OCTOBER TERM, 2024

No. 24-7262

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD ROLAND LAIRD,
Petitioner,

v.

LAUREL HARRY, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS; SUPERINTENDENT, S.C.I. SOMERSET,
Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

— CAPITAL CASE —

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REPLY TO RESPONDENTS' "COUNTER STATEMENT OF THE CASE"

Respondents observe that psychologist Dr. Henry Dee testified at Laird's retrial concerning a 1996 report from psychiatrist Dr. David Silverman. BIO 9. As elicited during the Commonwealth's cross-examination of Dr. Dee, the 1996 report stated that Laird had a "long smoldering antagonism toward persons identified as homosexuals." *Id.* Dr. Dee acknowledged that Laird's antagonism "might" have led him to victimize Anthony Milano, which supported the prosecution's theory that the killing was an anti-gay hate crime. NT 2/13/2007 at 98.

Entirely absent from the testimony of Dr. Dee or any other witness, though, was Dr. Silverman's connection of the crime to Laird's history of sexual abuse. Dr. Silverman had observed that Laird's homophobia "may have been caused by the fact that at about age 9 he had been required to perform fellatio on an adult male [relative] on a few separate occasions." *Laird v. Horn*, 159 F. Supp. 2d 58, 114 n.30 (E.D. Pa. 2001). The sentencer was never provided such an explanation for Laird's offense.

Similarly misleading is Respondents' argument that the Court must ignore psychologist Dr. David Lisak's report simply because the trial-level PCRA court declined to admit it. BIO 13. Respondents miscast the issue as whether "the report was improperly excluded under Pennsylvania's evidentiary rules." *Id.* They insist that federal courts on habeas review cannot "reexamine state-court determinations on state law questions." *Id.* (quoting *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)). These contentions miss the point, which is that Pennsylvania courts have the discretion to admit an expert's report alongside the expert's testimony. *Brennan v. St. Luke's Hosp.*, 285 A.2d 471, 473 (Pa. 1971) (such admission was "proper, if not

harmless error"); *Commonwealth v. Davis*, No. 618 WDA 2013, 2015 WL 7260024, at *14 (Pa. Super. Ct. May 11, 2015) ("The admissibility of expert reports is within the sound discretion of the trial court . . . ."). That is what the state courts did in the cases cited by Laird. *See* Cert Pet. 3 n.1 (citing *Commonwealth v. Flor*, 259 A.3d 891, 912 (Pa. 2021); *Commonwealth v. Gibson*, 19 A.3d 512, 516 (Pa. 2011)).

In this case, Laird proffered Dr. Lisak's report to the PCRA court, urged its admission, and formally filed it—which led to the report's inclusion in the state-court record relied on below. A253, 273; NT 5/24/12 at 5–7, 198–99, 218–19. It makes no difference whether Laird appealed the postconviction judge's discretionary ruling to the Pennsylvania Supreme Court, let alone whether he separately exhausted a federal claim on the issue. And it is no fault of Laird that the PCRA court declined to consider some of "the evidence *presented* in the State court proceeding." 28 U.S.C. § 2254(d)(2) (emphasis added). In any event, Respondents did not object to Laird's use of Dr. Lisak's report in the district court, and they expressly relied on the report when urging the Third Circuit to deny a certificate of appealability. *See* Dist. Dkt. #51 (Petitioner's Reply) at 3; Memorandum in Opposition to Application for Certificate of Appealability (Mar. 26, 2018), at 42 ("Dr. Lisak himself states in his 2012 report that Laird's disclosure of sexual abuse had been 'piecemeal,' a pattern typical among male victims of sexual abuse.").

REPLY ARGUMENT

I. RESPONDENTS MISREAD THE LOWER COURTS' DIVIDED OPINIONS.

The Third Circuit squarely resolved the question that Laird's case squarely presents: whether a habeas court should afford AEDPA deference to a lower state court's ruling on one element of a federal claim even when a higher state court resolved the merits on a different ground. A28–29. Respondents belittle the divided authority on that question, but to no avail.

Respondents "wholly discard" the Seventh Circuit's ruling in *Dunn v. Jess*, 981 F.3d 582 (7th Cir. 2020), because the parties in *Dunn* agreed to the method of AEDPA review urged by Laird. BIO 19–20. But the parties' agreement does not vitiate the court's holding, which cited *Wilson v. Sellers*, 584 U.S. 122 (2018), and explained that AEDPA deference "only applies to *issues* that the last reasoned state court decision reached on the merits." *Dunn*, 981 F.3d at 591 (emphasis added). The court stated that it must focus on the last merits decision and "simply review the specific reasons given by the state court and defer to those reasons if they are reasonable." *Id.* (citing *Lentz v. Kennedy*, 967 F.3d 675, 688 (7th Cir. 2020), itself quoting *Wilson*, 584 U.S. at 125)) (citation modified). When conducting de novo review of the prejudice issue that the state appellate court left undecided, the Seventh Circuit embraced the parties' view as its own: "The Wisconsin Court of Appeals did not reach *Strickland*'s prejudice prong, and so the parties agree that AEDPA deference does not apply *and we review that prong de novo*." *Dunn*, 981 F.3d at 591 (emphasis added).

Respondents fare no better invoking the Seventh Circuit's pre-*Wilson* decision

in *Atkins v. Zenk*, 667 F.3d 939 (7th Cir. 2012), or disagreeing with that court's disavowal of *Atkins* in *Thomas v. Clements*, 789 F.3d 760 (7th Cir. 2015). BIO 19–20. In *Thomas*, the Seventh Circuit reasoned that *Atkins* did not "render a holding on the deference owed" to a lower state court's decision on a question left undecided by a higher state court's merits ruling. 789 F.3d at 766. The court went on to observe that its decisions before and after *Atkins* "gave deference only to the prong the appellate court did reach and reviewed the other de novo." *Id.* 766–67 (citing cases). Respondents offer nothing more than disagreement with the Seventh Circuit's grasp of its own precedents.

Still more off base is Respondents' reliance on *Adeyanju v. Wiersma*, 12 F.4th 669 (7th Cir. 2021). BIO 20–21. Far from rejecting the court's approach in *Dunn*—a case not even cited in the opinion—the Seventh Circuit followed the parties' agreement that AEDPA deference did not apply to the *Strickland* prejudice issue that the state appellate court left undecided. *See Adeyanju*, 12 F.4th at 673–74. Respondents note that the Seventh Circuit gave "great weight" to the trial court's rationale on the question of prejudice. BIO 21 (quoting *Adeyanju*, 12 F.4th 674 n.1). But the trial court's remarks simply "strengthened" the Seventh Circuit's de novo determination. *Adeyanju*, 12 F.4th at 674, 674 n.1. It is unremarkable that the court would find additional support for its conclusion by crediting the trial judge's superior recollection of the proceedings. *Id.*

Respondents take a similar approach to the Eleventh Circuit's opinion in *Knight v. Florida Department of Corrections*, 958 F.3d 1035 (11th Cir. 2020). Once

again, Respondents criticize the decision. They contend that the Eleventh Circuit offered "no meaningful analysis" beyond a footnote explaining that *Wilson*'s general "look-through" rule does not apply in the circumstances present here. BIO 18; *see also Knight*, 958 F.3d at 1046 n.3 ("To be clear, this case provides us no occasion to 'look through' the Florida Supreme Court's decision and defer to the state trial court's prejudice determination under *Wilson v. Sellers*."). Respondents then contend that *Knight* conflicts with the Eleventh Circuit's pre-*Wilson* decision in *Hammond v. Hall*, 586 F.3d 1289 (11th Cir. 2009), as well as with Respondents' reading of this Court's opinions in *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005). BIO 18–19. Respondents are of course free to disagree with authority that conflicts with the ruling below, but the conflict itself persists.

Respondents also misread the Ninth Circuit's opinion in *Barker v. Fleming*, 423 F.3d 1085 (9th Cir. 2005). BIO 16–17. Contrary to Respondents' summary, the Washington Supreme Court ruled only (and unreasonably) that Barker was not prejudiced by any suppression of the exculpatory evidence at issue. *See Barker*, 423 F.3d at 1088, 1095–96; Appellee's Br., *Barker v. Fleming*, No. 04-39511 (9th Cir., filed Feb. 11, 2025), 2005 WL 946172, at *25–26. Washington's highest court reserved and expressed doubt on the issue of suppression under *Brady v. Maryland*, 373 U.S. 83 (1963), but without deciding it. *See Barker*, 423 F.3d at 1096 n.6. The state urged the Ninth Circuit to accord AEDPA deference to the lower appellate court's ruling, which reasoned that defense counsel could have discovered the allegedly suppressed evidence through "reasonable diligence" and that Barker otherwise failed to prove

non-disclosure by the prosecution. Appellee's Br., 2005 WL 946172, at *16, *19, *24. The Ninth Circuit nevertheless rejected the state's request by reviewing the suppression issue de novo. *Barker*, 423 F.3d at 1095–96. *Barker* thus ruled in Laird's favor on the question presented here. In Respondents' parlance, *Barker* involved "the same circumstance as the § 2254(d)(1) analysis at hand where the Third Circuit looked through the Pennsylvania Supreme Court's *silence*" on an element of the prisoner's claim. BIO 17.

II. RESPONDENTS' ISSUE-BY-ISSUE APPROACH TO AEDPA DEFERENCE CONFLICTS WITH THE STATUTE'S PURPOSES AS WELL AS THIS COURT'S DECISIONS.

Invoking the concerns of federalism, comity, and delay-reduction, Respondents argue that a federal court should evaluate multiple state-court merits decisions instead of a single one. BIO 23. But Respondents' proposed rule conflicts with these statutory aims. For one thing, a federal habeas court does not genuinely defer to a state-court "decision," 28 U.S.C. § 2254(d)(1)–(2), or extend comity to a state's judiciary, when it relies on an inferior ruling on the merits instead of a superior one. Pennsylvania's supreme court is the "highest court in the Commonwealth," to which the Pennsylvania Constitution assigns "supreme judicial power" as well as supervisory and administrative authority over all other courts. Pa. Const. art. V, §§ 2(a), 10(a). Habeas review properly focuses on the higher court's ruling when, as here, "the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion." *Wilson*, 584 U.S. at 125.

Neither would Respondents' proposal reduce delay. Many habeas claims have

multiple elements, and Respondents' approach would require a federal court to parse multiple state-court decisions to determine which portions of each decision should be accorded AEDPA deference.

The present case illustrates that problem. Respondents argue that the Pennsylvania Supreme Court did not reject the lower court's merits ruling on the question of counsel's performance. BIO 27–28. They describe the higher court's remarks as a mere "linguistic quibble" concerning the relative scope of mitigating evidence at trial and in postconviction. *Id.* at 28. But the Third Circuit took a different view, stating that the higher court "did not agree" with the lower court's reasoning. A21. Respondents' approach would require a federal court to adjudicate disagreements like the one between Respondents and the Third Circuit, all the while calibrating an issue-specific standard of review to assess separate portions of both merits rulings. Those tasks are neither efficient nor especially useful.

Respondents' legal arguments are equally misguided. Yes, this Court in *Wilson* cited the Third Circuit's decision in *Bond v. Beard*, 539 F.3d 265 (3d Cir. 2008), when describing the split authority on the question under review. BIO 26. But that question was whether a habeas court should "look through" and apply AEDPA to a lower state court's merits ruling when a higher court's merits ruling is unexplained, or instead whether the federal court should apply the even more deferential standard of *Harrington v. Richter*, 562 U.S. 86 (2011), to the higher unexplained decision. *See Wilson*, 584 U.S. at 128. It is true that *Bond* adopted the general "look through" mechanism that *Wilson* prescribed, *id.*, but this Court did not endorse the issue-by-

issue version of that method taken by *Bond* and endorsed by Respondents, rather than the claim-by-claim approach adopted by the majority of lower courts. *See* Cert Pet. 18–20.

It does not help Respondents to cite *Wiggins* and *Rompilla* in support of the element-by-element approach. BIO 26–27. Neither opinion resolves the question Laird presents, because the Court in both cases exercised de novo review over the *Strickland* prejudice issue that all state courts had left unresolved—quite unlike the present case, in which the Pennsylvania Supreme Court declined to resolve the performance question that the lower court had decided. *See Wiggins*, 539 U.S. at 534; *Rompilla*, 545 U.S. at 390; A200–02. For that matter, lower courts disagree on whether *Wiggins* and *Rompilla* support the claim-by-claim approach advanced by Laird, as opposed to the element-by-element approach urged by Respondents. *See Knight*, 958 F.3d at 1045–46, 1046 n.3 (citing *Wiggins* and *Rompilla* in support of Laird's view); *Thomas*, 789 F.3d at 767 (so citing *Wiggins*); *Barker*, 423 F.3d at 1093 (so construing *Williams v. Taylor*, 529 U.S. 362 (2000)); *but see Hammond*, 586 F.3d at 1331 (citing *Wiggins* in support of Respondents' view). Yet again, the Court should resolve the conflicting authority.

III. RESPONDENTS' DE NOVO REVIEW OF COUNSEL'S PERFORMANCE IS UNAVAILING.

Even though the Third Circuit applied only deferential review, Respondents offer a de novo defense of counsel's performance. BIO 28–31; A29, 37. Respondents insist that "it was Laird himself who withheld the information that he now claims was vital to his mitigation strategy." BIO 28. But Respondents ignore trial counsel's

own recognition that they had incomplete knowledge about Laird's sexual abuse and its effects. *See* Cert Pet. 10–11. Counsel admitted that Laird was hesitant to disclose the details, even while counsel complained that visits in the local jail were non-confidential—and even while counsel refused to visit Laird at his prison across the state. *Id.* Counsel spent little time consulting with the mental health experts who had examined Laird a decade earlier and who saw him briefly just before the retrial began. *Id.* at 9.

Capital counsel's duty to seek out "all reasonably available mitigating evidence," *Wiggins*, 539 U.S. at 524, operates even when the defendant provides only "minimal" assistance. *Rompilla*, 545 U.S. at 381. That duty is all the more pronounced when counsel recognize that their work is incomplete, which is to say, when "the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Unfortunately for Laird, counsel refrained as "a matter of convenience" from having their out-of-state experts evaluate Laird at the western Pennsylvania prison where he resided. NT 5/23/12 at 29, 32–33.

Neither is it true that Dr. Lisak's evidence "presented little more than a few additional anecdotes of the abuse Laird suffered at the hands of his father." BIO 30. The retrial defense offered no explanation for the crime. Defense counsel could only speculate about the effects of Laird's abuse: "What kind of person does that create? A person who, obviously, can no longer function on the streets of this world." NT 2/13/07 at 150. Counsel simply failed to develop and present evidence such as that offered by Dr. Lisak, i.e., that Laird felt "worthless" and "intensively ashamed of himself" as a

result of his father's sexual abuse, that he developed "a kind of hyper-masculinity to counter what he really felt about himself," and that his crime may reflect "the long, pent-up rage he was capable of feeling towards any male whom he perceived as wanting to touch him against his will." NT 5/24/12 at 115–16; A271–72. The prosecution argued that Laird's abuse did not make his crime any "less terrible," NT 2/13/07 at 124, and the defense had no answer when counsel could and should have.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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