

10-91 JUL 13 2010

No. **OFFICE OF THE CLERK**

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**

PETITION FOR WRIT OF CERTIORARI

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Chief Counsel

**Counsel of Record*

Counsel for Petitioner

Blank Page



QUESTIONS PRESENTED

Indiana law prohibits the use of non-statutory aggravating circumstances to sentence a person in a capital case. The trial court sentenced Corcoran to death for quadruple murder. In its order, the trial court discussed the nature of Corcoran's crimes and Corcoran's character—which are not statutorily authorized aggravators—yet also expressly stated that it had not considered those particulars as aggravating circumstances. On appeal, the Indiana Supreme Court accepted the trial court's explanation as comporting with state law and independently reviewed—and affirmed—Corcoran's sentence.

On collateral review, the Seventh Circuit granted habeas corpus relief and rejected the Indiana Supreme Court's ruling that the trial court did not violate state law.

1. Does a state capital defendant have a constitutional right to a sentencing decision informed in no way by facts that are neither elements of a crime of which he stands convicted or aggravating circumstances authorized by statute?

2. If so, may a federal court grant habeas relief based on its own finding that a state trial court improperly considered non-statutory aggravators when imposing a sentence of death, contrary to the determination of the state supreme court on that issue?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT.....	4
REASONS FOR GRANTING THE PETITION	13
I. The Seventh Circuit’s decision is irreconcilable with this Court’s decision in <i>Wainwright v. Goode</i>	13
II. The Seventh Circuit exceeded habeas jurisdiction by granting relief based upon its view, contrary to the state supreme court, that the trial court violated state law	16

A. If a state supreme court decides that state law was not violated by a trial court's consideration of aggravating facts, there can be no federal constitutional violation	17
B. The Seventh Circuit rejected the state supreme court's finding that sentencing comported with state law	18
III. The Seventh Circuit substituted its view of the record for the Indiana Supreme Court's finding on the trial court's use of non-statutory aggravators.....	20
IV. Even if state law were violated here, no federal law violation occurred because Corcoran's sentence is not arbitrary given other safeguards.....	21
CONCLUSION.....	25

TABLE OF AUTHORITIES

CASES

<i>Alvord v. Wainwright</i> , 725 F.2d 1282 (CA11 1984)	18
<i>Barclay v. Florida</i> , 463 U.S. 939 (1983).....	17, 22
<i>Corcoran v. Buss</i> , 483 F.Supp.2d 709 (N.D.Ind. 2007).....	1
<i>Corcoran v. Buss</i> , 551 F.3d 703 (2008)	1
<i>Corcoran v. Levenhagen</i> , 558 U.S. __ (2009)	1
<i>Corcoran v. Levenhagen</i> , 593 F.3d 547 (CA7 2010)	1, 9, 14
<i>Corcoran v. State</i> , 739 N.E.2d 649 (Ind. 2000).....	<i>passim</i>
<i>Corcoran v. State</i> , 774 N.E.2d 495 (Ind. 2002).....	1
<i>Corcoran v. State</i> , 820 N.E.2d 655, <i>aff'd on reh'g</i> , 827 N.E.2d 542 (Ind. 2005)	1, 8, 9
<i>Corcoran v. State</i> , 845 N.E.2d 1019 (Ind. 2006).....	1, 9

CASES [CONT'D]

<i>Engle v. Isaac</i> , 457 U.S. 1141 (1982).....	16
<i>Fox v. Coyle</i> , 271 F.3d 658 (CA6 2001)	18
<i>Goode v. Wainwright</i> , 410 So.2d 506 (Fla. 1982)	15
<i>Judy v. State</i> , 416 N.E.2d 95 (Ind. 1981).....	22
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003).....	21
<i>Prowell v. State</i> , 687 N.E.2d 563 (Ind. 1997).....	19
<i>Renico v. Lett</i> , 559 U.S. ___, 130 S. Ct. 1355 (2010)	17
<i>Smith v. Phillips</i> , 455 U.S. 209 (1982).....	16
<i>Sweet v. Delo</i> , 125 F.3d 1144 (CA8 1997)	20
<i>United States v. Jackson</i> , 390 U.S. 570 (1968).....	10
<i>Wainwright v. Goode</i> , 464 U.S. 78 (1983).....	<i>passim</i>

<i>Zant v. Stephens</i> , 462 U.S. 862 (1983).....	17
---	----

FEDERAL STATUTES

28 U.S.C. § 1254(1).....	2
28 U.S.C. § 2254(a).....	16
28 U.S.C. § 2254(a), (d), (e)(1)	3
28 U.S.C. § 2254(d).....	23
28 U.S.C. § 2254(d)(1)	12
28 U.S.C. § 2254(d)(2)	12, 21
28 U.S.C. § 2254(e)(1)	21
U.S.C. § 2254(d)(8)	21

STATE STATUTES

Antiterrorism and Effective Death Penalty Act of 1996	12
Indiana Code 35-50-2-9(k)	5, 7
Indiana Code § 35-50-2-9(b).....	7

RULES

Rule 54.....	24
Trial R. 2525-29	22
Trial R. 2915-16	6

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMENDMENT VI	6, 9
U.S. CONST. AMENDMENT VIII	2, 8, 13, 14, 23
U.S. CONST. AMENDMENT XVI, § 1.....	2, 24

PETITION FOR WRIT OF CERTIORARI

The State of Indiana, through William Wilson, Superintendent of the Indiana State Prison, respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit that granted Joseph Corcoran a writ of habeas corpus from his sentence of death.

OPINIONS BELOW

The most recent opinion of the Court of Appeals granting habeas corpus relief (App. 1a) is reported at *Corcoran v. Levenhagen*, 593 F.3d 547 (CA7 2010), *as amended by denial of reh'g and reh'g en banc*. The opinion of this Court remanding the case for further consideration (App. 16a) is reported at *Corcoran v. Levenhagen*, 558 U.S. __ (2009). The first opinion of the Court of Appeals reversing the grant of habeas corpus relief (App. 18a) is reported as *Corcoran v. Buss*, 551 F.3d 703 (2008), *reh'g and reh'g en banc denied*. The order of the district court granting a writ of habeas corpus (App. 53a) is reported at *Corcoran v. Buss*, 483 F.Supp.2d 709 (N.D.Ind. 2007). The decisions of the Indiana Supreme Court regarding Corcoran's alternate attempts to waive and seek state post-conviction review are reported at *Corcoran v. State*, 820 N.E.2d 655, *aff'd on reh'g*, 827 N.E.2d 542 (Ind. 2005), and *Corcoran v. State*, 845 N.E.2d 1019 (Ind. 2006). The decision of the Indiana Supreme Court on direct appeal from resentencing (App. 107a) is reported at *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002). The opinion of the Indiana Supreme Court on direct appeal affirming Corcoran's

conviction and reversing his sentence is reported at *Corcoran v. State*, 739 N.E.2d 649 (Ind. 2000).

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 2010. App. 147a. A petition for rehearing was denied on April 14, 2010. App 143a-144a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. AMEND XVI, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(a), (d), (e)(1)

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) 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.

(e)(1) 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.

STATEMENT

1. Joseph Corcoran is convicted of, and was sentenced to death for, the murders of four men, including his brother and his sister's fiancé. The Indiana Supreme Court summarized the facts underlying the crime as follows:

The nature of the offense is clear; Corcoran and his defense team do not dispute the events. On July 26, 1997, Corcoran was lying on his bedroom floor and heard men's voices. He became upset because he thought the men were talking about him and took a semi-automatic rifle downstairs to confront them. In the living room were four men, including Corcoran's brother and future brother-in-law, both of whom lived in the house with Corcoran.

Corcoran shot and killed Jim Corcoran, Scott Turner and Timothy Bricker at close range. The final victim, Doug Stillwell, tried to escape, but Corcoran chased him into the kitchen and shot him in the head.

App. 117a.

2. The State of Indiana charged Corcoran with four counts of murder. At trial, the jury found Corcoran guilty on all counts, found the aggravating circumstance of multiple murders, and unanimously recommended that the trial court impose the death penalty. App. 109a.

The trial court followed that recommendation and sentenced Corcoran to death. When sentencing Corcoran, the trial court discussed the statutory aggravating circumstance of multiple murders, the several mitigating circumstances offered by Corcoran, and offered its observations about the nature of the offenses and Corcoran's character. *Corcoran v. State*, 739 N.E.2d 649, 651 (Ind. 2000) (*Corcoran I*). Specifically as to the latter point, the trial court remarked in its oral sentencing statement,

Pursuant to the law, Indiana Code 35-50-2-9(k), I'm required to balance aggravating circumstances proved by the State of Indiana against mitigating circumstances proved by the Defense. That has been a very difficult process, and not a process that I have ever taken lightly, and certainly would never take lightly, Mr. Corcoran. Your emotional and mental disturbance is of concern to this Court. Also of concern to this Court is that none of the experts can seem to give me a straight answer, Mr. Corcoran, of what is really going on inside your head. And maybe it is as [the prosecutor] argued in his closing, that society just cannot begin to comprehend why you would do what you did, so we've got to say, there's got to be something wrong with this guy to have done what he did. I'm not going to say that, Mr. Corcoran, because I don't know. *I do know, however, that the knowing and intentional murders of four innocent people is an extremely heinous and aggravated crime. That makes you, Mr. Corcoran, a mass murderer. [The prosecutor] is right. I don't think in the history of*

this county we've had a mass murderer such as yourself. It makes you, Mr. Corcoran, a very dangerous, evil mass murderer. And I am convinced in my heart of hearts, Mr. Corcoran, if given the opportunity, you will murder again.

Corcoran I, 739 N.E.2d at 656-57 (emphasis added); Trial R. 2915-16.

On direct appeal, Corcoran appealed only his sentence. The Indiana Supreme Court upheld the constitutionality of Indiana's death penalty as it applied in Corcoran's case and specifically rejected Corcoran's argument that the State violated his Sixth Amendment right to a jury trial when the State offered to refrain from seeking the death penalty if Corcoran would waive a jury trial. *Corcoran I*, 739 N.E.2d at 654. However, the state supreme court vacated the death sentence and remanded the case for resentencing due to the possibility that the trial court impermissibly relied upon non-statutory aggravating circumstances, specifically the heinousness of the crimes, the innocence of the victims, and the trial court's belief that Corcoran will murder again if given the opportunity. *Id.* at 657. Chief Justice Shepard separately concurred, expressing his view that the trial court's statements were made to explain why the multiple murder aggravating circumstance received such great weight, but he agreed that remand was appropriate to clarify the matter. *Id.* at 658 (Shepard, C.J., concurring).

On remand, the trial court reimposed a death sentence. App. 124a. In its revised sentencing order, the trial court stated,

Pursuant to I.C. 35-50-2-9(k), and the December 6, 2000 Order from the Supreme Court, the trial Court has balanced the aggravating circumstances proved by the State against the mitigating circumstances proved by the Defendant. The trial Court, in balancing the proved aggravators and mitigators, emphasized to the Supreme Court that it only relied upon those proven statutory aggravators. The trial Court's remarks at the sentencing hearing, and the language in the original sentencing order explain why such high weight was given to the statutory aggravator of multiple murder, and further support the trial Court's personal conclusion that the sentence is appropriate punishment for this offender and these crimes.

App. 131a.

On appeal, the Indiana Supreme Court affirmed. App. 107a. With regard to Corcoran's allegation that the trial court considered non-statutory aggravating circumstances, the state supreme court concluded,

We are now satisfied that the trial court has relied on only aggravators listed in Indiana Code § 35-50-2-9(b). In response to our remand, the trial court stated, "[I]n balancing the proved aggravators and mitigators, [the trial court] emphasizes to the Supreme Court that it only relied upon those proven statutory aggravators."

There is no lack of clarity in this statement and no plausible reason to believe it untrue.

App. 112a-113a (citation omitted). Additionally, the state supreme court independently reconsidered Corcoran's death sentence and found that the single aggravating circumstance of multiple murders was weightier than the proffered mitigating circumstances, including that Corcoran suffered from a mental illness. App. 116a-120a. In dissent, Justice Rucker expressed his view that Corcoran's mental illness causes his death sentence to violate the Eighth Amendment. App. 121a.

3. Indiana law required Corcoran to file a petition for post-conviction relief in the state trial court by September 9, 2003. *Corcoran v. State*, 820 N.E.2d 655, 657 (*Corcoran III*), *aff'd on reh'g*, 827 N.E.2d 542 (Ind. 2005) (*Corcoran IV*). Corcoran, however, refused to sign the petition his attorneys prepared for him, thereby preventing its filing. *Corcoran III*, 820 N.E.2d at 657.

His counsel moved the post-conviction court for a competency determination, which the court conducted. *Id.* at 657-58. After hearing testimony by experts and Corcoran, the post-conviction court found that although Corcoran suffers from a mental illness, he nonetheless understood the proceedings, the ramifications of his actions, and was able to make rational choices regarding his case; thus it found him competent to make the decision not to pursue state post-conviction review. *Id.* at 661.

The Indiana Supreme Court affirmed the competency determination. *Id.* at 658-62. The court reaffirmed its decision on rehearing. *Corcoran IV*, 827 N.E.2d at 543.

While that appeal was pending, Corcoran changed his mind, signed, and attempted to file the post-conviction relief petition that his attorneys had prepared for him. *Corcoran v. State*, 845 N.E.2d 1019, 1020 (Ind. 2006) (*Corcoran V*). The post-conviction court dismissed the petition as untimely, a judgment that the Indiana Supreme Court affirmed. *Id.*

4. Corcoran next filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Indiana. Corcoran made several claims, including that (1) prosecutors violated his Sixth Amendment right to a trial by jury by offering to forego seeking the death penalty if Corcoran agreed to waive a jury trial; (2) he was incompetent to decide whether to waive state post-conviction review, and (3) the trial court improperly considered non-statutory aggravating circumstances while refusing to consider all of his proffered mitigating circumstances when sentencing him to death.

The district court held that the prosecution's offer served to coerce Corcoran into waiving his constitutional right to a jury trial or else be executed. App. 72a-87a. The district court also found, however, that the state courts' determinations that Corcoran was competent to forego state post-conviction review was reasonable and denied relief

on that basis. App. 94a-105a. The district court granted a writ of habeas corpus contingent upon the State's failing to impose a sentence other than death on Corcoran. App. 105a-106a. Because it granted habeas relief on other grounds, it found Corcoran's other claims, including those regarding aggravating and mitigating circumstances, to be moot. App. 87a-88a.

The State appealed the judgment and Corcoran cross-appealed, challenging the competency determination. The Seventh Circuit reversed the grant of a writ of habeas corpus. The panel unanimously held that the Indiana Supreme Court reasonably applied *United States v. Jackson*, 390 U.S. 570 (1968), and other precedents of this Court in determining that Corcoran's jury trial rights were not infringed upon by the prosecutor's offer. App. 30a-39a, 44a. Additionally, a panel majority held that the Indiana courts reasonably found Corcoran to be competent to forego state post-conviction review. App. 39a-43a. Judge Williams dissented from the latter finding and wrote separately to express her view that the state courts unreasonably determined that Corcoran was competent to waive state post-conviction review. App. 44a-52a.

Corcoran petitioned for rehearing and argued in part for the first time that instead of denying him habeas relief, the court of appeals should have remanded the case to the district court to adjudicate other claims raised in Corcoran's habeas petition that the district court had found to be moot in light of its grant of habeas relief. The panel denied

rehearing and no judge called for a vote on the suggestions for rehearing *en banc*.

This Court granted Corcoran's petition for a writ of certiorari, vacated the judgment, and remanded the case to the Seventh Circuit for consideration of Corcoran's remaining claims that the district court had found to be moot. App. 16a-17a.

On remand, the Seventh Circuit addressed Corcoran's remaining claims without briefing. It found that Corcoran had waived all of those claims because he did not raise them in his cross-appeal. App. 5a. However, the court addressed Corcoran's claims regarding the trial court's consideration of aggravating and mitigating circumstances because they constituted "plain error." App. 5a. Specifically, it found that the state supreme court's findings that the trial court had not considered non-statutory aggravating circumstances was an "unreasonable" determination of the facts because while the trial court disclaimed the use of the additional facts as separate aggravating circumstances, it acknowledged using them to help determine what weight to give the statutory aggravating circumstance. App. 5a-7a. The Seventh Circuit also held that the trial court erred in not considering Corcoran's age when evaluating the mitigating circumstances. App. 7a-10a. Finally, it rejected on the merits Corcoran's remaining claims, except for his competency to be executed claim, which is unexhausted. App. 10a-15a.

The State petitioned for rehearing and rehearing *en banc*, arguing that (1) this Court's opinion in

Wainwright v. Goode, 464 U.S. 78 (1983) (*per curiam*), and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) foreclosed a habeas court from reevaluating for itself a state supreme court's assessment of whether a trial court complied with state law regarding non-statutory aggravating circumstances; and (2) the transcript shows that the trial court did in fact consider Corcoran's age when finding mitigating circumstances. While the court declined to rehear the case, it amended its opinion to add the following language to the portion of its opinion regarding the aggravating circumstances:

This [remand for resentencing] will cure the state trial court's "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1). (It will also prevent noncompliance with Indiana law. Petitioner contended that, under the circumstances of this case, noncompliance with state law also violates the federal Constitution and thus warrants him relief under 28 U.S.C. § 2254(d)(2). Respondent has not advanced any contrary argument based on *Wainwright v. Goode*, 464 U.S. 78 (1983), or any similar decision.)

App. 144a-145a. It also retracted its finding that the trial court did not consider Corcoran's age and denied habeas relief on that claim. App. 145a-146a.

REASONS TO GRANT THE PETITION

I. The Seventh Circuit's decision is irreconcilable with this Court's decision in *Wainwright v. Goode*

Wainwright v. Goode, 464 U.S. 78 (1983) (per curiam), controls this case. Arthur Goode kidnapped, sexually assaulted, and strangled to death a 10-year old boy in Florida “for the fun of it” before going to Maryland, where he kidnapped two other boys and murdered one of them in Virginia. *Goode*, 464 U.S. at 79-80. At trial, Goode testified that he was “extremely proud” of having murdered the Florida boy and would do it again if given the chance. *Id.* at 80. The Florida trial court found that Goode was beyond rehabilitation and that execution was the only way to prevent Goode from harming another human being. *Id.* at 80-81. Florida law, however, did not permit future dangerousness to be a permissible factor to consider in capital sentencing. *Id.* at 82 n.3.

The Florida Supreme Court affirmed Goode's death sentence because its review of the record revealed that the trial court had not considered Goode's future dangerousness as an aggravating circumstance, but rather the trial court discussed it as a reply to defense counsel's argument and to explain “why the result of [its] weighing process was correct.” *Id.* at 82. The Eleventh Circuit found that the Florida Supreme Court's factual finding was “not fairly supported by the record as a whole,” and reasoned that it violated the Eighth Amendment to sentence Goode to death based at least in part of his

future dangerousness when other Florida defendants could not be so sentenced. *Id.* at 83.

This Court reversed on three alternative bases. First, it held that the Eleventh Circuit erred in not accepting the Florida Supreme Court's conclusion that the trial court did not violate state law. *Id.* at 83-84. Second, the Court held, under former habeas standards, that a state court's factual determination about what one of its courts actually did—even when the record is ambiguous—must be respected so long as it is “fairly supported” by the record. *Id.* at 84-85. Third, the Court held that even if a state court considers non-statutory aggravating circumstances, no federal error occurs when a properly instructed jury unanimously recommends a death sentence and the state supreme court independently reweighs the sentence without regard to the impermissible factors. *Id.* at 86-87.

Each of those holdings is relevant to Corcoran's case and apply with special force given the standards of AEDPA.

The similarities between *Goode* and *Corcoran* are striking. Both Goode and Corcoran murdered multiple victims: Goode murdered only two victims on separate occasions and in separate states, while Corcoran murdered four victims on a single occasion. In both Florida and Indiana, capital sentencers are not permitted to consider a defendant's future dangerousness as an aggravating circumstance justifying the death penalty. At their oral sentencings, the trial courts in both *Goode* and *Corcoran* referred to the likelihood that the

defendants would murder again if given the chance. Both courts described the crimes as “heinous.” Both courts offered those remarks as justification of their respective weighing of the proper, statutory aggravating circumstances. Finally, both the Florida and Indiana supreme courts concluded that the defendants’ death sentences comported with their state laws regarding non-statutory aggravating circumstances because they were offered in the context of explaining why the proper aggravating circumstances were entitled to the weight the trial courts gave them. *Compare Goode v. Wainwright*, 410 So.2d 506, 508-09 (Fla. 1982) (finding that the trial court’s consideration of future dangerousness during sentencing “explained why the result of his weighing process was proper.”), *with Corcoran I*, 739 N.E.2d at 656-57 (quoting the trial court’s oral and written sentencing statements and remanding for the trial court to clarify its reasoning and avoid non-statutory aggravating circumstances), *and* App. 131a (the trial court’s order upon remand explaining its oral remarks within the overall context of sentencing), *and* App. 112a-113a (Indiana Supreme Court accepting the trial court’s clarification that it only relied upon statutory aggravating circumstances).

The most striking difference between these two cases is the result: the Seventh Circuit granted habeas relief to Corcoran for the same reasons this Court rejected it in its pre-AEDPA decision in *Goode*. That is true whether the Court views the claim to be one of legal or factual error. *Compare* App. 5a-7a, 144a-145a (Seventh Circuit treating the issue as a factual error), *with Goode*, 464 U.S. at 83-87

(alternatively evaluating the claim as legal and factual error).

The Court should grant this petition to reaffirm the proper scope of habeas review with respect to these claims. Further, it should hold that federal courts must respect a state supreme court's determination of state law, and require habeas courts to defer to a state court's resolution of factual questions on an ambiguous record.

II. The Seventh Circuit exceeded habeas jurisdiction by granting relief based upon its view, contrary to the state supreme court, that the trial court violated state law

The Seventh Circuit lacked subject-matter jurisdiction to entertain Corcoran's non-statutory aggravating circumstances claim because that claim has no federal law component. Federal courts have jurisdiction to review State court judgments "only on the ground that [a State prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension." *Goode*, 464 U.S. at 83-84 (citing *Engle v. Isaac*, 457 U.S. 1141 (1982), and *Smith v. Phillips*, 455 U.S. 209 (1982)).

A. If a state supreme court decides that state law was not violated by a trial court's consideration of aggravating facts, there can be no federal constitutional violation

It is well-settled—a fact acknowledged by the Seventh Circuit (App. 7a)—that the consideration of non-statutory aggravating circumstances is not a violation of federal law. *See Zant v. Stephens*, 462 U.S. 862, 878 (1983) (permitting their use under federal law). Consequently, the federal Constitution is unconcerned with so-called non-statutory aggravating circumstances so long as their consideration is not “so wholly arbitrary as to offend the Constitution.” *Barclay v. Florida*, 463 U.S. 939, 950-51 (1983). In other words, consideration of an improper aggravating circumstance must “so infect the balancing process created by the [State] statute that it is constitutionally impermissible for the [State courts] to let the sentence stand.” *Goode*, 464 U.S. at 86 (citing *Barclay*, 463 U.S. at 956).

While the Court has not defined the precise contours of this general rule—thus making Corcoran’s burden even heavier under AEDPA, *see Renico v. Lett*, 559 U.S. ___, 130 S. Ct. 1355 (2010) (“The more general the rule . . . the more leeway courts have in reaching outcomes in case-by-case determinations”)—it has clearly established that the prerequisite to any such claim is that state law was actually violated. *Goode*, 464 U.S. at 84. Moreover, if a state supreme court has decided that a trial court’s particular actions comport with state law, then that conclusion is definitive and binding on a

federal habeas court. *Id.* In such a circumstance, once the state supreme court's legal "conclusion that the death sentence was consistent with state law is accepted, the [alleged] constitutional violation . . . dissolves." *Id.*

Additionally, both of the other circuits to have considered this issue after *Goode* agree that habeas courts may not override a state supreme court's decision that a sentencing court did not violate state law when finding and weighing aggravating circumstances. *Fox v. Coyle*, 271 F.3d 658, 667 (CA6 2001), *reh'g and reh'g en banc denied, cert. denied*; *Alvord v. Wainwright*, 725 F.2d 1282, 1284-86 (CA11 1984). The Seventh Circuit stands alone in doing the opposite.

B. The Seventh Circuit rejected the state supreme court's finding that sentencing comported with state law

The Indiana Supreme Court held that the manner in which the trial court considered the alleged non-statutory aggravating circumstances comported with Indiana law. App. 111a-113a. Nevertheless, the Seventh Circuit reevaluated the State law claim for itself and found that Indiana law was violated, necessitating federal habeas intervention (based on an unexplored, undefined theory of federal rights). App. 6a-7a, 144a-145a.

Although the Seventh Circuit framed its discussion of this claim as an erroneous factual determination by the Indiana Supreme Court regarding the conduct of the state trial court, the

Seventh Circuit's actual problem was with the state supreme court's understanding of Indiana law. Indiana law permits sentencers to consider the facts of the crime and character of the offender when sentencing a defendant to death, so long as those facts are used to determine the relative weight of the aggravating and mitigating circumstances rather than the circumstances themselves. *Corcoran I*, 739 N.E.2d at 657 ("the circumstances of a crime often provide 'an appropriate context for consideration of the alleged aggravating and mitigating circumstances'") (quoting *Prowell v. State*, 687 N.E.2d 563, 567-68 (Ind. 1997), *reh'g denied*). The trial court clearly stated the purpose for which it used the purported non-statutory aggravating circumstances, and the Indiana Supreme Court approved that use. For the purposes of habeas review, the Seventh Circuit was required to accept that approval under Indiana law. *Goode*, 464 U.S. at 84.

The Seventh Circuit, however, rejected that state court determination of state law and ruled in diametric opposition to the Court's instructions in *Goode*. Again, *Goode* held that, even under *de novo* review (much less the highly deferential AEDPA standard applicable here), habeas relief is unavailable when a state supreme court determines that a trial court has satisfied state law regarding consideration of non-statutory aggravating circumstances when imposing a sentence of death. *Id.* The Seventh Circuit's decision flouting the teaching of *Goode* may even warrant summary reversal.

III. The Seventh Circuit substituted its view of the record for the Indiana Supreme Court's finding on the trial court's use of non-statutory aggravators

Even if the Seventh Circuit properly viewed Corcoran's amorphous federal claim as proceeding from a factual dispute about what the trial court actually did with respect to non-statutory aggravators, it erred by reweighing the record for itself. Instead, it should have deferred to the Indiana Supreme Court's factual finding that the trial court did not utilize additional facts not specified by statute as aggravating circumstances.

Whether reviewed under the pre- or post-AEDPA standards, the decision below failed to accord requisite deference to the state court's factual determinations. Before AEDPA, federal habeas courts could not overturn a state court's factual conclusion that was "fairly supported by the record." *Goode*, 464 U.S. at 85. In *Goode*, a record remarkably similar this one, this Court reversed the Eleventh Circuit for not affording the Florida Supreme Court due deference in its factual findings regarding Goode's sentencing. As here, the *Goode* record was "at best ... ambiguous." *Id.* In such situations, habeas courts cannot substitute their view of the facts for those of state supreme courts. *Id.* See also *Sweet v. Delo*, 125 F.3d 1144, 1157 n.17 (CA8 1997) (citing *Goode*, "In light of the deference we owe to the state courts, we do not see how we may determine that the reason for the trial court's action was something other than what the court said

it was.”). Yet that is precisely what the Seventh Circuit did here.

Applying the deferential lens of AEDPA, the Indiana Supreme Court’s factual findings cannot be overturned by a habeas court unless they are objectively unreasonable in light of the evidence presented to the state court. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). That standard is significantly higher than the “fairly supported” standard governing the pre-AEDPA *Goode* case. See *Goode*, 464 U.S. at 85 (discussing the old standard under then-28 U.S.C. § 2254(d)(8)).

The Court of Appeals purported to apply 28 U.S.C. § 2254(d)(2), but the panel decision did not actually undertake such an analysis; rather, it simply concluded that the standard had been met because it read the record differently. App. 6a. That is not enough without clear and convincing evidence rebutting the presumption that the trial court did what it said it did. 28 U.S.C. § 2254(e)(1). All the Seventh Circuit did, however, was reach an opposite conclusion than did the Indiana Supreme Court on the same “ambiguous” record. See *Goode*, 464 U.S. at 85.

IV. Even if state law were violated here, no federal law violation occurred because Corcoran’s sentence is not arbitrary given other safeguards

1. Even assuming, *arguendo*, that the state courts made unreasonable factual determinations, habeas relief cannot be granted absent a violation of

federal law. “It is axiomatic that federal courts may intervene in the state judicial process only to correct wrong of a constitutional dimension.” *Id.* at 83.

When a state court considers an aggravating circumstance that is improper under state law (but not federal law), the only question for habeas courts “is whether the trial judge’s consideration of this improper aggravating circumstance so infects the balancing process created by the [state] statute that it is constitutionally impermissible for the [state supreme court] to let the sentence stand.” *Id.* at 86 (quoting *Barclay*, 463 U.S. at 956). *Goode* held that because a properly instructed jury recommended a death sentence and the Florida Supreme Court conducted its own review of the aggravating and mitigating circumstances to independently find the sentence proper, there was no risk that the weighing process was so infected. *Goode*, 464 U.S. at 86-87.

The same analysis applies here. The statutory capital sentencing schemes in Florida and Indiana are essentially the same. *Judy v. State*, 416 N.E.2d 95, 105 (Ind. 1981). Corcoran’s jury recommended execution after finding unanimously that Corcoran committed multiple murders and that the mitigating circumstances were outweighed by the aggravating circumstance. Trial R. 2525-29. The Indiana Supreme Court independently revisited Corcoran’s death sentence and found it to be the most appropriate sentence. App. 116a-120a. Corcoran has never suggested that the Indiana Supreme Court considered non-statutory aggravating circumstances in its independent reweighing. “Consequently, there is no sound basis for

concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.” *Goode*, 464 U.S. at 87.

2. Finally, the Seventh Circuit has suggested that the State has waived any reliance upon *Goode* because it had not cited the case to the courts below. App. 145a. This is erroneous also. In his petition for a writ of habeas corpus, Corcoran offered no citations to any caselaw in regard to his non-statutory aggravating circumstances claim and offered only a perfunctory argument in support. In response, the State argued in part that,

This claim fails to establish any constitutional deficiency in Indiana Supreme Court’s review of the trial court’s treatment of Corcoran’s sentence on remand, let alone does it show that the state supreme court’s judgment is in any way inconsistent with applicable United States Supreme Court precedent. Therefore, Corcoran’s claims alleging deficiencies in the record are without merit pursuant to 28 U.S.C. § 2254(d).

Memorandum in Support of Return to Order to Show Cause, *Corcoran v. Buss*, No. 3:05-cv-389-AS-CAN, at 16 (N.D.Ind. Aug. 11, 2006) (Docket Entry 33). While the State did not cite *Goode*, it did not have to because Corcoran bore the burden to prove what federal law was violated. The State’s argument in the district court, that Corcoran made no showing that the Indiana courts had violated clearly established precedent of this Court, is identical to Petitioner’s argument on appeal and in this petition:

Indiana courts did not violate federal law in the finding or weighing of aggravating circumstances.

Against the urging of Corcoran¹, the Seventh Circuit did not give the parties opportunity to brief the merits of Corcoran's claims in that Court. Rather, the only opportunity for the parties to inform that court of their arguments on the merits came on rehearing briefing, in which Petitioner relied heavily on *Goode* and other authority. See Petition for Rehearing and Rehearing En Banc, *Corcoran v. Levenhagen*, No. 07-2093 (CA7 Feb. 24, 2010). Consequently, the Seventh Circuit's implication that the State has waived any reliance on *Goode* (App. 144a-145a) is incorrect. The State has preserved all of its arguments in all courts below.

* * *

The Seventh Circuit failed to recognize that whether the trial court's sentencing statement complied with state law regarding non-statutory aggravating circumstances is entirely outside the purview of a federal habeas court and has no Eighth or Fourteenth Amendment implications. *Goode*, 464 U.S. at 84. The facts and law governing the merits of his claim are materially indistinguishable from

¹ See Corcoran's Circuit Rule 54 Statement of Position, *Corcoran v. Levenhagen*, No. 07-2093 (CA7 Dec. 14, 2009) (Docket Entry 51). That statement was properly limited to the procedural issue of how to proceed following this Court's October 2009 remand, and not on the merits of the underlying claims. See also Seventh Circuit Rule 54.

Goode. The Seventh Circuit's decision stands in irreconcilable conflict with this Court's clearly established precedent and the decisions of other circuits. Coupled with the deferential commands of AEDPA, Corcoran cannot obtain relief on this record. The Court should grant this petition, reverse the judgment below, and reinstate Corcoran's sentence.

CONCLUSION

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

Respectfully submitted,

GREGORY F. ZOELLER

Attorney General

THOMAS M. FISHER*

Solicitor General

STEPHEN R. CREASON

Chief Counsel

Counsel for Petitioner

**Counsel of Record*

Dated: July 13, 2010

Blank Page

10-91 JUL 13 2010

No. **OFFICE OF THE CLERK**

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**

PETITION FOR WRIT OF CERTIORARI

Office of the Indiana
Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6201
Tom.Fisher@atg.in.gov

GREGORY F. ZOELLER
Attorney General
THOMAS M. FISHER*
Solicitor General
STEPHEN R. CREASON
Chief Counsel

**Counsel of Record*

Counsel for Petitioner

Blank Page



QUESTIONS PRESENTED

Indiana law prohibits the use of non-statutory aggravating circumstances to sentence a person in a capital case. The trial court sentenced Corcoran to death for quadruple murder. In its order, the trial court discussed the nature of Corcoran's crimes and Corcoran's character—which are not statutorily authorized aggravators—yet also expressly stated that it had not considered those particulars as aggravating circumstances. On appeal, the Indiana Supreme Court accepted the trial court's explanation as comporting with state law and independently reviewed—and affirmed—Corcoran's sentence.

On collateral review, the Seventh Circuit granted habeas corpus relief and rejected the Indiana Supreme Court's ruling that the trial court did not violate state law.

1. Does a state capital defendant have a constitutional right to a sentencing decision informed in no way by facts that are neither elements of a crime of which he stands convicted or aggravating circumstances authorized by statute?

2. If so, may a federal court grant habeas relief based on its own finding that a state trial court improperly considered non-statutory aggravators when imposing a sentence of death, contrary to the determination of the state supreme court on that issue?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	4
REASONS FOR GRANTING THE PETITION	13
I. The Seventh Circuit’s decision is irreconcilable with this Court’s decision in <i>Wainwright v. Goode</i>	13
II. The Seventh Circuit exceeded habeas jurisdiction by granting relief based upon its view, contrary to the state supreme court, that the trial court violated state law	16

A. If a state supreme court decides that state law was not violated by a trial court's consideration of aggravating facts, there can be no federal constitutional violation	17
B. The Seventh Circuit rejected the state supreme court's finding that sentencing comported with state law	18
III. The Seventh Circuit substituted its view of the record for the Indiana Supreme Court's finding on the trial court's use of non-statutory aggravators	20
IV. Even if state law were violated here, no federal law violation occurred because Corcoran's sentence is not arbitrary given other safeguards	21
CONCLUSION	25

TABLE OF AUTHORITIES

CASES

<i>Alvord v. Wainwright</i> , 725 F.2d 1282 (CA11 1984)	18
<i>Barclay v. Florida</i> , 463 U.S. 939 (1983).....	17, 22
<i>Corcoran v. Buss</i> , 483 F.Supp.2d 709 (N.D.Ind. 2007).....	1
<i>Corcoran v. Buss</i> , 551 F.3d 703 (2008)	1
<i>Corcoran v. Levenhagen</i> , 558 U.S. __ (2009)	1
<i>Corcoran v. Levenhagen</i> , 593 F.3d 547 (CA7 2010)	1, 9, 14
<i>Corcoran v. State</i> , 739 N.E.2d 649 (Ind. 2000).....	<i>passim</i>
<i>Corcoran v. State</i> , 774 N.E.2d 495 (Ind. 2002).....	1
<i>Corcoran v. State</i> , 820 N.E.2d 655, <i>aff'd on reh'g</i> , 827 N.E.2d 542 (Ind. 2005)	1, 8, 9
<i>Corcoran v. State</i> , 845 N.E.2d 1019 (Ind. 2006).....	1, 9

CASES [CONT'D]

<i>Engle v. Isaac</i> , 457 U.S. 1141 (1982).....	16
<i>Fox v. Coyle</i> , 271 F.3d 658 (CA6 2001)	18
<i>Goode v. Wainwright</i> , 410 So.2d 506 (Fla. 1982)	15
<i>Judy v. State</i> , 416 N.E.2d 95 (Ind. 1981).....	22
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003).....	21
<i>Prowell v. State</i> , 687 N.E.2d 563 (Ind. 1997).....	19
<i>Renico v. Lett</i> , 559 U.S. ___, 130 S. Ct. 1355 (2010).....	17
<i>Smith v. Phillips</i> , 455 U.S. 209 (1982).....	16
<i>Sweet v. Delo</i> , 125 F.3d 1144 (CA8 1997)	20
<i>United States v. Jackson</i> , 390 U.S. 570 (1968).....	10
<i>Wainwright v. Goode</i> , 464 U.S. 78 (1983).....	<i>passim</i>

<i>Zant v. Stephens</i> , 462 U.S. 862 (1983).....	17
---	----

FEDERAL STATUTES

28 U.S.C. § 1254(1).....	2
28 U.S.C. § 2254(a).....	16
28 U.S.C. § 2254(a), (d), (e)(1)	3
28 U.S.C. § 2254(d).....	23
28 U.S.C. § 2254(d)(1)	12
28 U.S.C. § 2254(d)(2)	12, 21
28 U.S.C. § 2254(e)(1)	21
U.S.C. § 2254(d)(8)	21

STATE STATUTES

Antiterrorism and Effective Death Penalty Act of 1996	12
Indiana Code 35-50-2-9(k)	5, 7
Indiana Code § 35-50-2-9(b).....	7

RULES

Rule 54.....	24
Trial R. 2525-29	22
Trial R. 2915-16	6

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMENDMENT VI	6, 9
U.S. CONST. AMENDMENT VIII	2, 8, 13, 14, 23
U.S. CONST. AMENDMENT XVI, § 1.....	2, 24

Blank Page



PETITION FOR WRIT OF CERTIORARI

The State of Indiana, through William Wilson, Superintendent of the Indiana State Prison, respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit that granted Joseph Corcoran a writ of habeas corpus from his sentence of death.

OPINIONS BELOW

The most recent opinion of the Court of Appeals granting habeas corpus relief (App. 1a) is reported at *Corcoran v. Levenhagen*, 593 F.3d 547 (CA7 2010), *as amended by denial of reh'g and reh'g en banc*. The opinion of this Court remanding the case for further consideration (App. 16a) is reported at *Corcoran v. Levenhagen*, 558 U.S. __ (2009). The first opinion of the Court of Appeals reversing the grant of habeas corpus relief (App. 18a) is reported as *Corcoran v. Buss*, 551 F.3d 703 (2008), *reh'g and reh'g en banc denied*. The order of the district court granting a writ of habeas corpus (App. 53a) is reported at *Corcoran v. Buss*, 483 F.Supp.2d 709 (N.D.Ind. 2007). The decisions of the Indiana Supreme Court regarding Corcoran's alternate attempts to waive and seek state post-conviction review are reported at *Corcoran v. State*, 820 N.E.2d 655, *aff'd on reh'g*, 827 N.E.2d 542 (Ind. 2005), and *Corcoran v. State*, 845 N.E.2d 1019 (Ind. 2006). The decision of the Indiana Supreme Court on direct appeal from resentencing (App. 107a) is reported at *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002). The opinion of the Indiana Supreme Court on direct appeal affirming Corcoran's

conviction and reversing his sentence is reported at *Corcoran v. State*, 739 N.E.2d 649 (Ind. 2000).

JURISDICTION

The judgment of the Court of Appeals was entered on January 27, 2010. App. 147a. A petition for rehearing was denied on April 14, 2010. App 143a-144a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. AMEND XVI, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(a), (d), (e)(1)

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) 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.

(e)(1) 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.

STATEMENT

1. Joseph Corcoran is convicted of, and was sentenced to death for, the murders of four men, including his brother and his sister's fiancé. The Indiana Supreme Court summarized the facts underlying the crime as follows:

The nature of the offense is clear; Corcoran and his defense team do not dispute the events. On July 26, 1997, Corcoran was lying on his bedroom floor and heard men's voices. He became upset because he thought the men were talking about him and took a semi-automatic rifle downstairs to confront them. In the living room were four men, including Corcoran's brother and future brother-in-law, both of whom lived in the house with Corcoran.

Corcoran shot and killed Jim Corcoran, Scott Turner and Timothy Bricker at close range. The final victim, Doug Stillwell, tried to escape, but Corcoran chased him into the kitchen and shot him in the head.

App. 117a.

2. The State of Indiana charged Corcoran with four counts of murder. At trial, the jury found Corcoran guilty on all counts, found the aggravating circumstance of multiple murders, and unanimously recommended that the trial court impose the death penalty. App. 109a.

The trial court followed that recommendation and sentenced Corcoran to death. When sentencing Corcoran, the trial court discussed the statutory aggravating circumstance of multiple murders, the several mitigating circumstances offered by Corcoran, and offered its observations about the nature of the offenses and Corcoran's character. *Corcoran v. State*, 739 N.E.2d 649, 651 (Ind. 2000) (*Corcoran I*). Specifically as to the latter point, the trial court remarked in its oral sentencing statement,

Pursuant to the law, Indiana Code 35-50-2-9(k), I'm required to balance aggravating circumstances proved by the State of Indiana against mitigating circumstances proved by the Defense. That has been a very difficult process, and not a process that I have ever taken lightly, and certainly would never take lightly, Mr. Corcoran. Your emotional and mental disturbance is of concern to this Court. Also of concern to this Court is that none of the experts can seem to give me a straight answer, Mr. Corcoran, of what is really going on inside your head. And maybe it is as [the prosecutor] argued in his closing, that society just cannot begin to comprehend why you would do what you did, so we've got to say, there's got to be something wrong with this guy to have done what he did. I'm not going to say that, Mr. Corcoran, because I don't know. *I do know, however, that the knowing and intentional murders of four innocent people is an extremely heinous and aggravated crime. That makes you, Mr. Corcoran, a mass murderer. [The prosecutor] is right. I don't think in the history of*

this county we've had a mass murderer such as yourself. It makes you, Mr. Corcoran, a very dangerous, evil mass murderer. And I am convinced in my heart of hearts, Mr. Corcoran, if given the opportunity, you will murder again.

Corcoran I, 739 N.E.2d at 656-57 (emphasis added); Trial R. 2915-16.

On direct appeal, Corcoran appealed only his sentence. The Indiana Supreme Court upheld the constitutionality of Indiana's death penalty as it applied in Corcoran's case and specifically rejected Corcoran's argument that the State violated his Sixth Amendment right to a jury trial when the State offered to refrain from seeking the death penalty if Corcoran would waive a jury trial. *Corcoran I*, 739 N.E.2d at 654. However, the state supreme court vacated the death sentence and remanded the case for resentencing due to the possibility that the trial court impermissibly relied upon non-statutory aggravating circumstances, specifically the heinousness of the crimes, the innocence of the victims, and the trial court's belief that Corcoran will murder again if given the opportunity. *Id.* at 657. Chief Justice Shepard separately concurred, expressing his view that the trial court's statements were made to explain why the multiple murder aggravating circumstance received such great weight, but he agreed that remand was appropriate to clarify the matter. *Id.* at 658 (Shepard, C.J., concurring).

On remand, the trial court reimposed a death sentence. App. 124a. In its revised sentencing order, the trial court stated,

Pursuant to I.C. 35-50-2-9(k), and the December 6, 2000 Order from the Supreme Court, the trial Court has balanced the aggravating circumstances proved by the State against the mitigating circumstances proved by the Defendant. The trial Court, in balancing the proved aggravators and mitigators, emphasized to the Supreme Court that it only relied upon those proven statutory aggravators. The trial Court's remarks at the sentencing hearing, and the language in the original sentencing order explain why such high weight was given to the statutory aggravator of multiple murder, and further support the trial Court's personal conclusion that the sentence is appropriate punishment for this offender and these crimes.

App. 131a.

On appeal, the Indiana Supreme Court affirmed. App. 107a. With regard to Corcoran's allegation that the trial court considered non-statutory aggravating circumstances, the state supreme court concluded,

We are now satisfied that the trial court has relied on only aggravators listed in Indiana Code § 35-50-2-9(b). In response to our remand, the trial court stated, "[I]n balancing the proved aggravators and mitigators, [the trial court] emphasizes to the Supreme Court that it only relied upon those proven statutory aggravators."

There is no lack of clarity in this statement and no plausible reason to believe it untrue.

App. 112a-113a (citation omitted). Additionally, the state supreme court independently reconsidered Corcoran's death sentence and found that the single aggravating circumstance of multiple murders was weightier than the proffered mitigating circumstances, including that Corcoran suffered from a mental illness. App. 116a-120a. In dissent, Justice Rucker expressed his view that Corcoran's mental illness causes his death sentence to violate the Eighth Amendment. App. 121a.

3. Indiana law required Corcoran to file a petition for post-conviction relief in the state trial court by September 9, 2003. *Corcoran v. State*, 820 N.E.2d 655, 657 (*Corcoran III*), *aff'd on reh'g*, 827 N.E.2d 542 (Ind. 2005) (*Corcoran IV*). Corcoran, however, refused to sign the petition his attorneys prepared for him, thereby preventing its filing. *Corcoran III*, 820 N.E.2d at 657.

His counsel moved the post-conviction court for a competency determination, which the court conducted. *Id.* at 657-58. After hearing testimony by experts and Corcoran, the post-conviction court found that although Corcoran suffers from a mental illness, he nonetheless understood the proceedings, the ramifications of his actions, and was able to make rational choices regarding his case; thus it found him competent to make the decision not to pursue state post-conviction review. *Id.* at 661.

The Indiana Supreme Court affirmed the competency determination. *Id.* at 658-62. The court reaffirmed its decision on rehearing. *Corcoran IV*, 827 N.E.2d at 543.

While that appeal was pending, Corcoran changed his mind, signed, and attempted to file the post-conviction relief petition that his attorneys had prepared for him. *Corcoran v. State*, 845 N.E.2d 1019, 1020 (Ind. 2006) (*Corcoran V*). The post-conviction court dismissed the petition as untimely, a judgment that the Indiana Supreme Court affirmed. *Id.*

4. Corcoran next filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Indiana. Corcoran made several claims, including that (1) prosecutors violated his Sixth Amendment right to a trial by jury by offering to forego seeking the death penalty if Corcoran agreed to waive a jury trial; (2) he was incompetent to decide whether to waive state post-conviction review, and (3) the trial court improperly considered non-statutory aggravating circumstances while refusing to consider all of his proffered mitigating circumstances when sentencing him to death.

The district court held that the prosecution's offer served to coerce Corcoran into waiving his constitutional right to a jury trial or else be executed. App. 72a-87a. The district court also found, however, that the state courts' determinations that Corcoran was competent to forego state post-conviction review was reasonable and denied relief

on that basis. App. 94a-105a. The district court granted a writ of habeas corpus contingent upon the State's failing to impose a sentence other than death on Corcoran. App. 105a-106a. Because it granted habeas relief on other grounds, it found Corcoran's other claims, including those regarding aggravating and mitigating circumstances, to be moot. App. 87a-88a.

The State appealed the judgment and Corcoran cross-appealed, challenging the competency determination. The Seventh Circuit reversed the grant of a writ of habeas corpus. The panel unanimously held that the Indiana Supreme Court reasonably applied *United States v. Jackson*, 390 U.S. 570 (1968), and other precedents of this Court in determining that Corcoran's jury trial rights were not infringed upon by the prosecutor's offer. App. 30a-39a, 44a. Additionally, a panel majority held that the Indiana courts reasonably found Corcoran to be competent to forego state post-conviction review. App. 39a-43a. Judge Williams dissented from the latter finding and wrote separately to express her view that the state courts unreasonably determined that Corcoran was competent to waive state post-conviction review. App. 44a-52a.

Corcoran petitioned for rehearing and argued in part for the first time that instead of denying him habeas relief, the court of appeals should have remanded the case to the district court to adjudicate other claims raised in Corcoran's habeas petition that the district court had found to be moot in light of its grant of habeas relief. The panel denied

rehearing and no judge called for a vote on the suggestions for rehearing en banc.

This Court granted Corcoran's petition for a writ of certiorari, vacated the judgment, and remanded the case to the Seventh Circuit for consideration of Corcoran's remaining claims that the district court had found to be moot. App. 16a-17a.

On remand, the Seventh Circuit addressed Corcoran's remaining claims without briefing. It found that Corcoran had waived all of those claims because he did not raise them in his cross-appeal. App. 5a. However, the court addressed Corcoran's claims regarding the trial court's consideration of aggravating and mitigating circumstances because they constituted "plain error." App. 5a. Specifically, it found that the state supreme court's findings that the trial court had not considered non-statutory aggravating circumstances was an "unreasonable" determination of the facts because while the trial court disclaimed the use of the additional facts as separate aggravating circumstances, it acknowledged using them to help determine what weight to give the statutory aggravating circumstance. App. 5a-7a. The Seventh Circuit also held that the trial court erred in not considering Corcoran's age when evaluating the mitigating circumstances. App. 7a-10a. Finally, it rejected on the merits Corcoran's remaining claims, except for his competency to be executed claim, which is unexhausted. App. 10a-15a.

The State petitioned for rehearing and rehearing *en banc*, arguing that (1) this Court's opinion in

Wainwright v. Goode, 464 U.S. 78 (1983) (*per curiam*), and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) foreclosed a habeas court from reevaluating for itself a state supreme court's assessment of whether a trial court complied with state law regarding non-statutory aggravating circumstances; and (2) the transcript shows that the trial court did in fact consider Corcoran's age when finding mitigating circumstances. While the court declined to rehear the case, it amended its opinion to add the following language to the portion of its opinion regarding the aggravating circumstances:

This [remand for resentencing] will cure the state trial court's "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(1). (It will also prevent noncompliance with Indiana law. Petitioner contended that, under the circumstances of this case, noncompliance with state law also violates the federal Constitution and thus warrants him relief under 28 U.S.C. § 2254(d)(2). Respondent has not advanced any contrary argument based on *Wainwright v. Goode*, 464 U.S. 78 (1983), or any similar decision.)

App. 144a-145a. It also retracted its finding that the trial court did not consider Corcoran's age and denied habeas relief on that claim. App. 145a-146a.

REASONS TO GRANT THE PETITION

I. The Seventh Circuit's decision is irreconcilable with this Court's decision in *Wainwright v. Goode*

Wainwright v. Goode, 464 U.S. 78 (1983) (per curiam), controls this case. Arthur Goode kidnapped, sexually assaulted, and strangled to death a 10-year old boy in Florida “for the fun of it” before going to Maryland, where he kidnapped two other boys and murdered one of them in Virginia. *Goode*, 464 U.S. at 79-80. At trial, Goode testified that he was “extremely proud” of having murdered the Florida boy and would do it again if given the chance. *Id.* at 80. The Florida trial court found that Goode was beyond rehabilitation and that execution was the only way to prevent Goode from harming another human being. *Id.* at 80-81. Florida law, however, did not permit future dangerousness to be a permissible factor to consider in capital sentencing. *Id.* at 82 n.3.

The Florida Supreme Court affirmed Goode's death sentence because its review of the record revealed that the trial court had not considered Goode's future dangerousness as an aggravating circumstance, but rather the trial court discussed it as a reply to defense counsel's argument and to explain “why the result of [its] weighing process was correct.” *Id.* at 82. The Eleventh Circuit found that the Florida Supreme Court's factual finding was “not fairly supported by the record as a whole,” and reasoned that it violated the Eighth Amendment to sentence Goode to death based at least in part of his

future dangerousness when other Florida defendants could not be so sentenced. *Id.* at 83.

This Court reversed on three alternative bases. First, it held that the Eleventh Circuit erred in not accepting the Florida Supreme Court's conclusion that the trial court did not violate state law. *Id.* at 83-84. Second, the Court held, under former habeas standards, that a state court's factual determination about what one of its courts actually did—even when the record is ambiguous—must be respected so long as it is “fairly supported” by the record. *Id.* at 84-85. Third, the Court held that even if a state court considers non-statutory aggravating circumstances, no federal error occurs when a properly instructed jury unanimously recommends a death sentence and the state supreme court independently reweighs the sentence without regard to the impermissible factors. *Id.* at 86-87.

Each of those holdings is relevant to Corcoran's case and apply with special force given the standards of AEDPA.

The similarities between *Goode* and *Corcoran* are striking. Both Goode and Corcoran murdered multiple victims: Goode murdered only two victims on separate occasions and in separate states, while Corcoran murdered four victims on a single occasion. In both Florida and Indiana, capital sentencers are not permitted to consider a defendant's future dangerousness as an aggravating circumstance justifying the death penalty. At their oral sentencings, the trial courts in both *Goode* and *Corcoran* referred to the likelihood that the

defendants would murder again if given the chance. Both courts described the crimes as “heinous.” Both courts offered those remarks as justification of their respective weighing of the proper, statutory aggravating circumstances. Finally, both the Florida and Indiana supreme courts concluded that the defendants’ death sentences comported with their state laws regarding non-statutory aggravating circumstances because they were offered in the context of explaining why the proper aggravating circumstances were entitled to the weight the trial courts gave them. *Compare Goode v. Wainwright*, 410 So.2d 506, 508-09 (Fla. 1982) (finding that the trial court’s consideration of future dangerousness during sentencing “explained why the result of his weighing process was proper.”), *with Corcoran I*, 739 N.E.2d at 656-57 (quoting the trial court’s oral and written sentencing statements and remanding for the trial court to clarify its reasoning and avoid non-statutory aggravating circumstances), *and* App. 131a (the trial court’s order upon remand explaining its oral remarks within the overall context of sentencing), *and* App. 112a-113a (Indiana Supreme Court accepting the trial court’s clarification that it only relied upon statutory aggravating circumstances).

The most striking difference between these two cases is the result: the Seventh Circuit granted habeas relief to Corcoran for the same reasons this Court rejected it in its pre-AEDPA decision in *Goode*. That is true whether the Court views the claim to be one of legal or factual error. *Compare* App. 5a-7a, 144a-145a (Seventh Circuit treating the issue as a factual error), *with Goode*, 464 U.S. at 83-87

(alternatively evaluating the claim as legal and factual error).

The Court should grant this petition to reaffirm the proper scope of habeas review with respect to these claims. Further, it should hold that federal courts must respect a state supreme court's determination of state law, and require habeas courts to defer to a state court's resolution of factual questions on an ambiguous record.

II. The Seventh Circuit exceeded habeas jurisdiction by granting relief based upon its view, contrary to the state supreme court, that the trial court violated state law

The Seventh Circuit lacked subject-matter jurisdiction to entertain Corcoran's non-statutory aggravating circumstances claim because that claim has no federal law component. Federal courts have jurisdiction to review State court judgments "only on the ground that [a State prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "It is axiomatic that federal courts may intervene in the state judicial process only to correct wrongs of a constitutional dimension." *Goode*, 464 U.S. at 83-84 (citing *Engle v. Isaac*, 457 U.S. 1141 (1982), and *Smith v. Phillips*, 455 U.S. 209 (1982)).

A. If a state supreme court decides that state law was not violated by a trial court's consideration of aggravating facts, there can be no federal constitutional violation

It is well-settled—a fact acknowledged by the Seventh Circuit (App. 7a)—that the consideration of non-statutory aggravating circumstances is not a violation of federal law. *See Zant v. Stephens*, 462 U.S. 862, 878 (1983) (permitting their use under federal law). Consequently, the federal Constitution is unconcerned with so-called non-statutory aggravating circumstances so long as their consideration is not “so wholly arbitrary as to offend the Constitution.” *Barclay v. Florida*, 463 U.S. 939, 950-51 (1983). In other words, consideration of an improper aggravating circumstance must “so infect the balancing process created by the [State] statute that it is constitutionally impermissible for the [State courts] to let the sentence stand.” *Goode*, 464 U.S. at 86 (*citing Barclay*, 463 U.S. at 956).

While the Court has not defined the precise contours of this general rule—thus making Corcoran’s burden even heavier under AEDPA, *see Renico v. Lett*, 559 U.S. ___, 130 S. Ct. 1355 (2010) (“The more general the rule . . . the more leeway courts have in reaching outcomes in case-by-case determinations”)—it has clearly established that the prerequisite to any such claim is that state law was actually violated. *Goode*, 464 U.S. at 84. Moreover, if a state supreme court has decided that a trial court’s particular actions comport with state law, then that conclusion is definitive and binding on a

federal habeas court. *Id.* In such a circumstance, once the state supreme court's legal "conclusion that the death sentence was consistent with state law is accepted, the [alleged] constitutional violation . . . dissolves." *Id.*

Additionally, both of the other circuits to have considered this issue after *Goode* agree that habeas courts may not override a state supreme court's decision that a sentencing court did not violate state law when finding and weighing aggravating circumstances. *Fox v. Coyle*, 271 F.3d 658, 667 (CA6 2001), *reh'g and reh'g en banc denied, cert. denied*; *Alvord v. Wainwright*, 725 F.2d 1282, 1284-86 (CA11 1984). The Seventh Circuit stands alone in doing the opposite.

B. The Seventh Circuit rejected the state supreme court's finding that sentencing comported with state law

The Indiana Supreme Court held that the manner in which the trial court considered the alleged non-statutory aggravating circumstances comported with Indiana law. App. 111a-113a. Nevertheless, the Seventh Circuit reevaluated the State law claim for itself and found that Indiana law was violated, necessitating federal habeas intervention (based on an unexplored, undefined theory of federal rights). App. 6a-7a, 144a-145a.

Although the Seventh Circuit framed its discussion of this claim as an erroneous factual determination by the Indiana Supreme Court regarding the conduct of the state trial court, the

Seventh Circuit's actual problem was with the state supreme court's understanding of Indiana law. Indiana law permits sentencers to consider the facts of the crime and character of the offender when sentencing a defendant to death, so long as those facts are used to determine the relative weight of the aggravating and mitigating circumstances rather than the circumstances themselves. *Corcoran I*, 739 N.E.2d at 657 ("the circumstances of a crime often provide 'an appropriate context for consideration of the alleged aggravating and mitigating circumstances'") (quoting *Prowell v. State*, 687 N.E.2d 563, 567-68 (Ind. 1997), *reh'g denied*). The trial court clearly stated the purpose for which it used the purported non-statutory aggravating circumstances, and the Indiana Supreme Court approved that use. For the purposes of habeas review, the Seventh Circuit was required to accept that approval under Indiana law. *Goode*, 464 U.S. at 84.

The Seventh Circuit, however, rejected that state court determination of state law and ruled in diametric opposition to the Court's instructions in *Goode*. Again, *Goode* held that, even under *de novo* review (much less the highly deferential AEDPA standard applicable here), habeas relief is unavailable when a state supreme court determines that a trial court has satisfied state law regarding consideration of non-statutory aggravating circumstances when imposing a sentence of death. *Id.* The Seventh Circuit's decision flouting the teaching of *Goode* may even warrant summary reversal.

III. The Seventh Circuit substituted its view of the record for the Indiana Supreme Court's finding on the trial court's use of non-statutory aggravators

Even if the Seventh Circuit properly viewed Corcoran's amorphous federal claim as proceeding from a factual dispute about what the trial court actually did with respect to non-statutory aggravators, it erred by reweighing the record for itself. Instead, it should have deferred to the Indiana Supreme Court's factual finding that the trial court did not utilize additional facts not specified by statute as aggravating circumstances.

Whether reviewed under the pre- or post-AEDPA standards, the decision below failed to accord requisite deference to the state court's factual determinations. Before AEDPA, federal habeas courts could not overturn a state court's factual conclusion that was "fairly supported by the record." *Goode*, 464 U.S. at 85. In *Goode*, a record remarkably similar this one, this Court reversed the Eleventh Circuit for not affording the Florida Supreme Court due deference in its factual findings regarding Goode's sentencing. As here, the *Goode* record was "at best ... ambiguous." *Id.* In such situations, habeas courts cannot substitute their view of the facts for those of state supreme courts. *Id.* See also *Sweet v. Delo*, 125 F.3d 1144, 1157 n.17 (CA8 1997) (citing *Goode*, "In light of the deference we owe to the state courts, we do not see how we may determine that the reason for the trial court's action was something other than what the court said

it was.”). Yet that is precisely what the Seventh Circuit did here.

Applying the deferential lens of AEDPA, the Indiana Supreme Court’s factual findings cannot be overturned by a habeas court unless they are objectively unreasonable in light of the evidence presented to the state court. *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). That standard is significantly higher than the “fairly supported” standard governing the pre-AEDPA *Goode* case. See *Goode*, 464 U.S. at 85 (discussing the old standard under then-28 U.S.C. § 2254(d)(8)).

The Court of Appeals purported to apply 28 U.S.C. § 2254(d)(2), but the panel decision did not actually undertake such an analysis; rather, it simply concluded that the standard had been met because it read the record differently. App. 6a. That is not enough without clear and convincing evidence rebutting the presumption that the trial court did what it said it did. 28 U.S.C. § 2254(e)(1). All the Seventh Circuit did, however, was reach an opposite conclusion than did the Indiana Supreme Court on the same “ambiguous” record. See *Goode*, 464 U.S. at 85.

IV. Even if state law were violated here, no federal law violation occurred because Corcoran’s sentence is not arbitrary given other safeguards

1. Even assuming, *arguendo*, that the state courts made unreasonable factual determinations, habeas relief cannot be granted absent a violation of

federal law. “It is axiomatic that federal courts may intervene in the state judicial process only to correct wrong of a constitutional dimension.” *Id.* at 83.

When a state court considers an aggravating circumstance that is improper under state law (but not federal law), the only question for habeas courts “is whether the trial judge’s consideration of this improper aggravating circumstance so infects the balancing process created by the [state] statute that it is constitutionally impermissible for the [state supreme court] to let the sentence stand.” *Id.* at 86 (quoting *Barclay*, 463 U.S. at 956). *Goode* held that because a properly instructed jury recommended a death sentence and the Florida Supreme Court conducted its own review of the aggravating and mitigating circumstances to independently find the sentence proper, there was no risk that the weighing process was so infected. *Goode*, 464 U.S. at 86-87.

The same analysis applies here. The statutory capital sentencing schemes in Florida and Indiana are essentially the same. *Judy v. State*, 416 N.E.2d 95, 105 (Ind. 1981). Corcoran’s jury recommended execution after finding unanimously that Corcoran committed multiple murders and that the mitigating circumstances were outweighed by the aggravating circumstance. Trial R. 2525-29. The Indiana Supreme Court independently revisited Corcoran’s death sentence and found it to be the most appropriate sentence. App. 116a-120a. Corcoran has never suggested that the Indiana Supreme Court considered non-statutory aggravating circumstances in its independent reweighing. “Consequently, there is no sound basis for

concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment.” *Goode*, 464 U.S. at 87.

2. Finally, the Seventh Circuit has suggested that the State has waived any reliance upon *Goode* because it had not cited the case to the courts below. App. 145a. This is erroneous also. In his petition for a writ of habeas corpus, Corcoran offered no citations to any caselaw in regard to his non-statutory aggravating circumstances claim and offered only a perfunctory argument in support. In response, the State argued in part that,

This claim fails to establish any constitutional deficiency in Indiana Supreme Court’s review of the trial court’s treatment of Corcoran’s sentence on remand, let alone does it show that the state supreme court’s judgment is in any way inconsistent with applicable United States Supreme Court precedent. Therefore, Corcoran’s claims alleging deficiencies in the record are without merit pursuant to 28 U.S.C. § 2254(d).

Memorandum in Support of Return to Order to Show Cause, *Corcoran v. Buss*, No. 3:05-cv-389-AS-CAN, at 16 (N.D.Ind. Aug. 11, 2006) (Docket Entry 33). While the State did not cite *Goode*, it did not have to because Corcoran bore the burden to prove what federal law was violated. The State’s argument in the district court, that Corcoran made no showing that the Indiana courts had violated clearly established precedent of this Court, is identical to Petitioner’s argument on appeal and in this petition:

Indiana courts did not violate federal law in the finding or weighing of aggravating circumstances.

Against the urging of Corcoran¹, the Seventh Circuit did not give the parties opportunity to brief the merits of Corcoran's claims in that Court. Rather, the only opportunity for the parties to inform that court of their arguments on the merits came on rehearing briefing, in which Petitioner relied heavily on *Goode* and other authority. See Petition for Rehearing and Rehearing En Banc, *Corcoran v. Levenhagen*, No. 07-2093 (CA7 Feb. 24, 2010). Consequently, the Seventh Circuit's implication that the State has waived any reliance on *Goode* (App. 144a-145a) is incorrect. The State has preserved all of its arguments in all courts below.

* * *

The Seventh Circuit failed to recognize that whether the trial court's sentencing statement complied with state law regarding non-statutory aggravating circumstances is entirely outside the purview of a federal habeas court and has no Eighth or Fourteenth Amendment implications. *Goode*, 464 U.S. at 84. The facts and law governing the merits of his claim are materially indistinguishable from

¹ See Corcoran's Circuit Rule 54 Statement of Position, *Corcoran v. Levenhagen*, No. 07-2093 (CA7 Dec. 14, 2009) (Docket Entry 51). That statement was properly limited to the procedural issue of how to proceed following this Court's October 2009 remand, and not on the merits of the underlying claims. See also Seventh Circuit Rule 54.

Goode. The Seventh Circuit's decision stands in irreconcilable conflict with this Court's clearly established precedent and the decisions of other circuits. Coupled with the deferential commands of AEDPA, Corcoran cannot obtain relief on this record. The Court should grant this petition, reverse the judgment below, and reinstate Corcoran's sentence.

CONCLUSION

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

Respectfully submitted,

GREGORY F. ZOELLER

Attorney General

THOMAS M. FISHER*

Solicitor General

STEPHEN R. CREASON

Chief Counsel

Counsel for Petitioner

**Counsel of Record*

Dated: July 13, 2010

Blank Page

