IN THE
Supreme Court of the United States

No. ____

KEVIN WIGGINS,
Petitioner,
v.
THOMAS R. CORCORAN, *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In this case, the United States Court of Appeals for the Fourth Circuit held that under 28 U.S.C. § 2254(d)(1), a state court application of established federal law will satisfy the "objectively reasonable" standard of review set forth in *Williams v. Taylor*, 529 U.S. 362 (2000), so long as it is "minimally consistent with the facts and circumstances of the case." The questions presented are:

1. Does the Due Process standard of *Jackson v. Virginia* require a court to consider "all of the evidence" in deciding whether a reasonable factfinder could have found guilt beyond a reasonable doubt, as this Court held in *Jackson* and the First, Fifth and Seventh Circuits have likewise held, or may a conviction based entirely on circumstantial evidence be upheld under *Jackson* by considering only the evidence consistent with guilt and ignoring all evidence refuting guilt, as the Fourth Circuit held in this case.

2. Does defense counsel in a capital case violate the requirements of *Strickland v. Washington* by failing to investigate available mitigation evidence that could well have convinced a jury to impose a life sentence, as this Court concluded in *Williams v. Taylor* and as most Courts of Appeals have concluded, or is defense counsel's decision not to investigate such evidence "virtually unchallengeable" so long as counsel knows rudimentary facts about the defendant's background, as the Fourth Circuit held in this case.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fourth Circuit.

Kevin Wiggins was the appellee below. Thomas R. Corcoran, warden of the Maryland Correctional Adjustment Center, and J. Joseph Curran, Jr., attorney general of the State of Maryland, were appellants below.

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Petitioner Kevin Wiggins respectfully requests this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit, reported at 288 F.3d 629 (4th Cir. 2002), is reprinted at Pet. App. 1a-26a. The decision of the United States District Court for the District of Maryland, reported at 164 F. Supp. 2d 538 (D. Md. 2001), is reprinted at Pet. App. 28a-89a. The order of the United States Court of Appeals for the Fourth Circuit, denying rehearing and rehearing *en banc*, is set forth at Pet. App. 157a-158a.

JURISDICTION

The Court of Appeals' judgment was entered May 2, 2002. A timely petition for rehearing and rehearing *en banc* was denied May 29, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the provision of the federal habeas statute governing federal review of state court decisions, 28 U.S.C. § 2254, reprinted at Pet. App. 159a-162a.

STATEMENT OF THE CASE

A. Background

On September 17, 1988, an elderly white woman named Florence Lacs was found drowned in the bathtub of her apartment in Woodlawn, Maryland. Her apartment had been ransacked. Five days later, the police found two African Americans, Kevin Wiggins (then age 27) and his girlfriend Geraldine Armstrong (then age 42), traveling in Ms. Lacs' car. They were both arrested and charged with murder and robbery.

No direct evidence established how Ms. Lacs died. No witnesses saw her attacked. No one confessed to the crime. No forensic evidence pointed toward a suspect. The state knew only that Wiggins and Armstrong had Ms. Lacs' car and credit cards, and that the credit cards had been used beginning on September 15 at several stores. Armstrong's fingerprints (but not those of Wiggins) were found on the charge slips. Items purchased with the cards were found with Armstrong and Wiggins when they were arrested. The state's theory was that Ms. Lacs was murdered on the 15th before her credit cards were used later that evening. The state alleged Wiggins was the murderer because he was working as a painter in Ms. Lacs' apartment building.

The murder and robbery charges against Geraldine Armstrong were never pursued. Armstrong, however, had repeated uncounseled conversations with the prosecutors, and testified against Wiggins before the Grand Jury and at trial. Armstrong had taken a polygraph examination while in custody. According to the examiner's report, Armstrong answered dishonestly when asked whether she had been in the victim's apartment and had participated in the murder.[1] Additionally, one of Armstrong's brothers lived in an apartment directly underneath that of the victim. Another of Armstrong's brothers fought with Wiggins, brandishing a gun, when Wiggins had arrived at Geraldine's home on the evening of the 15th. CA App. 98. Despite having all charges against her dropped, Armstrong testified that she received no leniency in return for her testimony.

B. The Guilt/Innocence Trial

Two public defenders, Carl Schlaich and Michelle Nethercott, represented Wiggins. Schlaich had previously second-chaired one capital case. Nethercott had never represented a capital defendant, and had less than one year of overall experience. Shortly after the appointment, Schlaich left Baltimore County to lead the Harford County defender's office. He spent one day per week on his lingering Baltimore County responsibilities. CA App. 1176-77. Nethercott thus had principal responsibility for trial preparation. Shortly after this case ended, Schlaich was fired as a public defender.

Wiggins waived a jury trial and was tried before the Honorable J. William Hinkel of the Baltimore County Circuit Court. The prosecution's opening statement noted that Ms. Lacs was last seen alive on September 15, 1988, that Wiggins was working near her apartment that day, and that Wiggins was in possession of Ms. Lacs' car and credit cards at about 8 p.m. that night. *Id.* 21-24. The prosecution claimed that Wiggins

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[1] Court of Appeals Joint Appendix ("CA App.") 1399.

murdered Lacs at 5 p.m. on the 15th, and indicated that this could be proved by "conversations" Wiggins had with two inmates while incarcerated after his arrest. *Id.* 24.

The prosecution called John McElroy and Christopher Turner to substantiate Wiggins' alleged admissions. Both had met Wiggins for the first time in prison. On cross-examination, McElroy acknowledged that he "made up" the central elements of his testimony against Wiggins. *Id.* 58. Cross-examination similarly undermined Turner by establishing that he had been clinically diagnosed as actively psychotic, and had a long history of providing information in exchange for sentencing leniency. Both witnesses testified that they were cooperating in this case in order to secure reduced sentences for pending convictions. *Id.* 54-55, 131-38, 164-65.

Apart from these witnesses, the case was entirely circumstantial. The prosecution called three witnesses to try to tie Wiggins to the crime – Chianti Thomas (then an eleven-year old girl), Geraldine Armstrong, and Robert Weinberg (Wiggins' employer). On September 15, Thomas had been visiting a friend who lived across the hall from Ms. Lacs. Thomas testified that, while standing in the apartment hallway at about 5 p.m., she observed an African American man come up the stairs and speak briefly to Ms. Lacs about having moved some sheetrock. *Id.* 83-86. The prosecution repeatedly asked Thomas whether she could identify anyone in the courtroom as the person she saw that day, but she could not. *Id.* 86, 90. Thomas also testified that the police had asked her to make a photographic identification shortly after the murder, and that she picked the photo of "the man that had looked the closest to the man" she saw on the 15th. *Id.* 92. On cross-examination, Thomas testified that the person she saw on the 15th had left the building immediately after his brief conversation with Ms.

Lacs, while Ms. Lacs was still alive. *Id.* 93. There was no evidence that this person ever returned.

Geraldine Armstrong testified that Wiggins had arrived at her home at 8 p.m. on the 15th, and asked to come in to wash off the paint from his work. CA App. 97-98. She also testified that her brother Adolphus began an argument with Wiggins that quickly escalated to a serious altercation in which her brother pulled a gun. She then testified that she and Wiggins left to go shopping in Ms. Lacs' car and used Ms. Lacs' credit cards to purchase items for Armstrong and her child. She initially denied familiarity with the Woodlawn apartments, but eventually admitted that her brother Melvin lived directly beneath Ms. Lacs. *Id.* 102.

Robert Weinberg testified that Wiggins was in his employ painting apartments adjacent to that of Ms. Lacs on the 15th, and that Wiggins had appeared in his office sometime around 4:45 p.m. and was released for the day. *Id.* 202. Weinberg further testified that Wiggins returned 20 minutes later, stating that he had moved some sheetrock. *Id.* 838. According to Weinberg's testimony, it would have taken at least five minutes to walk from the office to Lacs' apartment, a couple of minutes to move the sheetrock, and another five minutes or more to return to the office. *Id.* 839, 843. Weinberg testified that Wiggins had in fact moved the sheetrock. *Id.* 197.

Lacking any direct evidence that Ms. Lacs died between the time when Thomas allegedly saw Wiggins and when Wiggins later allegedly arrived at Armstrong's home, the prosecution called a medical examiner, Dr. Margarita Korell, to establish that Lacs died on the 15th. Korell, however, ultimately testified that it was impossible to ascertain when Ms. Lacs died. *Id.* 264-68. Korell had previously signed a death certificate stating that Ms. Lacs died on September 16th.

The prosecution also elicited testimony from Ms. Lacs' friends. Edith Vassar testified that she had been with Lacs on Thursday, September 15. Vassar, however, testified that she "received a phone call" from Lacs on Friday the 16th. CA App. 67. On cross-examination, she reiterated that she was "quite sure" she spoke to Lacs on Friday. *Id.* 69. Vassar reported the conversation to the police, and thereafter received a call from an unknown person trying to convince her she must be in error. *Id.* 71. The prosecution also called Mary Elgert and Elizabeth Lane. Elgert testified that Ms. Lacs was wearing a blue skirt on the 15th. *Id.* 75. Lane had given the police a missing persons report indicating that Ms. Lacs was wearing a red dress on the 15th. *Id.* 390-391.

Finally, the prosecution presented forensic evidence. A detective testified that he recovered a baseball cap with a Ryder logo in Ms. Lacs' apartment, as well as fingerprints inside the entrance door, on the kitchen wall, and on the bathroom doorjamb. CA App. 217, 222. Three prints were of "comparison value," but none matched Wiggins. *Id.* 233-35, 356. No hairs and fibers from the cap matched those taken from Wiggins. *Id.* 284-285. Another detective testified to the extensive ransacking of Ms. Lacs' apartment. *Id*. 300-38. He also testified that a latex glove had been found on Wiggins. *Id.* 350. There was no evidence that the glove contained traces of the substances (such as Black Flag or cleanser) found in Ms. Lacs' tub.

The defense then presented its case, which consisted principally of the testimony of Dr. Gregory Kaufman, an expert in forensic pathology. Kaufman testified that Lacs died no earlier than 3 a.m. on September 17. *Id.* 452-53.

During closing arguments, the prosecution disavowed its jailhouse witnesses (McElroy and Turner), asserting that "we would like to distance ourselves from them as far as possible."

Id. 544. Thus, by the end of the evidentiary submissions the prosecution failed to prove that Wiggins admitted the murder, presented no forensic evidence indicating Wiggins entered Ms. Lacs' apartment or was involved in the murder, and failed to present any eyewitness testimony or other direct evidence proving Wiggins' guilt. Additionally, the state's own witnesses contradicted the state's case in critical respects. Chianti Thomas, on whom the prosecution relied to establish Wiggins' presence near Ms. Lacs' apartment on the 15th, testified that the person she saw left the building while Ms. Lacs was still alive. Edith Vassar testified that she was certain she spoke to Ms. Lacs on September 16. The state nevertheless contended that Wiggins must have been the murderer because he was near the apartment on the 15th, and (according to Geraldine Armstrong) possessed Ms. Lacs' car and credit cards by 8 p.m. that night.

C. The Conviction

The trial court convicted Wiggins. The court rejected the testimony of McElroy and Turner. CA App. 546-47. The court nevertheless concluded that Wiggins must have committed the murder. That conclusion rested on a chain of inferences. The court concluded that Ms. Lacs must have been robbed before her car and credit cards were used on the evening of the 15th; that the robbery must have occurred when Ms. Lacs' apartment was ransacked; and that Ms. Lacs must have been murdered when the apartment was ransacked. Because Wiggins was present at a time when (in the court's view) the robbery and ransacking must have occurred and had possession of the stolen items, the court concluded that Wiggins must have been the murderer.

In reaching that result, the trial court purported to disavow reliance on "any presumption arising from the recent possession of stolen property." CA App. 550. The court stated that it was instead relying on "all the evidence," but did not identify what evidence supported the judgment. *Id.* The court rejected Ms. Vassar's testimony that Ms. Lacs was alive on Friday the 16th, stating that it was inconsistent with what the court described as "overwhelming" evidence that Ms. Lacs died on the 15th. *Id.* 548-50. The court rejected the defense's expert forensic testimony for the same reason, and not because the expert's methods or analysis were flawed in any way. The court made no mention of the absence of any forensic evidence placing Wiggins in the victim's apartment, or of the evidence showing that someone else had been in the apartment. The court likewise did not mention Chianti Thomas's testimony that the man she saw on the 15th left the building while Ms. Lacs was still alive.

D. Sentencing

After entering the verdict, the trial court granted a continuance to permit the defense to prepare for sentencing. When proceedings recommenced in October 1998, Wiggins' counsel requested jury sentencing, despite having chosen a judge trial to decide guilt because Baltimore County juries are too "bent towards guilt" and "death oriented." CA App. 1213.

Wiggins' counsel opted to "retry guilt" by arguing that Wiggins was not a principal in the first degree under Maryland law. *Id.* 1192-93, 1199. They knew, however, that all prospective jurors would receive an instruction that Wiggins "has been found guilty of the murder of Florence Lacs in the first degree and the robbery of Florence Lacs." *Id.* 570. Similarly, counsel knew that after the evidence had been submitted, the judge would instruct the jury that "Kevin Wiggins has been convicted of murder in the first degree of Florence Lacs and the robbery of Florence Lacs. This conviction is binding upon you. Even if you believe the conviction to have been in error, you must accept that fact." *Id.* 982. Wiggins' counsel was thus forced to concede in closing that Wiggins "has been convicted" and that the jury "cannot change that." *Id.* 1018. Counsel could only suggest that it might be "at least reasonably possible, if not highly probable, that Florence Lacs died at the hands of someone other than Kevin Wiggins." *Id.* 1019. In response, the prosecution reiterated the judge's instructions that Wiggins "has been convicted of first degree murder and robbery" and that the jurors' duty was to "consider his crime" and "weigh that . . . against what you know about his background." *Id.* 1034, 1038. The jurors, however, knew nothing of that background. Wiggins' counsel conducted no additional investigation or preparation for the sentencing beyond what they had done for trial, and they introduced no mitigation evidence. Thus, when the jury weighed the crime against Wiggins' background, they knew only the stipulated fact that Wiggins had no prior convictions. The jury condemned Wiggins to death.

A divided Maryland Court of Appeals affirmed the conviction and sentence.

E. State Postconviction Proceedings

In 1993, Wiggins filed a petition for postconviction relief with the state court. The evidentiary hearing focused on allegations that Wiggins had not received effective assistance of counsel. The evidence established that defense counsel had not investigated or prepared a mitigation case. Indeed, each lawyer testified that the other was responsible for doing so. Pet. App. 52a. Counsel failed to prepare a social history or hire an expert to do so, despite knowing that funds were available for that purpose and that such analyses were a routine practice in their office. Pet. App. 53a; CA App. 1193-94.

The social history submitted to the postconviction court showed that Wiggins suffered horrible abuse. His mother was a chronic alcoholic. Pet. App. 165a-166a. During his childhood, she frequently left him and his sisters alone for days at a time. *Id.* 54a, 166a-167a. She would hide food from her children before she deserted them, leaving them to beg for food or pick it from trash cans. *Id.* 166a-167a. The children often went hungry for days; at times Kevin had nothing to eat but paint chips. *Id.* 167a. When Mrs. Wiggins was home, she would have sex in front of the children, sometimes while they were in the same bed. *Id.* 171a. If Mrs. Wiggins found that her children had eaten any of the food in the house, she would beat them with belts, straps, even furniture. *Id.* 167a-168a. On one occasion, according to Wiggins' sister, the mother forced Wiggins' hands against a hot stove burner to punish him. *Id.* 154a, 169a-171a.

As a result of this abuse, Wiggins and his sisters were placed in foster care when Wiggins was six. Pet. App. 173a. His initial foster mother's methods of discipline included biting the children and twisting their flesh. *Id.* 54a, 175a-176a. That abuse led to the children being moved again. *Id.* The second foster mother beat the children with straps and belts. *Id.* 176a. Her husband repeatedly molested and raped Wiggins during the young boy's years in the home. *Id.* 54a, 177a-179a. Shortly after this sexual abuse began, Wiggins lost interest in eating, and became so malnourished that he was hospitalized. *Id.* 179a. An I.Q. test taken at this time indicated a borderline retardation level of 72. *Id.* 181a.

At age 16 Wiggins ran away from home, lived on the street for a time, and spent brief periods in other foster homes. Pet. App. 184a-188a. He eventually returned to his second foster home because it provided some stability. *Id.* 188a. After a few months, however, Wiggins was again moved. *Id.* 189a. In the next foster home, he and other foster children were raped repeatedly by the foster mother's sons. *Id.* 54a,190a. When

Wiggins was 18, an examination indicated mental retardation, cranial pathology, and possible head trauma. *Id.* 192a.

Based on this evidence, the state postconviction court ruled from the bench that trial counsel had been ineffective:

> I don't even 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 just — I would be flabbergasted if the Court of Appeals said anything else. I really don't think that is even a close question.

CA App. 1431. The court also found, based on the documents and testimony, that Wiggins' trial counsel did not know of this mitigation evidence. *Id.* at 1437. Three and a half years later, however, the court issued a final written decision that made no mention of the prior ruling and concluded that counsel's failure to investigate mitigation evidence was a permissible "trial tactic." Pet. App. 155a-156a.[2] The court did, however, reaffirm that Wiggins' counsel did not know of the mitigating evidence presented during the postconviction hearing. *Id.* 142a n.269; *see also id.* 53a & n.15. A divided Maryland Court of Appeals affirmed. *Id.* 92a-130a.

F. District Court Proceedings

Wiggins filed a timely petition for relief pursuant to 28 U.S.C. § 2254 on August 6, 1999. Applying the standard of review applicable under 28 U.S.C. § 2254(d)(1), as explained in *Williams v. Taylor*, 529 U.S. 362, 412 (2000), Chief Judge Motz granted the petition.

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[2]Because of its length (256 pages) the opinion has been excerpted in the Appendix to this petition. The entire opinion can be found at CA App. 1451-1707.

The court invalidated Wiggins' conviction because the Maryland courts had unreasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, a criminal conviction denies due process if a reasonable factfinder could not have concluded that every element of the offense was proved beyond a reasonable doubt. The court explained why the evidence could not support upholding the conviction under that standard. Pet. App. 42a-50a.

The district court invalidated Wiggins' death sentence on the ground that the state courts had unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984). That result, the court concluded, followed *a fortiori* from *Williams v. Taylor,* 529 U.S. 362 (2000). As in *Williams*, Wiggins' counsel had failed to investigate and prepare a case in mitigation. Similarly, it would have been unreasonable to find a lack of prejudice because "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. The court declined to distinguish *Williams* on the ground that counsel's conduct here was a legitimate trial tactic. Such a conclusion was unreasonable, the Court held, for two reasons. First, counsel's decision to "retry" guilt was uninformed, and therefore unreasonable, because counsel had no appreciation of the strength of the mitigation case they might have presented. Second, counsel's choice here was so ill-advised that it could not be justified even had it been informed. *Id.* 55a.

G. The Fourth Circuit's Ruling

Invoking circuit precedent predating this Court's decision in *Williams v. Taylor*, the Fourth Circuit held that a state court decision would pass muster under 28 U.S.C. § 2254(d)(1) so long as it was "minimally consistent with the facts and circumstances of the case." Pet. App. 11a. Applying that "minimal consistency" standard, the court reversed Chief Judge Motz and reinstated both the conviction and sentence.

With respect to the conviction, the court held that the state court decision was "minimally consistent with the historical record of facts" because the Maryland Court of Appeals had rejected the conclusion that the robbery and murder were committed after the theft of the victim's car and personal property, Pet. App. 13a, and because the state trial judge had purported to rely on "all the evidence" and not merely a presumption arising from Wiggins' possession of stolen goods. *Id.* 14a n.5. To the extent the court examined the evidence independently (as opposed to merely asking whether the state courts had applied the correct legal standard), it concluded that the state courts had applied *Jackson* reasonably. *Id*. 13a-17a. The Fourth Circuit concluded that it could reasonably be inferred that Ms. Lacs died on September 15, "thus implicating Wiggins in more than mere theft or robbery," and that Wiggins had ample time (30 minutes, in the court's view) to commit the murder and robbery. *Id.* 15a-16a. The court did not discuss most of the evidence contradicting that inference, including the absence of any forensic evidence that Wiggins entered Ms. Lacs' apartment (a particularly telling absence given that Wiggins was painting that day and thus could have been expected to leave paint residue behind) and the forensic evidence indicating that someone other than Wiggins had been in the apartment. Nor did the court mention the alternative hypothesis, discussed by the district court, that the Armstrongs were responsible for the crime. Thus, the court never analyzed whether a consideration of all of the evidence could support beyond a reasonable doubt the conclusion that Wiggins murdered Ms. Lacs.

With respect to sentencing, the Fourth Circuit held that the district court erred in concluding that *Williams v. Taylor* had any bearing on the question whether the state court had applied *Strickland v. Washington* unreasonably. According to the court, *Williams* "merely reaffirms the long settled rule . . . that defendants have a constitutional right to provide a factfinder with relevant mitigating evidence." Pet. App. 19a. Concluding that any similarity between this case and *Williams* was "superficial," the Fourth Circuit held that "*Williams* did not establish a *per se* rule that counsel must develop and present an exhaustive social history." *Id.* 20a. Here, the court held, Wiggins' trial counsel "knew" the key facts of Wiggins' childhood – including physical abuse by his mother, and sexual abuse by foster parents – because social service records disclosed those facts. For this reason, the court believed that counsel had investigated sufficiently to justify the "strategic choice" to forego mitigation in favor of retrying guilt. *Id.* 21a. The court did not mention the specific factual findings of the state postconviction court that Wiggins' counsel did not know about Wiggins' history of abuse and that the social service records did not document that history. *See* page 11 *supra*. Nor did the court mention the district court's ruling, which was based on an examination of the social service records (*see* Pet. App. 53a n.15), that those records did not contain evidence of abuse.[3] The court also held, citing pre-*Williams* Fourth Circuit precedent, that "the jury could just as easily have viewed Wiggins' childhood and limited mental capacity as an indicator of future lawlessness," *id.* 23a – even though Wiggins had no criminal record and nothing in that evidence suggested a predisposition to violence.

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[3]In seeking rehearing, Petitioner pointed out this error and provided a complete set of the records for the court's review. The petition was denied without comment. Pet. App. 157a-158a. Those records have been lodged with the Clerk of this Court.

Chief Judge Wilkinson concurred. Though stating his view that Wiggins "very probably committed the heinous offense for which he stands convicted," the Chief Judge was unable to "say with certainty that he did so," and noted "unexplained items" of evidence such as "the unidentified fingerprints, baseball cap, fibers and hairs" as well as the fact that Wiggins "had no prior record." Pet. App. 24a. Judge Niemeyer also wrote separately. He questioned whether "the State court reasonably applied *Strickland*," noting that "[counsel] could have . . . insisted on arguing liability and still have maintained that any death sentence would be inconsistent with the mitigating circumstances of Wiggins' miserable upbringing and marginal intelligence." *Id.* 25a. He nevertheless concurred, though without full confidence in the result. *Id.* 26a.

REASONS FOR GRANTING THE PETITION

This case warrants review for two reasons. First, the Fourth Circuit's application of *Jackson v. Virginia* conflicts with *Jackson* itself as well as decisions of other Courts of Appeals. If left uncorrected, that decision will effectively eliminate *Jackson* claims in postconviction proceedings under § 2254(d) in the Fourth Circuit. Second, the Fourth Circuit's application of *Strickland v. Washington* directly conflicts with this Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000) (reversing Fourth Circuit's misapplication of *Strickland* in § 2254(d) context), as well as numerous decisions of the Courts of Appeals both before and after *Williams*. Indeed, the Fourth Circuit's *Strickland* ruling reflects a persistent refusal to recognize what this Court and other Circuits recognize as fundamental: in a capital case, counsel must investigate potential mitigating evidence, and cannot make a "reasonable" tactical decision to forego a mitigation case at sentencing absent such an investigation.

More generally, the decision in this case makes clear that the Fourth Circuit continues to be in conflict with the teachings of this Court, and the law of other Circuits, respecting the appropriate standard of review under § 2254(d)(1). In *Williams v. Taylor*, this Court held that the proper standard of review in a federal habeas case is whether the state court's application of federal law was "objectively reasonable." *Id.* at 409. *Williams* rejected the Fourth Circuit's far more deferential approach, which authorized relief only if the state court "applied federal law in a manner that reasonable jurists would all agree is unreasonable." *Id.* (quotation omitted).[4]

Although it paid lip service to *Williams* in this case, the Fourth Circuit actually applied a standard of review as lax as the one this Court previously rejected. Invoking pre-*Williams* precedent that set forth the very standard this Court invalidated in *Williams*, the Fourth Circuit held that to survive review under § 2254(d)(1) a state court decision need only be "minimally consistent with the facts and circumstances of the case." Pet. App. 11a (quoting, *inter alia*, *Wright v. Angelone*, 151 F.3d 151, 156-57 (4th Cir. 1998)). But it is obvious that a state court's application of federal law can be objectively unreasonable even though it is "minimally consistent" with "the facts and circumstances." The Fourth Circuit thus simply repackaged the standard this Court rejected in *Williams*.

In this regard, the Fourth Circuit is in conflict not only with *Williams* but also with the Second, Third, Eighth and Ninth Circuits. As the Second Circuit explained: "Some

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[4]Even before *Williams,* the Third and Eighth Circuits had applied an "objective unreasonableness" standard, and had criticized the Fourth Circuit's "all reasonable jurists" standard as insulating from review "all but those decisions so off the mark that they approach judicial incompetence." *Long v. Humphrey*, 184 F.3d 758, 760 (8th Cir. 1999); *see also Matteo v. Superintendent*, 171 F.3d 877, 889-90 (3d Cir. 1999) (en banc).

increment of incorrectness beyond error is required. We caution, however, that the increment need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *See Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000) (internal quotation marks and citation omitted). The Third and Eighth Circuits similarly ask "whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified." *Keller v. Larkins*, 251 F.3d 408, 418 (3d Cir. 2000) (internal citation and quotation omitted), *cert. denied,* 122 S. Ct. 396 (2001); *see also Boyd v. Minnesota*, 274 F.3d 497, 500 (8th Cir. 2001) (same). And the Ninth Circuit has interpreted *Williams* as reinforcing the standard previously established by the Third and Eighth Circuits: "[T]he court adopted an 'objectively unreasonable' standard, employing the language used in decisions by the Third and Eighth Circuits. . . . The Supreme Court thus chose to adopt the interpretation of AEDPA that espoused the more robust habeas review." *Van Tran v. Lindsey*, 212 F.3d 1143, 1150-51 (9th Cir.), *cert. denied,* 531 U.S. 944 (2000); *accord Gunn v. Ignacio*, 263 F.3d 965, 971 (9th Cir. 2001). *See also Neal v. Puckett*, 286 F.3d 230, 235-36 (5th Cir. 2002) (en banc) (endorsing and applying more stringent standard after *Williams*), *petition for cert. filed,* (U.S. June 13, 2002) (No. 01-10886).

Because it reflects no real change from its pre-*Williams* standard, the Fourth Circuit's "minimal consistency" test conflicts with the law of these Circuits. Parallel circumstances exist in the First Circuit which, like the Fourth Circuit here, refused to alter its supine standard of review after *Williams.* In the First Circuit, it remains the case that "a state court decision is objectively unreasonable only if it 'falls outside the universe of plausible, credible outcomes.'" *Mastracchio v. Vose*, 274 F.3d 590, 597 (1st Cir. 2001) (quoting the pre-

Williams decision of *O'Brien v. Dubois,* 145 F.3d 16, 25 (1st Cir. 1998)). Other Circuits have criticized that test as inconsistent with *Williams*, *see Van Tran v. Lindsey*, 212 F.3d at 1151; *Francis S. v. Stone*, 221 F.3d at 111, just as they criticized the First Circuit's test in decisions preceding *Williams*. *See Long v. Humphrey*, 184 F.3d 758, 760 (8th Cir. 1999) ("outside-the-universe-of-plausible-outcomes test excludes all but those decisions so off the mark that they approach judicial incompetence"); *Matteo v. Superintendent*, 171 F.3d 877, 889 (3d Cir. 1999).[5]

There thus remains a pressing need to bring clarity and national consistency to the standard of review applied under § 2254(d)(1). As this case vividly confirms, the Fourth Circuit's lax "minimal consistency" test will, in its specific applications, continue to generate conflicts with other Circuits applying established federal law in cases under § 2254(d)(1) and will deny habeas petitioners in that Circuit the right to review that Congress has prescribed.

I. THE FOURTH CIRCUIT'S ADJUDICATION OF PETITIONER'S *JACKSON V. VIRGINIA* CLAIM CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court held that proof beyond a reasonable doubt was a "substantive constitutional standard." *Id.* at 317. *Jackson* replaced the "no

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[5]The Seventh Circuit has in the past articulated a "minimal consistency" test, but recently clarified its law in a manner that accords with the Second, Third, Eighth and Ninth Circuits, stating that "[i]n making this determination, we do not 'defer' to the state court decision; AEDPA does not provide for the *Chevron* deference afforded administrative agencies," and that its review was "not so limited as to require a finding of judicial incompetence before we are allowed to overturn a state court's decision." *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002).

evidence" rule of *Thompson v. City of Louisville*, 362 U.S. 199 (1960), which had provided that due process was satisfied unless there was no evidence supporting a conviction. 443 U.S. at 316. As *Jackson* made clear, "it could not seriously be argued that . . . a 'modicum' of evidence [which would satisfy the 'no evidence' test] could by itself rationally support a conviction beyond a reasonable doubt." *Jackson*, 443 U.S. at 320 (internal quotation marks omitted).

The Fourth Circuit's holding that the Maryland courts applied *Jackson* reasonably in this case conflicts with *Jackson* itself, and conflicts in principle with the holdings of other Circuits in two ways.

First, the decision conflicts with *Jackson*'s clear teaching that "[a] federal court has a duty to assess the historical facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court." *Jackson*, 443 U.S. at 318. Here, the panel accepted at face value the state trial judge's bare assertion of the thoroughness of his approach and the state appellate court's acquiescence in that assessment. That is plainly insufficient to discharge a federal court's duty under § 2254(d)(1), as other Circuits have recognized. In *Hurtado v. Tucker*, 245 F.3d 7, 18 (1st Cir.), *cert. denied*, 122 S. Ct. 282 (2001), the First Circuit made clear that in deciding whether a state court has applied *Jackson* unreasonably, a federal habeas court must assess the evidence independently and cannot rely on the state court's conclusion that the evidence was sufficient. *Id.* ("Even with the deference due by statute to the state court's determination, the federal habeas court must itself look to 'the totality of the evidence' . . . . The failure of the state court to give appropriate weight to all of the evidence may mean that its conclusion is objectively unreasonable.") In *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 1463 (2002), the Fifth Circuit likewise made clear that the state court's mere invocation of the *Jackson* standard does not obviate the requirement of an independent review of the evidence.

Second, the Fourth Circuit's decision conflicts with *Jackson*'s requirement that the reasonable doubt inquiry be based on "*all of the evidence*," 443 U.S. at 319 (emphasis in original), and not merely the evidence that might support a conviction. As the district court explained, neither the state trial court's guilty verdict nor the Maryland Court of Appeals' application of *Jackson* in evaluating that verdict ever explained how a reasonable factfinder could have found guilt beyond a reasonable doubt based on *all* of the evidence. Instead, those courts ignored the most important evidence contradicting the hypothesis of guilt. Specifically, the state courts did not come to grips with the absence of any forensic evidence that Wiggins entered Ms. Lacs' apartment – evidence that would certainly have existed had he been in the apartment at 5 p.m. on September 15 immediately after a day of painting and working with sheetrock. Nor did those courts attempt to explain the forensic evidence (the fingerprints and the Ryder cap) indicating that someone else was in the apartment when Ms. Lacs was murdered. These courts similarly neglected the role of the Armstrongs, even though Geraldine (like Wiggins) had the victim's car and possessions on the evening of September 15, and was initially charged with the murder and robbery.

The courts likewise did not consider the plausibility of the state's theory that Wiggins entered Ms. Lacs' apartment, thoroughly ransacked it, ran a tub full of water, drowned Ms. Lacs, and found and stole all the items in the few minutes that would have been available to do so under the state's view of the facts. Contrary to the Fourth Circuit's unsupported statement, the evidence does not permit the inference that Wiggins had 30 minutes to commit this crime. His employer testified that he was gone approximately 20 minutes. CA App. 838. Although it would only have taken two minutes or so to move the sheetrock, it would have taken at least five minutes to walk from the employer's office to Ms. Lacs' apartment and another five to walk back. *Id.* 839, 843. Additionally, Wiggins spent time in conversation with Ms. Lacs and then left the building. When that is factored in, there would have been a few minutes at most available to Wiggins – an interval not even remotely sufficient to do what he is convicted of having done. And that assumes Wiggins actually returned to Ms. Lacs' apartment after Chianti Thomas saw him leave, a supposition that lacks any evidentiary support.

Indeed, the *only* way in which Wiggins' conviction can be described as supported by the record is to ignore this contradictory evidence. *Jackson*, however, permits only "reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. And *Wright v. West*, 505 U.S. 277 (1992), did not change that rule. Although the Court made clear that the evidence need not eliminate every plausible hypothesis of innocence, that decision did not purport to establish that reviewing courts can ignore "all of the evidence" in applying *Jackson* and focus myopically on only the evidence supporting a hypothesis of guilt. That is particularly true in cases – such as this one – where the conviction rests entirely on inferences from circumstantial evidence.

Unlike the Fourth Circuit here, other Courts of Appeals applying *Jackson* in cases under § 2254(d)(1) have recognized their duty to guard against "conjecture camouflaged as evidence." *Piaskowski v. Bett*, 256 F.3d 687, 693 (7th Cir. 2001). In *Piaskowski*, for example, the Seventh Circuit made clear that under *Jackson* "each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation." *Id.* Similarly, in *United States v. Coleman*, No. 99-50018, 2001

U.S. App. LEXIS 18004, at *6-*7 (9th Cir. Aug. 7, 2001) (unpublished), the Ninth Circuit determined that an inference insufficiently supported by the record could not sustain a finding of guilt beyond a reasonable doubt. *Cf. United States v. Hall*, 999 F.2d 1298, 1299-1300 (8th Cir. 1993) ("We believe that while a reasonable mind might have followed the path outlined by the government, it would nevertheless still have had to entertain a reasonable doubt with respect to the identity of the perpetrator . . . of the crime"). The Fourth Circuit's approach in this case is at odds with those decisions.[6] If left uncorrected, the Fourth Circuit's "minimal consistency" approach to evaluating *Jackson* claims under § 2254(d)(1) will, as a practical matter, eliminate the substantive protection of *Jackson* in cases under that provision.

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[6]In a case decided before Congress amended § 2254 in 1996, the Fourth Circuit applied *Jackson* correctly. "Favoring the prosecution with all inferences does not mean that we ignore evidence that is in the record, but which they ignore." *Evans-Smith v. Taylor*, 19 F.3d 899, 910 n.29 (4th Cir. 1994). In *Evans-Smith*, the Fourth Circuit condemned as inconsistent with *Jackson* the very reasoning that the state courts employed in this case to convict Wiggins and to affirm that conviction – *i.e.* reasoning backward from the conclusion that Wiggins committed the murder and rejecting all evidence inconsistent with that hypothesis. The Fourth Circuit did not mention the *Evans-Smith* decision in its opinion in this case, even though it was briefed extensively and was discussed in the petition for rehearing – thus suggesting that the Fourth Circuit believes its "minimal consistency" standard of review under § 2254(d)(1) obviates any need to determine whether a state court has applied established federal law incorrectly.

II. THE FOURTH CIRCUIT'S APPLICATION OF *STRICKLAND V. WASHINGTON* CONFLICTS WITH THIS COURT'S DECISION IN *WILLIAMS V. TAYLOR*, AS WELL AS THE DECISIONS OF OTHER CIRCUITS.

This Court should also grant review of the Fourth Circuit's extraordinary ruling that *Strickland v. Washington* does not impose on capital counsel a duty to investigate potential mitigation evidence, and that counsel's choice to forego putting on mitigation evidence is "virtually unchallengeable" so long as counsel knows rudimentary facts about the defendant's background. Pet. App. 17a. That decision conflicts with *Williams v. Taylor* as well as the prevailing law of the circuits.

In rejecting the district court's conclusion that *Williams v. Taylor* governed this case, the Fourth Circuit asserted that "*Williams* does not establish a *per se* rule that counsel must develop and present an exhaustive social history . . . in a capital murder case." Pet. App. 19a. Rather, the court opined, *Williams* "merely reaffirms the long settled rule, in the context of a particularly glaring failure of counsel's duty to investigate, that defendants have a constitutional right to provide a factfinder with relevant mitigating evidence." *Id.* (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989)). But that plainly misreads *Williams*. It was not an Eighth Amendment case about a defendant's right to present mitigating evidence; it was a Sixth Amendment case about counsel's obligation to investigate and present that evidence. And *Williams* did not state, or even remotely imply, that only "particularly glaring failure[s]" would raise issues under *Strickland v. Washington*. Pet. App. 19a. To the contrary, the *Williams* Court found ineffective assistance because "trial counsel failed to conduct an investigation that would have uncovered substantial amounts of mitigation evidence" and "failed to present evidence showing that Williams had a deprived and abused upbringing." 529 U.S. at 415 (O'Connor, J., concurring).[7]

This case is not materially different from *Williams*. Like Williams, Wiggins was abused and then abandoned by his mother. Like Williams, Wiggins was placed in abusive foster care settings. Like Williams, Wiggins was borderline mentally retarded. In addition, Wiggins was subject to ongoing sexual abuse by his foster father, as well as sexual abuse in other foster homes. Wiggins was also homeless for a significant portion of his adult life, as well as part of his adolescence. But unlike Williams, Wiggins had no criminal record or history or violence. In *Williams*, the state introduced significant evidence of the defendant's future dangerousness. Indeed, the dissenting opinion noted that Williams had engaged in a life-long crime spree, and noted the "strong evidence that [Williams] would continue to be a danger to society, both in and out of prison." *Williams*, 529 U.S. at 419 (Rehnquist, C.J., concurring in part and dissenting in part). Here, in contrast, the prosecution introduced no evidence (apart from the underlying facts of the crime) to support the death sentence in Wiggins' case.[8]

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[7]*Bell v. Cone*, 122 S. Ct. 1843, 1854 (2002), is not to the contrary. In *Bell*, trial counsel presented vast mitigating evidence during the guilt phase, thus demonstrating extensive investigation and preparation, and simply chose not to recall those witnesses at sentencing. *Id*. at 1852-53. But trial counsel "*investigated* the possibility of calling other witnesses," *id*. at 1853 (emphasis added), thereby satisfying the constitutional requisite. Furthermore, "the prosecution adduced overwhelming physical and testimonial evidence showing that respondent perpetrated the crimes and that he killed . . . in a brutal and callous fashion." *Id*. at 1847-48.

[8]The Fourth Circuit is also in conflict with *Williams* in its holding that counsel reasonably could have concluded that mitigation evidence would have done more harm than good. *See* Pet. App. 22a. In *Williams*, this Court made clear that counsel's performance was deficient, and that Williams

The Fourth Circuit sought to distinguish *Williams* on the ground that counsel here made a tactical decision to forego a mitigation case, whereas counsel in *Williams* merely defaulted on his responsibilities. In that regard, however, the Fourth Circuit's decision conflicts with the prevailing law in the Circuits in two related respects.

First, the Fourth Circuit has rejected the principle that "[i]n a capital case the attorney's duty to investigate all possible lines of defense is *strictly observed*." *Stouffer v. Reynolds*, 168 F.3d 1155, 1167 (10th Cir. 1999) (emphasis added) (internal citation and quotations omitted). That principle was well-established in other Circuits before this Court's decision in *Williams*, and it has been pervasively reaffirmed since *Williams* was decided. *See Neal,* 286 F.3d at 236-37 (en banc) ("[W]e consider it indisputable that, in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a reasonably substantial, independent investigation into potential mitigating circumstances.") (internal quotation omitted);[9] *Mayfield v. Woodford*, 270 F.3d 915, 927-28 (9th Cir. 2001) (en banc); *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002) (noting that "the [*Williams*] Court held that counsel's failure to investigate and present evidence of a defendant's mental defect and social history constitutes deficient performance"), *cert. denied*, 122 S. Ct. 2645 (2002); *Lindstadt v. Keane*, 239 F.3d 191, 200 (2d Cir. 2001) (noting

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suffered prejudice, even though "not all of the additional evidence was favorable to Williams" in that (unlike the evidence here) it included past criminal activity. 529 U.S. at 396.

[9]To assess counsel's performance under that standard, the Fifth Circuit "look[s] to such factors as what counsel did to prepare for sentencing, what mitigation evidence he had accumulated, what additional 'leads' he had, and what results he might reasonably have expected from those leads." *Id.* at 237.

that *Williams* "[held] that a failure to investigate and present mitigating evidence during sentencing hearing constituted ineffective assistance"); *Jermyn v. Horn*, 266 F.3d 257, 308 (3d Cir. 2001) (noting that *Williams* "[found] counsel ineffective because they failed to conduct an investigation that would have uncovered information graphically describing Williams' 'nightmarish childhood' and the fact that he had been severely abused by his father and placed in foster care."); *Coleman v. Mitchell*, 268 F.3d 417, 451 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1639 (2002). Whereas the prevailing law in other Circuits makes investigation of a capital defendant's background virtually a mandatory duty absent unusual circumstances, the Fourth Circuit considers it just one option among many for defense counsel.

Second, the Fourth Circuit's decision conflicts with the prevailing standards in other Circuits for determining when counsel has undertaken sufficient investigation to justify deferring to counsel's trial tactics. In this case, the Fourth Circuit held that counsel's decision should be considered "virtually unchallengeable," Pet. App. 17a, so long as counsel has "some knowledge about potential avenues of mitigation on behalf of a client" – irrespective of whether counsel follows up on that knowledge by investigating it. *Id.* 19a. Thus, the Fourth Circuit concluded in this case that counsel's knowledge of the rudimentary facts about a defendant's background (here, that he was taken from his mother and placed in foster care, and was of limited intelligence) *discharges* counsel's duty to investigate further. The prevailing law in other Circuits, however, is that possessing such evidence *triggers* the duty to investigate. *E.g. Lockett v. Anderson*, 230 F.3d 695, 714 (5th Cir. 2000) (finding ineffectiveness where "there was enough information before counsel . . . to put him on notice" that he should have pursued further investigation); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) (counsel had "a small amount of information" that necessitated further inquiry).

In *Coleman v. Mitchell*, for example, the Sixth Circuit similarly held that counsel could not make a reasoned decision to forego mitigation in favor of a residual doubt defense because counsel had not investigated, and therefore did not realize he could have presented, a powerful case based on the defendant's abused childhood. 268 F.3d at 447-54. *Accord Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000) (finding *Strickland* violation, even though counsel's decision could "be considered a strategic one, [because] it was a decision made without undertaking a full investigation"), *cert. denied*, 531 U.S. 1035 (2000). The Tenth Circuit has rejected as unreasonable counsel's decision to focus on "sympathy and mercy" rather than a mitigation case when counsel did not thoroughly investigate available mitigation evidence prior to choosing his strategy. *Battenfeld v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001). As both *Coleman* and *Battenfeld* explain, counsel who has not thoroughly investigated available defenses cannot "competently advise [a client] regarding the meaning of mitigation evidence and the availability of possible mitigation strategies," much less make an informed decision about which course to pursue. *Battenfeld*, 236 F.3d at 1229; *Coleman*, 268 F.3d at 447.

The Seventh, Eighth, Ninth and Eleventh Circuits apply similar tests. *See Washington v. Smith*, 219 F.3d 620, 633 (7th Cir. 2000); *Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir. 1989); *Antwine v. Delo,* 54 F.3d 1357, 1367 (8th Cir. 1995) ("if limiting the investigation was not reasonable, then neither was the subsequent strategic choice"); *Hill v. Lockhart*, 28 F.3d 832, 845 (8th Cir. 1994); *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001); *Jackson v. Herring*, 42 F.3d at 1367 ("Thus, our case law rejects the notion that a strategic decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.") (internal quotations omitted); *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991).

In sum, the Fourth Circuit is fundamentally out of step with the Sixth Amendment principles established by this Court and applied in other Circuits. It should go without saying in a capital case that a decision as fateful as deciding to forego a mitigation defense cannot be reasonable unless it is fully informed. That much follows ineluctably from the bedrock proposition that "only when the jury is given a vehicle for expressing its reasoned moral response . . . in rendering its sentencing decision . . . can we be sure that the jury . . . has made a reliable determination that death is the appropriate sentence." *Penry v. Johnson*, 121 S. Ct. 1910, 1920 (2001) (internal citation omitted). Given the absolute centrality of mitigation issues to the sentencing judgment, counsel must know – and must be in a position to explain to their clients – what they will be giving up by foregoing mitigation and opting for a different sentencing defense (such as "retrying guilt"). This Court has recognized that fundamental point, and Courts of Appeals other than the Fourth Circuit routinely apply it.

Finally, the Fourth Circuit's analysis of the *Strickland* issue starkly illustrates why a "minimal consistency" standard of review is inappropriate under § 2254(d)(1). In reaching the conclusion that Wiggins' counsel was adequately informed about his background, the court correctly noted that counsel had gleaned some basic knowledge from social service records. Pet. App. 20a. But the court made a serious error in its further assumption that those records contained evidence of the abuse and neglect that prompted his placement in foster care (including having his hands burned as a child as a result of his mother's abuse), or of the sexual violence perpetrated against him by foster parents and others, or of most of the other horrible realities of his youth. The state trial court, which took evidence and heard the testimony of Wiggins' trial counsel, made specific factual findings to the contrary. The district court, which examined the social service records, likewise concluded (in a ruling the Fourth Circuit does not mention) that they did not contain this information. Pet. App. 53a & n.15. Indeed, those records speak for themselves and contain none of what the Fourth Circuit assumed they contain. Thus, possession of those records cannot possibly have provided trial counsel with information sufficient to make an informed tactical decision to forego a case in mitigation.[10]

[10]The Fourth Circuit's mistake was based in part on the Maryland Court of Appeals' equally erroneous assumptions about what the social service records contained. Pet. App. 20a-21a. As Chief Judge Motz explained, the Maryland Court of Appeals' contrary statement was entirely unreasonable; the social service records themselves demonstrate by clear and convincing evidence that such physical and sexual abuse is *not* referenced, and trial counsel had access to no other information. Pet. App. 53a-55a & n.15; 28 U.S.C. § 2254(d)(2), (e)(1).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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