No. 02-311

IN THE

Supreme Court of the United States

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

REPLY BRIEF

DONALD B. VERRILLI, JR.*
LARA M. FLINT
JENNER & BLOCK, LLC
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

* *Counsel of Record*

October 15, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF AUTHORITIES

CASES

STATUTES

REPLY TO BRIEF IN OPPOSITION

The brief in opposition offers no response to the three principal arguments for certiorari set forth in the petition. Respondents do not address the conflict between the Fourth Circuit's "minimal consistency" standard – which the court in this case described as the "criterion of reasonableness for purposes of § 2254(d)" (Pet. App. 11a) – and the significantly stricter standard of review that applies in other Circuits. Nor do Respondents address the conflict between the Fourth Circuit's application of *Jackson v. Virginia*, 443 U.S. 307 (1979), in this case, and the much stricter standard used by other Circuits. Respondents likewise say nothing about the conflict between the Fourth Circuit's "particularly glaring failure" standard for evaluating whether capital counsel have conducted an investigation sufficient to satisfy the Sixth Amendment, *see Strickland v. Washington*, 446 U.S. 668 (1984), and the far stricter standard that prevails in other Circuits. Instead of answering the arguments for review set forth in the petition, respondents have provided a lengthy defense of the Fourth Circuit's decision on the merits. Respondents' arguments on that score are wrong, but for present purposes they are beside the point.

1. Respondents make no effort to defend the Fourth Circuit's "minimal consistency" standard of review for cases under 28 U.S.C. § 2254(d), which, for all intents and purposes, repudiates this Court's teaching in *Williams v. Taylor*, 529 U.S. 362 (2000). In *Williams*, this Court rejected the standard of review previously applied in the Fourth Circuit in § 2254(d) cases on the ground that it was overly deferential to state court judgments. In response, however, the Fourth Circuit has simply interpreted *Williams* as though it approved the Fourth Circuit's prior approach. Only the form of words has changed. The Fourth Circuit standard rejected in *Williams* allowed for relief only if a state court

"applied federal law in a manner that reasonable jurists would all agree is unreasonable." *Williams*, 529 U.S. at 409 (quotation omitted). Now, the Fourth Circuit will allow relief only if a state court decision is not "minimally consistent with the facts and circumstances of the case." Both formulations provide relief only where the state court's determination is so far off the mark that it approaches judicial incompetence. Objectively unreasonable state court judgments can survive review under § 2254(d) under that Circuit's current standard of review just as they could under the standard invalidated in *Williams*, so long as they remain within the outer reaches of the plausible.

There thus remains a conflict between the Fourth Circuit and other courts over the appropriate standard of review in § 2254(d) cases. *See* Petition for Certiorari ("Pet.") at 15-18. So long as the Fourth Circuit continues to apply that standard of review, outcomes in cases under § 2254(d) will predictably diverge from those of other Circuits, and habeas petitioners in the Fourth Circuit will continue to be denied the full measure of protection that Congress intended when it enacted § 2254(d). That is powerfully confirmed by the Fourth Circuit's resolution of the *Jackson v. Virginia* issue, and especially of the *Strickland v. Washington* issue, in this case.

2. Respondents never come to grips with the issue raised in the petition respecting the proper application of *Jackson v. Virginia*. The fundamental problem with the Fourth Circuit's decision is that the court – like the Maryland Court of Appeals before it – did not consider all the evidence in concluding that a reasonable trier of fact could have found Wiggins guilty beyond a reasonable doubt. The factual record is plainly a troubling one, in which the finding of guilt

rested entirely on a chain of inferences from circumstantial evidence. Chief Judge Wilkinson acknowledged in concurrence that he could "not say with certainty" that the evidence showed guilt beyond a reasonable doubt. Pet. App. 24a. Although a court applying the *Jackson* standard need not "affirmatively rule out every hypothesis except that of guilt," *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion) (quotation omitted), neither must the habeas petitioner rule out a hypothesis of guilt. It is not enough that there is some evidence from which an inference of guilt can be drawn. The record *as a whole* must be sufficiently strong to support the inference of guilt *beyond a reasonable doubt.* And that assessment must be made on the basis of all the evidence. The stronger the evidence inconsistent with a hypothesis of guilt, the stronger the evidence supporting the hypothesis of guilt must be to sustain the conviction under *Jackson*. That is the principle that other Circuits have applied in vindicating *Jackson* claims (*see* Pet. at 21-22), and it is the principle the Fourth Circuit refused to follow in this case.

3. Respondents misconceive the Sixth Amendment issue raised in the petition for certiorari. As respondents would have it, the fundamental question in this case is whether Wiggins' trial counsel provided ineffective assistance of counsel by unreasonably choosing to "retry guilt" rather than presenting a case in mitigation at sentencing. But the heart of this case – and the issue on which the Fourth Circuit is in conflict with the prevailing law in other Circuits, as well as this Court's decision in *Williams v. Taylor* – is whether trial counsel adequately *investigated* the potential mitigation case that could be made on Wiggins' behalf. Without adequate investigation, trial counsel 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 v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001); *see also Coleman v. Mitchell*, 268 F.3d 417, 447 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1639 (2002).

The fact is that the Fourth Circuit differs sharply from other Circuits in the standard it applies to decide whether trial counsel in a capital case has conducted a sufficiently thorough investigation to meet the Sixth Amendment's requirements for effective assistance of counsel. The established rule in numerous Circuits is 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). As demonstrated, the Fifth, Sixth, Eighth, Ninth and Eleventh Circuits have all held – in circumstances analogous to those of this case – that trial counsel's "tactical" choice to forego a mitigation defense cannot be reasonable if counsel did not thoroughly investigate available mitigating evidence prior to making the choice. *See* Pet. at 25-29. To advise a client and make an informed tactical choice, trial counsel must know what they will be giving up if they forego a mitigation case in favor of an alternative defense.

In marked contrast, the Fourth Circuit in this case upheld defense counsel's choice to forego a mitigation defense in a situation in which counsel did not do the kind of investigation that other Circuits routinely require as a prerequisite for deferring to such tactical choices. In the Fourth Circuit, capital counsel need not conduct the kind of thorough investigation that other Circuits routinely require as a Sixth Amendment minimum. For the Fourth Circuit, it is

enough that counsel have "some knowledge about potential avenues of mitigation." Pet. App. 19a. The Fourth Circuit's opinion is replete with statements that only "a particularly glaring failure" or a "wholesale failure" of counsel's duty to investigate will justify Sixth Amendment relief. Pet. App. 17a, 19a. Indeed, the Fourth Circuit went so far as to claim that this Court's decision in *Williams* set forth that standard, even though *Williams* contains no language even remotely suggesting such a standard. And as a result of applying that lax standard, the Fourth Circuit rejected Wiggins' Sixth Amendment claim even though his counsel did not do the kind of investigation that other Circuits routinely require, and thus were in no position to assess – or to advise their client about – the relative strengths of a mitigation defense (which would have been extremely powerful here) and the effort to "retry guilt." There is thus a sharp and persistent conflict between the Fourth Circuit and the prevailing law of other Circuits on this important question.

When respondents do finally seek to defend the investigation that Wiggins' trial counsel undertook in this case, they egregiously misstate the record. Respondents cite testimony allegedly establishing that Wiggins' trial counsel had investigated and knew the mitigation evidence, and therefore made an informed decision to forego a mitigation case at sentencing. Brief in Opposition at 26-27. But – as respondents know full well – the testimony establishes far less than respondents suggest. Although Wiggins' counsel initially indicated that he knew the details of Wiggins' childhood, he ultimately testified only that "he knew that [information] as it was reported in other people's reports" – *i.e.*, the social service records. He had not done any investigation beyond obtaining those reports. After hearing the very testimony quoted by respondents, the state habeas

court made findings that Wiggins' trial counsel did *not* know the facts of Wiggins' childhood – the horrible privations and physical abuse inflicted by his mother, the repeated sexual predation to which he was subject while in foster care, the homelessness, and the other brutal facts of his youth. CA App. 1437 ("I have no reason to believe that [trial counsel] did have all of this information [in Wiggins' social history]"). *See also* Pet. App. 142a n.269 ("[N]ot a single report by any other health care professional reported the abuse. Nor was there a mention of abuse against Wiggins in any report of the DSS.").

The Maryland Court of Appeals acknowledged that the source of trial counsel's knowledge was the social service records. Pet. App. 121a-122a. That court, however, went on to err in concluding that those records included "detailed social service records that recorded incidences of physical and sexual abuse." *Id.* at 121a. The Maryland Court of Appeals made no mention of the specific findings made by the trier of fact on this issue – the state habeas court, which heard the testimony quoted by respondents – that trial counsel had not discovered the mitigating evidence developed in postconviction proceedings. In the district court, Chief Judge Motz examined the social service records, and concluded that the Maryland Court of Appeals had been "erroneous" in concluding that "much of the critical information . . . had been contained in social service records available to trial counsel." Pet. App. 54a n.16. Remarkably, the Fourth Circuit ignored the district court's unambiguous conclusion, and instead stated that Wiggins' trial counsel "did know about Wiggins' difficult childhood, as the district court acknowledged." Pet. App. 20a.

Ultimately this is not a matter on which there is room for reasonable interpretation. Either the social service records contain this evidence or they do not. If they do not, then there is no basis whatsoever for the factual finding on which the Maryland Court of Appeals rested, and which the Fourth Circuit cited to bolster its conclusion that Wiggins' counsel did not commit a "particularly glaring failure of counsel's duty to investigate." Pet. App. 19a. The social service records speak for themselves, are a part of the record of this proceeding, and have been submitted to this Court for review. They simply do not contain the powerful mitigating that would have been available had Wiggins' trial counsel adequately investigated Wiggins' background – or made use of available public funds to hire an expert to prepare a social history comparable to the one prepared for the postconviction proceedings (*see* Pet. App. 163a). No reasonable person could read the records and conclude that they support a finding that trial counsel knew of the physical and sexual abuse Wiggins suffered as a child, or of the many other horrible privations detailed in the social history prepared during the postconviction proceedings. Thus, there is no basis for relying on the statement by the Maryland Court of Appeals that the records contained the facts trial counsel needed to make an informed decision. *See* 28 U.S.C. § 2254(d)(2).

That an error so basic and so important could have occurred in this case vividly confirms the need for review. The Fourth Circuit's failure to come to grips with the record is a direct and obvious consequence of the supine standard of review the court continues to apply in § 2254(d) cases involving allegations of ineffective assistance of counsel. Future errors of this kind will be the predictable result of applying a "minimal consistency" test in § 2254(d) cases,

and of providing for relief only in cases involving "particularly glaring" or "wholesale" failures of capital counsel's duty to investigate potential mitigation evidence.

There is a pressing need for this Court to resolve the conflict between the Fourth Circuit and the prevailing law in other Circuits on this important Sixth Amendment issue. The adequacy of counsel's investigation arises in most, if not all, capital cases, and is thus certain to recur. Capital defendants in the Fourth Circuit will continue to be denied relief on their Sixth Amendment claims in situations where other Circuits would provide relief as a matter of course. On a matter as fundamental as the right to the effective assistance of counsel at capital sentencing, a conflict of this kind is intolerable.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

DONALD B. VERRILLI, JR.*
LARA M. FLINT
JENNER & BLOCK, LLC
601 13TH STREET, N.W.
WASHINGTON, D.C. 20005
(202) 639-6000

October 15, 2002

*Counsel of Record