

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KEVIN WIGGINS, :

4 Petitioner :

5 v. : No. 02-311

6 SEWALL SMITH, WARDEN, ET AL. :

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8 Washington, D. C.

9 Monday, March 24, 2003

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 11:03 a.m.

13 APPEARANCES:

14 DONALD B. VERRILLI, JR., ESQ., Washington, D. C.; on behalf  
15 of the Petitioner.

16 GARY E. BAIR, Solicitor General, Baltimore, Maryland; on  
17 behalf of the Respondents.

18 DAN HIMMELFARB, ESQ., Assistant to the Solicitor General,  
19 Department of Justice, Washington, D. C.; on behalf of  
20 the United States, as amicus curiae, supporting the  
21 Respondents.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
next in Number 02-311, Kevin Wiggins versus Sewall Smith.  
Mr. Verrilli.

ORAL ARGUMENT OF DONALD B. VERRILLI, JR.  
ON BEHALF OF THE PETITIONER

MR. VERRILLI: Mr. Chief Justice, and may it  
please the Court:

Under the clearly established law of Strickland  
v. Washington, a lawyer's decision about how to defend a  
client facing a death sentence must be supported either by  
a thorough investigation or by a reasonable professional  
judgment supporting limitation on investigation.

In this case, the Maryland Court of Appeals and  
the Fourth Circuit applied that rule in an objectively  
unreasonable manner. Kevin Wiggins' lawyers did not  
fulfill what this Court described in Williams against  
Taylor as their obligation under Strickland to investigate  
thoroughly their client's background, and no reasonable  
professional judgment in fact supports or could support  
their failure to do so.

QUESTION: Do you think the Williams case is a  
white horse for you, that is, I mean, that it's exactly  
identical to this case?

1                   MR. VERRILLI: I do not think it's exactly  
2 identical to this case, Your Honor, but we think it  
3 clearly informs this case both by explaining what an --  
4 what an objectively unreasonable application of Strickland  
5 amounts to and in emphasizing the critical importance of  
6 investigating a -- a -- your client's background as -- as  
7 a prerequisite to making informed, reasonable choices  
8 about how best to defend your client.

9                   QUESTION: But -- but wasn't Williams decided  
10 after the Maryland Supreme Court's opinion here?

11                  MR. VERRILLI: Yes, it was Justice Scalia,  
12 but --

13                  QUESTION: So, therefore, it can't be used for  
14 purposes of deciding whether what Maryland did was an  
15 unreasonable application of then-existing Federal law.

16                  MR. VERRILLI: I disagree with that, Justice  
17 Scalia, for the following reason. Williams, like this  
18 case, was an AEDPA case and all Williams could do was  
19 decide whether Strickland had been unreasonably applied.  
20 Williams was -- because Williams was an AEDPA case, was a  
21 2254(d)(1) case, Williams could break no new ground by  
22 definition, and therefore, the -- the fact that Williams  
23 concluded what it did about Strickland's requirement,  
24 means that that is what Strickland requires. And that --  
25 and -- and so we don't think it -- we're going beyond

1 AEDPA in the least.

2 QUESTION: Yet, you go back to Strickland and  
3 you can't find the principle that you're now enunciating.

4 MR. VERRILLI: Oh, no, no. I disagree with  
5 that, Mr. Chief Justice. We think it's right on page 690  
6 and 691 of -- of Strickland, and here's the principle that  
7 we think -- Strickland specifically says, as we read it,  
8 that a lawyer's judgment about how to defend a client has  
9 either got to be based on complete investigation or, if  
10 it's based on less than complete investigation, it's  
11 reasonable only to the extent that reasonable professional  
12 judgment supports the limitation on investigation. That's  
13 the rule.

14 QUESTION: Last year in Bell -- Bell versus  
15 Cohen -- Cone, we stressed that it is a tremendously  
16 deferential regard that we have to the lawyer's action in  
17 a case like that.

18 MR. VERRILLI: Yes, but there's a fundamental  
19 difference between this case and Bell v. Cone, Mr. Chief  
20 Justice, and it's this. Bell v. Cone was not a case about  
21 the failure to investigate. That was purely a case about  
22 counsel's decisions about what information to present to  
23 the sentencer after having done what was indisputably a  
24 thorough investigation.

25 And the reason that's critical is because as --

1 as we read Strickland, the whole point of the deference  
2 given to counsel's choices about what to present is  
3 premised on the adequacy of the investigation that  
4 precedes them. That is what the source of the deferential  
5 stance towards presentation is. It's the adequacy of  
6 investigation.

7 QUESTION: Is that what this case is about,  
8 Mr. Verrilli, about failure to investigate?

9 MR. VERRILLI: This case is about both, but it's  
10 principally about --

11 QUESTION: It would seem to me if it were, you  
12 would have to establish pretty clearly that counsel did  
13 not know these many things that you say he did not know.  
14 And in fact, counsel was never asked the question, did you  
15 know this, did you know that, did you know -- we don't  
16 know what counsel --

17 I -- I'm looking at the joint appendix on  
18 page 490. He knew a lot of these things. He's -- he's --  
19 he's asked did you know that Wiggins had been removed from  
20 his natural mother as a result of a finding of neglect and  
21 abuse when he was 6 years old? Yes, he says, I knew that.  
22 That was in the social service records. So you knew it.  
23 Yes.

24 You also knew that there were reports of sexual  
25 abuse at one of the foster homes. Yes, he knew that.

1           You also knew he had his hands burned as a child  
2 as a result of his mother's abuse of him. Yes, he knew  
3 that.

4           You also knew about homosexual overtures made  
5 towards him by his Job Corps supervisor. Yes.

6           And you also knew he was -- he was borderline  
7 mentally retarded. Yes.

8           Now, that -- that examination could have --  
9 could have gone further, but you didn't know, did you,  
10 this, this, this, this, and this. There's no examination  
11 like that. We know that he knew many things about this  
12 person's background, but we don't know that he didn't know  
13 the rest of it.

14           MR. VERRILLI: I disagree with that, Justice  
15 Scalia.

16           QUESTION: Well, how do we know that he didn't  
17 know it?

18           MR. VERRILLI: Well, here's how. There -- there  
19 are two absolutely compelling reasons, but before I get to  
20 them, I think it's important to look at the very next  
21 thing that the lawyer says in that colloquy. And the very  
22 next thing the lawyer says is, well, yes, at least I knew  
23 what was reported in other people's reports. And that is  
24 what led the Maryland Court of Appeals to the conclusion  
25 it reached, which was that the social service records and

1 the pre-sentence records, other people's reports,  
2 contained that information, and we have shown by clear and  
3 convincing evidence that they do not.

4 But there are two additional points that are  
5 critical here, and the first one is this. The trier of  
6 fact, the actual judge who heard that testimony --

7 QUESTION: I -- I have to correct you. That --  
8 he -- he didn't say that all of this that he knew he only  
9 knew because it was in other people's reports. The  
10 question was -- he had just said -- and you also knew that  
11 he was borderline mentally retarded. Yes.

12 He -- then another question is begun. You knew  
13 all -- he interrupts the question and he says, at least I  
14 knew that as it was reported in other people's reports,  
15 yes. The that was the fact that he was borderline  
16 mentally retarded.

17 MR. VERRILLI: Justice Scalia, that is not how  
18 the --

19 QUESTION: That's how it reads.

20 MR. VERRILLI: -- Maryland Court of Appeals read  
21 it. It is not how the Fourth Circuit read it.

22 QUESTION: The court of appeals and the Fourth  
23 Circuit must have read it wrong because that's the way it  
24 reads.

25 MR. VERRILLI: But -- but, Justice Scalia, what



1 matters here for AEDPA purposes under (d)(2) is whether  
2 the court of appeals based its determination on an  
3 unreasonable factual finding, and there are two -- there  
4 are two critical indicia here that it did. The first  
5 one -- the first one is this. Well, there are three.

6 First, the records don't contain the  
7 information.

8 Second, the trier of fact, the judge who heard  
9 this testimony, concluded -- and this is at page 605 and  
10 606 of the joint appendix -- that Mr. Schlaich, the lawyer  
11 who gave that testimony, did not know what was in the  
12 social -- what was in the social history subsequently  
13 prepared.

14 QUESTION: This was in the trial itself or in a  
15 State habeas proceeding?

16 MR. VERRILLI: In the State habeas proceeding,  
17 Your Honor. His -- at the conclusion of his testimony and  
18 during closing argument by the -- by the government in  
19 that State habeas proceeding, the -- the trier of fact who  
20 heard the testimony, could assess demeanor, could assess  
21 credibility, heard all the other evidence, saw all the  
22 other evidence, concluded that he didn't know and found it  
23 was error.

24 And then -- and the next point that we think  
25 conclusively demonstrates that -- that the lawyers did not

1 know is this. Remember that -- that at the close of the  
2 sentencing proceeding, not the post-conviction proceeding,  
3 Mr. Chief Justice, but the actual sentencing proceeding,  
4 counsel for Wiggins made a proffer of what mitigating  
5 evidence they would have submitted to the sentencing jury  
6 had their motion to bifurcate been granted. That proffer  
7 doesn't mention any of the mitigating evidence that --  
8 that we have shown in the social history -- doesn't  
9 mention the terrible abuse of the first 6 years of his  
10 life. It doesn't mention the horrible burning incident.  
11 It doesn't mention the sexual abuse. It doesn't mention  
12 the homelessness. There's no conceivable reason why  
13 counsel would have withheld all of that information from  
14 its proffer at the conclusion of the sentencing phase of  
15 the proceeding if counsel knew that and could --

16 QUESTION: So that counsel referred to other  
17 people's reports and other reports. Can we draw any  
18 inference from the record that there were some reports  
19 other than the -- I take it it's the social -- social  
20 services report?

21 MR. VERRILLI: Well, I think there was --

22 QUESTION: And the pre-sentence and social --

23 MR. VERRILLI: Pre-sentence.

24 QUESTION: -- and social services? Were there  
25 any other documents that --

1                   MR. VERRILLI: The -- there is a document which  
2 the State has lodged which indicates that there were  
3 transcripts of interviews with family members. Those  
4 aren't in the record, but I think the same exact analysis,  
5 the same exact inference has to be drawn. If those had  
6 included the kind of terrible descriptions of -- of abuse,  
7 it would have shown up in the psychologist's report  
8 because, after all, what that document shows is the  
9 psychologist got those interviews and it would have shown  
10 up in the proffer because that is the most --

11                  QUESTION: And -- and the psychologist's is the  
12 social -- social services report.

13                  MR. VERRILLI: No. That's separate --

14                  QUESTION: That's a separate report.

15                  MR. VERRILLI: That's a separate --

16                  QUESTION: That's exactly my -- look, there is a  
17 document here called lodging and it says, Baltimore City  
18 Department of Social Services Department File. Now, in  
19 looking through it briefly, I cannot find in it all the  
20 references that you say are not in it.

21                  MR. VERRILLI: They are --

22                  QUESTION: I don't think they're there.

23                  MR. VERRILLI: They are not there.

24                  QUESTION: But this says, other people's  
25 reports, and I'm perhaps going to hear in about 20 minutes

1 from now that there could be other reports to which he was  
2 referring which are not in this document and which might  
3 be those other -- those other interviews with other  
4 people, et cetera. In other words, I don't want you to  
5 sit down -- it's -- it's one thing if I'm supposed to look  
6 at this document and say did this lawyer investigate the  
7 background, and the answer I think would be no. But it's  
8 quite another thing if he knew all kinds of other things  
9 from other sources, namely about the burned hands, all the  
10 things you've listed. So I want to be sure.

11 Now, you're referring me one other thing, the  
12 proffer. But in respect to the proffer, since I've read  
13 the briefs, I suspect I will hear the following. Of  
14 course, he didn't want to proffer this. His strategic  
15 decision was to make the jury think that this man might  
16 not have done it, and the more lunatic we make him sound,  
17 the more the jury is going to think the opposite.

18 MR. VERRILLI: Justice Breyer, let me -- let  
19 me --

20 QUESTION: Or I suspect I'll hear that because  
21 I've read it.

22 MR. VERRILLI: Let me address --

23 QUESTION: So I would like you --

24 MR. VERRILLI: Let me address that directly  
25 because I think this goes the essence of why the Maryland

1 Court of Appeals judgment was an unreasonable application  
2 of -- of the Strickland rule, and it's this.

3 The proffer occurred in the following context.  
4 Counsel for Wiggins made a motion to bifurcate the  
5 sentencing proceeding so that they could first retry the  
6 factual case of eligibility, and then if they lost, they  
7 could then put on the full-blown mitigation case.

8 QUESTION: That would have involved the  
9 principal issue had they -- as a separate --

10 MR. VERRILLI: Right. Bifurcation would have  
11 first involved the principalship, and then had  
12 principalship been established to the jury's satisfaction,  
13 they would have moved to the issue of mitigation. And  
14 the -- and the trial judge denied that motion. Now, he  
15 denied that motion -- this is critical -- on the first day  
16 of the sentencing hearing. So up to the first day of the  
17 sentencing hearing, Kevin Wiggins' lawyer's strategy was  
18 obviously to prepare both a principalship case and a  
19 mitigation case because they made a motion that was  
20 designed to allow them to do precisely that. So there is  
21 no conceivable justification for them to have failed to do  
22 everything a reasonable lawyer would have done to develop  
23 a mitigation case.

24 And they -- and what the proffer shows -- I'm  
25 afraid the proffer cannot, Justice Breyer, be explained on

1 the basis that Your Honor described for this reason. The  
2 point of the proffer -- the point of the proffer was to  
3 show the judge and to create a record on appeal of what  
4 they would have shown had the bifurcation been granted and  
5 they could have tried their mitigation case. This proffer  
6 was their mitigation case.

7 QUESTION: What about the first part which was  
8 Justice Kennedy's part, I think so far all of our parts --  
9 questions, which is when you read just the part that  
10 Justice Scalia read to you -- and he says it's on the  
11 basis of other people's reports -- will the other side  
12 concede or how do we know it's -- what he's referring to  
13 is this document rather than some other set of documents?

14 MR. VERRILLI: Well, I think what's critical in  
15 that regard is what the Maryland Court of Appeals found  
16 because what AEDPA requires deference to is factual  
17 findings made by a State court. And what the -- and the  
18 factual finding that the Maryland Court of Appeals  
19 found -- made is on page 121 of the appendix to the  
20 petition in the -- in the second paragraph there. It --  
21 it says, counsel was indeed aware of Wiggins' unfortunate  
22 background. They had available to them not only the  
23 pre-sentence investigation, but detailed social service  
24 records documenting sexual abuse and physical abuse.

25 That is the sum and substance, the total, of

1 what the Maryland Court of Appeals said in terms of the  
2 facts here. It's the sole factual finding. That factual  
3 finding --

4 QUESTION: Did it say, and nothing else? Did it  
5 say, and nothing else?

6 MR. VERRILLI: It said --

7 QUESTION: You're -- you're making it as though  
8 it was a factual finding that this is all that he knew.  
9 Now, they knew that he knew that, but they didn't make a  
10 factual finding that he didn't know anything else.

11 MR. VERRILLI: They -- the factual -- the only  
12 factual finding they made -- the only -- the only -- the  
13 only thing that supports and explicates the general  
14 statement at the outset of that paragraph that they were  
15 aware of his unfortunate childhood is the specific factual  
16 finding that the social service records documented sexual  
17 abuse and documented physical abuse. We've shown by clear  
18 and convincing evidence that that finding is wrong.

19 And then under (d)(2) in AEDPA the question is  
20 whether the Maryland Court of Appeals' judgment was -- was  
21 based on an -- an unreasonable factual determination. And  
22 we've shown that the only thing that they found --

23 QUESTION: Mr. Verrilli, I'd like to come back  
24 to the habeas -- the State habeas decision that you --  
25 that you cited us to, which is on the joint appendix

1 page 604. Now, as I understand it, if you're making a  
2 claim of failure to investigate, the burden is on you to  
3 show that counsel did not know things that he would have  
4 learned on investigation. The burden is on you.

5 As I read this court's decision, what the court  
6 is simply saying is, I don't ever remember a death penalty  
7 case where there was not a social history done. And so it  
8 was simply unthinkable not to have a social history.

9 Then when you go across the page, so, therefore,  
10 based upon the evidence that I have seen, I'm concluding  
11 it was error for them not to investigate it because I  
12 don't have any information before me to believe that they  
13 did not have this information available to them

14 You see the context? And I understand what  
15 you're saying, but the context of this case is that I have  
16 no reason to believe that they did have all of this  
17 information. That's not -- that's not enough to satisfy  
18 your burden. That court would have had to find I believe  
19 that they did not have this information, not I just have  
20 no reason to believe that they had it.

21 MR. VERRILLI: But --

22 QUESTION: The court should have had to find  
23 they did not have this information. It doesn't find that.  
24 It just says I have no reason to believe that they had it.

25 MR. VERRILLI: Justice Scalia, I disagree. I do



1 not think that is a reasonable reading of what the trial  
2 judge held. What the trial --

3 QUESTION: You -- you tell me what it means. It  
4 says --

5 MR. VERRILLI: The trial --

6 QUESTION: -- I have no reason to believe that  
7 they did have all of this information.

8 MR. VERRILLI: The trial judge said that he was  
9 concluding that it was error not to investigate. If they  
10 knew the information, it wouldn't have been error not to  
11 investigate and --

12 QUESTION: No. Earlier the -- the trial judge  
13 says, I just don't think -- I -- I don't know any  
14 capital --

15 MR. VERRILLI: With all due respect, Justice  
16 Scalia --

17 QUESTION: -- I don't know any capital case in  
18 which a social history wasn't done.

19 MR. VERRILLI: With all due respect --

20 QUESTION: I think he -- I think he reversed  
21 simply because you're always supposed to do a social  
22 history.

23 MR. VERRILLI: With all due respect, Your Honor,  
24 the very sentence that you pointed to said, based on the  
25 evidence that I have seen, I'm concluding it was error for

1    them not to investigate it.  If they knew the information,  
2    he never would have reached that conclusion.

3                   QUESTION:  No.  He reached the conclusion  
4    because --

5                   MR. VERRILLI:  And that's completely supported  
6    by the proffer.

7                   QUESTION:  He reached the conclusion because  
8    he --

9                   QUESTION:  No two voices at the same time.  
10   Justice Scalia is asking you a question.

11                   MR. VERRILLI:  Excuse me.

12                   QUESTION:  He reached the conclusion because he  
13   said, I have no reason to believe that they had the  
14   information.  He never made the finding that they didn't  
15   have it.

16                   MR. VERRILLI:  I think that's implicit, Justice  
17   Scalia, in his conclusion that it was error not to  
18   investigate, and I think it's completely confirmed by the  
19   proffer which didn't include any of this information and  
20   for which there would have been absolutely no explanation  
21   for its exclusion.  Absolutely none whatsoever.  So I  
22   think with respect to the -- to the factual finding that  
23   the Maryland Court of Appeals made, that the social  
24   services records documented abuse and provided the source  
25   of his knowledge, that's clearly erroneous.

1                   QUESTION: Mr. Verrilli, you said absolutely no  
2 reason why it wouldn't come in if they had it. Why  
3 couldn't counsel for the defense think if we introduce  
4 this, it's going to be subject to cross examination? And  
5 if we look at that social history, we find out that the  
6 whole thing is -- the defendant himself was the source of  
7 the information about the horrible sexual abuse he had  
8 been exposed to as a child. The jury might find that a  
9 person who had been so abused would be full of hate and  
10 therefore very likely would have had the mental state to  
11 carry out this brutal murder that -- in other words, that  
12 this kind of information could be a two-edged sword. The  
13 jury could infer from it he's not fully responsible for  
14 his acts or, on the other hand, that this person was  
15 violent, full of hate, and indeed committed this brutal  
16 murder.

17                   MR. VERRILLI: Well, I think, Your Honor, I'm  
18 going to answer Your Honor's question directly, but I -- I  
19 need a minute to do it.

20                   QUESTION: Yes.

21                   MR. VERRILLI: The question under Strickland, it  
22 seems to us, is that once you've concluded that there was  
23 a failure to investigate adequately, the question is  
24 whether there is a reasonable probability that the outcome  
25 would have been different as a result of that failure.

1 And in this case, it seems to me, that means that what  
2 we -- and Strickland also stresses that that is an  
3 objective test. That is not based on the idiosyncracies  
4 of the individual decision makers. It's an objective  
5 analysis.

6 And so the question here is whether had this  
7 information been investigated, if it was in the hands of  
8 competent counsel, is there a reasonable probability that  
9 competent counsel would have used it and introduced it,  
10 and then is there a reasonable probability that it would  
11 have affected the sentencing jury's outcome.

12 And the second half of that analysis, it seems  
13 to us, is answered a fortiori by Williams against Taylor.

14 The first half of that analysis seems to us  
15 clearly to support relief here because, as I take Your  
16 Honor's question, it's a question of, well, there might be  
17 a justification for not submitting this evidence to the  
18 jury. Yes, there might. We think in a case like this  
19 one, it would be an unreasonable choice not to do so  
20 because this evidence has so little of what this Court has  
21 described in other cases like Burger and Darden as a sharp  
22 double edge, and it is so powerfully mitigating that we  
23 don't think it would have that effect.

24 But we -- we respectfully suggest that's not the  
25 relevant question. Once you've established deficient

1 performance with respect to investigation, then we shift  
2 to the prejudice inquiry, and it's an objective analysis.  
3 And so long as there is a reasonable probability that  
4 competent counsel would have used this information in  
5 combination with the case that they made, then -- and  
6 there's a reasonable probability that the outcome would  
7 have been affected, which I think Williams v. Taylor  
8 establishes for us, then we have shown what we need to  
9 show to be entitled to relief.

10 QUESTION: Do you --

11 QUESTION: What are the --

12 QUESTION: What do you think the test is that  
13 Williams against Taylor lays down as to determining a -- a  
14 probability of a different outcome?

15 MR. VERRILLI: Well, I think, if I may just draw  
16 from Justice O'Connor's concurring opinion with respect to  
17 that. If there's an obvious failure on the part of the  
18 State court to consider the totality of the record, that's  
19 an unreasonable application with respect to prejudice.  
20 And with -- in Williams, of course, as Your Honor's  
21 dissenting opinion pointed out, there was a much more  
22 severe case of aggravating information than here.  
23 Williams had a terrible, long record of violence. Wiggins  
24 has none. And the mitigating evidence here is even  
25 stronger than the mitigating evidence that existed in the

1 Williams case.

2 And so we think it follows directly from  
3 Williams that -- that if you look at whether there's a  
4 reasonable probability that the outcome would have been  
5 different here on the basis of submitting this evidence,  
6 that we think that's a very clear and easy case under the  
7 standards that Williams sets.

8 QUESTION: Are -- are you making any argument  
9 that the ruling on the bifurcation motion might also have  
10 been different if there had been a proffer of this? Or  
11 did the judge rule on the bifurcation motion without  
12 knowing what the mitigation evidence might be?

13 MR. VERRILLI: The -- factually, Justice  
14 Kennedy, it's the latter. The -- he ruled on the  
15 bifurcation motion at the outset of the -- of the trial.

16 QUESTION: Is -- is that a common motion in  
17 Maryland capital cases, to try to bifurcate the sentencing  
18 proceeding?

19 MR. VERRILLI: At the time it was, and the  
20 reason it was, Mr. Chief Justice, is because sometime  
21 shortly before this case was tried in Baltimore County,  
22 another Baltimore County judge had allowed such a motion.

23 And we think that fact reinforces the utterly  
24 unreasonable character of the failure to investigate here.  
25 These lawyers had a -- had -- had to think there was a

1 reasonable prospect they were going to be able to put on a  
2 mitigation case, but we know that all they had to put on  
3 that mitigation case was the psychologist's testing. And  
4 after all, that -- all that psychologist did was test.

5 QUESTION: But they would -- they would be  
6 fighting over the principalship too, would they not?

7 MR. VERRILLI: Yes, but that -- the point of  
8 bifurcation was to do principalship first, and if they  
9 prevailed on principalship, they wouldn't go to the second  
10 phase. And only if they didn't prevail on principalship  
11 would they go to the second phase where they wouldn't have  
12 any of the tactical cross currents they were worried about  
13 because principalship was already established and they  
14 could go whole hog and make the fullest mitigation case  
15 possible.

16 And the fact that they were -- that they were  
17 endeavoring to follow that strategy until the first day of  
18 the sentencing hearing, October 11th, 1989, shows that  
19 they didn't -- that all they had as of October 11, 1989,  
20 was the psychologist's report -- shows that they did not  
21 investigate at the level that Strickland requires.

22 QUESTION: Mr. --

23 QUESTION: What about the psychological reports,  
24 Mr. Verrilli? Those were available to defense counsel?

25 MR. VERRILLI: Yes, Justice O'Connor.

1                   QUESTION: And indeed, obtained by defense  
2 counsel.

3                   MR. VERRILLI: Yes, Justice O'Connor.

4                   QUESTION: And what did they reveal in this area  
5 of mitigation?

6                   MR. VERRILLI: They were -- the -- the -- there  
7 are two things that are important about the psychologist's  
8 report: one, what it does contain; the other, what it  
9 doesn't contain.

10                  The psychologist was commissioned in this case  
11 to do testing of Mr. Wiggins, intelligence testing and  
12 then psychological profiling, MMPI-type testing. The  
13 evidence is undisputed about that. That's what the  
14 psychologist did.

15                  The thing that's significant about what was  
16 discovered was the fact that Mr. Wiggins was of borderline  
17 intelligence, which seems to us quite relevant and  
18 entirely consistent -- it would have been entirely  
19 consistent, even absent bifurcation, to use that evidence,  
20 in addition to an effort to disprove principalship,  
21 because the borderline intelligence would easily and  
22 strongly have supported the conclusion that Mr. Wiggins  
23 was an accomplice and not a principal.

24                  But the thing it doesn't show is any of the  
25 history of abuse, and that's because the psychologist



1 wasn't commissioned to do that. They didn't do what they  
2 needed to do here, which was to do the social history.  
3 The evidence is clear that it was routine practice in  
4 these public defenders' office to do the social history.  
5 They admitted that. The evidence is clear -- and the --  
6 and the public defenders admitted it -- that funds were  
7 available for that purpose. They just didn't do it. They  
8 just dropped the ball on this. They didn't do what all  
9 the lawyers in their office did routinely, and they didn't  
10 do what the State post-conviction trial judge said he had  
11 never seen not done, which is prepare this social history  
12 and --

13           QUESTION: Mr. Verrilli, is -- is there any  
14 evidence, one way or the other, as to whether defense  
15 counsel simply sat down with the defendant and said, tell  
16 us about your background and what has happened to you in  
17 your life? Is there any evidence one way or the other  
18 about that?

19           MR. VERRILLI: There is not. There is not, but  
20 it wouldn't be a surprise, Justice Souter, that even if an  
21 interview like that occurred, that the defendant would not  
22 have revealed it, that -- it's very difficult to get this  
23 kind of history of horrible personal abuse out of a  
24 defendant. It very often requires a professional to do  
25 it. That is why -- that's the very reason why the social

1 workers are brought in to do the kinds of social histories  
2 as a -- as a routine matter. And it wasn't done here.

3 If there are no further questions, I'd like to  
4 reserve my remaining time.

5 QUESTION: Very well, Mr. Verrilli.  
6 Mr. Bair.

7 ORAL ARGUMENT OF GARY E. BAIR  
8 ON BEHALF OF THE RESPONDENTS

9 MR. BAIR: Mr. Chief Justice, and may it please  
10 the Court:

11 I'd like to first start with a correction in the  
12 factual record in this case. Counsel for petitioner  
13 has -- has referred the Court to JA605 and 606. And  
14 indeed, that was a comment made by the post-conviction  
15 court during the State post-conviction proceedings.  
16 However, that was an oral comment from the bench in April  
17 of 1994.

18 The post-conviction court's written opinion did  
19 not issue until 1997. And in the post-conviction written  
20 opinion -- it was a 257-page written opinion. And that  
21 written opinion basically countermanded and superseded and  
22 disavowed the statements that are on page JA605 and 606.  
23 If you look to page 137a of the appendix to the petition  
24 for writ of certiorari, that is where you have the  
25 excerpts from --

1 QUESTION: What page? What --

2 MR. BAIR: 137a, Your Honor. That is where  
3 you have the excerpt from the State habeas, State  
4 post-conviction court's written opinion. And if you look  
5 at footnote 261 on that page --

6 QUESTION: These are footnotes in the State  
7 court's opinion or footnotes in the -- in the appendix?

8 MR. BAIR: This is in -- these are footnotes in  
9 the State post-conviction court's opinion. It was, as I  
10 said, a very lengthy opinion and had several hundred  
11 footnotes as well as 257 pages.

12 By the time the post-conviction court rendered  
13 its final decision, its written decision, it had the  
14 transcripts from the post-conviction proceeding. And --  
15 and as you may recall, the post-conviction proceeding  
16 lasted 5 months. Testimony was taken over 7 days in a  
17 5-month post-conviction hearing.

18 That footnote 261 is the transcript that Justice  
19 Scalia was referring to which is on JA490 and 491. So  
20 this is the testimony that the post-conviction court used  
21 to make its fact finding. And in its fact finding it said  
22 Schlaich had more information than appeared in the PSI  
23 report.

24 I would go back to what was said earlier. There  
25 were several sources of the information for trial counsel.

1 In fact, I would -- I would tally them up to be six  
2 different sources. You had, obviously, the DSS reports,  
3 the lodged material that Justice Breyer referred to,  
4 220 pages of social background, educational background,  
5 medical background, because petitioner was in foster care  
6 from when he was about 6 years old to when he --

7 QUESTION: Let me just get one thing straight on  
8 the -- the long footnote that you quote. They end up  
9 saying, you knew all this and you did not get a social  
10 history. Do you think it was -- a competent counsel would  
11 have gotten a social history or not knowing what he said  
12 he knew?

13 MR. BAIR: I think he got a -- he -- he got a  
14 social history in a different way, Your Honor. He didn't  
15 hire a forensic social worker. Instead, he obtained  
16 lengthy DSS reports, hired a psychologist, hired a  
17 criminologist, talked to family members, talked to the  
18 client. He didn't do it in the way that -- that counsel  
19 now says it should have been done.

20 QUESTION: Is -- is the way that counsel says it  
21 should have been done the way that lawyers typically do it  
22 in -- in Maryland?

23 MR. BAIR: I think they do it in different ways,  
24 Your Honor. I think -- I think sometimes they use  
25 forensic social workers. Sometimes they use

1 psychologists.

2 QUESTION: But they're wrong to tell us that  
3 they normally use social workers. Is that right?

4 MR. BAIR: I think --

5 QUESTION: That was -- his representation was  
6 that this case is unique because every other member of the  
7 defense bar routinely gets the social history. Are you --  
8 is that right or wrong?

9 MR. BAIR: I think it's wrong. I think it's  
10 wrong, Your Honor. I think that lawyers in Maryland use  
11 psychiatrists, they use psychologists, they use social  
12 workers, they use combinations thereof.

13 QUESTION: But he didn't use any of these.

14 MR. BAIR: Pardon me?

15 QUESTION: He didn't use any of those.

16 MR. BAIR: He -- he used a psychologist and he  
17 used a criminologist. And he obtained very lengthy DSS  
18 records.

19 QUESTION: If -- the DSS records that he  
20 obtained -- are they all in the lodging or there are some  
21 other ones?

22 MR. BAIR: Yes. They're all -- they're all in  
23 the lodging.

24 QUESTION: Okay. Now, if -- if -- it's  
25 5 months -- it took 5 months. They went into this in

1 great care. You've given us the lodging. I've looked  
2 through the lodging, my law clerk more thoroughly. I  
3 can't find a word about the sexual abuse. I can't find a  
4 word about the frightful things that he -- one I did find  
5 where it said for -- when he was taken from his mother  
6 at age 6, it's true that the mother hadn't fed him for  
7 2 days. All right. That's there, but none of this other  
8 stuff is there.

9 And -- and, indeed, if he looked at any of it --  
10 anywhere for this other stuff, where would he have looked?  
11 Why wasn't that in the record which took 5 months, if in  
12 fact he looked? Why was there no more reference to it  
13 than an ambiguous statement where he seems to refer to the  
14 lodging?

15 MR. BAIR: Your Honor, a couple of -- a couple  
16 of points to be made.

17 First of all, I -- I agree, and I think we state  
18 in our brief, there is no specific reference to sexual  
19 abuse in those -- in -- in the lodging.

20 QUESTION: And that's actually -- to me that's  
21 the most serious thing there is, I mean, in terms of  
22 shaping an individual who could later turn out the way  
23 that some have turned out. And -- and there is -- it was  
24 horrible in this case, and -- and there's absolutely no  
25 reference whatsoever that I can find that suggests that

1 this lawyer even knew about it.

2 MR. BAIR: Well, there is, Your Honor. That --  
3 that goes back to JA490 and 491.

4 QUESTION: He said he knew about it.

5 MR. BAIR: But the lawyer explicitly testified  
6 that he knew of it.

7 QUESTION: And what was -- that's why I want to  
8 know since -- since that statement, the two pages out of  
9 5 months, when I read them -- people can characterize them  
10 differently, but it seemed to me ambiguous, and the  
11 written reports could have easily referred to what I call  
12 the lodging. But if they didn't refer to the lodging,  
13 what did they refer to?

14 MR. BAIR: The written reports and -- and I  
15 think the reports of others could be either written  
16 reports or oral reports. I think --

17 QUESTION: What he said was -- what did he say?  
18 He said, in other people's reports. Yes, they could have  
19 been. So I would like to know. There's been 5 months of  
20 trial, as you said. There have been endless proceedings.  
21 In your opinion, what did they refer to if, in fact, they  
22 did not refer to the lodging? Because if they did refer  
23 to the lodging, the lawyer in those two pages out of the  
24 5 months simply made a mistake, repeating what he knew  
25 later and thinking that he had learned it earlier from the

1 lodging.

2 MR. BAIR: Your Honor, again, two -- two points  
3 to be made. One is if there is any ambiguity or any lack  
4 of a record here, I think under Strickland that inures to  
5 the detriment of petitioner. He had the burden at this  
6 hearing to rebut the -- the strong presumption of  
7 competence, the strong presumption of reasonable conduct.

8 But let me go back to what the reports were.  
9 You had reports from the client. And I think, although,  
10 as -- as was asked earlier by Justice Souter, there's  
11 nothing in the record to say whether he spoke to his  
12 client. I think we can infer that he spoke to his client.  
13 He represented him for close to a year. Counsel for  
14 petitioner at post-conviction never pursued those lines of  
15 questioning. So I think we can assume that this lawyer  
16 talked to his client.

17 QUESTION: The -- the post-conviction proceeding  
18 extended over a period of 5 months. How many trial days  
19 were there?

20 MR. BAIR: There were 7 days, Your Honor, where  
21 testimony was taken in those 5 months --

22 QUESTION: So it had recessed and then  
23 resumed --

24 MR. BAIR: Yes.

25 QUESTION: -- several times.



1                   MR. BAIR: Yes, several times. It was --

2                   QUESTION: Mr. Bair, you -- you seem to accept  
3 that -- that all that he knew was as it was reported in  
4 other people's reports. But I just don't read the text  
5 that way. He said, at least I knew that as it was  
6 reported in other people's reports. And the that in that  
7 transcript is that he was borderline mentally retarded.

8                   MR. BAIR: I agree.

9                   QUESTION: That is the only thing that he said  
10 he got from other people's reports.

11                  MR. BAIR: I agree. I think --

12                  QUESTION: We don't know where he got all of the  
13 other information that he said he had.

14                  MR. BAIR: No, but I think logically, going back  
15 to the reports of sexual abuse, there's only one person  
16 that could have come from because even the Selvog report,  
17 which is what post-conviction counsel prepared -- Selvog  
18 testified at the post-conviction hearing that his sole  
19 source for the information about Wiggins' sexual abuse was  
20 from Wiggins himself.

21                  Now, Wiggins obviously spoke to his attorney.  
22 He spoke to the psychologist who interviewed him. He  
23 spoke to the criminologist that trial counsel hired.  
24 Clearly, I think an inference can be drawn that Wiggins  
25 reported that sexual abuse either directly to his attorney

1 or to the criminologist or to the psychologist.

2 QUESTION: And in your view on page 137a of the  
3 transcript, all of those matters are comprehended in this  
4 question and this answer toward maybe -- 10 lines from the  
5 top. You also knew that there were reports of sexual  
6 abuse at one of his foster homes? Yes.

7 MR. BAIR: Yes.

8 QUESTION: So the term -- the word reports there  
9 means that he relied on things other than that are in the  
10 lodging.

11 MR. BAIR: Yes, I think so, Your Honor.

12 QUESTION: To your knowledge -- and this is  
13 quite important to me. I'm just trying to find out what  
14 the -- if they were not referring to the lodging which  
15 contains the reports, if they were not referring to that  
16 document, they must have been referring to or they were  
17 referring to Wiggins' own statements.

18 MR. BAIR: Either Wiggins' own statements or the  
19 reports of the other experts in the case.

20 QUESTION: Other experts in the case.

21 MR. BAIR: Right. There was --

22 QUESTION: He would have gotten them from?

23 MR. BAIR: From Wiggins.

24 QUESTION: After the trial was over.

25 MR. BAIR: No, no, Your Honor.

1           QUESTION: Before, before.

2           MR. BAIR: This was all going on --

3           QUESTION: That's the criminologist and the --

4           MR. BAIR: Yes, yes. And those reports were

5 prepared before trial or between trial and sentencing.

6 There was a 2-and-a-half month postponement between the

7 time of this trial and the time of the sentencing.

8           QUESTION: All right. So the words, other

9 people's reports, could have meant Wiggins told me or an

10 expert whom I hired who talked to Wiggins told me.

11          MR. BAIR: Yes.

12          QUESTION: Yes, okay.

13          MR. BAIR: Or I guess the only -- the only

14 other --

15          QUESTION: That -- that he was mentally

16 retarded. It only goes to whether he was mentally

17 retarded.

18          MR. BAIR: Yes.

19          QUESTION: I'm puzzled about another thing.

20          MR. BAIR: The only other --

21          QUESTION: Do those reports refer to sexual

22 abuse?

23          MR. BAIR: Pardon me, Your Honor?

24          QUESTION: Do those reports refer to sexual

25 abuse?

1           MR. BAIR: The only report that refers to sexual  
2 abuse -- now, the only written report that refers to  
3 sexual abuse is the Selvog report.

4           QUESTION: The what?

5           MR. BAIR: The -- the Selvog report was the one  
6 done by the social worker during post-conviction by -- by  
7 post-conviction counsel.

8           The psychologist's report was an oral report.  
9 So we don't really know exactly what he knew because  
10 there -- that was never reduced to writing.

11          QUESTION: Well, I'm still puzzled. Were there  
12 any written reports available to the lawyer that referred  
13 to sexual abuse that we know about?

14          MR. BAIR: No.

15          QUESTION: So then when he said you know that  
16 there were reports of sexual abuse at one of his foster  
17 homes, he was wrong.

18          MR. BAIR: No. I think he -- he was referring  
19 to -- he could have been referring to reports of Wiggins  
20 himself.

21          QUESTION: Oh, oh. I see what you're saying --

22          QUESTION: Oral reports.

23          MR. BAIR: Oral reports.

24          QUESTION: That -- that word reports does not  
25 mean written reports.

1                   MR. BAIR: I don't think it has to refer to  
2 written reports, Your Honor.

3                   The only -- just to follow up with Justice  
4 Breyer, the only other report was the pre-sentence  
5 investigation. That was the other written report that was  
6 available to counsel.

7                   QUESTION: But that didn't have --

8                   MR. BAIR: No, no, no.

9                   QUESTION: I mean, what's worrying me obviously  
10 is we're -- we're turning an awful lot here on this word,  
11 other reports, which came in a fairly long hearing and  
12 which would normally be taken as referring to written  
13 reports, though it doesn't say that. And I'm -- that  
14 makes me concerned. I'm not sure where to go with it.

15                  MR. BAIR: Well, I think two points, Your Honor.  
16 One, counsel did testify and it was undisputed -- it was  
17 never in any way negated through cross examination or any  
18 other vehicle -- that he knew of sexual abuse. In fact,  
19 he specifically answered the question, the more specific  
20 sexual abuse question, I knew about the Job Corps  
21 overture. So those answers are unequivocal and they stand  
22 in the record unchallenged.

23                  QUESTION: Yes, but that's troubling because the  
24 Job Corps overture is -- is quite mild compared to the  
25 repeated days, months-on-end physical abuse suffered at

1 the hands of the stepfather.

2 MR. BAIR: I agree.

3 QUESTION: And it seems to me that this -- well,

4 I'll ask you. Does this permit us to make the inference

5 that if he had known this, he would have brought it out?

6 MR. BAIR: I think --

7 QUESTION: Because it's just very difficult to

8 see why he would not have.

9 MR. BAIR: Well, I think he made a -- a

10 reasonable tactical decision.

11 QUESTION: That goes to the tactical point.

12 MR. BAIR: I think he made a reasonable tactical

13 decision. He had a powerful case. Under Maryland law,

14 the jury had to find unanimously and beyond a reasonable

15 doubt that Wiggins was the principal, that is, the actual

16 killer in this case.

17 They also had to find unanimously and beyond a

18 reasonable doubt that the murder and the robbery occurred

19 at the same time, and there was evidence in this case.

20 This was a very unusual situation in that it wasn't even

21 clear whether the robbery occurred simultaneously with the

22 murder. There was a -- there was a -- a huge dispute at

23 trial and at sentencing over when Ms. Lacs was killed

24 because her body was discovered on a Saturday. Wiggins

25 was in possession of her car --

1                   QUESTION: Mr. Bair, may I ask? Did counsel  
2 during the -- the sentencing hearing come up with a theory  
3 as to what happened other than that his client was the  
4 killer?

5                   MR. BAIR: Yes, absolutely. He challenged  
6 and -- and very strenuously both during opening and -- and  
7 closing -- pointed out the evidence in the case that  
8 showed there were five fingerprints in Ms. Lacs' apartment  
9 that were not tied to anyone. There was a hat, some sort  
10 of a baseball hat, that was in the apartment.

11                  QUESTION: No, I understand -- but did he -- did  
12 he suggest who they might have belonged to? Did he come  
13 up with a theory as to who --

14                  MR. BAIR: No. I don't -- I don't think there  
15 was any particular person who was another suspect.

16                  QUESTION: He didn't suggest that the man who  
17 lived downstairs might have been involved.

18                  MR. BAIR: No. And that -- that was never  
19 challenged as part of any ineffective assistance of  
20 counsel in these proceedings, Your Honor.

21                  QUESTION: Mr. Bair, what -- what do you respond  
22 to opposing counsel's argument that it doesn't matter  
23 because you didn't know until the eve of trial that you  
24 wouldn't have had a bifurcated proceeding, so you should  
25 have been doing this research in contemplation of a

1 bifurcated proceeding?

2 MR. BAIR: Well, Your Honor, first of all, of  
3 course, our position is they were doing it. They had,  
4 as -- as I said, lots of information. They were doing it.  
5 They were -- they were keeping that option open.

6 But another answer, Your Honor, is the evidence  
7 would not have been put on. The more evidence that --  
8 that actually came out in -- in, you know, the  
9 proceedings, the details that we've now learned of through  
10 the Selvog report, they are so double-edged. They are so  
11 potentially harmful particularly in the context of this  
12 case. Between the Selvog report and the lodged materials,  
13 the DSS records, the -- the jury would have heard not just  
14 that Kevin Wiggins was -- had been in foster care and had  
15 a clean record, which is all they did hear. In addition,  
16 if those records had come in, they would have heard that  
17 he hated his biological mother, that he was in fights with  
18 other foster children, that he had once stolen some  
19 gasoline and tried to set fire to -- to a building, that  
20 he had a disturbed personality --

21 QUESTION: That all goes to explain why they  
22 wouldn't have put it in, but why didn't they put any of  
23 this in the proffer at the -- to the judge at the --

24 MR. BAIR: There -- there was no need to, Your  
25 Honor. There's no need under Maryland law to give a



1 detailed proffer. They -- they did not want to tip off  
2 the other side as to any potential things that might be  
3 negative to their client.

4 And again, to the degree that we don't know  
5 about the details, it -- it inures to the detriment of  
6 Wiggins. It was his burden to bring out all of this  
7 evidence and he didn't do it.

8 QUESTION: Does -- does the strength of the  
9 mitigating evidence have anything to do with whether a  
10 bifurcated proceeding is allowed?

11 MR. BAIR: No.

12 QUESTION: Would they have been more likely to  
13 get the bifurcated proceeding if they had come up with a  
14 lot of information about his childhood and so forth?

15 MR. BAIR: I don't believe so, Your Honor. Of  
16 course --

17 QUESTION: What does it turn on then?

18 MR. BAIR: I think it was -- it was the trial  
19 court's discretion. I think it was just a -- this was  
20 back in 1989. There wasn't a lot of definitive law on it  
21 at the time. Since then, the Maryland Court of Appeals  
22 has said absolutely not.

23 QUESTION: Was there a transcript of that  
24 hearing? He just said, I want a bifurcated hearing and  
25 sat down, or did he say, I want a bifurcated hearing

1 because there's going to be very substantial mitigating  
2 evidence and I want the jury to consider that separately?  
3 What did he -- do we have a transcript of what he said  
4 here?

5 MR. BAIR: I think we do have a transcript, Your  
6 Honor, and my recollection is that there was a short  
7 discussion of it, not -- not a detailed discussion of it.

8 QUESTION: No, but if he had been in a position  
9 to make a strong proffer, why wouldn't he have made it?  
10 His case for a bifurcated hearing would have been stronger  
11 if he had had a strong proffer. Wouldn't it have been?

12 MR. BAIR: It would have been stronger, Your  
13 Honor, but I think in all likelihood if you look -- if you  
14 look at the Maryland sentencing law, it contemplates it,  
15 as I said, the court of appeals in Maryland has since held  
16 definitively. In fact, in the direct appeal in this case,  
17 in the Wiggins case itself on direct appeal, they have  
18 held that the Maryland sentencing procedure in capital  
19 cases requires that the jury go through certain steps, and  
20 those steps all have to be done at a unitary hearing.  
21 Obviously, there's a bifurcated guilt/innocence and  
22 sentencing.

23 QUESTION: Well --

24 QUESTION: Well, obviously, the -- the defense  
25 counsel didn't know until the motion was made and ruled

1 upon for a bifurcated hearing whether the judge would  
2 grant it, and there's no reason presumably that defense  
3 counsel should not have investigated the mitigating  
4 circumstances pending that ruling.

5 MR. BAIR: I agree.

6 QUESTION: And yet, we don't have a clear  
7 understanding of what he knew. And in fact, did not  
8 defense counsel tell the jury for sentencing that they  
9 would be hearing evidence about the defendant's  
10 background --

11 MR. BAIR: They -- they did --

12 QUESTION: -- at sentencing? And then nothing  
13 was put on.

14 MR. BAIR: No, not -- not really, Your Honor.

15 QUESTION: I mean, what -- what is the jury to  
16 make of that? It's so odd.

17 MR. BAIR: I don't -- I don't think so, Justice  
18 O'Connor. I think -- I think what counsel did is if you  
19 look at the essence of the -- the approach at sentencing,  
20 clearly it was we're contesting principalship. There was  
21 one comment about you're going to hear what a tough life  
22 he had.

23 Now, that was done I think for a couple reasons.  
24 One is the counsel knew that petitioner could allocute and  
25 probably would allocute personally to -- to the -- the

1 jury.

2           They also knew that there was going to be a  
3 criminologist who was going to testify because the jury  
4 knew there was only two choices for this man, either life  
5 or death. That was -- and life without parole. But they  
6 knew it was either life or life without parole or death.  
7 And they were also putting on evidence by a criminologist  
8 that would show that Wiggins would adjust well to a life  
9 sentence. So I think they -- they also knew that -- that  
10 the pre-sentence report --

11           QUESTION: Thank you, Mr. Bair.

12           MR. BAIR: Thank you, Your Honor.

13           QUESTION: Mr. Himmelfarb, we'll hear from you.

14           ORAL ARGUMENT OF DAN HIMMELFARB

15           ON BEHALF OF THE UNITED STATES,

16           AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

17           MR. HIMMELFARB: Mr. Chief Justice, and may it  
18 please the Court:

19           The position of the United States is that the  
20 Sixth Amendment imposed no obligation to present evidence  
21 of petitioner's background at sentencing. It imposed no  
22 obligation to conduct a more extensive investigation of  
23 his background before sentencing. Those conclusions  
24 follow from a straightforward application of Strickland  
25 versus Washington which judges attorney performance by a

1 single standard, whether it was reasonable under all the  
2 circumstances of the case.

3 The decision to choose a principalship defense  
4 and to reject a mitigation defense falls comfortably  
5 within the wide range --

6 QUESTION: What's the bifurcated -- I've never  
7 heard of a bifurcated sentencing hearing. How does that  
8 work?

9 MR. HIMMELFARB: My understanding, Justice  
10 Breyer, is that the basis for the motion was that the  
11 principalship defense could be undermined by presenting  
12 the mitigating evidence, so they wanted to do it  
13 separately.

14 QUESTION: Right. So what do you do? You  
15 present the principalship defense and then the jury votes  
16 death or life, and then if they vote death, they go on and  
17 present the next one, and if the next jury or the same  
18 jury, having heard the other one, votes life, then it's  
19 life? I mean, I don't see how it works.

20 MR. HIMMELFARB: My understanding is that under  
21 the theory advanced by petitioner's counsel in support of  
22 the bifurcation motion, principalship alone would be  
23 determined at the first phase of the sentencing. If the  
24 jury found principalship, there would be a second phase at  
25 which counsel could --

1                   QUESTION: Okay. Under those circumstances,  
2 they're saying that, obviously, in that motion he would  
3 have given everything he knew about the background since  
4 he thought it might work that way, and if he didn't,  
5 that's evidence, in fact, amazingly convincing evidence,  
6 that he didn't know. He didn't know about the sexual  
7 history.

8                   And the main argument they're making has nothing  
9 to do with the strategic choice. It has to do with his  
10 failure to investigate.

11                  So what's your -- what's your response?

12                 MR. HIMMELFARB: If you look at the actual  
13 proffer that was made in support of the bifurcation  
14 motion, which is at pages 44 and 45 of the joint appendix,  
15 what counsel said was, I can proffer to the court that in  
16 a non-bifurcated proceeding, the defense is in a position  
17 of coming forward with evidence regarding psychological  
18 history on Mr. Wiggins.

19                 QUESTION: This is 40 -- page 44 of the appendix  
20 to the petition?

21                 MR. HIMMELFARB: No, Mr. Chief Justice. It's  
22 the joint appendix.

23                 QUESTION: Oh, the joint appendix?

24                 MR. HIMMELFARB: Page 44 at the bottom.

25                 I'm in a position to come forward with evidence

1 regarding psychological history on Mr. Wiggins, including  
2 aspects of his life history, including a diagnosis of a  
3 personality disorder, including diagnosis of some  
4 retardation. So --

5 QUESTION: So he says nothing whatsoever about  
6 the most frightful sexual abuse, about having the mother  
7 who did all the things that this one particularly did, not  
8 feeding them, burning their hands on the stove, et cetera.  
9 I won't list it. But I just don't see anything in the  
10 thing you've just read that suggests that he knew a single  
11 thing about that.

12 MR. HIMMELFARB: Well, it's true it was a  
13 general proffer rather than a highly particularized  
14 proffer.

15 QUESTION: Yes. And so their point is,  
16 obviously, if he had known about it, he would have said  
17 something, and the fact that he didn't say something, when  
18 coupled with the ambiguities on the pages, you know, 404  
19 or 405 or 401-402 -- you get what we're talking about, the  
20 footnote -- coupled with that shows that the correct  
21 reading of that is he didn't know about it.

22 MR. HIMMELFARB: I think there's an important  
23 point to keep in mind here. The constitutional right  
24 petitioner has raised in this case is not the duty to  
25 know, it's the duty to investigate. The claim is that the

1 investigation was constitutionally inadequate.

2 And the other important thing to keep in mind is  
3 that there is significant evidence in the record that a  
4 significant investigation was done, an investigation which  
5 we think is constitutionally adequate.

6 QUESTION: Mr. Himmelfarb, in that connection,  
7 there's something I'd like you to set me straight on.  
8 There was a statement at some point that each of the  
9 defense counsel thought the other was going to bear the  
10 laboring awe in working up the mitigation case. Now, it  
11 seems to me that each one thought the other was doing it  
12 and the other wasn't doing it. That would be ineffective  
13 representation if each one thought the other was  
14 investigating and it turned out neither investigated.

15 MR. HIMMELFARB: I agree that would be  
16 problematic, but I don't think the record bears that  
17 suggestion out, again, going to the joint appendix.

18 QUESTION: Well, where -- where do I get that  
19 notion from that each one thought the other was  
20 principally responsible for working up the mitigation  
21 case?

22 MR. HIMMELFARB: Petitioner makes that argument  
23 in his brief, and there are record cites to support it.  
24 But we don't think the record cites do, in fact, support  
25 the notion that each counsel thought the other was



1 responsible for investigating the mitigation case.

2           There were two lawyers, Schlaich and Nethercott.  
3 At page 485 of the joint appendix, Schlaich testified that  
4 after he left the Baltimore County Public Defenders Office  
5 and went to another office, from that point forward his  
6 co-counsel, Ms. Nethercott, did most of the mitigation  
7 preparation with his guidance.

8           Then Ms. Nethercott testified at the  
9 post-conviction hearing as well, and her testimony was  
10 that she had no responsibility for retaining experts,  
11 that that was Schlaich's responsibility.

12           So I think that's a far cry from testimony by  
13 either that only the other one had responsibility for  
14 preparing the mitigation case. Each one was testifying  
15 about his or her particular responsibilities.

16           QUESTION: Yes, but where -- the page you refer  
17 to, he says, when asked what he did in -- in mitigation,  
18 he said, well, basically what we did in mitigation was  
19 attempt to retry the factual case and try to convince the  
20 jury on the principalship issue. That doesn't sound like  
21 the kind of mitigation we're talking about.

22           MR. HIMMELFARB: Well, that's right, Justice  
23 Stevens. It remains the case, though, that a substantial  
24 amount of investigation was done. That testimony --

25           QUESTION: But this part of the transcript

1 certainly doesn't support that proposition.

2 MR. HIMMELFARB: Well --

3 QUESTION: That's the part you called our  
4 attention --

5 MR. HIMMELFARB: -- in fairness to Mr. Schlaich,  
6 I think he was interpreting the question to mean what was  
7 your defense at sentencing, not so much what was your  
8 mitigation --

9 QUESTION: That's right. So this part does not  
10 support the -- the proposition that he did any mitigating  
11 research himself or with the other person. He's talking  
12 about the principalship issue.

13 MR. HIMMELFARB: I was just responding to  
14 Justice Ginsburg's question about whether it was true that  
15 each one testified that the other was responsible for the  
16 investigation. My only point is that I don't think the  
17 record bears out that suggestion in petitioner's brief.

18 QUESTION: But it also doesn't show that there  
19 was substantial investigation, which is what you went on  
20 to say, and I don't think it's supported.

21 MR. HIMMELFARB: I do, Justice Kennedy. The  
22 investigation that was done in this case by trial counsel  
23 was not materially different from the investigation that  
24 was done by post-conviction counsel. It was trial  
25 counsel, after all, who obtained the social services

1 records that documented a history of neglect. Trial  
2 counsel directed public defender investigators to go out  
3 and interview petitioner's family members, which they did.  
4 Trial counsel hired a psychologist to conduct clinical  
5 interviews of petitioner which were done.

6 Really the only difference between what trial  
7 counsel did and what post-conviction counsel did was that  
8 post-conviction counsel hired a social worker, a so-called  
9 mitigation specialist, who supervised the investigation  
10 and pulled the information together in a report.

11 But we're talking here about whether there is a  
12 constitutional deficiency in the investigation, and any  
13 difference in the two investigations, which is really the  
14 fact that the social worker was there in the one but not  
15 the other, we think can't have constitutional  
16 significance.

17 I do want to say a little bit about the duty to  
18 present claim because most of the focus in the argument  
19 has been on the question of the duty to investigate.

20 We think that the principal defense was  
21 reasonable both because a finding of no principalship  
22 would have been an absolute bar to imposition of the death  
23 penalty and because the principalship case that the State  
24 put on here was so weak.

25 We also think it was reasonable not to present a

1 mitigation defense either in addition to the principalship  
2 defense or instead of it. It was reasonable not to  
3 present it in addition to the principal defense because it  
4 had a -- a very serious possibility of undermining it. It  
5 was reasonable not to present it instead of the  
6 principalship defense because mitigating evidence is just  
7 that. It's evidence that would be weighed against  
8 aggravating circumstances. It might or might not lead to  
9 a sentence of death.

10 A finding of no principalship is a categorical  
11 bar to imposition of the death penalty. If a single juror  
12 harbored a reasonable doubt about whether petitioner had  
13 carried out the killing himself, it would be obligated to  
14 return a verdict of life.

15 QUESTION: But presumably the -- the  
16 determination of the facts about the murder was made in  
17 the trial when he was determined guilty or innocent, and  
18 they found him guilty. And so to try to redetermine that  
19 at sentencing and not to offer any evidence in mitigation,  
20 do you think we can say that's reasonable?

21 MR. HIMMELFARB: Absolutely. There were two  
22 different issues, one issue at the guilt phase, one issue  
23 at the sentencing, as far as the -- as far as petitioner's  
24 role is concerned. He was charged with first degree  
25 murder. As the jury was instructed, a conviction of first

1 degree murder does not necessarily encompass a finding of  
2 principalship, a finding that petitioner himself had  
3 carried out the killing. So it was perfectly  
4 understandable that petitioner's counsel would think that  
5 contesting principalship at sentencing would be a  
6 reasonable strategy.

7 QUESTION: Thank you, Mr. Himmel farb.

8 Mr. Verrilli, you have 4 minutes remaining.

9 REBUTTAL ARGUMENT OF DONALD B. VERRILLI, JR.

10 ON BEHALF OF THE PETITIONER

11 MR. VERRILLI: Thank you, Mr. Chief Justice.

12 I'd like to clarify the -- the facts surrounding  
13 the proffer because it's very important to understand how  
14 this unfolded.

15 Counsel for Wiggins made a motion. That motion  
16 was argued on October 11th, 1989 and denied at that time,  
17 the first day of the sentencing hearing. But the proffer  
18 was not made at that time. What -- what counsel for my  
19 friend, the United States, described was what Mr. Schlaich  
20 he would proffer if he had to proffer. He made the actual  
21 proffer at the end of the sentencing proceeding, and it  
22 can be found at pages, I think, 349 to 51 of the -- 348 to  
23 51 of the joint appendix. And there's a lengthy proffer  
24 there of what he would have shown had he been able to put  
25 on his mitigation case in the -- in the method he wanted

1 to. So --

2 QUESTION: He does that -- he does that to  
3 argue --

4 MR. VERRILLI: He's making a record for --

5 QUESTION: -- after the fact that that the  
6 judge --

7 MR. VERRILLI: He's making a record for appeal,  
8 Justice Kennedy. Here's the -- here's what we would have  
9 suffered because we wouldn't have been -- we weren't able  
10 to put on all of this mitigating evidence, and here it is.

11 And so the sum total of his mitigation case is  
12 right there on the pages. He's described what it is and  
13 it contains nothing about the horrible abuse that this boy  
14 suffered. Nothing.

15 Now, with respect to the question of whose  
16 responsibility it was, I think it is correct to focus on  
17 the -- the colloquy on page 485 of the -- of the joint  
18 appendix, but the question asked Mr. Schlaich there, as  
19 Justice Stevens' question suggested, was, well, he first  
20 says, well, it was Ms. Nethercott's job to develop  
21 mitigation. And then the question put to him is what  
22 guidance did you give her, obviously, about how to develop  
23 the mitigation case. And he says, well, what we decided  
24 to do was retry the factual case. That's the -- that's  
25 what he says he gave as guidance with respect to

1 developing the mitigation case. So it's -- it's  
2 completely clear that this was neglect. They just dropped  
3 the ball.

4 Now, with respect to what they actually did at  
5 the sentencing proceeding, picking up on Justice  
6 O'Connor's questions, I think this is critical as well.

7 Remember, Strickland says no hindsight, but  
8 that's an argument that works against the government in  
9 this case because what these lawyers actually did was, in  
10 opening statement, invite the jury specifically to  
11 consider not only the facts of the crime but, quote, who  
12 this person is, said they would hear he had a difficult  
13 life. And then they didn't deliver on that promise.

14 But not only that, Dr. Johnson, the -- the  
15 criminologist, got up and testified, well, yes, violent  
16 people do tend to adjust well in prison. Well, that's not  
17 focusing on principalship. That, once again, is inviting  
18 the jury beyond principalship into the mitigation inquiry  
19 and giving them some reason to -- to mitigate, but of  
20 course, omitting all of the extraordinarily powerful  
21 reasons to mitigate that the social history shows.

22 And then third, there was as a matter of law in  
23 Maryland a pre-sentence report that had to go to the jury.  
24 And there was nothing that Wiggins' lawyers could do to  
25 stop that. And that pre-sentence report gave a highly

1 misleading and negative portrayal of Wiggins' background.  
2 And the -- what -- effect of what these lawyers did was to  
3 leave that un rebutted, further damaging Wiggins'  
4 prospects, further ensuring that he was going to get a  
5 death sentence.

6 Now, if I could conclude by just reminding this  
7 Court that very recently in the Miller-El case, this Court  
8 said even in the context of Federal habeas, the  
9 deferential review of Federal habeas, there's a difference  
10 between deference and abdication. And what my friends on  
11 the other side are asking for here is the latter. They  
12 are asking for abdication. They are asking this Court to  
13 uphold a judgment even though the only factual finding the  
14 Maryland Court of Appeals made was wrong by clear and  
15 convincing evidence, and even though that proffer  
16 demonstrates that Wiggins' lawyers did not do the work  
17 necessary and did not know the powerful mitigation case  
18 that could have been made to save this man's life.

19 Thank you.

20 CHIEF JUSTICE REHNQUIST: Thank you,  
21 Mr. Verrilli.

22 The case is submitted.

23 (Whereupon, at 12:03 p.m., the case in the  
24 above-entitled matter was submitted.)

25