SUPREME COURT OF THE UNITED STATES

No. 02–311

KEVIN WIGGINS, PETITIONER *v.* SEWALL SMITH, WARDEN, ET AL.

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

[June 26, 2003]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Court today vacates Kevin Wiggins' death sentence on the ground that his trial counsel's investigation of potential mitigating evidence was "incomplete." *Ante*, at 18. Wiggins' trial counsel testified under oath, however, that he was aware of the basic features of Wiggins' troubled childhood that the Court claims he overlooked. App. 490–491. The Court chooses to disbelieve this testimony for reasons that do not withstand analysis. Moreover, even if this disbelief could plausibly be entertained, that would certainly not establish (as 28 U. S. C. §2254(d) requires) that the Maryland Court of Appeals was *unreasonable* in believing it, and in therefore concluding that counsel adequately investigated Wiggins' background. The Court also fails to observe §2254(e)(1)'s requirement that federal habeas courts respect state-court factual determinations not rebutted by "clear and convincing evidence." The decision sets at naught the statutory scheme we once described as a "highly deferential standard for evaluating state-court rulings," *Lindh* v. *Murphy*, 521 U. S. 320, 333, n. 7 (1997). I respectfully dissent.

I

Wiggins claims that his death sentence violates *Strick-*

land v. *Washington*, 466 U. S. 668 (1984), because his trial attorneys, had they further investigated his background, would have learned—and could have presented to the jury—the following evidence: (1) According to family members, Wiggins' mother was an alcoholic who neglected her children and failed to feed them properly, App. to Pet. for Cert. 165a–169a; (2) according to Wiggins and his sister India, Wiggins' mother intentionally burned 5-year-old Wiggins' hands on a kitchen stove as punishment for playing with matches, *id.*, at 169a–171a; (3) Wiggins was placed in foster care at age six because of his mother's neglect, and was moved in and out of various foster families, *id.*, at 173a–192a; (4) According to Wiggins, one of his foster parents sexually abused him "'two or three times a week, sometimes every day,'" when he was eight years old, *id.*, at 177a–179a; (5) According to Wiggins, at age 16 he was knocked unconscious and raped by two of his foster mother's teenage children, *id.*, at 190a; (6) According to Wiggins, when he joined the Job Corps at age 18 a Job Corps administrator "'made sexual advances . . . and they became sexually involved," *id.*, at 192a–193a (later, according to Wiggins, the Job Corps supervisor drugged him and when Wiggins woke up, he "knew he had been anally penetrated," *id.*, at 193a); and (7) Wiggins is "borderline" mentally retarded, *id.*, at 193a–194a. All this information is contained in a "social history" report prepared by social worker Hans Selvog for use in the state postconviction proceedings.

In those proceedings, Carl Schlaich (one of Wiggins' two trial attorneys) testified that, although he did not retain a social worker to assemble a "social history" report, he nevertheless had detailed knowledge of Wiggins' background:

> "'Q But you knew that Mr. Wiggins, Kevin Wiggins, had been removed from his natural mother as a result

of a finding of neglect and abuse when he was six years old, is that correct?

"'A I believe that we tracked all of that down.

"'Q You got the Social Service records?

"'A That is what I recall.

"'Q That was in the Social Service records?

"'A Yes.

"'Q So you knew that?

"'A Yes.

"'Q You also knew that where *[sic]* were reports of sexual abuse at one of his foster homes?

"'A Yes.

"'Q Okay. You also knew that he had had his hands burned as a child as a result of his mother's abuse of him?

"'A Yes.

"'Q You also knew about homosexual overtures made toward him by his Job Corp supervisor?

"'A Yes.

"'Q And you also knew that he was borderline mentally retarded?

"'A Yes.

"'Q You knew all—

"'A At least I knew that as it was reported in other people's reports, yes.

"'Q But you knew it?
"'A Yes.'" App. 490–491.

In light of this testimony, the Maryland Court of Appeals found that "counsel *did* investigate and *were* aware of [Wiggins'] background," *Wiggins* v. *State*, 352 Md. 580,

610, 724 A. 2d, 1, 16 (1999) (emphasis in original), and, specifically, that "[c]ounsel were aware that [Wiggins] had a most unfortunate childhood," *id.*, at 608, 724 A. 2d, at 15. These state-court determinations of factual issues are binding on federal habeas courts, including this Court, unless rebutted by clear and convincing evidence.[1] Relying on these factual findings, the Maryland Court of Appeals rejected Wiggins' claim that his trial attorneys failed adequately to investigate potential mitigating evidence. Wiggins' trial counsel, it said, "did not have as detailed or graphic a history as was prepared by Mr. Selvog, but that is not a Constitutional deficiency. *See Gilliam v. State,* 331 Md. 651, 680–82, 629 A. 2d 685, 700–02 (1993), *cert. denied,* 510 U. S. 1077 . . . (1994); *Burger v. Kemp*, 483 U. S. 776, 788–96 . . . (1987)." *Id.*, at 610, 724 A. 2d, at 16.

The state court having adjudicated Wiggins' Sixth Amendment claim on the merits, 28 U. S. C. §2254(d) bars habeas relief unless the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," §2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," §2254(d)(2). The Court concludes without foundation that the Maryland Court of Appeals decision failed both these tests. I shall discuss each in turn.

A

In concluding that the Maryland Court of Appeals *un-*

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[1] 28 U. S. C. §2254(e)(1) provides:

"In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

reasonably applied our clearly established precedents, the Court disregards §2254(d)(1)'s command that only "clearly established Federal law, as determined by the Supreme Court of the United States" be used in assessing the reasonableness of state-court decisions. Further, the Court misdescribes the state court's opinion while ignoring §2254(e)(1)'s requirement that federal habeas courts respect state-court factual determinations.

1

We have defined "clearly established Federal law, as determined by the Supreme Court of the United States" to encompass "the holdings . . . of this Court's decisions *as of the time of the relevant state-court decision*." *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000) (emphasis added). Yet in discussing what our precedents have "clearly established" with respect to ineffectiveness claims, the Court relies upon a case—*Williams* v. *Taylor*, *supra*—that *postdates* the Maryland court's decision rejecting Wiggins' Sixth Amendment claim. See *ante*, at 9. The Court concedes that *Williams* was not "clearly established Federal law" at the time of the Maryland Court of Appeals' decision, *ante*, at 9, yet believes that it may ignore §2254(d)'s strictures on the ground that "Williams' case was before us on habeas review, and we therefore made no new law in resolving his ineffectiveness claim," *ibid*. The Court is wrong—in both its premise and its conclusion.

Although *Williams* was a habeas case, we reviewed the *first* prong of the habeas petitioner's *Strickland* claim—the inadequate-performance question—*de novo*. Williams had surmounted §2254(d)'s bar to habeas relief because we held that the Virginia Supreme Court's analysis with respect to *Strickland*'s second prong—the *prejudice* prong—was both "contrary to," and "an unreasonable application of," our clearly established precedents. See *Williams*, *supra*, at 393–394, 397. That left us free to provide habeas relief—and since the State had not raised

a *Teague* defense, see *Teague* v. *Lane*, 489 U. S. 288 (1989), we proceeded to analyze the inadequate-performance contention *de novo*, rather than under "clearly established" law. That is clear from the fact that we cited no cases in our discussion of the inadequate-performance question, see 529 U. S., at 395–396. The Court is mistaken to assert that this discussion "made no new law," *ante*, at 9. There was nothing in *Strickland*, or in any of our "clearly established" precedents at the time of the Virginia Supreme Court's decision, to support *Williams*' statement that trial counsel had an "obligation to conduct a thorough investigation of the defendant's background," 529 U. S., at 396. That is why the citation supporting the statement is not one of our opinions, but rather standards promulgated by the American Bar Association, *ibid.* (citing ABA Standards for Criminal Justice 4–4.1, commentary, p. 4–55 (2d ed. 1980)). Insofar as this Court's cases were concerned, *Burger* v. *Kemp*, 483 U. S. 776, 794 (1987), had *rejected* an ineffective-assistance claim even though acknowledging that trial counsel "could well have made a more thorough investigation than he did." And *Strickland* had eschewed the imposition of such "rules" on counsel, 466 U. S., at 688–689, specifically stating that the very ABA standards upon which *Williams* later relied "are guides to determining what is reasonable, *but they are only guides*." 466 U. S., at 688 (emphasis added). *Williams did* make new law—law that was *not* "clearly established" at the time of the Maryland Court of Appeals' decision.

But even if the Court were correct in its characterization of *Williams*, that *still* cannot justify its decision to ignore an Act of Congress. Whether Williams "made new law" or not, what *Williams* held was not clearly established Supreme Court precedent *as of the time of the state court's decision*, and cannot be used to find fault in the state court opinion. §2254(d)(1) means what it says, and

the Court simply defies the congressionally imposed limits on federal habeas review.

2

The Court concludes that *Strickland* was applied unreasonably (and §2254(d)(1) thereby satisfied) because the Maryland Court of Appeals' conclusion that trial counsel adequately investigated Wiggins' background, see *Wiggins,* 352 Md., at 610, 724 A. 2d, at 16, was unreasonable. That assessment cannot possibly be sustained, particularly in light of the state court's factual determinations that bind this Court under §2254(e)(1). The Court's analysis of this point rests upon a fundamental fallacy: that the state court "clearly assumed that counsel's investigation began and ended with the PSI and the DSS records," *ante*, at 16. That is demonstrably not so. The state court did observe that Wiggins' trial attorneys "had available" the presentence investigation (PSI) report and the Maryland Department of Social Services (DSS) reports, *Wiggins, supra,* at 608–609, 724 A. 2d, at 15–16, but there is absolutely nothing in the state-court opinion that says (or assumes) that these were the *only* sources on which counsel relied. It is rather *this* Court that makes such an assumption—or rather, such a bald assertion, see *ante*, at 14 (asserting that counsel "cease[d] all investigation" upon receipt of the PSI and DSS reports); *ante,* at 11 (referring to "[c]ounsel's decision not to expand their investigation beyond the PSI and DSS records").

Nor *could* the Maryland Court of Appeals have "assumed" that Wiggins' trial counsel looked no further than the PSI and DSS reports, because the state-court record is clear that Wiggins' trial attorneys had investigated well beyond these sources. Public-defender investigators interviewed Wiggins' family members, see Defendant's Supplemental Answer to State's Discovery Request filed in No. 88–CR–5464 (Cir. Ct. Baltimore Cty., Md., Sept. 18, 1989), Lodging of Respondents, and Wiggins' trial attorneys

hired a psychologist, Dr. William Stejskal (who reviewed the DSS records, conducted clinical interviews, and performed six different psychological tests of Wiggins, *ibid.;* App. 349–351), and a criminologist, Dr. Robert Johnson (who interviewed Wiggins and testified that Wiggins would adjust adequately to life in prison, *id.*, at 319–321). Schlaich also testified in the state postconviction proceedings that he knew information about Wiggins' background that was not contained in the DSS or PSI reports—such as the allegation that Wiggins' mother burned his hands as a child, *id.*, at 490—so Schlaich *must* have investigated sources beyond these reports.

As the Court notes, *ante*, at 17–18, the Maryland Court of Appeals did not expressly state that counsel's investigation extended beyond the PSI and DSS records. There was no reason whatever to do so, since it had found that "counsel *did* investigate and *were* aware of appellant's background," *Wiggins*, *supra*, at 610, 724 A. 2d, at 16, and since that finding was based on a state-court record that clearly demonstrates investigation beyond the PSI and DSS reports. The court's failure to recite what is obvious from the record surely provides no basis for believing that it stupidly "assumed" the opposite of what is obvious from the record .

Once one eliminates the Court's mischaracterization of the state-court opinion—which did not and could not have "assumed" that Wiggins' counsel knew only what was contained in the DSS and PSI reports—there is no basis for finding it "unreasonable" to believe that counsel's investigation was adequate. As noted earlier, Schlaich testified in the state postconviction proceedings that he was aware of the essential items contained in the later-prepared "social history" report. He knew that Wiggins was subjected to neglect and abuse from his mother, App. 490, that there were reports of sexual abuse at one of his foster homes, *ibid.*, that his mother had burned his hands

as a child, *ibid.*, that a Job Corps supervisor had made homosexual overtures towards him, *id.*, at 490–491, and that Wiggins was "'borderline'" mentally retarded, *id.*, at 491.[2] Schlaich explained that, although he was aware of all this potential mitigating evidence, he chose not to present it to the jury for a strategic reason—namely, that it would conflict with his efforts to persuade the jury that Wiggins was not a "principal" in Mrs. Lacs' murder (*i.e.* that he did not kill Lacs by his own hand). *Id.*, at 504–505.

There are only two possible responses to this testimony that might salvage Wiggins' ineffective-assistance claim. The first would be to declare that Schlaich had an inescapable *duty* to hire a social worker to construct a so-called "social history" report, *regardless* of Schlaich's pre-existing knowledge of Wiggins' background. Petitioner makes this suggestion, see Brief for Petitioner 32, n. 8 (asserting that it was "'a normative standard'" at the time of Wiggins' case for capital defense lawyers in Maryland to obtain a social history); and the Court flirts with accepting it, see *ante*, at 11 ("professional standards that prevailed in Maryland . . . at the time of Wiggins' trial" included, for defense of capital cases, "the preparation of a social history report"); *ibid.*, at 11 (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, p. 133 (1989) (hereinafter ABA Guide-

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[2] The only incident contained in the "social history" report about which Schlaich did not confirm knowledge was the occurrence of sexual abuse in *more than one* of Wiggins' foster homes. And *that* knowledge remained unconfirmed only because the question posed asked him whether he knew of reports of abuse at "'one'" of the foster homes. App. 490. The record does not show that Schlaich knew of all these incidents in the degree of detail contained in the "social history" report—but it does not show that he did *not*, either. In short, given Schlaich's testimony there is *no basis* for finding that he was without knowledge of *anything* in the "social history" report.

lines), which says that counsel should make efforts "'to discover *all reasonably available* mitigating evidence'" (emphasis added by the Court)). To think that the requirement of a "social history" was part of "clearly established Federal law" (which is what §2254(d) requires) when the events here occurred would be absurd. Nothing in our clearly established precedents requires counsel to retain a social worker when he is already largely aware of his client's background. To the contrary, *Strickland* emphasizes that "[t]here are countless ways to provide effective assistance in any given case," 466 U. S., at 689, and further states that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, *but they are only guides*," *id.*, at 688. Cf. *ante*, at 11 (treating the ABA Guidelines as "well-defined norms"). It is inconceivable that Schlaich, assuming he testified truthfully regarding his detailed knowledge of Wiggins' troubled childhood, App. 490–491, would need to hire a social worker to comport with *Strickland*'s competence standards. And it certainly would not have been *unreasonable* for the Maryland Court of Appeals to conclude otherwise.

The second possible response to Schlaich's testimony about his extensive awareness of Wiggins' background is to assert that Schlaich lied. The Court assumes *sub silentio* throughout its opinion that Schlaich was not telling the truth when he testified that he knew of reports of sexual abuse in one of Wiggins' foster homes, see, *e.g., ante,* at 12 ("Had counsel investigated further, they may well have discovered the sexual abuse later revealed during state postconviction proceedings"), and eventually declares straight-out that it disbelieves Schlaich, *ante*, at 19–20. This conclusion rests upon a blatant mischaracterization of the record, and an improper shifting of the burden of proof to the State to demonstrate Schlaich's awareness of Wiggins' background, rather than requiring Wiggins to

prove Schlaich's ignorance of it. But, more importantly, it is simply not enough for the Court to conclude, *ante*, at 20, that it "cannot infer from Schlaich's postconviction testimony that counsel looked further than the PSI and DSS reports in investigating petitioner's background." If it is at least *reasonable* to believe Schlaich told the truth, then it could not have been *unreasonable* for the Maryland Court of Appeals to conclude that Wiggins' trial attorneys conducted an adequate investigation into his background. See 28 U. S. C. §2254(d)(1).

Schlaich's testimony must have been false, the Court insists, because the social services records do not contain any evidence of sexual abuse, and "[t]he questions put to Schlaich during his postconviction testimony all referred to what he knew from the social services records." *Ante*, at 18. That is not true. Schlaich was *never* asked "what he knew from the social services records." With regard to the alleged sexual abuse in particular, Schlaich answered "'[y]es'" to the following question: "'You also knew that where *[sic]* were reports of sexual abuse at one of his foster homes?'" This question did not "refe[r] to what [Schlaich] knew from the social services records," as the Court declares; and neither, by the way, did *any* of the other questions put to Schlaich regarding his knowledge of Wiggins' background. See App. 490–491. Wiggins' postconviction counsel simply never asked Schlaich to reveal the source of his knowledge.

Schlaich's most likely source of knowledge of the alleged sexual abuse was Wiggins himself; even Hans Selvog's extensive "social history" report unearthed no documentation or corroborating witnesses with respect to that claim. *Id.,* at 464; see App. to Pet. for Cert. 177a, 193a. The Court, however, dismisses this possibility for two reasons. First, because "'the record contains no evidence that counsel ever pursued this line of questioning with Wiggins.'" *Ante*, at 19. This statement calls for a time-out to get our

bearings: The burden of proof here is on *Wiggins* to show that counsel made their decision without adequate knowledge. See *Strickland*, 466 U. S., at 687. And when counsel has testified, under oath, that he *did* have particular knowledge, the burden is not on counsel to show how he obtained it, but on *Wiggins* (if he wishes to impeach that testimony) to show that counsel could not have obtained it. Thus, the absence of evidence in the record as to whether or not Schlaich pursued this line of questioning with Wiggins dooms, rather than fortifies, Wiggins' ineffective-assistance claim. Wiggins has produced no evidence that *anything* in Hans Selvog's "social history" report was unknown to Schlaich, and no evidence that any source on which Selvog relied was not used by Schlaich.

The Court's second reason for rejecting the possibility that Schlaich learned of the alleged sexual abuse from Wiggins is even more incomprehensible. The Court claims that "the phrase 'other people's reports' [would] have been an unusual way for counsel to refer to conversations with his client." *Ante*, at 19. But Schlaich never used the phrase "other people's reports" in describing how he learned of the alleged sexual abuse in Wiggins' foster homes. Schlaich testified only that he learned of Wiggins' *borderline mental retardation* as it was reported in "other people's reports":

> "'Q And you also knew that he was borderline mentally retarded?
>
> "'A Yes.
>
> "'Q You knew all—
>
> "'A At least I knew *that* as it was reported *in other people's reports*, yes.
>
> "'Q But you knew it?
> "'A Yes.'" App. 490–491 (emphasis added).

It is clear that when Schlaich said, "'At least I knew *that*

as it was reported in other people's reports,'" *Id.*, at 491 (emphasis added), the "'that'" to which he referred was the fact that Wiggins was borderline mentally retarded—not the other details of Wiggins' background which Schlaich had previously testified he knew.

The Court's final reason for disbelieving Schlaich's sworn testimony is his failure to mention the alleged sexual abuse in the proffer of mitigating evidence he would introduce if the trial court granted his motion to bifurcate. "Counsel's failure to include in the proffer the powerful evidence of repeated sexual abuse is . . . explicable only if we assume that counsel had no knowledge of the abuse." *Ante*, at 20. But because the *only* evidence of sexual abuse consisted of Wiggins' own assertions, see App. 464; App. to Pet. for Cert. 177a, 193a (evidence not exactly worthy of the Court's flattering description as "powerful"), *there was nothing to proffer unless Schlaich declared an intent to put Wiggins on the stand*. Given counsel's chosen trial strategy to prevent Wiggins from testifying during the sentencing proceedings, the decision not to mention sexual abuse in the proffer is perfectly consistent with counsel's claimed knowledge of the alleged abuse.

Of course these reasons the Court offers—which range from the incredible up to the feeble—are used only in support of the Court's conclusion that, *in its independent judgment*, Schlaich was lying. The Court does not even attempt to establish (as it must) that it was *objectively unreasonable* for the state court to believe Schlaich's testimony and therefore conclude that he conducted an adequate investigation of Wiggins' background. It could not possibly make this showing. Wiggins has not produced any direct evidence that his attorneys were uninformed with respect to *anything* in his background, and the Court can muster no circumstantial evidence beyond the powerfully unconvincing fact that Schlaich failed to

mention the allegations of sexual abuse in his proffer. To make things worse, the Court is *still* bound (though one would not know it from the opinion) by the state court's factual determinations that Wiggins' trial counsel "*did* investigate and *were* aware of [Wiggins'] background," *Wiggins,* 352 Md., at 610, 724 A. 2d, at 16 (emphasis in original), and that "[c]ounsel were aware that [Wiggins] had a most unfortunate childhood," *id.,* at 608, 724 A. 2d, at 15. See 28 U. S. C. §2254(e)(1).[3] Because it is at least reasonable to believe Schlaich's testimony, and because §2254(e)(1) requires us to respect the state court's factual determination that Wiggins' trial attorneys were aware of Wiggins' background, the Maryland Court of Appeals' legal conclusion—that trial counsel "did not have as detailed or graphic a history as was prepared by Mr. Selvog, *but that is not a Constitutional deficiency*," *Wiggins, supra,* at 610, 724 A. 2d, at 16 (emphasis added)—is unassailable under §2254(d)(1).

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[3] The Court defends its refusal to adhere to these state-court factual determinations on the ground that "the Maryland Court of Appeals' conclusion that the *scope* of counsel's investigation . . . met the legal standards set forth in *Strickland* represented an objectively unreasonable application of our precedent." *Ante*, at 16. That is an inadequate response, for several reasons. First, because in the very course of determining *what was* the scope of counsel's investigation the Court was bound to accept (as it did not) the Maryland Court of Appeals' factual findings that counsel knew of Wiggins' background, including his "most unfortunate childhood." And it is an inadequate response, secondly, because even after the Court concludes that the petitioner has avoided §2254(d)'s bar to relief because of that misapplication of *Strickland* (or because of the alleged mistaken factual assumption "that counsel learned of . . . sexual abuse . . . from the DSS records," *ante*, at 15–16), it *still* must observe §2254(e)(1)'s presumption of correctness in deciding the merits of the habeas question. See *Miller-El* v. *Cockrell*, 537 U. S. 322, 341, 348 (2003).

B

The Court holds in the alternative that Wiggins has satisfied §2254(d)(2), which allows a habeas petitioner to escape §2254(d)'s bar to relief when the state court's adjudication of his claim "resulted in a decision that was *based on an unreasonable determination of the facts* in light of the evidence presented in the State court proceeding," (emphasis added). This is so, the Court says, because the Maryland Court of Appeals wrongly claimed that Wiggins' social service records "recorded incidences of . . . sexual abuse." 352 Md., at 608–609, 724 A. 2d, at 15.

That it made that claim is true enough. And I will concede that Wiggins has rebutted the presumption of correctness by the "clear and convincing evidence" that §2254(e)(1) requires. It is both clear and convincing from reading the DSS records that they contain no evidence of sexual abuse. I will also assume, *arguendo*, that the state court's error was "unreasonable" in light of the evidence presented in the state-court proceeding.

Given all that, the Court's conclusion that a §2254(d)(2) case has been made out still suffers from the irreparable defect that the Maryland Court of Appeals' decision was not "based on" this mistaken factual determination. What difference did it make whether the social services records contained evidence of sexual abuse? Even if they did not, the court's decision would have been the same in light of Schlaich's sworn testimony that he was aware of the alleged sexual abuse. The *source* of Schlaich's knowledge—whether he obtained it from the DSS reports or from Wiggins himself—was of no consequence. The only thing that mattered was that Schlaich *knew*, and testified under oath that he knew, enough about Wiggins' background to make it reasonable to proceed without a report by a social worker. The Court's opinion does not even discuss this requirement of §2254(d)(2), that the unreasonable determination of facts be one on which the state-

court decision was *based*.

II

The Court's indefensible holding that Wiggins has avoided §2254(d)'s bar to relief is not alone enough to entitle Wiggins to habeas relief on his Sixth Amendment claim. Wiggins *still* must establish that he was "prejudiced" by his counsel's alleged "error." *Strickland*, 466 U. S., at 691–696. Specifically, Wiggins must demonstrate that, if his trial attorneys had retained a licensed social worker to assemble a "social history" of their client, there is a "reasonable probability" that (1) his attorneys would have chosen to present the social history evidence to the jury, *and* (2) upon hearing that evidence, the jury would have spared his life. The Court's analysis on these points continues its disregard for the record in a determined procession towards a seemingly preordained result.

There is no "reasonable probability" that a social-history investigation would have altered the chosen strategy of Wiggins' trial counsel. As noted earlier, Schlaich was well aware—without the benefit of a "social history" report—that Wiggins had a troubled childhood and background. And the Court remains bound, *even after* concluding that Wiggins has satisfied the standards of §§2254(d)(1) and (d)(2), by the state court's factual determination that Wiggins' trial attorneys "*were* aware of [Wiggins'] background," *Wiggins,* 352 Md., at 610, 724 A. 2d, at 16, and "were aware that Wiggins had a most unfortunate childhood," *id.,* at 608, 724 A. 2d, at 15. See 28 U. S. C. §2254(e)(1). Wiggins' trial attorneys chose, however, not to present evidence of Wiggins' background to the jury because of their "deliberate, tactical decision to concentrate their effort at convincing the jury that appellant was not a principal in the killing of Ms. Lacs." *Wiggins, supra,* at 608, 724 A. 2d, at 15.

Wiggins has not shown that the incremental informa-

tion in Hans Selvog's social-history report would have induced counsel to change this course. Schlaich testified under oath that presenting the type of evidence in Selvog's report would have conflicted with his chosen defense strategy to raise doubts as to Wiggins' role as a principal, and that he wanted to avoid a "shotgun approach" with the jury. App. 504–505.[4] (This testimony is entirely unrefuted by the Court's statement that *at the time of trial* counsel "were not in a position to make a reasonable strategic choice," because of their alleged inadequate investigation, *ante*, at 23. Schlaich presented this testimony in state postconviction proceedings, when *there was no doubt* he was fully aware of the details of Wiggins' background. See App. 490–491.) It is irrelevant whether a hypothetical "reasonable attorney" might have introduced evidence of alleged sexual abuse, *ante*, at 19–20; *Wiggins'* attorneys would *not* have done so, and therefore Wiggins was not prejudiced by their allegedly inadequate investigation. There is simply *nothing* to show (and the Court does not even dare to *assert*) that there is a "reasonable probability" this evidence would have been introduced *in this case*. *Ante*, at 19–20.

What is more, almost all of Selvog's social-history evidence was *inadmissible* at the time of Wiggins' trial. Maryland law provides that evidence in a capital sentencing proceeding must be "reliable" to be admissible, see *Whittlesey* v. *State*, 340 Md. 30, 70, 665 A. 2d 223, 243 (1995), and many of the anecdotes regarding Wiggins'

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[4] Introducing evidence that Wiggins suffered semiweekly (or perhaps daily) sexual abuse as a child, for example, could have led the jury to conclude that this horrible experience made Wiggins precisely the type of person who could perpetrate this bizarre crime—in which a 77-year-old woman was found drowned in the bathtub of her apartment, clothed but missing her underwear, and sprayed with Black Flag Ant and Roach Killer.

childhood consist of the baldest hearsay—statements that have been neither taken in court, nor given under oath, nor subjected to cross-examination, nor even submitted in the form of a signed affidavit. Consider, for example, the allegation that Wiggins' foster father sexually abused him "'two or three times a week, sometimes everyday,'" App. to Pet. for Cert. 177a. The *only* source of that information was Wiggins himself, in his unsworn and un-cross-examined interview with Hans Selvog. There is absolutely no documentation or corroboration of the claim, App. 464, and the allegedly abusive foster parent is apparently deceased. *Id.,* at 470. Wiggins was, however, examined by a pediatrician during the time that this supposed biweekly or daily sexual abuse occurred, and the pediatrician's report mentioned no signs of sexual abuse. App. to Pet. for Cert. 181a; App. 464.

Much of the other "evidence" in Selvog's report (including Wiggins' claim that he was drugged by his Job Corps supervisor and raped while unconscious, and that he was raped by the teenage sons at his fourth foster home) was also undocumented and based entirely on Wiggins' say-so. The Court treats all this uncorroborated gossip as established fact,[5] *ante*, at 22—indeed, even refers to it as "powerful" evidence, *ibid.*—and assumes that Wiggins' lawyers could have simply handed Hans Selvog's report to the jury. Nothing could be further from the truth. As the State Circuit Court explained in rejecting Wiggins' Sixth

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[5] Wiggins' postconviction lawyers could have increased the credibility of these anecdotes, and assisted this Court's prejudice determination, by at least having Wiggins testify under oath in the state postconviction proceedings as to his allegedly abusive childhood. They did not do that—perhaps anticipating, correctly alas, that they could succeed in getting this Court to vacate a jury verdict of death on the basis of rumor and innuendo in a "social history" report that would never be admissible in a court of law.

Amendment claim, "Selvog's report would have had a great deal of difficulty in getting into evidence in Maryland. He was not licensed in Maryland, the report contains multiple instances of hearsay, it contains many opinions in the nature of diagnosis of a medical nature." App. to Pet. for Cert. 156a.

The Court contends that Selvog's report "may have been admissible," *ante*, at 24—relying for that contention upon *Whittlesey* v. *State*, *supra*. *Whittlesey*, however, merely *vacated* the trial judge's decision that a social-history report assembled by Selvog was *per se* inadmissible on hearsay grounds and remanded for a determination of whether the hearsay evidence was "reliable." *Id.*, at 71–72, 665 A. 2d, at 243. Thus, unless the Court is prepared to make the implausible contention that Wiggins' hearsay statements in Selvog's report are "reliable" under Maryland law, there is no basis for its conclusion that Maryland "considers this type of evidence at sentencing," *ante*, at 24. The State Circuit Court in the present case, in its decision that postdated *Whittlesey*, certainly did not think Selvog's report met the standard of reliability, App. to Pet. for Cert. 156a, and that court's assessment was undoubtedly correct. Wiggins' accounts of his background, as reported by Selvog, are the hearsay statements of a convicted murderer and, as the trial testimony in this case demonstrates, a serial liar. Wiggins lied to Geraldine Armstrong when he told her that Mrs. Lacs' car belongs to "'a buddy of min[e],'" App. 179. He lied when he told the police that he had obtained Mrs. Lacs' car and credit cards on Friday in the afternoon, rather than Thursday, *id.,* at 180. He lied to Armstrong about how he obtained Mrs. Lacs' ring, *ibid*. And, knowing that the information he provided to Selvog would be used to attack his death sentence, Wiggins had every incentive to lie again about the supposed abuse he suffered. The hearsay statements in Selvog's report pertaining to the alleged sexual abuse were of

especially dubious reliability; Maryland courts have consistently refused to allow hearsay evidence regarding alleged sexual abuse, except for statements provided by the victim to a treating physician. See *Bohnert* v. *State*, 312 Md. 266, 276, 539 A. 2d 657, 662 (1988) (refusing to admit into evidence a social worker's opinion, based on a child's "unsubstantiated averments," that the child had been sexually abused); *Nixon* v. *State*, 140 Md. App. 170, 178–188, 780 A. 2d 344, 349–354 (2001) (child protective services agent's testimony that retarded teenager told agent she had been sexually abused was inadmissible hearsay); *Low* v. *State*, 119 Md. App. 413, 424–426, 705 A. 2d 67, 73–74 (1998) (refusing to admit into evidence examining physician's testimony regarding a child's statements of sexual abuse).

Given that the anecdotes in Selvog's report were unreliable, and therefore inadmissible, the only way Wiggins' trial attorneys could have presented these allegations to the jury would have been to place Wiggins on the witness stand. Wiggins has not established (and the Court does not assert) any "reasonable probability" that they would have done this, given the dangers they saw in exposing their client to cross-examination over a wide range of issues. See App. 353 (Wiggins' trial attorneys advising him in open court: "'Kevin, if you do take the witness stand, you must answer any question that's asked of you. If it is a question the judge rules is a permissible question, you would have to answer'"). Their perception of those dangers must surely have been heightened by their observation of Wiggins' volatile and obnoxious behavior throughout the trial. See, *e.g.*, *id.,* at 32 (Wiggins interrupting the judge's statement of the verdict to say: "He can't tell me I did it. I'm going to go out. . . . I didn't do it. He can't tell me I did it"); *id.,* at 56 (Wiggins interrupting the prosecutor's opening argument to say: "'I'm not going to take that because I didn't kill that lady. I'm not going

to sit there and take that'").

But even indulging, for the sake of argument, the Court's belief that Selvog's report "may" have been admissible, *ante*, at 24, the Court's prejudice discussion simply assumes without analysis that the sentencing jury would have believed the report's hearsay accounts of Wiggins' statements. *Ante*, at 24–25. Yet that same jury would have learned during the guilt phase of the trial that Wiggins is a proven liar, see App. 179–180, and Wiggins would not have aided his credibility with the jury by avoiding the witness stand and funneling his story through a social worker. I doubt very much that Wiggins' jury would have shared the Court's uncritical and wholesale acceptance of these hearsay claims.

* * *

Today's decision is extraordinary—even for our "death is different" jurisprudence. See *Simmons* v. *South Carolina*, 512 U. S. 154, 185 (1994) (SCALIA, J., dissenting). It fails to give effect to §2254(e)(1)'s requirement that state court factual determinations be presumed correct, and disbelieves the sworn testimony of a member of the bar while treating hearsay accounts of statements of a convicted murderer as established fact. I dissent.