

No. 18-1495

In the

Supreme Court of the United States

BRYAN P. STIRLING, Director, South Carolina
Department of Corrections; WILLIE D. DAVIS,
Warden of Kirkland Correctional Institution,

Petitioners,

v.

CHARLES CHRISTOPHER WILLIAMS,

Respondent.

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

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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STATEMENT OF THE CASE

Petitioners, the Director of the South Carolina Department of Corrections and the Warden of Kirkland Correctional Institution (collectively, “the State”), seek this Court’s review of a decision of the United States Court of Appeals for the Fourth Circuit, affirming a decision of the United States District Court for the District of South Carolina granting Respondent Charles Christopher Williams’s petition for habeas corpus, pursuant to 28 U.S.C. § 2254, on the grounds that Williams was denied effective assistance of counsel in the penalty phase of his capital murder trial due to his trial counsel’s failure to investigate, develop, and present potentially mitigating evidence of Fetal Alcohol Syndrome (“FAS”).

In a unanimous opinion, the Court of Appeals held, first, that trial counsel’s admitted failure to investigate potentially mitigating evidence of FAS was deficient performance (a holding that the State does not challenge in this Court) and, second, that the deficiency prejudiced Williams. Because Williams’s ineffective assistance of counsel claim had first been raised in a state court petition for post-conviction relief and adjudicated on the merits by the Greenville County, South Carolina Circuit Court (“PCR Court”), the Court of Appeals also considered whether the PCR Court’s contrary holdings on both deficient performance and prejudice were either unreasonable applications of clearly established Federal law or unreasonable determinations of the facts. *See* 28 U.S.C. § 2254(d). In each case, the Court of Appeals determined that they were.

In the Petition, the State seeks this Court's review of the following question:

Is a state court objectively unreasonable, for purposes of 28 U.S.C. § 2254(d)(1), when it concludes that a capital defendant was not prejudiced by his counsel's failure to introduce evidence that a federal habeas court concludes is a "double-edged sword" that might "indicate future dangerousness" and which counsel may well choose not to introduce in any further proceedings.

Pet. at i-ii. However, that issue is not squarely presented by this case, as the Court of Appeals neither addressed nor decided this question. Furthermore, there is nothing about this issue that warrants this Court's review. Contrary to the State's suggestion, there is no split of authority between the Courts of Appeals nor is the issue an important and recurring one that demands this Court's immediate attention. In fact, the Petition is simply a request for error correction.

* * *

In September 2003, Williams confronted his former girlfriend and held her at gunpoint for approximately 90 minutes. When she attempted to escape, Williams shot her four times and killed her. A. 271. In February 2005, a Greenville County, South Carolina, jury convicted Williams of kidnapping, murder, and possession of a firearm during a violent crime. A. 272.

During the penalty phase,¹ defense counsel presented mitigating evidence of Williams's troubled childhood – including his mother's alcoholism – as well as his mental illness and difficulties in school. A. 274. That evidence included testimony from a forensic psychiatrist who opined that Williams suffered from major depressive disorder and obsessive-compulsive disorder but was able to, with difficulty, conform his behavior to the requirements of the law. A. 272, 274. Defense counsel elicited additional mitigation testimony through cross-examination of a state psychiatrist, including information about Williams's trouble with his parents' divorce, his mother's alcoholism, Williams's difficulty in school, and his untreated attention deficit disorder. A. 274.

For its part, the State alleged but a single aggravating factor: "Murder was committed while in the commission of kidnapping." *Ibid.*

On the second day of penalty phase deliberations, the jury sent a note to the trial court stating it was deadlocked nine to three in favor of death. *Ibid.* Williams moved for a mistrial, but the trial court denied the motion and instead gave an *Allen*² charge. *Ibid.* The jury resumed its deliberations and, after three hours and 45 minutes, returned a sentence of death. *Ibid.* The Supreme Court of South Carolina affirmed Williams's convictions and death sentence,

¹ Under South Carolina law, juries in capital cases consider guilt and sentencing in separate proceedings. S.C. Code Ann. § 16-3-20(A), (B).

² *Allen v. United States*, 164 U.S. 492 (1896).

State v. Williams, 690 S.E.2d 62 (S.C. 2010), and this Court denied his petition for a writ of certiorari, *Williams v. South Carolina*, 562 U.S. 899 (2010).

In November 2010, Williams filed a petition for post-conviction relief in the PCR Court, asserting a number of claims, including a claim of ineffective assistance of counsel based on trial counsel's failure to investigate signs that Williams suffered from FAS – namely, evidence of his mother's drinking during her pregnancy and Williams's corresponding brain damage. A. 275. In January 2013, the PCR Court held an evidentiary hearing at which three FAS experts testified on Williams's behalf. *Ibid.* Richard Adler, a forensic psychiatrist, diagnosed Williams with Partial Fetal Alcohol Syndrome, a form of FAS. *Ibid.* Neuropsychologist Paul Connor testified that his assessment of Williams indicated severe functional impairments and damage to the corpus callosum, all consistent with or symptomatic of FAS. *Ibid.* Finally, Natalie Novick Brown, a forensic psychologist, concluded that Williams's executive functions – including “self-regulation” and “behavior control” – were impaired due to FAS, leading to behavioral difficulties, including impulse control problems and coping skills equivalent to those of a nine-year-old. *Ibid.*

Trial counsel testified they could not recall an investigation into FAS or why such an investigation was not conducted. A. 276. In the words of one of the trial attorneys, FAS “wasn't ever brought up,” “[i]t

wasn't discussed," and "[i]t wasn't ruled in, it wasn't ruled out."³ A. 250.

In spite of this evidence, the PCR Court denied relief and stated the following reasons for doing so:

Considering all of the information it had available and in consultation with its experts, trial counsel developed a cogent strategy to present mitigation evidence—including evidence of the mother's alcohol addiction—but also made a *strategic decision* to not present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate reasons for that strategic decision).

A. 59 (emphasis in the original).

The PCR Court also found that, even if counsel's performance had been deficient, Williams suffered no prejudice. A. 61–63. In reaching that conclusion, the PCR Court did not reweigh the aggravating and mitigating evidence, as this Court's precedents require, but instead relied on “a survey of jury verdicts in sister jurisdictions [that] shows that defendants are often sentenced to death in spite of evidence offered in mitigation that the defendant had fetal alcohol syndrome or organic brain damage.” A. 62.

³ *Williams v. Stirling*, Civil Action No. 6:16-cv-01655-JMC, 2018 U.S. Dist. LEXIS 38709, at *34 (D.S.C. Mar. 8, 2018).

The South Carolina Supreme Court dismissed Williams's petition for writ of certiorari, *Williams v. South Carolina*, No. 2016-MO-012, 2016 WL 1458174 (S.C. Apr. 13, 2016), as did this Court, *Williams v. South Carolina*, 137 S. Ct. 1812 (2017).

Williams filed a timely petition for habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the District of South Carolina in November 2016 and an amended petition in February 2017, asserting 15 grounds for relief, including the claim that Williams was denied effective assistance of counsel due to trial counsel's failure to investigate evidence of FAS. A. 279. The District Court referred the case to a Magistrate Judge who issued a detailed report and recommendation concluding that the petition be granted as to the FAS claim and that Williams's death sentence therefore be vacated. A. 67, 168–197; see also A. 67–222. In a detailed opinion of her own, the District Court accepted the Magistrate Judge's recommendation on the FAS issue. A. 222–267.

On appeal, the Fourth Circuit reviewed the District Court's determination de novo and, after applying appropriate deference under § 2254(d) to the state PCR Court's determinations, affirmed. Specifically, as noted above, the Court of Appeals found first “that the PCR Court's determination that the investigation was not deficient involved both an unreasonable application of the law and an unreasonable determination of the facts.” A. 292–293.

In that regard, the Court of Appeals stated:

As an initial matter, the PCR Court's application of *Strickland* [v. *Washington*, 466 U.S. 668 (1984)] and its progeny to the present case was objectively unreasonable. 28 U.S.C. § 2254(d)(1). In reaching its conclusion, the PCR Court confused a strategic decision not to further develop FAS evidence after *some* investigation into its potential mitigating value – which could have complied with *Strickland* – with a complete failure to investigate the FAS evidence for any potential mitigating value, a failure that plainly falls below an objective standard of reasonableness.

* * *

The PCR Court's determination of the facts was also objectively unreasonable. 28 U.S.C. § 2254(d)(2). Specifically, the PCR Court relied on the factual assumption that trial counsel made *a* strategic choice not to present the FAS evidence. But * * * it was impossible for trial counsel to have made a strategic choice because there was no investigation into FAS. Both [trial attorneys] testified repeatedly that FAS was never considered, while [the defense investigator] testified that nobody

ever ruled out FAS. Therefore, counsel could not, as the PCR Court found, have made a choice between mitigation strategies.

* * *

Additionally, the PCR Court erroneously assumed that a lack of an established protocol assessment of FAS in the forensic context meant that FAS was not a widely understood condition at the time of trial; in fact, the ABA Guidelines at the time flagged FAS as a potentially mitigating factor, and trial counsel testified that they were sufficiently aware of FAS such that certain issues that arose during their investigation should have triggered an investigation into a possible FAS diagnosis.

A. 293–294 (emphasis added).

The Court of Appeals also found both that Williams established prejudice and that the PCR Court’s contrary determination involved an unreasonable application of clearly established law. The Court of Appeals explained its conclusion that Williams established prejudice as follows:

“When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer * * *

would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695. We conclude that Williams has established prejudice: had the FAS evidence been presented, there was a *reasonable probability* that, given the balance of aggravating and mitigating factors, the jury would have returned a different sentence. First, as discussed previously, the FAS evidence was different from the other evidence of mental illness and behavioral issues because it could have established *cause and effect* for the jury – specifically, a FAS diagnosis could have provided to the jury evidence of a neurological defect that *caused* Williams’ criminal behavior. Without this information, the jury could have assumed that Williams was an individual who – despite challenges in his home life, education, and mental health – was generally responsible for his actions, and therefore would have assigned greater moral culpability to him for his criminal behavior.

At the PCR hearing, experts testified that FAS impaired Williams’ judgment, as well as his ability to control his impulses and consider the consequences of his actions. This

could have been persuasive mitigating evidence for a jury – particularly a deadlocked one – considering the death penalty, and could have been outcome-determinative because of how it framed a defendant’s culpability, particularly in comparison to the other mitigating factors submitted for the jury’s consideration. *See Rompilla v. Beard*, 545 U.S. 374, 391–93 (2005) (linking brain damage caused by FAS and petitioner’s capacity to appreciate the criminality of his conduct).

Further, the State only presented one aggravating factor: that the murder occurred in the commission of a kidnapping. Consequently, had this solitary aggravating evidence been weighed against the totality of the mitigating evidence presented during both the penalty phase and the PCR proceedings, there is a reasonable probability the jury would have determined the balance of factors did not warrant a death sentence.

A. 296–298 (emphases in original).

Finally, the Court of Appeals explained why the PCR Court’s prejudice determination involved an unreasonable application of clearly established law:

As an initial matter, we note that, by relying on the survey of jury verdicts,

the PCR court failed to examine the facts of this case in view of the *Strickland* requirements and instead made a generalized assessment unrelated to the case before it. Relatedly, the PCR court's failure to reweigh the totality of the available mitigation evidence against the aggravating evidence in *this specific* case is evidenced by two additional points. See *Williams* [v. *Taylor*, 529 U.S. 362, 397–398 (2000)]. First, although the mitigation evidence may have been mixed, it was error for the state court to fail to “entertain [the] possibility” that the mitigating FAS evidence could have “alter[ed] the jury’s selection of penalty” because it “might well have influenced the jury’s appraisal of [the defendant’s] moral culpability.” *Id.* at 398. As discussed above, the mitigating FAS evidence here could have been significant for the jury because it could have established cause and effect, thereby diminishing Williams’ culpability. The evidence’s significance is further heightened here given that the jury was initially deadlocked on whether to impose the death penalty. Second, as outlined previously, the aggravating evidence was minimal. When compared to the totality of the mitigating evidence, it is clear that

the PCR court assigned unreasonable weight to the sole aggravating factor.

Given the aggravating and mitigating evidence in the context of this particular case, it is evident that the presentation of the FAS evidence would have resulted in, at a minimum, a reasonable probability of a different sentence, even if it did not guarantee one. This is all the law requires.

A. 298–299.

The State filed a timely petition for rehearing *en banc*. The Fourth Circuit denied the petition, with no judge requesting a poll under Fed. R. App. P. 35. A. 302.

ARGUMENT

Petitioners present one question for this Court’s review: whether a federal habeas court can properly conclude that trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to introduce “double-edged” mitigation evidence. For the several reasons set forth below, no such review is warranted.

1. The State seeks this Court’s review of an issue that this case does not squarely present, namely, whether a state court conclusion that a capital defendant was not prejudiced by the introduction of “double-edged” evidence can be objectively

unreasonable, for purposes of 28 U.S.C. § 2254(d)(1). The Court of Appeals neither addressed nor decided that issue. Instead, as explained at pages 16–17, below, the Court of Appeals determined that the state PCR Court’s prejudice determination involved an unreasonable application of clearly established law because the PCR Court failed to re-weigh mitigation evidence against aggravation evidence in this specific case, as directed by this Court in *Williams*, 529 U.S. at 397–398. Contrary to this Court’s direction, the PCR Court relied on a survey of verdicts in other jurisdictions to support a generalized assessment of whether the absence of the evidence would have prejudiced Williams. A. 298–299. It was that method of analysis that the Fourth Circuit determined was an unreasonable application of clearly established law.

2. In any event, there is nothing about the question presented that warrants this Court’s review. Attempting to show otherwise, the State suggests, but does not directly assert, that the Fourth Circuit’s decision conflicts with the decisions of other courts of appeals. Pet. at 9–10. Specifically, the State points to the Fifth Circuit’s decision in *Charles v. Stephens*, 736 F.3d 380, 394 (5th Cir. 2013), and the Eleventh Circuit’s decisions in *Evans v. Sec’y, Dep’t of Corr.*, 703 F.3d 1316, 1326–1328 (11th Cir. 2013), and *Peede v. Attorney General*, 715 F. App’x 923, 931–932 (11th Cir. 2017), and argues that these cases stand for the proposition that the failure to introduce “double-edged” mitigation evidence “will usually require that relief be denied.” Pet. at 10.

a. However, there is no conflict between one court of appeals holding that “double-edged” mitigation evidence is “usually” insufficient and another court of appeals holding that, under the facts of a particular case, “double-edged” mitigation evidence is sufficient to warrant habeas relief in that case.

b. The Petitioners concede, “The State is not advocating a *per se* rule that failure to introduce [double-edged mitigation] evidence may never be prejudicial.” Pet. at 10. And, indeed, such a *per se* rule would contravene Williams. Accordingly, that the Fifth and Eleventh Circuits have held that certain “double-edged” mitigation evidence did not warrant relief under the facts of specific cases, and that the Fourth Circuit has held that “double-edged” mitigation evidence did warrant relief under the facts of this particular case is unremarkable – to the contrary, such divergent results are the expected result of the case-by-case prejudice analysis that Williams requires.

3. The State is also wrong by asserting that this case presents “an important and recurring issue that warrants this Court’s immediate attention.” Pet. at 17. In support of this contention, the State notes, “The need to evaluate ‘double-edged sword’ evidence is common.” *Ibid.* But the fact that habeas courts may regularly evaluate such evidence does not mean that the issue of how to do so is a recurring one, much less an important and undecided one that merits this Court’s attention.

a. Indeed, Petitioners' argument to the contrary appears to be based entirely on a dissent from and a concurrence in the denial of certiorari in two cases, *Trevino v. Davis*, 138 S. Ct. 1793 (2018), and *Peede v. Jones*, 138 S. Ct. 2360 (2018), that both sought review of decisions denying habeas relief on the grounds that the petitioners had failed to establish that they were prejudiced by failures to introduce evidence also characterized as "double-edged." *Ibid.* In both of those cases, this Court properly denied review, presumably because those cases, like this one, presented only requests for error correction.

b. In her dissent in *Trevino*, Justice Sotomayor criticized the Fifth Circuit for "stop[ping] its [prejudice] analysis short without reweighing the totality of all the evidence," *Trevino*, 138 S. Ct. 1794, an approach which she noted was "in direct contravention of this Court's precedent." *Ibid.* Thus, her dissent did not suggest that *Trevino* presented any meaningful legal issue. Rather, Justice Sotomayor explained her dissent by stating, "[a]lthough this Court is not usually in the business of error correction, this case warrants [the Court's] intervention and summary disposition * * * to correct the Fifth Circuit's flagrant error." *Ibid.*

c. In her concurrence in *Peede*, Justice Sotomayor was similarly critical of the Eleventh Circuit's "truncated consideration of new mitigation evidence that simply dismisses it as double-edged," but nonetheless concluded that the case did not warrant this Court's review. *Peede*,

138 S. Ct. at 2361. Furthermore, although Justice Sotomayor described the Eleventh Circuit’s approach as “a blanket rule foreclosing a showing of prejudice because the new evidence is double edged,” *ibid.*, in fact, that court has never endorsed such a categorical rule. Rather, as Justice Sotomayor herself noted, “The Eleventh Circuit * * * ha[s] repeatedly ruled that [such so-called double-edged] post-conviction evidence is *usually* insufficient to warrant habeas relief.” *Id.* at 2360–2361 (emphasis added).

4. At bottom, therefore, the Petition is simply a request for error correction. The arguments against the Court engaging in such a review are particularly strong in this case, as the issue—a determination of prejudice resulting from a failure to introduce potentially mitigating evidence in a capital sentencing proceeding—necessarily requires, under this Court’s precedents in *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams*, 529 U.S. 362, a detailed review and reweighing of all the mitigating and aggravating evidence in the factual record.

5. The Fourth Circuit’s decision is plainly correct. The Court of Appeals engaged in a comprehensive analysis of *Strickland* prejudice, properly re-weighing the evidence in aggravation against the totality of available mitigating evidence, and evaluating “both the evidence adduced at trial and in the state PCR proceedings.” A. 295. In doing so, the Court observed that the missing FAS evidence “could have been persuasive mitigating evidence for a jury—particularly a deadlocked one—considering the death penalty, and could have been outcome-

determinative because of how it framed a defendant's culpability, particular in comparison to the other mitigating factors submitted for the jury's consideration." A. 298. After conducting this reweighing, the Fourth Circuit properly concluded that, had the "solitary aggravating evidence been weighed against the totality of the mitigating evidence presented during both the penalty phase and the PCR proceedings, there is a reasonable probability that the jury would have determined the balance of factors did not warrant a death sentence," and that, therefore, "Williams had established *Strickland* prejudice." A. 298. That conclusion was a straightforward application of this Court's precedents in *Rompilla*, *Strickland*, *Wiggins*, and *Williams*.

6. Furthermore, the Court of Appeals' conclusion that the PCR Court's contrary determination was an unreasonable application of clearly established law is also unassailable, as the PCR Court wholly ignored this Court's mandate on the proper way to conduct a prejudice analysis and, instead of reweighing the evidence, relied on a survey of verdicts in other jurisdictions. A. 298–299. As the Court of Appeals correctly noted, that procedure caused the PCR Court to make "a generalized assessment unrelated to the case before it" (*ibid.*), instead of making a case-specific prejudice analysis, as this Court has instructed.

CONCLUSION

The petition for a writ of certiorari should be denied.

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