No. 02-311

In the Supreme Court of the United States

KEVIN WIGGINS, PETITIONER

v.

SEWALL SMITH, WARDEN, ET AL.

(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The United States will address the following question:

Whether defense counsel rendered ineffective assistance under the Sixth Amendment to the Constitution when counsel elected not to conduct additional investigation of petitioner's background and not to present possibly mitigating evidence of his background at his capital sentencing after determining that the evidence could undercut counsel's strategy of creating doubt that petitioner had actually killed the victim.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the resolution of the question on which the Court granted certiorari, because claims of ineffective assistance of counsel are frequently asserted on collateral review in federal criminal cases. Although this case involves a state prisoner seeking relief under 28 U.S.C. 2254, the Court's decision will likely affect ineffectiveness claims brought by federal prisoners under 28 U.S.C. 2255 as well.

STATEMENT

1. On September 17, 1988, the mostly clothed body of 77-year-old Florence Lacs was found floating in a bathtub in her apartment in Woodlawn, Maryland. She was not wearing underwear and her skirt had been raised to her waist.

Quantities of a household cleaner and bug spray were found in the water. An autopsy showed that Lacs had minor trauma injuries that were consistent with a pre-death struggle and that the actual cause of death was drowning. There were no signs of forced entry, but the apartment had been ransacked. Lacs had last been seen alive on the afternoon of September 15, wearing the same outfit she was wearing when her body was found. Pet. App. 3a-4a, 94a-95a.

Petitioner was employed by a construction firm doing work in Lacs's apartment building at the time of her murder. On September 15, petitioner completed his daily work assignments shortly after 4 p.m. At approximately 5 p.m., petitioner was seen having a conversation with Lacs outside her apartment. At approximately 7:45 p.m., petitioner arrived at his girlfriend's house in Lacs's car. He and his girlfriend then went on a shopping spree, using Lacs's credit cards. Petitioner was arrested several days later while riding in Lacs's car. Pet. App. 5a-6a, 95a-96a.

2. In late 1988, petitioner was charged with capital murder and related offenses. After a bench trial, he was found guilty of all charges. Petitioner then chose to be sentenced by a jury. Pet. App. 6a-8a, 96a-97a; J.A. 28-32.

Under the Maryland capital sentencing scheme in effect at the time of petitioner's sentencing, Md. Ann. Code art. 27, § 413 (1988), a defendant was not eligible for the death penalty unless the State proved beyond a reasonable doubt at trial that the defendant was guilty of murder in the first degree (which includes felony murder, *id.* § 410 (1988)) and then proved beyond a reasonable doubt at sentencing that the defendant was a "principal in the first degree," which means that he was the person who actually carried the murder out, *State* v. *Ward*, 396 A.2d 1041, 1046 (Md. 1978). Before imposing the death penalty, the sentencer was also required to find that there was at least one aggravating circumstance and that the aggravating circumstances out-

weighed any mitigating circumstances. Md. Ann. Code art. 27, § 413 (1988).

Before sentencing, petitioner filed a motion for bifurcation, requesting that the jury first decide whether he was a principal in the first degree and then, if it found that he was, decide in a separate proceeding what aggravating and mitigating circumstances existed and whether the former outweighed the latter. The basis for the motion was that petitioner was considering offering certain mitigating evidence, but did not wish to present the evidence in the same proceeding in which he was contesting principalship because of the risk that the evidence would make the jury more likely to find that he was a principal. The mitigating evidence that petitioner was prepared to offer was the testimony of a psychologist who had evaluated petitioner and concluded that he had an IQ of 79 and a personality disorder. The trial court denied the motion. J.A. 34-52, 349-351.

At sentencing, petitioner did not present any evidence of mental retardation or mental illness. Pet. App. 8a. Instead, as he had at the trial's guilt phase, petitioner exploited the lack of forensic evidence placing him in the victim's apartment, highlighted the conflicting testimony about the time she was last known to be alive, and presented expert testimony that contradicted the State's evidence about the time of death. J.A. 271-306, 390-401. In summation, petitioner's counsel argued that the State had not proved beyond a reasonable doubt that it was petitioner who "personally put [the victim] in the water" and "personally h[e]ld her there * * * until she drowned," and that it was "at least reasonably possible, if not highly probable, that Florence Lacs died at the hands of someone other than [petitioner]." J.A. 391-392. The jury unanimously found that petitioner was a principal in the first degree (the fact that made him eligible for the death penalty), that the murder was committed in the course of robbing the victim (a statutory

aggravating factor), and that petitioner had not previously been convicted of a crime of violence (a statutory mitigating factor to which the parties had stipulated). Pet. App. 8a, 97a; J.A. 408-409. The jury then unanimously found that the aggravating factor outweighed any mitigating factors and sentenced petitioner to death. *Ibid.*

The Maryland Court of Appeals affirmed petitioner's murder conviction and death sentence, Br. in Opp. App. 1a-31a, with two judges dissenting from the affirmance of the sentence on the ground that the evidence was insufficient to support a finding that petitioner was a principal in the first degree, *id.* at 32a-38a. This Court denied certiorari. 503 U.S. 1007 (1992).

3. a. In January 1993, petitioner sought post-conviction relief in state court. Petitioner raised numerous claims, including the claim that his lawyers had rendered ineffective assistance at sentencing by failing to conduct a complete investigation into his background and failing to present evidence of his background. In support of that claim, petitioner proffered a "social history," prepared by a social worker for use in the post-conviction proceedings, in which the social worker concluded that petitioner had been physically abused by his mother and sister when he was a child, had been removed from his mother because of abuse and neglect, had been sexually molested while in foster care, and was borderline retarded. The social history was based on interviews of petitioner, as well as interviews of some other members of petitioner's family, a review of social-services records, and a review of other records. Pet. App. 163a-198a; J.A. 419-420, 444-445.

At an evidentiary hearing, one of petitioner's trial attorneys testified that he had obtained petitioner's social-services records before sentencing, had been aware that petitioner was abused as a child and had a borderline mental capacity, and had been aware of the potential mitigating

effect of such evidence in a capital case. The testimony showed that counsel had decided that evidence concerning petitioner's childhood and intelligence would not be more fully developed or presented to the jury, because counsel believed that the best way to avoid the death penalty was to create reasonable doubt that petitioner was a principal in the first degree, and believed that evidence of petitioner's background might not only divert jurors' attention but be viewed as inconsistent with an attack on principalship. Pet. App. 136a-139a; J.A. 485-492, 503-508.

The state court denied post-conviction relief. Pet. App. 131a-156a. It rejected petitioner's ineffective-assistance claim on the ground that counsel "had good reasons for the decisions [they] made," even though some might disagree with them. *Id.* at 156a. Because counsel had "made a tactical decision" that "was reasonable," the court held that the decision not to develop and present information along the lines of that in the social history was likewise justifiable. *Ibid.* In so holding, the court observed that one of petitioner's attorneys had previously represented a defendant charged with the murder of an elderly victim, that the defendant had been sentenced to death despite the introduction of evidence that he lived in foster homes and was sexually abused, and that the experience had influenced petitioner's counsel in the assessment of whether petitioner would benefit from presenting similar evidence. *Id.* at 136a-139a.

b. The Maryland Court of Appeals affirmed the denial of post-conviction relief. Pet. App. 92a-128a. Addressing petitioner's argument that the Sixth Amendment imposes a "virtually mandatory duty to investigate mitigating evidence" and that the tactical decision made in this case was "patently unreasonable," the court "reject[ed] the argument in the broad form that it is presented." *Id.* at 123a. As an initial matter, the court observed, petitioner's counsel "*did* investigate and *were* aware of [petitioner's] background,"

albeit not in the same detail as later developed in the social history. *Ibid.* "More important," the court continued, "counsel *does* have leeway in making strategic and tactical decisions about how to present a case at a capital sentencing hearing" and "is *not* required to present every conceivable mitigation defense if, after proper investigation and review, [counsel] concludes that it is not in the defendant's best interests to do so." *Id.* at 123a-124a. The court concluded that it was not constitutionally unreasonable for counsel to have decided "to proceed with what they thought was their best defense" (contesting principalship), and that, because evidence of a "dysfunctional and abused childhood is not always successful," it was "not unreasonable" for counsel "to choose not to distract from their principal defense with evidence of [petitioner's] unfortunate childhood." *Id.* at 126a.

As was the case on direct appeal, two judges dissented. In their view, the evidence that petitioner was a principal in the first degree was insufficient as a matter of law, and his sentence should therefore have been reduced to life imprisonment. Pet. App. 129a-130a.

This Court denied certiorari. 528 U.S. 832 (1999).

4. In August 1999, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in the United States District Court for the District of Maryland. The district court granted relief. Pet. App. 28a-89a.

After concluding that "no rational trier of fact could have found [petitioner] guilty of murder beyond a reasonable doubt," Pet. App. 44a, the court held that, even if petitioner was properly convicted of murder, he was entitled to have his death sentence vacated, because his counsel rendered ineffective assistance at sentencing, *id.* at 50a-55a. While acknowledging that trial counsel "were aware of some mitigating information about [petitioner's] unfortunate upbringing," the court stated that counsel's "very possession of that

information triggered [an] obligation to conduct a more complete investigation." *Id.* at 53a. In the court's view, the social history offered at the state-court post-conviction proceeding contained "many crucial facts" of a mitigating nature, and "particularly since [petitioner] had no prior criminal record, a tactical decision made by trial counsel in possession of this information not to present a mitigating case would have been virtually inexplicable." *Id.* at 54a-55a. In any event, the court concluded, petitioner's "trial counsel were under a duty to obtain the information necessary to make a reasoned decision and their failure to do so deprived him of effective assistance of counsel." *Id.* at 55a. Because it viewed the state courts' rejection of petitioner's ineffective-assistance claim as being "almost directly contrary" to this Court's decision in *Williams* v. *Taylor*, 529 U.S. 362 (2000), the district court held that the determination that counsel were not ineffective "involved an unreasonable application of clearly established federal law." Pet. App. 50a.

5. A unanimous panel of the Fourth Circuit reversed. Pet. App. 1a-24a. Applying 28 U.S.C. 2254(d)(1), which allows habeas corpus relief only if it is shown that a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as established by the Supreme Court of the United States," the court of appeals held that the Maryland Court of Appeals had not acted unreasonably in rejecting petitioner's challenges to the sufficiency of the evidence at trial and the effectiveness of counsel at sentencing, and that the district court had therefore erred in vacating petitioner's conviction and sentence. Pet. App. 10a-24a.

After concluding that the Maryland Court of Appeals' rejection of petitioner's challenge to the sufficiency of the evidence was not only "not unreasonable" but "fully supported by the record," Pet. App. 17a, the court turned to petitioner's ineffective-assistance claim. The court noted

that, although there were "superficial similarities" between *Williams* v. *Taylor* and this case, *Williams*, unlike this case, involved a "complete failure to investigate" that resulted in counsel's failure to discover and present "a wealth of potentially mitigating evidence grounded in Williams' 'nightmarish' childhood." *Id.* at 19a. In such circumstances, the court explained, "counsel's complete failure to investigate could not have led to a reasonable strategic choice for the simple reason that he had no information upon which to make a strategic choice." *Ibid.* The court pointed out that *Williams* did "not establish a *per se* rule that counsel must develop and present an exhaustive social history in order to effectively represent a client in a capital murder case," but merely applied "the rule under *Strickland*" that counsel must have "some knowledge about potential avenues of mitigation" in order to make a decision that can be "fairly characterized as a reasonable strategic choice." *Ibid.* The court believed that the conduct of petitioner's counsel was consistent with that requirement. *Id.* at 20a.

In contrasting the circumstances of this case with those in *Williams*, the court of appeals noted that petitioner's counsel "did know about [petitioner's] difficult childhood," including incidents of neglect, physical abuse, and sexual molestation, and did know that petitioner had borderline mental abilities. Pet. App. 20a. But because petitioner's counsel regarded the State's evidence as "quite flimsy," counsel thought that petitioner's best hope of avoiding the death penalty would be to plant some doubt in the minds of the jurors as to whether petitioner was the actual killer. *Id.* at 21a. And because counsel viewed petitioner's psycho-social history as "problematic in that it tended to conflict with any attack on principalship," counsel decided not to offer evidence regarding petitioner's background. *Ibid.* That "choice between arguments," the court said, is "the very essence of counsel's function in any context." *Id.* at 22a.

Chief Judge Wilkinson and Judge Niemeyer each wrote a concurring opinion. In his concurrence, Chief Judge Wilkinson expressed the view that, while petitioner "very probably committed the heinous offense for which he stands convicted," he could not "say with certainty" that petitioner did so. Pet. App. 24a. But such concerns, Chief Judge Wilkinson went on to say, were matters to be addressed in the clemency process and not by courts. *Ibid.* In his concurrence, Judge Niemeyer said that the adequacy of counsel's representation at sentencing was a "closer call" for him than the sufficiency of the evidence at trial, and suggested that counsel might have been able to "ha[ve] it both ways" by "arguing liability and still * * * maintain[ing] that any sentence of death would be inconsistent with the mitigating circumstances of [petitioner's] miserable upbringing and marginal intelligence." *Id.* at 25a. Judge Niemeyer ultimately concluded, however, that this view "may be only a luxury of hindsight," and that there was "support in the record from which to conclude that [petitioner's] counsel's decision was a tactical one and * * * was not an unreasonable strategy to pursue." *Id.* at 26a.

SUMMARY OF ARGUMENT

Strickland v. *Washington*, 466 U.S. 668 (1984), which governs claims of ineffective assistance of counsel, requires courts to accord a high degree of deference to counsel's performance and to presume that the challenged action or omission had a sound strategic justification. *Strickland* imposes only a general requirement that counsel make objectively reasonable choices; there is no "checklist for judicial evaluation of attorney performance." *Id.* at 688. In this case, defense counsel did not render deficient performance, either in failing to present mitigating evidence or in failing to conduct a further investigation into mitigating evidence. Rather, defense counsel made a strategic choice to concentrate on weaknesses in the state's case for a capital sen-

tence, and that choice was reasonable under *Strickland*'s deferential standard.

A. In *Strickland* and three subsequent cases, *Darden* v. *Wainwright*, 477 U.S. 168 (1986), *Burger* v. *Kemp*, 483 U.S. 776 (1987), and *Bell* v. *Cone*, 122 S. Ct. 1843 (2002), this Court rejected claims that counsel had performed deficiently by not presenting evidence of a defendant's background at his capital sentencing. In each case, the Court found that it was reasonable for counsel to believe that the mitigating evidence could undermine the strategy that counsel had permissibly selected.

At his capital sentencing, petitioner's counsel chose to attack the State's evidence that petitioner himself had carried out the murder of which he was convicted and chose not to offer evidence of petitioner's troubled childhood and low intelligence. A showing that petitioner was not a principal in the first degree in the murder would have precluded the death penalty altogether. Because the evidence that petitioner had carried out the murder was entirely circumstantial, because petitioner had no criminal record, and because fingerprints and hair found at the crime scene did not belong to petitioner, counsel's decision to contest the evidence that petitioner was a principal in the first degree was a sound strategy. Because the jury might have believed that the evidence of petitioner's unfortunate background and low IQ made it more rather than less likely that petitioner himself had carried out the grisly murder, counsel's decision not to present such mitigating evidence was likewise reasonable.

The court of appeals' holding that petitioner's counsel acted reasonably in not presenting evidence of his background is consistent with *Williams* v. *Taylor*, 529 U.S. 362 (2000), the only case in which this Court has found that a failure to offer mitigating evidence at a capital sentencing constituted deficient performance. In *Williams*, counsel

failed to present mitigating evidence because they did not obtain records that documented the defendant's history of abuse. Their inaction was the result, not of a strategic decision, but of a mistaken belief that state law barred access to the records. The failure of counsel in *Williams* to present other mitigating evidence—evidence of the defendant's borderline retardation and better behavior in structured settings—likewise had no strategic justification, because the evidence did not conflict with counsel's tactical decision to focus on the defendant's voluntary confession to the murder.

B. In *Strickland*, this Court made clear that the general standards for evaluating claims of deficient performance apply to counsel's duty to investigate: "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." 466 U.S. at 691. In this case, counsel were sufficiently aware of petitioner's background to make a reasonable choice that further investigation was unnecessary in light of the defense strategy selected.

Petitioner's counsel investigated his background and were aware that he was borderline mentally retarded, had been diagnosed with a personality disorder, had been neglected by his alcoholic mother, and had spent most of his childhood in foster homes. There is also evidence that petitioner's counsel were aware that petitioner had been physically abused and sexually molested. In light of the reasonableness of counsel's strategy of contesting principalship; their existing knowledge about petitioner's intelligence, mental health, and family history; and their reasonable conclusion that presenting this type of evidence could undermine their attack on principalship, it was not unreasonable for counsel to decide that there was no need to conduct a further investigation of petitioner's background.

Like his duty-to-present claim, petitioner's duty-to-investigate claim is not assisted by *Williams* v. *Taylor*. In *Williams*, counsel did not conduct *any* investigation of the defendant's background, and counsel's failure to do so was based, not on any tactical consideration, but on a mistaken belief that the defense was not entitled to obtain the records containing the mitigating evidence. In finding that failure deficient, *Williams* applied the long-settled principles of *Strickland* and did not create any heightened or otherwise unique standard for counsel's duty to investigate a capital defendant's background. Nor should any such quasi-mandatory duty be created, because it could divert counsel's resources from pursuing the investigation of what counsel reasonably concludes is the best defense.

ARGUMENT

DEFENSE COUNSEL'S DECISION NOT TO PRESENT EVIDENCE OF PETITIONER'S BACKGROUND AND NOT TO UNDERTAKE A FURTHER INVESTIGATION OF HIS BACKGROUND WAS A REASONABLE STRATEGIC JUDGMENT THAT SATISFIED THE STANDARDS OF THE SIXTH AMENDMENT

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." This Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970)). The principles for assessing claims of ineffective assistance of counsel were established in *Strickland* v. *Washington*, which "announced a now-familiar test." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 476 (2000). A defendant making an ineffectiveness claim must show both that counsel's performance was deficient, which

means that "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 688, and that the deficient performance prejudiced the defendant, which means that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Petitioner contends that his counsel performed unreasonably when counsel decided not to present evidence of, or conduct a further investigation into, petitioner's troubled childhood and low intelligence because of the judgment that such evidence could interfere with counsel's strategy of avoiding a death sentence by creating doubt about petitioner's role in the killing. Petitioner's contention should be rejected.[1]

A. Counsel Did Not Perform Deficiently In Deciding Not To Present Evidence Of Petitioner's Background

Petitioner's counsel chose to contest the State's evidence that petitioner was a principal in the first degree (and was therefore eligible for the death penalty) and chose not to offer mitigating evidence concerning petitioner's background (which, if found to outweigh any aggravating circumstances found by the jury, would prevent the imposition of a death sentence). Because these were reasonable strategic decisions, counsel did not perform deficiently.

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[1] Because this case arises on federal habeas corpus, petitioner "must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance." *Bell* v. *Cone*, 122 S. Ct. 1843, 1852 (2002). Under 28 U.S.C. 2254(d)(1), he "must show that the [Maryland] Court of Appeals applied *Strickland* to the facts of his case in an objectively unreasonable manner." 122 S. Ct. at 1852. "[A]n unreasonable application is different from an incorrect one." *Id.* at 1850. This brief explains why counsel's performance satisfies the Sixth Amendment under *Strickland*. It follows *a fortiori* that, in rejecting petitioner's ineffective-assistance claim, the state court did not apply *Strickland* in an objectively unreasonable manner.

1. *Under* Strickland *v.* Washington, *Courts Are Required To Defer To Counsel's Reasonable Strategic Decisions*

a. Last Term, in *Bell* v. *Cone*, this Court repeated what it first said in *Strickland*: "[j]udicial scrutiny of a counsel's performance must be highly deferential," with "every effort * * * be[ing] made to eliminate the distorting effects of hindsight." 122 S. Ct. at 1852 (quoting 466 U.S. at 689). Since it is "all too tempting" for a convicted defendant to "second-guess counsel's assistance" and "all too easy" for a court to find an act or omission "unreasonable" because it was "unsuccessful," *Strickland*, 466 U.S. at 689, courts "must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance," *Cone*, 122 S. Ct. at 1854 (quoting *Strickland*, 466 U.S. at 689). That means that a defendant alleging that his lawyer's performance was constitutionally deficient "must overcome the 'presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."' " *Id.* at 1852 (quoting *Strickland*, 466 U.S. at 689, quoting *Michel* v. *Louisiana*, 350 U.S. 91, 101 (1955)).

Related to *Strickland*'s principle that courts must defer to an attorney's reasonable decisions, and no less fundamental, is the Court's firm rejection of any kind of "checklist for judicial evaluation of attorney performance." *Strickland*, 466 U.S. at 688. Any "set of detailed rules for counsel's conduct" could not account for "the variety of circumstances faced by defense counsel" and would both "restrict the wide latitude counsel must have in making tactical decisions" and "interfere with the constitutionally protected independence of counsel." *Id.* at 688-689. As this Court reiterated three Terms ago in *Roe* v. *Flores-Ortega*, "the Federal Constitution imposes [only] one general requirement: that counsel make objectively reasonable choices." 528 U.S. at 479. Be-

yond this, "[m]ore specific guidelines are not appropriate." *Strickland*, 466 U.S. at 688.

b. In four different cases, this Court has found that counsel did not perform deficiently in deciding not to present evidence of a defendant's background at his capital sentencing. In each case, the Court concluded that it was reasonable for counsel to believe that the mitigating evidence could undermine the strategy that counsel had reasonably decided upon.

In *Strickland* itself, counsel's strategy for avoiding the death penalty was to rely on the defendant's "remorse and acceptance of responsibility" and to argue, based solely on statements made at the guilty plea colloquy, that the defendant had "committed the crimes under extreme mental or emotional disturbance." 466 U.S. at 673-674. Having settled on that strategy, counsel "decided not to present * * * evidence concerning [the defendant's] character and emotional state." *Id.* at 673. This Court held that counsel's "strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on [the defendant's] acceptance of responsibility for his crimes" was "well within the range of professionally reasonable judgments." *Id.* at 699. Indeed, the Court concluded that "there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment." *Ibid.* The Court deferred to counsel's decision to rely on the defendant's acceptance of responsibility because the sentencing judge's "views on the importance of owning up to one's crime's were well known," and it deferred to counsel's decision not to present evidence because the tactic "ensured that contrary character and psychological evidence * * * would not come in." *Ibid.*

The Court has taken the same deferential approach in three subsequent cases. In *Darden* v. *Wainwright*, 477 U.S.

168 (1986), the Court upheld the reasonableness of counsel's strategy "to rely on a simple plea for mercy from the [defendant] himself," *id.* at 186, and not to present mitigating evidence, *id.* at 184, concluding that counsel might reasonably have believed that any effort to suggest that the defendant was not violent and could not have committed the crimes at issue would have opened the door to devastating rebuttal with his prior convictions and psychiatric evidence, *id.* at 186. In *Burger* v. *Kemp*, 483 U.S. 776 (1987), the Court sustained defense counsel's decision to rely on a strategy of showing that a co-defendant had exerted influence over the defendant's will, *id.* at 793, and not to present any "mitigating evidence at all," *id.* at 788, even though there was evidence that the defendant "had an IQ of 82 and functioned at the level of a 12-year-old child," *id.* at 779. The Court deferred to counsel's judgment that presenting such evidence would have exposed the defendant to evidence of his lack of remorse, and that seeking to show that he had a "troubled family background" could have revealed his "violent tendencies" and brushes with the law, which were "at odds" with the chosen strategy. *Id.* at 793. In *Bell* v. *Cone*, the Court held that the state court was not "objectively unreasonable" under 28 U.S.C. 2254 in sustaining, under *Strickland*, counsel's strategic judgment not to present mitigating evidence at sentencing, and instead to rely on evidence adduced at the guilt stage that his offense could have been influenced by his military service and use of drugs. 122 S. Ct. at 1848, 1853. The Court held that sound trial tactics made it reasonable to do so, since the defendant himself might have "lash[ed] out" on the witness stand and calling other witnesses might have allowed the prosecution to elicit his criminal history. *Id.* at 1853.

2. *The Decision Not To Present Evidence Of Petitioner's Background Was Strategically Reasonable*

Petitioner's counsel's strategy at sentencing was eminently reasonable.

a. In counsel's judgment, petitioner's best hope for avoiding the death penalty was to contest principalship—to argue that, although petitioner was guilty of felony murder, the State could not meet its burden of proving that he was the one who had actually carried the murder out. This strategy is similar to the strategy of appealing to jurors' "residual doubts"—the "doubts that may have lingered in the minds of jurors who were convinced of [the defendant's] guilt beyond a reasonable doubt, but who were not absolutely certain of his guilt." *Franklin* v. *Lynaugh*, 487 U.S. 164, 187 (1988) (O'Connor, J., concurring in the judgment). This Court has observed that "residual doubt has been recognized as an extremely effective argument for defendants in capital cases," *Lockhart* v. *McCree*, 476 U.S. 162, 181 (1986) (internal quotation marks omitted), and one study has suggested that "doubt involv[ing] the defendant's level of participation in the murder" plays an even greater role than "residual doubt" in influencing a jury's sentencing decision, Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1580 (1998). In the context of the sentencing scheme at issue here, it is certainly the case that, other things being the same, creating doubt about the defendant's role was even more likely to prevent a death sentence than creating doubt about his guilt. That is because, while "residual doubt" is merely a mitigating circumstance that would be weighed against any aggravating circumstances and might or might not lead to a sentence of life, see Md. Ann. Code art. 27, § 413(g)(8) (1988), successfully contesting principalship would necessarily prevent a

sentence of death by making the defendant ineligible for it, *id.* § 413(e)(1) (1988).

In short, if "residual doubt" is ordinarily a good strategy, contesting principalship is an even better one, assuming the circumstances justify it. And the circumstances justified it here. Counsel could convincingly attack the State's case that petitioner had carried out the killing himself, both because the evidence of principalship was entirely circumstantial—there were no eyewitnesses, petitioner did not confess, and there was no forensic evidence tying petitioner to the murder—and because, as the jury learned, petitioner had no history of violence. Indeed, counsel could plausibly argue not only that the evidence did not prove that petitioner had carried out the killing, but that it affirmatively showed that someone other than petitioner had done it, because police found fingerprints and hair at the crime scene that were not petitioner's. Pet. App. 4a. The reasonableness of counsel's strategy is confirmed by the fact that two judges of the Maryland Court of Appeals, on both direct and collateral review (Br. in Opp. App. 32a-38a; Pet. App. 128a-130a), concluded that the evidence of petitioner's principalship was insufficient under the Maryland rule that a conviction based solely on circumstantial evidence "is not to be sustained unless the circumstances are inconsistent with any reasonable hypothesis of innocence." Br. in Opp. App. 33a (internal quotation marks omitted). Given the evidence, counsel's strategy to contest principalship can hardly be considered "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Compare *Baker* v. *Corcoran*, 220 F.3d 276, 296 n.17 (4th Cir. 2000) (reasonable to contest principalship because "[t]he evidence that [the defendant] shot [the victim] was not overwhelming"), cert. denied, 531 U.S. 1193 (2001), with *Evans* v. *Smith*, 220 F.3d 306, 319 (4th Cir. 2000) (reasonable *not* to contest principalship because of "the state's strong evidence that [the

defendant] was the shooter"), cert. denied, 532 U.S. 925 (2001).

b. Counsel were also within the range of professionally competent assistance when they ultimately decided not to present evidence of petitioner's low intelligence and troubled childhood. As this Court has observed, evidence of "mental retardation and history of abuse" is a "two-edged sword," because "it may diminish [the defendant's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Penry* v. *Lynaugh*, 492 U.S. 302, 324 (1989), overruled on other grounds by *Atkins* v. *Virginia*, 122 S. Ct. 2242 (2002).[2] As counsel recognized, not only can such evidence increase the likelihood of a finding of future dangerousness in a case where that is alleged to be an aggravating circumstance, it can also increase the likelihood of a finding that the defendant himself carried out the murder in a case, like this one, where principalship must be proved. That risk is particularly great in a case, like this one, in which the murder was grisly. Petitioner's troubled background and low intelligence could have provided the jury with an explanation of why a person would have pulled a 77-year-old woman's skirt up to her waist and sprayed her with insecticide before drowning her in her bathtub.

In an effort to place themselves in a position where they could both contest principalship and present evidence of

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[2] Courts of appeals routinely rely on the "double-edged" nature of a defendant's troubled background in rejecting claims that counsel provided ineffective assistance by not presenting evidence of that type at a capital sentencing. See, *e.g.*, *Harris* v. *Cockrell*, 313 F.3d 238, 244 (5th Cir. 2002); *Crawford* v. *Head*, 311 F.3d 1288, 1321 (11th Cir. 2002); *Bryan* v. *Gibson*, 276 F.3d 1163, 1178 (10th Cir. 2001); *Bacon* v. *Lee*, 225 F.3d 470, 481 (4th Cir. 2000), cert. denied, 532 U.S. 950 (2001); *Gerlaugh* v. *Stewart*, 129 F.3d 1027, 1035 (9th Cir. 1997), cert. denied, 525 U.S. 903 (1998); *Jones* v. *Page*, 76 F.3d 831, 846 (7th Cir.), cert. denied, 519 U.S. 951 (1996); *Sidebottom* v. *Delo*, 46 F.3d 744, 754 (8th Cir.), cert. denied, 516 U.S. 849 (1995).

petitioner's background, without running the risk that the mitigating evidence would be viewed by the jury as proof of principalship, petitioner's counsel requested a bifurcated sentencing, in which principalship would be decided during the first phase and, if it was proved, aggravating and mitigating circumstances would be found and weighed during the second phase. J.A. 34-52. It was only after their bifurcation motion was denied that counsel decided not to present evidence of petitioner's background. In view of counsel's reasonable belief that contesting principalship was the best way to avoid a death sentence, their reasonable belief that simultaneously presenting evidence of petitioner's background could undermine that strategy, and the trial court's decision that thwarted their effort to present the evidence separately, counsel cannot be said to have acted unreasonably in deciding not to present the evidence at all.

c. Petitioner contends that counsel could have contested principalship and offered the evidence of his background in the same proceeding. Quoting the district court (Pet. App. 55a n.17), petitioner asserts (Br. 41) that, "[f]ar from conflicting with an effort to disprove principalship," the facts concerning his low intelligence and troubled childhood "could have been 'mesh[ed] . . . into an effective argument that [petitioner] had been made the pawn of others who were responsible for the murder.'" It may well be true that this strategy "could have been" adopted. *Ibid.* But any suggestion that this approach was the only reasonable one is at odds with *Strickland*'s fundamental teaching that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689.[3]

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[3] Petitioner also contends (Br. 29, 37-41) that counsel's strategy not to present mitigating evidence was unreasonable because the sentencing jury would receive some information about petitioner's past from a pre-

3. Williams *v.* Taylor *Does Not Control Petitioner's Duty-To-Present Claim*

Williams v. *Taylor*, 529 U.S. 362 (2000), is the only case in which this Court has found that counsel's failure to offer evidence of a defendant's background at a capital sentencing constituted deficient performance. In *Williams*, counsel's strategy was to rely on the fact that the defendant had initiated contact with the police himself and voluntarily confessed to the murder. *Id.* at 369. Because counsel did not obtain the defendant's juvenile and social-services records, counsel was not aware of and therefore did not present evidence that the defendant "had been severely and repeatedly beaten by his father," that his parents had "been imprisoned for the criminal neglect of [the defendant] and his siblings," or that the defendant had spent time in "an abusive foster home." *Id.* at 395. Counsel also failed to present "available evidence" that the defendant was "borderline mentally retarded," *id.* at 396 (internal quotation marks omitted), and that his "conduct had been good in certain structured settings * * * (such as when he was incarcerated)," *id.* at

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sentence report that painted an "innocuous" portrait (Br. 29), which, in petitioner's view, should have been rebutted, and because counsel told the jury that "they would present evidence of his 'difficult life' and then failed to do so" (*ibid.*). The fact that the presentence report did not fully reveal petitioner's background, however, did not obligate defense counsel to inject evidence into the case that they reasonably believed would undercut their strategic decision to attack principalship. Nor did counsel's passing comment in her opening statement that "[y]ou're going to hear that Kevin Wiggins has had a difficult life" and that "[i]t has not been easy for him" (J.A. 72) implicitly forecast that the defense would present a full-blown mitigation case. Rather, counsel's comment was made in the context of the broader point that petitioner had "tried to be a productive citizen," had "reached the age of 27 with no convictions," and was "not a man who spent his life in and out of prison." *Ibid.* This point in fact reinforced the attack on principalship that formed the heart of the defense, and was echoed both in the presentence report (J.A. 17-24) and in petitioner's allocution to the jury (J.A. 407-408).

415 (opinion of O'Connor, J.) (internal quotation marks omitted). Petitioner places great reliance on *Williams*, but there is a fundamental distinction between this case and that one: the fact that there was a valid strategic reason for not presenting evidence here, but none there.

At the post-conviction hearing in *Williams*, one of his lawyers testified that he had failed to obtain the records that contained mitigating information about the defendant's background, not "because he thought they would be counterproductive," but "because [he] erroneously believed that state law didn't permit it." 529 U.S. at 373 (internal quotation marks omitted). Indeed, the lawyer acknowledged that information about the defendant's childhood "would have been important in mitigation." *Ibid.* In finding counsel's performance deficient, this Court thus relied on the fact that counsel's failure to offer the mitigating evidence of childhood abuse was not based on "any strategic calculation." *Id.* at 395.

Counsel's failure to present the other mitigating evidence in *Williams*—evidence of the defendant's borderline retardation and improved behavior in structured settings—likewise had no strategic justification. While counsel in this case could reasonably have believed that presenting evidence of petitioner's troubled childhood and low IQ would increase the risk that the jury would find that he had personally carried out the murder of which he was convicted, counsel in *Williams* could not reasonably have believed that presenting evidence of childhood abuse, low intelligence, and adaptability to structured settings would undercut their decision to rely on the defendant's confession as a manifestation of his contrition. As the Court observed, "the failure to introduce the * * * voluminous amount of evidence that * * * [spoke] in [the defendant's] favor was not justified by a tactical decision to focus on [the] voluntary confession." 529 U.S. at 396.

Petitioner is thus mistaken in his contention (Br. 42) that, "[i]f the mitigation evidence available in this case is 'double-edged,' then no defendant could ever successfully pursue an ineffectiveness claim for failure to present mitigation evidence." Counsel's decision not to offer mitigating evidence in this case was reasonable because the evidence could have undermined the strategy that counsel reasonably believed was best. As *Williams* demonstrates, the result may be different when the mitigating evidence could not have undermined counsel's chosen strategy and there was no other valid strategic justification for not presenting it.

B. Counsel Did Not Perform Deficiently In Deciding Not To Conduct A Further Investigation Of Petitioner's Background

Petitioner contends that his counsel had no basis for preferring the strategy of attacking principalship to the strategy of presenting mitigating evidence, because counsel did not fully investigate his background before making the decision. Like the decision not to present evidence of petitioner's background, counsel's decision not to conduct a further investigation of his background was reasonable under the circumstances of this case. Counsel's performance was therefore not deficient.

1. Strickland*'s Requirement That Courts Defer To Counsel's Reasonable Decisions Applies To Decisions Not To Conduct An Exhaustive Investigation*

In *Strickland*, after setting forth the general standards for evaluating claims of deficient performance, this Court discussed the application of those standards to "counsel's duty to investigate." 466 U.S. at 690. The Court stated that the general standards "require no special amplification," *ibid.*, because the duty to investigate is governed by the same basic requirement of reasonableness: "In any ineffectiveness case, a particular decision not to investigate must

be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments," *id.* at 691. That means that, while strategic choices "made after thorough investigation of law and facts" are "virtually unchallengeable," strategic choices "made after less than complete investigation" are likewise reasonable so long as "reasonable professional judgments support the limitations on investigation." *Id.* at 690-691. Counsel thus has a duty either "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691.

In both *Strickland* and *Burger* v. *Kemp*, in addition to rejecting a challenge to counsel's decision not to present evidence concerning the defendant's background (see pp. 15-16, *supra*), this Court rejected a challenge to counsel's decision not to conduct a further investigation of his background. In both cases, the Court relied on the fact that counsel had chosen a reasonable strategy for avoiding a death sentence and had reasonably concluded that the presentation of mitigating evidence would not improve the defendant's chances. See *Strickland*, 466 U.S. at 699 (counsel's strategic decision to rely on defendant's acceptance of responsibility and argue that he had acted under extreme emotional distress was "well within the range of professionally reasonable judgments," and his "decision not to seek more character or psychological evidence than was already in hand" was "likewise reasonable"); *Burger* v. *Kemp*, 483 U.S. at 794-795 (although record "suggest[s] that [counsel] could well have made a more thorough investigation than he did," there was "a reasonable basis for [counsel's] strategic decision that an explanation of [the defendant's] history would not have minimized the risk of the death penalty," and "[h]aving made this judgment, he reasonably determined that he need not undertake further investigation * * * [concerning the defendant's] past").

2. *The Decision Not To Conduct A Further Investigation Of Petitioner's Background Was Reasonable*

Petitioner's counsel acted reasonably in deciding not to conduct a further investigation of his background.

a. In affirming the denial of post-conviction relief, the Maryland Court of Appeals found that, while petitioner's trial counsel did not have "as detailed or graphic a history" as was prepared for the post-conviction proceedings, counsel "*did* investigate and *were* aware of [petitioner's] background." Pet. App. 123a. That finding is supported by the record. See 28 U.S.C. 2254(e)(1). Before sentencing, counsel arranged for petitioner to be evaluated by a psychologist, who determined that petitioner had an IQ of 79, had "difficulty coping" and became "anxious and confused in demanding situations," and had a "psychiatric/psychological diagnosis of personality disorder" with "features of borderline paranoid personality." J.A. 349-351. Petitioner's counsel also obtained his social-services records, J.A. 490, which reflected that petitioner had been removed from his home at age five after being "very, very neglected" by his alcoholic mother (Lodging Material 49); that he had lived in a series of foster homes until he was 18; that he had left one of those homes at 16 because his foster mother physically disciplined him with "something other than her hands" (J.A. 72); and that he suffered from borderline mental retardation. According to the testimony of one of petitioner's trial attorneys at the post-conviction hearing, counsel were also aware before sentencing that petitioner had been physically and sexually abused. J.A. 490-491.

In light of the reasonableness of counsel's strategy of contesting principalship; their existing knowledge about petitioner's intelligence, mental health, and family history; and their reasonable conclusion that presenting this type of evidence could undermine their attack on principalship, it

was not unreasonable for counsel to decide that there was no need to conduct any further investigation of petitioner's background, including the preparation of a social history. When capital defense counsel has a valid strategy for avoiding a death sentence, has investigated enough to have a general understanding of the potentially mitigating features of the defendant's background, and then decides that presenting evidence of the defendant's background will undermine the chosen strategy, counsel has made "reasonable investigations" and "reasonable decision[s] that make[] [further] investigations unnecessary." *Strickland*, 466 U.S. at 691.

b. Petitioner contends (Br. 33-36) that this Court should not defer to the Maryland Court of Appeals' finding that counsel were aware of petitioner's background, at least insofar as the finding was based on the testimony of petitioner's attorney that he knew about the physical and sexual abuse described in the social history, because he testified that his knowledge of those facts was based on the social-services records and the records do not in fact reflect petitioner's abusive treatment. While it is true that the social-services records do not indicate that petitioner was physically abused by his mother or sexually molested by others, it is not clear that petitioner's attorney testified that the records were the source of his knowledge.[4] If counsel had some other source

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[4] In response to questioning from petitioner's post-conviction counsel, petitioner's trial attorney testified that petitioner's placement in foster care was reflected in the social-services records (a fact that is indisputably true) and that petitioner's borderline mental retardation had been "reported in other people's reports" (another fact that is indisputably true). J.A. 490-491. In between those two statements, petitioner's attorney answered "[y]es" in response to three questions: whether he had been aware of reports of sexual abuse at one of petitioner's foster homes, whether he had been aware that petitioner's hands were burned by his mother, and whether he had been aware that petitioner's Job Corps

(petitioner himself, for example), petitioner could not very well maintain that his trial counsel had not been aware before sentencing of the facts set forth in the social history. But even if petitioner's trial attorney was mistaken, and in fact had not been aware of the physical and sexual abuse described in the social history, petitioner's failure-to-investigate claim is at best a claim that trial counsel should have arranged for petitioner to be interviewed by a social worker, because the social worker who prepared the social history obtained the information about the abusive treatment of petitioner that was not documented in the social-services records almost entirely from petitioner himself. See Pet. App. 167a-171a, 177a-179a, 183a, 190a, 192a-193a.

The difficulty with any claim that petitioner's trial counsel performed deficiently by not arranging for petitioner to be interviewed by a social worker is that petitioner was interviewed by a psychologist. After conducting clinical interviews, reviewing the social-services records, reviewing transcripts of interviews of petitioner's family members, and performing six different psychological tests, the psychologist concluded that petitioner had a low IQ and personality disorder and rendered opinions as to how those conditions affected petitioner's behavior. J.A. 349-351; State Ct. R. 440-441. As the evidence at the post-conviction hearing showed, a social worker of the type who prepared petitioner's social history cannot perform objective psychological tests and must rely to a large degree on information provided by the person whose social history he is preparing—in this case, a person seeking to have his death sentence overturned. J.A. 417-418, 425-427, 432-433. Particularly since counsel had formed a reasonable belief that evidence of the defendant's background could undermine their strategy for avoiding a death sentence, it was reasonable for them to

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supervisor had made sexual advances. J.A. 490-491. But the witness was not asked to and did not reveal the source of his knowledge of those facts.

decide that petitioner need not be interviewed by a social worker after having already been interviewed by a psychologist. Compare *Gudinas* v. *State*, 816 So. 2d 1095, 1103-1109 (Fla. 2002) (reasonable not to hire social worker when counsel hired psychologist and physician who evaluated capital defendant and testified about his intelligence and mental condition), with *People* v. *Ganus*, 706 N.E.2d 875, 877-880 (Ill. 1998) (reasonable not to hire psychologist when counsel hired "mitigation specialist" who prepared and testified about capital defendant's social history), cert. denied, 528 U.S. 829 (1999).

3. Williams *v.* Taylor *Does Not Control Petitioner's Duty-To-Investigate Claim*

The court of appeals' conclusion that petitioner's counsel acted within the range of competence demanded of criminal defense attorneys in deciding not to undertake a fuller investigation of his background is consistent with *Williams* v. *Taylor*. In *Williams*, the Court found capital defense counsel's representation deficient because, among other things, they had "failed to conduct an investigation that would have uncovered extensive records graphically describing [the defendant's] nightmarish childhood." 529 U.S. at 395. But petitioner's duty-to-investigate claim is not controlled by *Williams* for the same reason that his duty-to-present claim is not controlled by that case (see pp. 21-23, *supra*): the fact that there was a tactical reason here, but none there, for counsel's inaction.

Petitioner's counsel *did* investigate his background; unlike counsel in *Williams*, for example, they obtained petitioner's social-services records. But they did not conduct a full-blown investigation, because they believed that the best chance of avoiding a death sentence was to challenge principalship and that presenting evidence of petitioner's background could make it more rather than less likely that the jury would find that he was a first-degree principal. In

Williams, by contrast, counsel conducted *no* investigation of the defendant's background, and their failure to do so was based, not on "any strategic calculation," but on a mistaken belief that "state law barred access to [the] records" containing the mitigating evidence. 529 U.S. at 395. Far from having made a tactical decision not to offer the evidence, counsel in *Williams* acknowledged that information about the defendant's background "would have been important in mitigation." *Id.* at 373.

According to petitioner (Br. 24), *Williams* stands for the proposition that counsel's failure to conduct "a thorough investigation for mitigating evidence" constitutes deficient performance "absent an extremely strong reason for believing such an investigation unwarranted." *Williams* announced no such rule. In that case, the Court applied the long-settled standards of *Strickland*, see 529 U.S. at 390-399; *id.* at 413-416 (opinion of O'Connor, J.), which, like *Williams*, involved "counsel's duty to investigate." 466 U.S. at 690. In *Strickland*, far from adopting a unique standard for that duty, the Court stated that, "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691. That is the same standard that applies to any other decision by counsel. And far from adopting an "extremely strong" presumption that a lawyer who does not conduct a "thorough investigation" for mitigating evidence has performed deficiently (Pet. Br. 24), the Court made clear in *Strickland* that the only presumption in ineffective-assistance cases is the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," 466 U.S. at 689.

Because "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation" but "simply to ensure that criminal

defendants receive a fair trial," *Strickland*, 466 U.S. at 689, this Court has "consistently declined to impose mechanical rules on counsel—even when those rules might lead to better representation," *Roe* v. *Flores-Ortega*, 528 U.S. 470, 481 (2000). There would therefore be no constitutional basis for the mechanical rule suggested by petitioner even if it were likely to lead to better representation. But it is by no means clear that it would. Requiring more investigation than is reasonable under the circumstances would in many cases cause counsel to devote their energies and resources to investigating the defendant's background even though their time would be better spent developing some other defense. Such a rule would "distract counsel from the overriding mission of vigorous advocacy of the defendant's cause," *Strickland*, 466 U.S. at 689, with the result that a rule intended to benefit criminal defendants would often work to their detriment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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