



No. 10-91

IN THE
Supreme Court of the United States

WILLIAM WILSON,
Superintendent, Indiana State Prison,
Petitioner,

v.

JOSEPH EDWARD CORCORAN,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. The State preserved the issues presented 2

II. The court of appeals lacked jurisdiction to correct
a perceived state law error whether reviewed
under AEDPA or not..... 5

CONCLUSION..... 7

TABLE OF AUTHORITIES**Cases**

<i>Corcoran v. Levenhagen</i> , 130 S. Ct. 8 (2009) (per curiam)	3
<i>Corcoran v. Levenhagen</i> , 593 F.3d 547 (CA7 2010)	5
<i>United States v. Cotton</i> , 535 U.S. 625 (2002)	2
<i>Wainwright v. Goode</i> , 464 U.S. 78 (1983) (per curiam)	1, 6, 7
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000)	6
<i>Zant v. Stephens</i> , 462 U.S. 862 (1983)	6

Statutes

28 U.S.C. § 2254(a)	6
28 U.S.C. § 2254(d)	2, 6

REPLY BRIEF FOR PETITIONER

The decision of the court of appeals warrants this Court's review because it irreconcilably conflicts with *Wainwright v. Goode*, 464 U.S. 78 (1983) (per curiam), and exceeds a federal habeas court's jurisdiction by "correcting" a state supreme court's application of state law. Indeed, not even Respondent Corcoran tries to justify the court of appeals' broad expansion of habeas jurisdiction. At bottom, Corcoran's defense on the merits of his claim affirms the crux of Petitioner's argument: no Supreme Court precedent clearly establishes that consideration of non-statutory aggravating circumstances during capital sentencing violates the Constitution.

Moreover, Corcoran's primary focus, his assertion of a non-existent waiver, is equally devoid of support in law or fact. Corcoran asserts that Petitioner has forfeited any argument that the court of appeals could not exceed its well-defined jurisdiction. Not only is such an objection to subject-matter jurisdiction not waiveable, the issue arose for the first time when the court of appeals decided the matter on its own without giving the parties an opportunity to brief the merits. Not even Corcoran invited the court of appeals to adopt such a sweeping view of its jurisdiction, and Petitioner objected to it at the first available opportunity. A lower court's judgment should not evade further review merely because that court constructed—on its own and for the first time—an alternative theory of jurisdiction. The Court should grant the petition and reverse the judgment of the court of appeals.

I. The State preserved the issues presented

The State preserved the questions presented by the petition, and this case is a proper vehicle in which to decide them. First, the court of appeals' error here is one of subject-matter jurisdiction and cannot be waived. *United States v. Cotton*, 535 U.S. 625, 630 (2002). Second, the State has always maintained that Corcoran's arguments pertaining to the use of non-statutory aggravating circumstances failed to assert federal habeas claims. The precise manifestation of that deficiency only crystallized for the first time following the decision below when the court of appeals agreed that Corcoran's claims lacked basis in federal law but granted relief in order to correct a perceived error of Indiana law. Pet. App. 7a, 144a-145a. And in any event the Seventh Circuit ultimately addressed the State's jurisdictional argument squarely, which conclusively refutes any assertion of waiver.

1. The State has consistently maintained in the courts below that Corcoran's non-statutory aggravating circumstance claim has no federal law basis, let alone basis in the clearly-established precedent of this Court as required by 28 U.S.C. § 2254(d). As discussed in the petition, the State's argument in the district court was that Corcoran had failed to make out a violation of federal law by the Indiana courts. Pet. 23-24. Implicit in that argument is that any errors by the Indiana courts were errors of state law only, and were thus outside the purview of a federal court's habeas jurisdiction. Accordingly, the State's jurisdictional defense has been part of the case all along.

2. The State did not waive any arguments in its brief opposing Corcoran's petition for a writ of certiorari last term. In his prior petition, Corcoran's question presented was a procedural one: should the court of appeals have ignored all of his remaining claims that the district court had found moot in light of its grant of relief that would require a new trial. Petition for Writ of Certiorari at 23-25, *Corcoran v. Levenhagen*, 130 S. Ct. 8 (2009) (per curiam) (No. 08-10495) (2009 WL 3375035). The State briefly responded that Corcoran's additional, unadjudicated claims were both waived and—with regard to Corcoran's non-statutory aggravating circumstance claim—frivolous insofar as the Indiana Supreme Court found as a factual matter that the trial court did not consider improper non-statutory aggravating circumstances. Brief in Opposition at 9-10, *Corcoran*, 130 S. Ct. 8 (No. 08-10495) (2009 WL 3440019).

The Court granted the petition and remanded the case for review of Corcoran's unaddressed claims, but did not purport to consider their merits. *Corcoran*, 130 S. Ct. at 9. The Court left for the Seventh Circuit the job of considering all arguments for and against relief in the first instance, just as Corcoran had requested. *Id.*

Under such circumstances, there would be little point in deeming the State to have waived defenses to Corcoran's claims not asserted in the brief in opposition. Regardless of the pleadings in this Court, the Seventh Circuit had a full opportunity to consider all defenses; there can be no suggestion that the State sought to sandbag the lower court.

The waiver cases cited by Corcoran addressed circumstances where respondents failed to assert defenses in opposition to certiorari, but then raised them on the merits in *this* Court after certiorari had been granted, thus sandbagging the very court that was to decide the case. They do not require respondents to invoke all possible defenses to a claim when opposing a request for remand. Indeed, had the State acquiesced to Corcoran's petition, it would not have waived its merits defenses on remand. Particularly given that the precise contours of any given claim often are not fully apparent until the party asserting it attempts a plenary showing on the merits, it would be unfair to saddle remand opponents with the obligation to offer its full slate of merits defenses on pain of waiver.

3. Petitioner did not waive any arguments by not filing a statement following remand pursuant to Seventh Circuit Rule 54. Rule 54 statements are not merits briefs; they are statements concerning the procedural posture of a case following remand from this Court and are intended to inform the court of appeals about what action, as a matter of procedure, the parties wish the court to take. They are designed, for example, to afford the parties the opportunity to say whether further briefing or argument is necessary, whether remand to the district court is appropriate, or whether the issue on remand is ripe for decision.

Perhaps the limited purpose of Rule 54 statements are best illustrated by Corcoran's own in this case, which was properly limited to whether the court of appeals should remand the case to the

district court to consider Corcoran's claims in the first instance. Circuit Rule 54 Statement of Position, *Corcoran v. Levenhagen*, 593 F3d 547 (CA7 2010) (No. 07-2093) (Docket Entry 51). Not even Corcoran briefed the merits of his claims, let alone addressed the jurisdictional issue that only first crystallized with the court of appeals' later decision. Corcoran cannot fault Petitioner for sharing his own inability to predict the court of appeals' radical action.

4. Finally, the court of appeals did not find that Petitioner waived its argument. It could not, because it created the jurisdictional issue for the first time in its decision, and rehearing was the first opportunity that Petitioner had to address it. Indeed, if it believed the arguments were waived then it would not have substantially amended its opinion in an attempt to address its errors raised in Petitioner's petition for rehearing. Pet. App. 143a-146a.

II. The court of appeals lacked jurisdiction to correct a perceived state law error whether reviewed under AEDPA or not

Corcoran makes one correct observation: the court of appeals held that the Indiana Supreme Court made an unreasonable factual finding, resulting in an error of Indiana law that required remedy through habeas corpus. The problem with that analysis, as explained by *Goode*, is three-fold: (1) it is not the province of a habeas court to disagree with a state court about what that state's law allows, (2) habeas courts may not second-guess a state court factual finding that is at least debatable, and (3)

even if a factual finding was wrong, it has to result in a violation of federal law before habeas relief is permissible. 464 U.S. at 83-87.

Corcoran offers no response to the former two truths. As for the latter, Corcoran musters no authority finding a constitutional prohibition on non-statutory aggravating circumstances. The most he offers is the bald assertion that the question is no longer clear cut. Corcoran is incorrect about that—even the court of appeals understands that federal law permits state courts to find non-statutory aggravating circumstances. Pet. App. 7a (citing *Zant v. Stephens*, 462 U.S. 862, 878 (1983)).

Inexplicably, that court's analysis did not stop there. The Constitution does not both permit and prohibit the use of such circumstances at the same time. Where both the court of appeals and Corcoran go wrong is in assuming that § 2254(d)(2) permits habeas relief for any unreasonable factual finding irrespective of its relevance to constitutional error. Section 2254(a) limits the jurisdiction of a habeas court to errors of federal law. 28 U.S.C. § 2254(a); *Williams v. Taylor*, 529 U.S. 362, 375 (2000). A habeas petitioner should not be permitted to use § 2254(d)(2) as a back door to obtain a federal court declaration of what is and is not permitted by state law. Yet this is precisely what the court of appeals did here by disagreeing with the Indiana Supreme Court about what Indiana law says about a state trial court considering facts outside the statutory aggravating circumstances.

Goode is indistinguishable from Corcoran's case in any meaningful way. Corcoran's claim boils down to an invitation for the habeas courts to exceed their jurisdiction and grant him habeas relief based on a disagreement with the Indiana Supreme Court over an application of Indiana law. Just as this Court did in *Goode*, the court of appeals was required to deny relief. It refused.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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Dated: September 15, 2010

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