No. 19-7476

IN THE

Supreme Court of the United States

Timothy Wayne Kemp,
Petitioner
v.
Dexter Payne, Director,
Arkansas Division of Correction
Respondent

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

REPLY BRIEF OF PETITIONER

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This case asks how a court should review the performance of counsel. The State's response doesn't refute the compelling reasons for granting certiorari. It raises no material factual disputes and, like the Eighth Circuit's opinion, fails to engage with the professional norms that this Court has repeatedly held elaborate the duties of counsel. The case is a strong candidate for this Court's review because it concerns only *Strickland*'s performance prong—the district court found prejudice, a finding not at issue here—and because it doesn't involve an underlying state-court decision that requires deference. This Court should grant certiorari to correct the misapprehension among lower courts that *Bobby v. Van Hook*, 558 U.S. 4 (2009), allows courts to disregard evidence of prevailing professional norms. For the reasons set forth in the Petition and those below, the Petition should be granted.

A. The Court's precedents require counsel's performance be evaluated in light of prevailing professional norms.

This Court has held that *Strickland*'s performance prong requires an "objective review of [counsel's] performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 689 (1984)). Consideration of professional standards and counsel's perspective promises to fairly enforce the right to counsel without infringing on the independence of counsel. And by providing an objective framework for assessing counsel's performance, it reduces arbitrariness in adjudication of ineffective-assistance-of-counsel claims.

To prove what norms prevailed at the time of his trial and resentencing, Kemp presented contemporary journal articles, training materials, professional standards (including the ABA Guidelines), and the testimony of an experienced capital defense attorney. Kemp also established what resources were available to trial counsel—namely, funds to hire an investigator.

Despite Kemp's diverse showing of prevailing professional norms, the Respondent has zeroed in on one piece of evidence, the ABA Guidelines. He argues that Kemp seeks to transform the Guidelines into a constitutionally required "checklist" for attorney performance. Brief in Opposition (BIO) at 19, 21. This is a caricature of Kemp's position. In fact, Kemp urges the Court to reaffirm the importance of prevailing professional norms in assessing counsel's performance. While Kemp hasn't solely relied on the ABA Guidelines, they are "valuable measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010).

The Respondent defends the Eighth Circuit's failure to engage with prevailing professional norms by relying on *Van Hook*, in which it says "a similar mitigation case satisfied *Strickland*." BIO at 27. But *Van Hook* actually embraced professional norms and by its logic, Kemp's counsel should not be evaluated under the same metric as Van Hook's. Van Hook's trial was roughly 10 years before Kemp's. *See* 558 U.S. at 5. In *Van Hook*, the Court faulted the Sixth Circuit for using guidelines that weren't contemporary with the attorney's performance. *Id.* at 7–8. Judging Kemp's counsel by looking back ten years presents the same problem. The Eighth Circuit

didn't engage with the professional norms necessary to "consider whether" counsel's performance "reflected the prevailing professional practice at the time of the trial." *Id.* at 8.

In line with *Wiggins*, Kemp presented evidence to put counsel's conduct in "context," 539 U.S. at 523, evidence specific to the time period and issues prevalent in his case. For example, he presented evidence that at the time of his trial fetal-alcohol issues were widely recognized by the general public and the capital-defense community. Moreover, he presented evidence specific to "counsel's perspective at the time." *Id.* Kemp established that Rosenzweig had attended a training on fetal alcohol issues prior to representing Kemp.

For sure, the Eighth Circuit acknowledged that counsel's performance must be judged by prevailing professional norms at the time of trial. App. A at 14. But the court engaged *none* of the objective evidence Kemp presented to determine what those prevailing professional norms actually were. The court simply found that "prevailing professional norms required trial counsel 'to conduct a thorough investigation of the defendant's background.'" App. A at 16 (citing *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). This conclusion begs the question of what constituted thoroughness by 1990s standards. Worse, it overlooks that *Williams v. Taylor*—the case from which the Eighth Circuit derived the modifier "thorough"—itself relied on a 1980 ABA Guideline to find that a "thorough" investigation is required as a general matter. *See* 529 U.S. 362, 396 (2000) (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4–55 (2d ed. 1980)). Likewise, *Van Hook*

referenced a set of 1985 guidelines. 558 U.S. at 7. By the 1990s, the defense of capital cases had evolved. The profession had developed more specific standards. The standards that governed counsel's conduct in the 1990s, not those that applied in the 1980s, are the relevant reference point for assessing counsel's conduct. By failing to look to contemporary standards of practice, the Eighth Circuit violated this Court's precedents and approved an investigation that was, as discussed further below, manifestly unreasonable.

B. An investigation in line with prevailing professional norms at the time of Kemp's trials would have uncovered the full, tragic story of Kemp's childhood and revealed his impairments.

The Respondent argues that the juries basically heard the story presented in habeas and that Rosenzweig's investigation was sufficient. Neither is true. The story that the juries heard was incomplete and misleading. Had counsel followed contemporary professional norms, he would have uncovered that the abuse Kemp suffered was "more affecting and more severe." App. B at 30.

At trial, the defense attorney summed up the abuse evidence in one paragraph:

> Dr. Moneypenny also told you and I think actually Lillie Kemp first told you about the background that he had. Lillie loves him very much and that was indicated. She told you that. But she also told you that his father was abusive. He was never called by his name. He was called, "you little son of a bitch," or "you stupid little thing." He never learned an affection with his father. That was never there. He was never able to learn to show his feelings and his emotions with his family. Lillie loved him but she also indicated to you she did everything she could do to support the family. There was lots of time when she wasn't there for Tim. And because of that Dr. Moneypenny indicated to you that he learned not to empathize. He learned to shut off his feelings, to not express himself.

Tr. 1951–52. The portrayal of Kemp's mother as a loving influence was such that the prosecutor was able to argue that Kemp "had it so much better than most." Tr. 1947.

The habeas evidence exposed Kemp's childhood as many magnitudes worse than trial counsel discovered. Kemp's mother, Lillie, got falling down drunk on whiskey, wine and beer while pregnant with Kemp. (Ex. 3 at 5). Kemp's father, Verlon, thought the baby wasn't his, so he choked, beat, and kicked Lillie in the stomach trying to abort the pregnancy. (Ex. 15 at 3). Kemp survived, and Verlon was arrested for public intoxication while visiting the infant Kemp in the hospital. (Ex. 59 at 2). When Kemp was six months old, Lillie filed an emergency petition for divorce on the grounds that Verlon "repeatedly assaulted" and "repeatedly threatened to kill" her. (Ex. 51 at 5.) She dropped the suit because Verlon had threatened to kill her and her children. (Ex. 15 at 3.) Verlon kept a gun with him at all times, even sleeping with it. (Ex. 145 at 4.) A visiting cousin described her visit with the family: "I was scared the whole time I was there. I just knew he was going to kill all of us with that shotgun. They lived way back in the sticks and I remember thinking, that Verlon could kill us and no one would ever find a body." *Id.* The cousin witnessed Verlon beat Kemp down his back with his belt so that he had welts from the base of his hairline to the bend of his knees. *Id.* Another cousin remembers Verlon running the whole family out of the house at gun point. R. 546. The kids routinely stayed away from the house as long as they could to avoid their father's wrath; at home they hid in their room silently. Kemp's half-sister testified: "We

didn't want to make any noise. We didn't want to draw attention to ourselves." R. 621. When he was 13, Kemp had to drive his mother to the liquor store because she was too drunk to drive herself. (Ex. 8 at 1.) Another time, Lillie "ran off with Verlon, leaving the boys to shift for themselves for three weeks." App. B at 31. Regularly, Kemp had to listen as his father sodomized his mother with bottles and watched him beat her with two-by-fours and broken furniture. (Ex. 7 at 8; Ex. 12 at 2; Ex. 15 at 8, 9.) Verlon put Lillie in the hospital several times. (Ex. 5 at 1.) Verlon slit the throat of Kemp's favorite dog, saying that "he killed it because Tim loved it more than his father." (Ex. 15 at 4.) During Kemp's teenage years, his father was admitted to the state psychiatric hospital after threatening to kill himself and his family. (Ex. 77 at 16.) He used the admission to further terrorize his family, telling them he could kill them and get away with it because he'd been declared insane. (Ex. 15 at 6.)

This compelling evidence both informs the reasonableness of counsel's investigation and rebuts the Respondent's claim that the district court's prejudice ruling was "inexplicable." BIO at 15. In *Van Hook*, the Court found that the additional evidence "added nothing of value." 558 U.S. at 12. But here, Rosenzweig's shallow investigation failed to uncover the "horrible story" of Kemp's youth. App. B at 30. And this wasn't a case where counsel could reasonably expect more investigation to be cumulative. Counsel knew Kemp's father was abusive and suspected that Kemp had some kind of learning disability. Had counsel followed prevailing professional norms and continued to investigate, he would have

uncovered a story that, as the district court found, would have led the jury to spare Kemp's life. *See Wiggins*, 539 U.S. at 525 (explaining that a mitigation investigation should proceed absent indications that further investigation will be counterproductive or fruitless).

The habeas hearing also definitively established that Kemp did not suffer from a personality disorder that made him unfeeling, as the juries learned at trial. Rather, his mother's alcohol abuse and the constant threats of death and violence left him brain damaged and suffering from posttraumatic stress. Dr. Moneypenny misdiagnosed Kemp with a personality disorder because his opinion was based on Rosenzweig's incomplete investigation. As explained in the Petition, Dr. Moneypenny's source material was shallow and inadequate in Rosenzweig's contemporaneous assessment. *See* Pet. at 7 (describing Rosenzweig's criticisms of the state hospital for not talking to other family members or examining more documents). Experts with a more complete history testified at the habeas hearing that, in light of Kemp's other diagnoses (FASD and PTSD), a personality disorder diagnosis was inappropriate. *See* R. at 392; 1091–92. Contrary to the Respondent's assertion, Rosenzweig's work with Dr. Moneypenny proves that his investigation was faulty.

Trial counsel would have found the same compelling evidence presented in habeas had he followed prevailing norms. The Respondent (like the district court) contends that the case presented at habeas took over a decade to develop, but the record disproves that. The habeas case was largely developed in the five months

between appointment of habeas counsel and the filing of the initial habeas petition. *Compare in re Timothy Wayne Kemp*, No. 4-02-mc-0014 (E.D. Ark.) (Sept. 17, 2002 order appointing habeas counsel) *with Kemp v. Kelley*, No. 5-03-cv-55 (Feb. 14, 2003 petition for writ of habeas corpus and exhibits). The 2003 petition contained an 80-page discussion of Kemp's social history. It was supported by 64 exhibits, including signed witness statements and primary documents. Many of those signed witness statements were introduced at the hearing or the affiants gave live testimony. One of the exhibits was a report from a testifying expert diagnosing Kemp with PTSD, major depression, and frontal lobe damage caused by fetal alcohol exposure. What habeas counsel did in five months would have been accomplished by reasonable trial counsel in the nine months between his appointment and the first trial or in the eight months before the resentencing hearing.

So what did trial counsel actually do here? He spoke to at most four witnesses, relying nearly exclusively on Kemp's mother, and got one set of school records.[1] This is far from the wide-ranging search for witnesses and documents that prevailing standards for investigations of capital cases called for at the time of Kemp's trial. *See* Pet. at 20–22.

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[1] The Respondent cites a newspaper article to in an attempt to establish trial counsel's credentials. BIO at 4. Instead of considering outside-the-record-hearsay on a factual matter, the court should consider the sworn testimony regarding Rosenzweig. Sean O'Brien, who has known Rosenzweig since 1989, testified that defense teams use investigators because lawyers often do not have the skills or the time to perform an investigation themselves, but that Rosenzweig, in particular, was "not qualified to do mitigation specialist work for a number of reasons" and "lacks all skills of an effective interviewer." R. 1243–44.

Contrary to the Respondent's arguments, this investigation would not have withstood scrutiny in other circuits. In *Williams v. Allen*, 542 F.3d 1326, 1339 (11th Cir. 2008), which involved a 1990 trial, the court "rejected the idea that there is a 'magic number' of witness from whom an attorney is required to seek mitigating evidence," instead emphasizing that the relevant question is whether "an attorney's efforts to speak with available witnesses were insufficient to formulate an accurate life profile of the defendant." *Id.* (internal citation omitted). Rosenzweig's investigation fails the test, particularly where his heavy (if not exclusive) reliance on Kemp's mother allowed the prosecutor to argue that Kemp was "worse than most people because he has no excuse." Tr. 1948.

The Respondent is likewise unconvincing in arguing that the Fourth Circuit would approve of Rosenzweig's investigation into fetal-alcohol issues because, in contrast to the attorney in *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019), he didn't know his client's mother drank. Rosenzweig utterly failed to investigate Kemp's mother, so, yes, he didn't know she drank, much like he didn't know she'd had multiple miscarriages (Ex. 15 at 1–2), or that her first husband died when the pair were driving drunk (Ex. 142 at 2), or that she had been cited for driving while intoxicated (Ex. 83). While the Eighth Circuit held that counsel was "missing" "any solid indication that Lillie drank alcohol heavily while pregnant" (App. A at 18), such information was only "missing" because counsel didn't take the rudimentary steps to find it. A rule that counsel is only required to investigate if they see "red flags" is untenable—a baseline investigation is required to raise those flags.

C. The State's justifications for counsel's limited investigation are impermissible post-hoc rationalizations unsupported by the record.

Wiggins rejected attempts to justify a limited mitigation investigation by casting a "post hoc rationalization" as a "strategic decision." 539 U.S. at 526–27. The Respondent offers two post-hoc rationalizations disguised as strategic decisions. The first is that counsel had to go to trial with the evidence in hand for fear that the trial court would reverse a favorable ruling. The second is that counsel had to carefully craft his presentation to keep the jury from learning that Kemp had escaped from jail while awaiting trial. The veneer of strategy does not withstand review of the record—particularly given that counsel changed nothing about his investigative approach before Kemp's resentencing.

Before the first trial, the prosecution announced that it would seek to prove the prior-violent-felony aggravating circumstance. But Kemp had never been convicted of a felony. It was not until twenty days before trial that the prosecution produced a list of Kemp's alleged (and, still to this day, unproven) violent offenses. The trial court ruled that it would not allow the events in because they had not been prosecuted. The Respondent contends that Rosenzweig was forced to rush to trial rather than ask for more time for fear that the judge would reverse his ruling and allow the prosecution to introduce evidence of those events. This argument is flawed factually and legally.

Counsel did not learn of the alleged conduct until twenty days before trial. By then, the investigation should have largely been complete—or rather it would have been if the defense were sufficiently staffed. And the more complete story—which

would have been found by diligent trial counsel—would not have opened the door to adult criminal conduct. Kemp's habeas evidence concerned his tragic childhood and his disabilities. Many of the witnesses who testified in habeas had not seen Kemp since he was a child. This case was less susceptible to rebuttal with Kemp's adult conduct than the case put on at trial, which featured his employer and his mother with whom he was still living at age 33. So too, evidence that Kemp suffered from FASD and PTSD was less likely to trigger introduction of the unproven conduct than Moneypenny's personality-disorder testimony. *See*, *e.g.* Tr. 1905 ("this kind of personality disorder, a person is already more angry and hostile than average, than usual.") And if counsel really had to speed to trial without finishing his investigation, then counsel would have completed that investigation in the eight months he had before resentencing. But counsel did nothing different. He found no additional witnesses, he sought out no additional documents. His failure to do so proves the supposed "strategic decision" is a post hoc rationalization.

The Respondent's second post-hoc rationalization, that counsel had to limit his presentation to prevent introduction of Kemp's jail escape, also does not hold up to scrutiny. Rosenzweig talked to two members of Kemp's family—his mother and one of his aunts. The aunt, he found, had harbored Kemp when he escaped from jail pretrial. Not calling her was a reasonable decision. But this concern doesn't explain his minimal presentation or his shallow investigation. At the habeas hearing, Rosenzweig testified that, other than not calling Kemp's aunt, the escape primarily prevented him from arguing that Kemp would be a good prisoner, or had been a

good prisoner pre-trial. R. 813–15. At the resentencing, the prosecutor made explicit that unless the defense argued Kemp was a model prisoner she would not bring up the escape. R'sen 1018. At the habeas hearing, Rosenzweig agreed that introduction of evidence of childhood trauma, PTSD, or FASD would not have opened the door to the escape. R. 816. The Respondent's focus on whether it was wise to call Kemp's aunt as a witness distracts from the more important question. Was counsel's investigation sufficient? He had talked to only two family witnesses. He had an insufficient understanding of Kemp's life and an insufficient roster from which to select witnesses.

The Respondent gives Rosenzweig much credit for his attempts to talk to Kemp's brother. But Rosenzweig never saw Kemp's brother in person, and when his efforts failed, he never sought out other witnesses. Kemp had two half-sisters who gave compelling testimony at habeas and were never contacted by trial counsel. These sisters at times lived under the same roof with Kemp and shared a father with Kemp—whom counsel knew to be abusive. They were not "distant relatives." *See* App. A at 17 (citing *Van Hook*, 558 U.S. at 11). And, again, if the escape concern is really what drove the limited presentation, then counsel was given a second chance to find untainted witnesses before the resentencing. But counsel failed to seek them out. Inexplicably, he talked to the same aunt again—after he'd already decided it was too risky to call her.

There were several witnesses who testified at the habeas hearing either in person or by affidavit who were available at trial, who never assisted Kemp in his

escape, and whom trial counsel never approached. Moreover, there were available, compelling primary documents, such as Kemp's mother's emergency petition for divorce, or family court records deeming his father an unfit parent, that could have documented Kemp's abusive childhood and would not have led to the introduction of prejudicial conduct. Rosenzweig's failure to seek out this evidence—as prevailing professional norms called for—shows that counsel's narrow investigation was the product of "inattention, not strategic judgment." *Wiggins*, 539 U.S. at 526.

Conclusion

The Court should grant the Petition for a Writ of Certiorari.

Dated: April 24, 2019

Respectfully submitted,

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