No. 10-91

In The Supreme Court Of The United States

WILLIAM WILSON, Warden, *Petitioner,*

v.

JOSEPH E. CORCORAN, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Should this Court grant certiorari to consider a question based on arguments not raised in the district court, the Court of Appeals, or previously before this Court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules & Statutes

Other Sources

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

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Joseph E. Corcoran, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the United States Court of Appeals for the Seventh Circuit's opinion and amended opinion in this case. The Seventh Circuit's unanimous opinion is reported as *Corcoran v. Levenhagen*, 593 F.3d 547 (7th Cir. 2010) (1a-15a), and was amended via the rehearing process in unreported fashion. *Corcoran v. Levenhagen*, 2010 U.S. App. LEXIS 7658 (7th Cir. Apr. 14, 2010) (143a-146a). While the Panel amended the opinion, Petitioner's *en banc* request was denied. *See id.* 144a ("...no judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny the petition for rehearing.")

The Seventh Circuit conducted proceedings consistent with and in response to the Opinion of this Court remanding the case for further proceedings. *Corcoran v. Levenhagen*, 558

U.S. __, 130 S.Ct. 8 (2009) (16a-17a). Specifically, this Court noted that claims remained to be addressed:

> An Indiana jury convicted Joseph Corcoran of four counts of murder. Corcoran was sentenced to death. After Corcoran's challenges to his sentence in the Indiana courts failed, he sought federal habeas relief. Corcoran argued in his federal habeas petition that: **(1) the Indiana trial court committed various errors at the sentencing phase;** (2) his sentence violated the Sixth Amendment; (3) Indiana's capital sentencing statute was unconstitutional; (4) the prosecution committed misconduct at sentencing; and (5) he should not be executed because he suffers from a mental illness. See *Corcoran* v. *Buss*, 483 F. Supp. 2d 709, 719, 726 (ND Ind. 2007). The District Court granted habeas relief on Corcoran's claim of a Sixth Amendment violation, and ordered the state courts to resentence Corcoran to a penalty other than death. *Id.*, at 725-726. The District Court did not address Corcoran's other arguments relating to his sentence, noting that they were "rendered moot" by the order that Corcoran be resentenced because of the Sixth Amendment violation. *Id.*, at 734.

Corcoran, 558 U.S. at __, 130 S.Ct. at 9 (emphasis added) (16a). This Court specifically noted that the Warden, Petitioner herein, addressed the frivolity of the merits in the brief in opposition. *Id.* ("In its brief in opposition, the State argues that Corcoran's claims were waived, and that they were in any event frivolous, so that a remand would be wasteful. Brief in Opposition 9-10.") (17a).

This Court remanded to the Seventh Circuit for further proceedings and a consideration of the merits. The Rules of the Seventh Circuit required the filing of a Rule 54 statement upon the remand from this Court. The Seventh Circuit notified the parties of this requirement and the due date for such a statement. *See Corcoran v. Levenhagen* Docket 11/23/09 Letter to Parties. In his Rule 54 Statement to the Seventh Circuit, Respondent Corcoran argued that the most appropriate procedure would be a remand to the district court for a consideration of the merits.

In short, Respondent Corcoran's previous victory should not have deprived him of a district court review on his other claims.[1] **Petitioner failed to even file a Rule 54 statement.**

The Seventh Circuit exercised its discretion to address the merits as permitted by this Court. *See Corcoran*, 593 F.3d at 550 (3a-5a).

STATEMENT OF THE CASE

Petitioner paints an incomplete picture of the record below and mischaracterizes that which confronted the Seventh Circuit. As described by the Seventh Circuit, the record reflects the factual findings of the state court simply were not entitled to deference:

> **But this finding of fact, that the trial court did not consider non-statutory aggravators in the balancing process used to determine Corcoran's death sentence, was obviously in error**, if we are to believe what the trial court added next. Specifically, it stated that its "remarks at the sentencing hearing, and the language in the original sentencing order,"--both regarding the use of the three non-statutory aggravators about which Corcoran complained—"*explain why such high weight was given to the statutory* aggravator of multiple murder." *See id.* (emphasis added). In other words, the court added weight to a statutory aggravator based on the non-statutory aggravators. And factor weighting is part of factor "balancing," the very process in which the trial court disclaimed reliance on non-statutory aggravators. So unlike the Indiana Supreme Court, we are far from "satisfied that the trial court has relied only on aggravators listed in Indiana Code § 35-50-2-9(b)." *Corcoran v. State*, 774 N.E.2d 495, 499 (Ind. 2002). Indeed, we find this an "unreasonable determination of the facts" in light of the trial court's proceedings, thus warranting habeas relief. 28 U.S.C. § 2254.
>
> Nothing in this opinion prevents Indiana from adopting a rule, *contra Bivins*, 642 N.E.2d at 955-56, permitting the use of non-statutory aggravators in the death sentence selection process. *See Zant v. Stephens*, 462 U.S. 862, 878, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) (permitting their use under federal law). But the state trial court must reconsider its sentencing determination, and **this time may not find, contrary to logic, that it both did and did not consider non-statutory aggravating circumstances when it sentenced Corcoran to death**.

Cocoran, 593 F.3d at 551-552 (emphasis added) (6a-7a). The record establishes that the trial court reweighed the improper non-statutory aggravating circumstances. *See* Supp. R. 48-49 (the

[1] The Seventh Circuit improperly held that Respondent Corcoran had waived these issues in failing to pursue an appeal when the district court did not address the merits on the basis of mootness. *Corcoran*, at 550. There has been no waiver and Respondent followed the then existing process.

trial court refers to the earlier improper statements as "further support for the trial court's personal conclusion that the sentence is appropriate punishment for this offender and their crimes.").

In sum, the record overwhelmingly supports the Seventh Circuit's holding, and clearly and convincingly rebuts that of the state court's treatment of the issue. Simply, the Seventh Circuit found that the record overcame the presumption that is usually accorded a state court determination. This is not a controversial proposition and Petitioner improperly describes this uncontroversial act as a usurpation of state law, when no such thing occurred.

Petitioner correctly notes that the Seventh Circuit decided the instant matter after the remand without full briefing or argument. *See* Petition p. 11. However, this is not a complete recounting of the procedural history. The Rules of the Seventh Circuit required the filing of a Rule 54 statement upon the remand from this Court. The Seventh Circuit notified the parties of this requirement and the due date for such a statement. *See Corcoran v. Levenhagen* Docket 11/23/09 Letter to Parties. Respondent filed in accordance with the Rule and the Seventh Circuit's directive. **Petitioner filed nothing**. This failure, or waiver, is a significant omission in the statement of the case.

While Petitioner states what occurred previously before this Court, Petitioner omits salient procedural facts. In Petitioner Warden's previous brief in opposition to this Court,

> In any event, Corcoran's claims are frivolous and remand would not be an appropriate use of judicial resources... The first of these claims argues that the trial court considered non-statutory aggravating circumstances and failed to consider mitigating circumstances. As for the allegation regarding non-statutory aggravating circumstances, it is simply impossible to infer from the sentencing statement that any such circumstances were considered as the trial court's order was emphatic and unambiguous in this regard.

Brief in Opposition p. 10 (citation omitted). Petitioner failed to raise the state law basis now being featured. Rather, Petitioner contested the merits and the lack of ambiguity in the record, and invited a review of the record.[2] *Id.* ("...unambiguous in this regard.").

ARGUMENTS AS TO WHY CERTIORARI SHOULD BE DENIED

I. PETITIONER'S QUESTIONS PRESENTED COULD HAVE BEEN ARGUED OR PRESENTED TO THIS COURT PREVIOSULY, BUT WERE NOT.

This Court decided Respondent Corcoran's case last term. *See Corcoran*, 558 U.S. __, 130 S.Ct. 8 (16a-17a). In opposition to Respondent Corcoran's then petition for writ of certiorari, Petitioner herein contested the merits of Respondent Corcoran's claims and even then did not apprise this Court of the current issue. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 383 (1989) (failure to argue in brief in opposition is a waiver of argument); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816 (1985) (failure to argue in brief in opposition is a waiver of argument). In his Brief in Opposition to Corcoran's ultimately successful Petition for Writ of Certiorari, Petitioner Warden herein addressed the merits of the claim and did not allege a state law basis. Brief in Opposition p. 10.

This Court specifically recognized that one of Respondent Corcoran's claims related to constitutional irregularities in the sentencing process. *Corcoran*, 558 U.S. at __, 130 S.Ct. at 9 ("Corcoran argued in his federal habeas petition that: (1) the Indiana trial court committed various errors at the sentencing phase...") (16a). This Court also specifically recognized that the Petitioner herein contested the merits of the claim. *Id.* ("In its brief in opposition, the State argues that Corcoran's claims were waived, and that they were in any event frivolous, so that a remand would be wasteful. Brief in Opposition 9-10.") (17a).

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[2] Petitioner now also inconsistently asserts the record is ambiguous. *See* Petition pp. 14, 16, 20, 21. There has been no change in the record, only a change in Petitioner's status.

A party cannot and should not be rewarded for withholding arguments until filing a subsequent cert petition with this Court. Petitioner is attempting to do just that, and revitalize arguments that could and should have been made previously to this Court, but were not. Given Petitioner's procedural shortcomings and impediments, this Court should not grant cert herein.

II. PETITIONER'S QUESTIONS PRESENTED HAVE NEVER BEEN ARGUED OR PRESENTED TO THE COURTS BELOW.

A party must present arguments to the lower courts in order for an issue to properly matriculate to this Court. A party cannot and should not be rewarded for withholding arguments until filing a cert petition with this Court. Petitioner has done just that, attempting to play "Monday morning quarterback," when utterly failing to apprise the lower courts of the arguments now being presented.

Petitioner erroneously argues that the unanimous Seventh Circuit decision upon which no judge requested a vote for rehearing *en banc* involved solely a matter of state law.[3] Petitioner never argued a state law basis in the proceedings below, until belatedly in the *en banc* request. *See City of Canton, Ohio v. Harris*, 489 U.S. at 383 (noting the non-jurisdictional basis to deny cert on the failure to argue below, but waived by respondent for failure to timely raise in brief in opposition); *Oklahoma City v. Tuttle*, 471 U.S. at 815-816 (same).

In his return of writ before the District Court, Petitioner did not assert that the claims were solely state law issues. Rather, Petitioner argued that the "state supreme court's judgment is [not] 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)." ECF R. 33 p. 16 (Memorandum in Support of Return of Writ). Petitioner invited the District Court to apply 2254(d). In stark contrast, Petitioner now complains about the

[3] For the reasons more fully expressed herein, that simply is not true. *See Parker v. Dugger*, 498 U.S. 308 (1991).

Seventh Circuit's application of the very process that Petitioner requested occur. A party should not be allowed to switch positions within the same litigation. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

In short, Respondent failed to timely assert a state law basis before the District Court. *See Lee v. Kemna*, 534 U.S. 362, 376 n. 8 (2002) (state's assertion of procedural default deemed waived because not raised in appellate court brief or in brief in opposition to cert); *Canaan v. McBride*, 395 F.3d 376, 381-82 (7th Cir. 2005) (finds a state's waiver of procedural defenses for failing to raise it before state court or federal court).

When Respondent Corcoran raised in his rehearing request from *Corcoran v. Levenhagen*, 551 F.3d 703 (2008), the Seventh Circuit's failure to consider the mooted claims, Petitioner Warden addressed the merits of the claim and did not allege a state law basis. Response to Rehearing Request pp. 6-7. Specifically, Petitioner Warden:

> Regardless, these claims do not warrant further delay by remand to the district court. The Indiana Supreme Court correctly rejected this argument on direct appeal after remanding to the trial court. *Corcoran v. State*, 774 N.E. 2d 495, 498 (Ind. 2002). As the Indiana Supreme Court correctly observed, the trial court's sentencing order after remand was clear that the trial court relied only upon the multiple murder aggravator in imposing Corcoran's death sentence of death. *Id*....Given these indisputable facts, it is unclear how Corcoran arrives at his contention that the trial court's statement regarding the appropriateness of his sentence violates the Eighth and Fourteenth Amendments.

At no point did Petitioner apprise the Seventh Circuit that the claims relate solely to a state law basis and therefore were not cognizable in federal habeas.

Further and most recently, Petitioner failed to file a Rule 54 statement contesting the Ground's upon which relief were granted as presenting state law issues. Having failed to utilize the opportunity to present that argument to the Seventh Circuit (as ordered by the Seventh Circuit), Petitioner should not be allowed to resuscitate it now in this discretionary matter. *See*

Kemna, 534 U.S. at 376 n. 8 (state's assertion of procedural default deemed waived because not raised in appellate court brief or in brief in opposition to cert).

Petitioner never alleged below the bases now being presented to this Court. Petitioner waived this argument by failing to assert to the District Court and the Seventh Circuit on multiple occasions, in opposition to Corcoran's rehearing request and upon remand in by failing to file the Rule 54 remand statement.[4] Indeed, the Seventh Circuit specifically found a waiver by amending the opinion with "Respondent has not advanced any contrary argument based on *Wainwright v. Goode*, 464 U.S. 78, 104 S. Ct. 378, 78 L. Ed. 2d 187 (1983), or any similar decision." *Corcoran*, 2010 U.S. App. LEXIS 7658 at *2 (145a).

Because Petitioner **never raised** such challenges until the *en banc* process, neither the Seventh Circuit nor the district court decided the questions now presented by Petitioner. A party should not be rewarded for sandbagging arguments with the hope of presenting a successful cert request to this Court. This Court has found that a Petitioner has a "burden of showing that the issue was properly presented" to the court being reviewed. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). As in *Adams* (where the defect was discovered after cert was granted and cert was dismissed as improvidently granted), Petitioner herein cannot demonstrate that the issue now being presented was properly presented to the Court below because he never made that argument.

Given Petitioner's multiple waivers, this Court should not grant cert herein to raise an issue never presented or considered below due to Petitioner's failures to brief this aspect of the merits. This is particularly true when the unanimous Seventh Circuit specifically noted that "Respondent has not advanced any contrary argument based on *Wainwright v. Goode*, 464 U.S.

[4] As previously noted, Petitioner also failed to argue this in his brief in opposition to this Court prior to this Court's disposition in *Corcoran*, 558 U.S. __, 130 S.Ct. 8.

78, 104 S. Ct. 378, 78 L. Ed. 2d 187 (1983), or any similar decision." *Corcoran*, 2010 U.S. App. LEXIS 7658 at *2 (145a).

Petitioner cannot establish that the questions presented were properly presented to any of the courts below, and in one instance failed to file a brief between the remand from this Court and the Seventh Circuit's ruling. When Petitioner untimely sought to assert them in the *en banc* request, no judge called a vote and the Seventh Circuit amended its opinion to highlight the waiver. Therefore, this case is not an appropriate candidate for cert. *See Adams*.

Alternatively, if this Court is inclined to forgive the multiple waivers, this Court should remand the matter to the District Court. The District Court should have the opportunity to pass on the issue and allow it to matriculate to this Court in the manner normally envisioned by the federal process.

III. PETITIONER CONCEDES THAT A FEDERAL CONSTITUTIONAL CLAIM EXISTS.

In his petition, Petitioner notes that a state's failure to comply with its statute can rise to the level of a constitutional violation. Petition p 17 *citing to Goode* and *Barclay*. This concession that it is not simply a matter of state law confirms that the unanimous Seventh Circuit properly applied 2254 (d) in making a determination whether the record supported the state court's conclusions, and when it did not, whether Respondent Corcoran was entitled to relief. Petitioner cannot in one breathe recognize that a constitutional violation may exist but then in the next argue that there can be no federal review of that question. Because Petitioner concedes that a constitutional violation may exist, the writ should be denied.

IV. PETITIONER'S CONFLICT IS ILLUSORY, IF IT DOES EXIST, IT IS STALE AND UNDEVELOPED, AND WAS INVITED BY PETITIONER.

The unanimous Seventh Circuit properly applied this Court's authority. Contrary to Petitioner's assertions, there is no conflict between the judgment below and the decision of any other federal court of appeals. *See* Sup.Ct. R. 10(a). Petitioner can only cite two cases covering the last twenty-seven years to claim that the judgment below conflicts with judgments of other lower courts. All of the cases cited as supporting a purported conflict rely on different factual records under distinct death penalty statutes.

In this regard, Petitioner attempts to manufacture her questions presented and thereby create a conflict which is illusory. The cases cited by Petitioner, safely characterized as few and far between, presented distinct factual records under distinct death penalty statutes.

For instance, in *Fox v. Coyle*, 271 F.3d 658, 669 (6th Cir. 2001), the Sixth Circuit considered a death penalty statute that specifically allowed the consideration of non-statutory circumstances in the weighting process. Thus, as a factual matter, the Sixth Circuit considered an appropriate consideration of evidence under a state's criteria. However and in conformity with the Seventh Circuit's actions, the Sixth Circuit did note that a departure from the statute would raise a constitutional violation by describing that "no constitutional claim is stated where a state's highest court either concludes that no extra-statutory factors were considered at the trial level...The critical question in this case is thus whether the Ohio courts considered extra-statutory aggravating factors." *Id.* at 667. Engaging in this analysis (again the same as that conducted by the Seventh Circuit), the Sixth Circuit concluded Mr. Fox simply lost on the factual record in his case.

There exists no genuine conflict. It cannot be said with confidence that different courts have decided the same legal issue in opposite ways, because there are dissimilar facts and

statutory processes involved. As former Justice Breyer explained that "attorneys often present cases that involve not actual divides among the lower courts, but merely different verbal formulations of the same underlying legal rule. And we are not particularly interested in ironing out minor linguistic discrepancies among lower courts because those discrepancies are not outcome determinative." Justice Breyer, *Reflections on the Role of Appellate Courts: A view from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006).

Additionally, while Respondent does not agree there are conflicts, the alleged conflict hardly represents an "important" issue upon which there is a divisive split of authority in the circuits requiring this Court to intervene. Rather, the age of the authority 26 years for one and almost 10 for the other, establish that this is not a live controversy currently percolating in the circuits. Assuming these cases are in conflict, it is not developed enough (only 3 cases in 26 years) to merit exercising this Court's cert discretion. *See McCray v. New York*, 461 U.S. 961, 963 (1983); *Gilliard v. Mississippi*, 464 U.S. 867 (1983).

Finally, Petitioner did not argue this aspect of the merits in any of the courts below in spite of numerous opportunities. Therefore, Petitioner's silence invited this conflict, to the extent there is any conflict at all.

Therefore, the Court must deny the cert request.

V. SETTING ASIDE PETITIONER'S NUMEROUS WAIVERS, THE SEVENTH CIRCUIT COMMITTED NO ERROR AND THIS COURT DOES NOT NEED TO REVIEW THE UNANIMOUS SEVENTH CIRCUIT'S APPLICATION OF SETTLED LEGAL PRINCIPLES TO THE UNIQUE FACTS OF RESPONDENT'S CASE.

The Seventh Circuit opinion merely applied this Court's authority, in the context of AEDPA, to the record in Respondent's case. In so doing, the unanimous Seventh Circuit identified and applied the required and correct Supreme Court principles from *Zant v. Stephens*,

462 U.S. 862 (1983). *Corcoran*, 593 F.3d at 551. Applying these principles, the unanimous Seventh Circuit looked to Respondent's sentencing calculus and determined that the factual record rebutted the findings of the state courts.

In sum, Petitioner's cert request herein should be rejected because at its core it consists of (at best) a misapplication of a properly stated rule of law. *Ross v. Moffett*, 417 U.S. 600, 616-17 (1974) (purpose of cert is not to correct perceived errors). No member of the Seventh Circuit called for a vote on this illusory state law bases asserted now and belatedly in the *en banc* process.

Petitioner merely quibbles over the factual determination of the unanimous Seventh Circuit. This Court does not ordinarily grant review of such "fact bound" cases. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.") Instead, Sup. Ct. R. 10 specifically provides that "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual finding." *See Kyles v. Whitley*, 514 U.S. 419, 456 (1995)(Scalia, J., dissenting) ("What we have here is an intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err – precisely the type of case in we are *most* inclined to deny certiorari."). Petitioner never argued in his cert petition that the Seventh Circuit's factual findings were flawed, but only challenges the Seventh Circuit's ability to address the merits at all.[5]

Petitioner overstates the impact of *Wainwright v. Goode*, 464 U.S. 78 (1983) (per curiam). Initially, *Goode* itself conducted the very analysis of the state court record to which Petitioner now states the unanimous Seventh Circuit erred in conducting and should be prohibited from conducting. Specifically, this Court in *Goode* reviewed the state court record

[5] Again, this is a flip-flop from the district court argument and the argument in the brief in opposition to cert in this Court that specifically invited application of 2254(d).

and made a determination that the record did not rebut the state court's finding that the non-statutory aggravators were improperly considered. *Id.* at 84-85. The unanimous Seventh Circuit cannot be faulted for following the dictates of *Goode*.

Further, Petitioner overstates *Goode's* reach and utterly ignores this Court's subsequent authority applying those same principles. Significant and subsequent non-per curiam authority has addressed the federal aspects of Corcoran's claim. *See e.g. Parker v. Dugger*, 498 U.S. 308 (1991); *Johnson v. Mississippi*, 486 U.S. 578 (1988); *Sochor v. Florida*, 504 U.S. 527 (1992); *Clemons v. Mississippi*, 494 U.S. 738 (1990). While not overruling the precise circumstances of *Goode*, those cases have effectively defined and redefined *Goode's* circumstances to the uncontroversial proposition that when a record does not rebut a state court's finding, habeas relief cannot be obtained.[6]

The unanimous Seventh Circuit properly held that the Indiana Supreme Court's finding that the trial court did not consider non-statutory aggravators is not fairly supported by the record. The record establishes that the trial court reweighed the improper non-statutory aggravating circumstances. Supp. R. 48-49 (the trial court refers to the earlier improper statements as "further support for the trial court's personal conclusion that the sentence is appropriate punishment for this offender and their crimes."). After reviewing the totality of the record, the Seventh Circuit was correct in holding in these circumstances that:

> ...the court added weight to a statutory aggravator based on the non-statutory aggravators. And factor weighting is part of factor "balancing," the very process in which the trial court disclaimed reliance on non-statutory aggravators. So

[6] Those cases also recognize that an independent review and reweighing can cure the alleged error. However, there has been no independent assessment in Respondent's case. The Indiana Supreme Court assessed Corcoran's case via the sentencing entry, not independently of such. *See State v. Corcoran*, 774 N.E.2d 495, 501-502 (Ind. 2002) (applying a "manifestly unreasonable" standard the court concluded it was "satisfied that the trial court's decision" was appropriate). The Indiana Supreme Court did not independently assess this evidence, and rather, applied a reasonableness test to the trial court's determination. A determination based on non-statutory aggravators (for a second time) which Respondent Corcoran had no opportunity to challenge. *See Gardner v. Florida*, 430 U.S. 349 (1977).

> unlike the Indiana Supreme Court, we are far from "satisfied that the trial court has relied only on aggravators listed in Indiana Code § 35-50-2-9(b)." *Corcoran v. State*, 774 N.E.2d 495, 499 (Ind. 2002). Indeed, we find this an "unreasonable determination of the facts" in light of the trial court's proceedings, thus warranting habeas relief. 28 U.S.C. § 2254.

Corcoran, 593 F.3d at 551.

Thus, pursuant to *Parker*, 498 U.S. at 320 and *Goode*, 464 U.S. at 83-85, the Indiana Supreme Court's ruling is an instance of a determination of fact not fully and fairly made by the court. Because the state court record clearly contradicted the Indiana Supreme Court's finding, Petitioner satisfies 2254(d)(2). *See Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (state court assumptions incorrect therefore (d)(2) and (e)(1) does not constrain Court's review).

There is no dispute that it would have been a violation of federal constitutional principles if the trial court considered non-statutory aggravators in support of Petitioner's death sentence. Indiana was a weighing state (*see Hough v. Anderson*, 272 F.3d 878, 906 (7th Cir. 2001)); and thus, reliance on such circumstances was improper pursuant to *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) and *Sochor v. Florida*, 504 U.S. 527, 532 (1992). Thus, Petitioner's request boils down to a request for error correction. Under the unique and unlikely to recur circumstances of this case, this is an inadequate basis for the exercise of this Court's certiorari jurisdiction. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 250 (1969).

In sum, in seeking certiorari, Petitioner has misstated and mischaracterized the legal basis of the unanimous Seventh Circuit opinion. It is not simply a state legal issue (as Petitioner conceded), but an application of this Court's death penalty jurisprudence to a distinct factual record. Given this clear mischaracterization, Petitioner is thus asking this Court to review an issue that is not even presented by the judgment below (again in large measure due to Petitioner's failure to raise the state law bases until the *en banc* process). Additionally, the

petition should also be denied because the judgment below correctly found the record to rebut the factual findings of the state court, and thereby a constitutional violation. Because the unanimous Seventh Circuit's conclusion applied settled principles to the unique record of Respondent's case, certiorari should be denied. *See also* Sup. Ct. R. 10.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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FOR THE SEVENTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that three copies of the enclosed Respondent's Motion to Proceed In Forma Pauperis and Brief in Opposition were served via first-class U.S. mail, postage prepaid, on this 6th day of August, 2010 upon:

Mr. Thomas M. Fisher,
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All persons required to be served have been served.

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