 485-86). Given the approach Wiggins' lawyers actually pursued, it made no sense whatsoever to "limit[] investigation into social history" based on a desire to "avoid conflicting arguments." Pet. App. 23a.

The conclusion that Wiggins' lawyers fell short of the standards established in *Strickland* is fully consistent with the specific facts of *Strickland* itself as well as this Court's decisions applying it. In *Strickland*, counsel made a reasonable judgment to limit additional investigation into mitigation because nothing in the initial investigation provided a reason to think that further investigation might prove fruitful. The Court specifically noted that it was reasonable for defendant's counsel to "surmise from his conversations with respondent that character and psychological evidence would be of little help." 466 U.S. at 699. Similarly, although defendant's counsel in *Strickland* did not interview all of his client's family members, neighbors, and friends, nothing that counsel had learned from his interviews with his client or his conversations with his client's wife and mother – or from any other source – suggested that further investigation would uncover anything like Wiggins' nightmarish life history or other potential mitigation evidence. To the contrary, "affidavits submitted in the collateral proceeding showed nothing more than that certain persons would have testified that respondent was basically a good person who was worried about his family's financial problems." *Id.* at 677. Such evidence "would barely have altered the sentencing profile presented to the sentencing judge." *Id.* at 700. Thus, counsel in *Strickland* had investigated sufficiently to be able to conclude reasonably that further investigation would not yield meaningful mitigation evidence.

The same is true of *Burger v. Kemp*, 483 U.S. 776 (1987). In that case, defense counsel "talked with the [defendant's] mother on several occasions and concluded that her testimony

would not be helpful and might have been counterproductive." *Id.* at 792. The lawyer also interviewed another lawyer who had "acted as [the defendant's] 'big brother,'" and concluded that his testimony "was not helpful" – an assessment the other lawyer shared. *Id.* at 792-93. Counsel's meetings with his client convinced him that Burger would express no remorse if he testified, and his interviews with a psychologist likewise convinced him that the psychologist would disclose on cross-examination that Burger had bragged about the brutality of his acts. To be sure, postconviction counsel had uncovered additional mitigation evidence about Burger's difficult upbringing. As the Court explained, however, the relevant question under *Strickland* was not whether trial counsel might have turned up that evidence had he investigated more thoroughly. Rather, the question was whether counsel's "performance in evaluating the mitigation evidence available to him, and in deciding not to pursue further mitigating evidence" was consistent with prevailing professional standards. *Id.* at 788. The decision on the part of Burger's lawyer to make a less than complete investigation into mitigation was reasonable precisely because he had done a substantial investigation and turned up nothing that was helpful (or that even suggested that further investigation would produce helpful evidence) and much that could have been extremely harmful. Here, in stark contrast, the initial investigation by Wiggins' lawyers uncovered leads suggesting that further investigation might well result in the discovery of powerful mitigation evidence. In this determinative respect, the situation they faced differs fundamentally from the one Burger's lawyer faced.

The other case on which the State places heavy reliance, *Bell v. Cone*, 122 S. Ct. 1843 (2002), is totally inapposite. That case involved no claim that counsel investigated inadequately. Rather, counsel's conduct was challenged under *United States v. Cronic*, 466 U.S. 648 (1984), on the theory that counsel's decision to rely at sentencing on the mental health evidence

admitted at the guilt-innocence phase amounted to a failure to provide any representation at all. The Court rejected the claim on the ground that counsel could reasonably have decided that the jury would remember the mental health evidence (which they had heard just the day before). *Bell v. Cone* thus has no relevance here.[2]

Unlike the lawyers in *Strickland*, *Burger*, and *Bell*, Wiggins' lawyers chose to shut down their investigation into mitigation at the very point when any reasonably competent capital defense counsel would have known that it was imperative to press forward. Their conduct was an obvious violation of *Strickland*'s requirement that decisions to limit investigation must be supported by reasonable professional judgments. The Maryland Court of Appeals applied that established rule of *Strickland* in an objectively unreasonable manner when it reached the opposite conclusion.

B. The Decision of the Maryland Court of Appeals Cannot Reasonably Be Defended on the Ground That Wiggins' Lawyers Knew the Facts of Wiggins' Nightmarish Upbringing.

Wiggins is also entitled to relief under 28 U.S.C. § 2254(d)(2) because the adjudication of his *Strickland* claim by the Maryland Court of Appeals resulted in a decision that is based on an unreasonable determination of the facts.

The Maryland Court of Appeals concluded that Wiggins' lawyers "were aware that [Wiggins] had a most unfortunate childhood." Pet. App. 121a. But the only finding in the Court's opinion which explicates and supports that conclusion

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[2] Similarly, in *Darden*, the Court found no deficient performance where counsel clearly spent a "significant portion" of time preparing for sentencing. *Darden v. Wainwright*, 477 U.S. 168, 184-85 (1986). Moreover, the mitigation evidence was not particularly compelling, and the Court concluded that any rebuttal evidence would have opened the door for the State to produce damaging evidence of the defendant's prior convictions, as well as psychiatric reports concluding that the defendant was a sociopath who would "act entirely on impulse." *Id.* at 186.

was the following: "Mr. Schlaich had available to him not only the presentence investigation report . . . which included some of appellant's social history, but also more detailed social services records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care and borderline retardation." *Id.* In upholding the Maryland Court of Appeals' decision as reasonable in this regard, the Fourth Circuit accepted the Maryland court's finding, indicating that "Schlaich stated that he knew some of the details of Wiggins' childhood as they existed in the presentence investigation report and social services records which he had seen," including the facts that "there were reports of sexual abuse at one of his foster homes; that he had had his hands burned as a child as a result of his mother's abuse; that there had been homosexual overtures made toward him by a job corps supervisor; and that he was borderline mentally retarded." Pet. App. 20a.

The Maryland Court of Appeals cannot, however, be upheld on that ground because its decision was "objectively unreasonable," and clear and convincing evidence shows that its "factual premise was incorrect." *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1041 (2003). As the State and its supporting *amici* now concede (Resp. Br. at 22 n.9; U.S. Br. at 25), the social services records do not contain what the Maryland Court of Appeals and the Fourth Circuit said they contain. Apart from documenting the specific situation of neglect that led to Wiggins' initial foster care placement, the records do not describe any of the horrifying details of Wiggins' first six years before he was taken from his mother. The records do not recount "instances of physical and sexual abuse."[3] They contain nothing at all about the years of rape and sexual abuse at the hands of Mr. Miner, and nothing about Wiggins being

[3] The state postconviction trial court made the correct factual finding (ignored by the Maryland Court of Appeals) that there was no "mention of abuse against Wiggins in any [social services] report." Pet. App. 142a n.269.

raped by the teenage sons of the Blackwell family.

The social services records themselves provide "clear and convincing" evidence of the state court's error for purposes of 28 U.S.C. § 2254(e)(1). To disprove a factual determination by "clear and convincing" evidence, it must be "highly probable" that the determination was erroneous. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). Here, the error is not merely highly probable; it is certain. The social services records conclusively establish the error of the Maryland Court of Appeals because they do not document Wiggins' physical and sexual abuse. The presumption of correctness established in 28 U.S.C. § 2254(e)(1) is thus easily overcome here. *See generally Miller-El*, 123 S. Ct. at 1041 (federal court may conclude that state court's factual premise was incorrect by clear and convincing evidence). Because the entire factual premise on which the decision of the Maryland Court of Appeals rests is demonstrably incorrect (even granting it the appropriate deference under § 2254(e)(1)), its ultimate decision was based on an "objectively unreasonable" factual determination under § 2254(d)(2). *Miller-El*, 123 S. Ct. at 1041-42.

Unable to rely on the Maryland Court of Appeals' actual findings, the State is forced to improvise. Specifically, the State now suggests that Mr. Schlaich's statement that "at least" he knew the facts as they were "reported in other people's reports," JA 491, was not a qualified claim that he knew only what was in the official reports, but rather an unqualified claim that he knew all the mitigation facts "whatever the source." Resp. Br. at 35. But that self-serving spin on Mr. Schlaich's testimony is no substitute for a state court finding under § 2254, and it merits no deference. It is incorrect in any event. Schlaich was plainly referring to facts as they were "reported" in written "reports"; he was being questioned about the social services records when he made the statement. JA 490. That is precisely how both the Maryland Court of Appeals and the Fourth Circuit understood the testimony. Pet. App. 20a, 121a.

Most importantly, the State's *post hoc* reading of the cold record is completely at odds with the conclusions reached by the state postconviction trial court - the trier of fact who actually heard Mr. Schlaich's testimony, observed his demeanor, and considered all the other evidence. That court specifically stated that "based upon the evidence that I have seen I'm concluding it was error for them not to investigate it" because "I have no reason to believe that they did have all of this information." JA 605-06. The court made that finding in direct response to the State's argument that "whoever was responsible for [mitigation evidence] did develop it" by obtaining social services records, the presentence investigation, and a psychological test. CA App. 1436. The court also noted "I don't ever remember a death penalty case that there was not this social history done. . . . Not to do a social history, *at least to see what you have got*, to me is absolute error. . . . I really don't think that is even a close question." JA 605 (emphasis added). It was thus quite clear to the judge who actually heard the testimony that Mr. Schlaich did not know what he claimed to know about Wiggins' life history in the testimony on which the State now relies.

This contemporaneous finding made by the judge best positioned to assess Mr. Schlaich's demeanor and credibility merits great deference because it lies "peculiarly within a trial judge's province." *Wainwright v. Witt*, 469 U.S. 412, 428 (1985); *Patton v. Yount*, 467 U.S. 1025, 1038-39 (1984). And it is not undermined in the least by the written decision the court issued three years later. Although the court reversed itself and ruled that counsel's performance was not deficient, it did so solely on the basis of its legal conclusion that "when the decision not to investigate . . . is a matter of trial tactics, there is no ineffective assistance of counsel." Pet. App. 155a. This (erroneous) ruling that a tactical decision was *per se* immune from scrutiny under *Strickland*, made the extent of counsel's investigation irrelevant; it did not change the judge's earlier finding that Wiggins' lawyers had never learned the

mitigation evidence documented in the social history.

That Wiggins' lawyers were ignorant of the key mitigation facts is confirmed by their proffer of the evidence they would have introduced had the state court agreed to bifurcate the sentencing proceeding into separate eligibility and mitigation phases. That proffer included *nothing* about Wiggins' history of horrible abuse but consisted solely of a recitation of the conclusions reached by a psychologist on the basis of limited testing. JA 349-51. Had Wiggins' lawyers known the powerful mitigation evidence the State now claims they knew, that evidence surely would have been included in the proffer. Counsel's silence in this regard speaks volumes.

Thus, Wiggins is entitled to relief under § 2254(d)(2) as well as § 2254(d)(1).

II. EVEN APART FROM THEIR UNREASONABLE INVESTIGATION INTO MITIGATION, WIGGINS' LAWYERS PURSUED A PLAINLY UNREASONABLE COURSE AT SENTENCING.

Even if Wiggins' lawyers had conducted the "requisite diligent investigation" into Wiggins' personal history, *see Williams*, 529 U.S. at 536 (O'Connor, J., concurring), their defense at sentencing would still be patently unreasonable. The State contends that Wiggins' lawyers made the reasonable judgment to "concentrate" on a single defense at sentencing. But the State seeks to defend a nuanced tactical judgment that Wiggins' lawyers never made. The justification the State now presses was manufactured years later on the basis of Mr. Schlaich's self-serving testimony during the postconviction hearing, and cannot be squared with the actual record of the sentencing proceeding. Under *Strickland*, however, counsel's performance must be judged only on "the facts of the particular case, viewed as of the time of counsel's conduct," 466 U.S. at 690, and not on *post hoc* rationalizations.

The plain fact is that Wiggins' lawyers did not focus exclusively on the principalship issue at sentencing, and thus

forgoing a powerful case in mitigation cannot be justified on that basis. Wiggins' counsel invited the jury to "consider not only the facts of the crime" but also "who the person is," and they promised that the jury would hear about Wiggins' difficult life," JA 70-72, but then failed to present the mitigation evidence necessary to guide the jury's inquiry. Wiggins' lawyers thus left the jury to assess Wiggins' background and character solely on the basis of the harmful and misleading presentence report they knew would be introduced at sentencing as a matter of law. Compounding that failure, Wiggins' counsel introduced testimony from Dr. Johnson that actually suggested Wiggins might have violent tendencies, *see* Pet. Br. at 6, thus making precisely the point the State contends Mr. Schlaich was trying to avoid.

The effort to disprove principalship was entirely inadequate.[4] Counsel failed to use mitigation evidence that would have bolstered their effort to disprove principalship and would have furthered - not conflicted with - what the State now claims was their strategy. Wiggins' borderline intelligence, for example, would have powerfully reinforced the theme that Wiggins was an impressionable person who easily could have been led astray by others such as the Armstrongs and been a mere accomplice in Ms. Lacs' death. Moreover, by contending that Wiggins did not kill Ms. Lacs, yet doing nothing to dissipate the force of the judge's instructions that Wiggins had already been found guilty of murdering her and that the jury was bound to accept that fact, Wiggins' lawyers effectively sealed their client's fate. Wiggins' lawyers offered the jury no alternative hypothesis as

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[4] Contrary to the State's brief, Wiggins does *not* contend that the sentencing judge's instructions that Wiggins had been convicted of murder renders *per se* ineffective Schlaich's pursuit of a principalship defense. *See* Resp. Br. at 41. What Wiggins *does* contend is that, to have any chance of succeeding, Schlaich had to distinguish the two concepts for the jury, and that Schlaich's bungled presentation failed to do just that. *See* Pet. Br. at 44-45. That a number of appellate judges later understood the distinction that Schlaich failed to make clear to the jury is thus of no consequence.

to how Ms. Lacs might have died if Wiggins' did not kill her. They never suggested who other than Wiggins might have been in Ms. Lacs' apartment, or how the murder might have occurred if Wiggins was merely an accomplice and not the principal. The State concedes as much in suggesting that Wiggins' lawyers were pursuing a "residual doubt" strategy.[5]

Thus, even apart from the failure to investigate, Wiggins' lawyers performed far below acceptable professional standards at sentencing.

III. IT FOLLOWS *A FORTIORI* FROM *WILLIAMS V. TAYLOR* THAT WIGGINS SUFFERED PREJUDICE.

The State barely contests prejudice, and makes no effort to distinguish *Williams v. Taylor*, despite its prominence in petitioner's opening brief, and despite the district court's holding that prejudice followed from *Williams "a fortiori."* Pet. App. 51a. In *Williams*, this Court held that counsel's failure to investigate and present mitigation evidence had caused

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[5] This Court has recognized that "residual" doubt will not be a factor unless the sentencer also decided guilt - and therefore may have doubts left over from trial. *Franklin v. Lynaugh*, 487 U.S. 164, 173 n.6 (1988) (penalty-only jury will not rely on residual doubt); *Lockhart v. McCree*, 476 U.S. 162, 181 (1986). As explained by the very empirical studies the State cites, jurors sometimes negotiate a "compromise" or "trade-off between guilt and punishment," so that those with doubts about guilt agree to convict in exchange for other jurors' promise to reject the death penalty. Margery Malkin Koosed, *Averting Mistaken Executions By Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. Ill. U. L. Rev. 41, 67 (2001); *see also id.* at 43, 70; William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 29 (1987-88) (explaining likelihood that jurors "exchanged what should have been votes for a verdict of not guilty, based on reasonable doubt, for a life recommendation at the sentencing phase"); William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476, 1527 (1998) (describing "trade off"). Where, as here, a sentencing jury did not make the guilt-innocence decision, counsel cannot rely on any such "lingering" doubts or "trade-offs." The new sentencing jury "nullified] lingering doubt as a sentencing consideration." Bowers, 83 Cornell L. Rev. at 1546.

Williams prejudice despite overwhelming evidence that Williams had engaged in a life-long "crime spree" that showed he "would continue to be a danger to society." 529 U.S. at 418-19 (Rehnquist, C.J., dissenting). The evidence left undiscovered and unpresented at Wiggins' sentencing hearing was at least as powerful as that at issue in *Williams*, while – in sharp contrast to Williams – Wiggins had no criminal record at all. The State simply has no response to the conclusion of Judge Motz, which the Fourth Circuit did not question, that "Wiggins' mitigation evidence was much stronger, and the State's evidence favoring imposition of the death penalty was far weaker, than the comparable evidence in *Williams*." Pet. App. 51a.

Instead, the State seeks to denigrate the mitigation evidence by making spurious attacks. The State contends that Selvog's testimony would have been suspect because he failed to obey a state law requiring those discovering child abuse to report that abuse to appropriate authorities. Putting aside the fact that the abuser (Mr. Miner) was dead, the State knows full well that Selvog had no such duty. Attorney General Curran (who is counsel in this case) issued an Attorney General opinion in 1990 specifically concluding that Maryland's reporting obligation did not extend to a "mental health provider [] participating in the preparation of a defense to a criminal proceeding." 75 Md. Op. Att'y Gen. 76 (1990). The State also contends that Selvog's testimony might not be admissible in Maryland. This ignores that Selvog testified in this case that he had previously been qualified as an expert in a capital sentencing trial in Maryland and that testimony from licensed social workers is routinely admitted at capital sentencing. *See also* Br. *Amici Curiae* of the National Association of Social Workers, *et al.* at 14-17. The State also asserts that Selvog's conclusions depend solely on Wiggins' own claims about his past. That ignores the record. As the social history makes clear, Wiggins' sister India and aunt Mozelle independently corroborated the horrors of life with

Wiggins' mother, including the episode in which Wiggins' hands were burned as punishment. India also provided much additional corroborating evidence, including descriptions of grossly inappropriate sexual behavior by Mr. Miner. And while Wiggins was the only witness to the sexual abuse against him, it is hardly uncommon for abused children to keep such matters secret. Moreover, medical and school records provide significant evidence that Wiggins was suffering emotional difficulties during the very time he was being abused by Mr. Miner - including severe eating disorders and extraordinary absences from school.

The State further asserts that there was no prejudice because the State could have "give[n] its own interpretation to information contained in the report and . . . counter[ed] Selvog's report with evidence of its own." Resp. Br. at 47. But it is well past time for the State to have made its case. The State had the social services records prior to sentencing, and could have introduced them irrespective of what Wiggins' lawyers did. The State doubtless chose not to do so because the evidence is obviously mitigating, not aggravating.[6] And the State had ample opportunity during the state postconviction evidentiary hearing to demonstrate what harmful evidence it might have introduced in response had Wiggins lawyers' put on a mitigation case. It introduced nothing.

Nor is there any merit to the State's related suggestion that Wiggins' mitigation evidence would hurt him rather than help him. Resp. Br. at 49. The short answer to that argument is that *Williams v. Taylor* forecloses it. The mitigation evidence in *Williams* had far more of a double-edge, 529 U.S. at 396

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[6] The records themselves do not begin to support the portrait of a violent malevolent youth that the State seeks to paint by selectively quoting snippets and taking matters out of context. Despite all he went through, Wiggins had no criminal record and there is no suggestion in the records of the kind of violent propensities that would support a conclusion that he would be a danger to society.

(noting that "not all of the additional evidence was favorable"), yet this Court had no trouble concluding that *Williams* was prejudiced by its exclusion at sentencing because "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded' might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398. Indeed, the State's position is tantamount to a contention that prejudice can never be shown on the basis of evidence about a defendant's deprived background because it could always give rise to an inference that such deprivation could make the defendant antisocial as an adult. Wiggins had no prior record at all, and the record evidence contains only the most minor of confrontations. If the failure to investigate and present such evidence is non-prejudicial because it is "double-edged," then there is no remedy for a counsel's incompetence with respect to even the most powerful mitigation evidence.

The bottom line in this case is that, because of counsel's incompetence, the jurors that sentenced Wiggins to death never had a chance to consider mitigation evidence of extraordinary power. They never had a chance to consider the effects of the privation and abuse Wiggins suffered at the hands of his natural mother and foster parents; they never had a chance to consider the effects of the ongoing rape and sexual abuse that Wiggins suffered in foster homes in which the State of Maryland itself had placed him; and they never had a chance to consider the relevance of Wiggins' borderline intelligence. Had the jury considered that evidence, there is far more than a reasonable probability that they would have reached a reasoned moral conclusion that the effects of Wiggins' nightmarish life experience made him "less culpable than defendants who have no such excuse," and thus undeserving of a death sentence. *Penry v. Lynaugh*, 492 U.S. at 319.

CONCLUSION

The decision of the Fourth Circuit should be reversed.

Respectfully submitted,

Donald B. Verrilli, Jr.*
Ian Heath Gershengorn
Michael B. DeSanctis
Amy L. Tenney
Jenner & Block, LLC
601 13th Street, N.W.
Washington, DC 20005
(202) 639-6000

Counsel for Petitioner

*Counsel of Record

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