No. 17-25

IN THE
Supreme Court of the United States

MARSHALL MCDANIEL,

Petitioner,

v.

CRAIG FOSTER, WARDEN,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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As Mr. McDaniel's Petition For Writ Of Certiorari (the "Petition" or "Pet.") makes clear, the United States Court of Appeals for the Seventh Circuit in this case "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). First, by placing substantial reliance on *Utah v. Strieff*, 136 S. Ct. 2056 (2016), the Seventh Circuit decided that federal habeas courts may, in denying a habeas petition, rely on decisions of this Court that post-date the state court's adjudication of the prisoner's claim on the merits. This holding conflicts with *Greene v. Fisher*, 565 U.S. 34 (2011).

Second, the Seventh Circuit decided that the circumstances of a detainee's detention and interrogation prior to a confession are irrelevant for the purposes of the third factor of the three-factor test set forth in *Brown v. Illinois*, 422 U.S. 590 (1975)—the purpose and flagrancy of official misconduct. This conflicts with this Court's decisions in *Brown*, *Dunaway v. New York*, 442 U.S. 200 (1979), and *Taylor v. Alabama*, 457 U.S. 687 (1982).

Accordingly, as demonstrated in Mr. McDaniel's Petition and below, this Court should grant Mr. McDaniel a writ of certiorari and review the Seventh Circuit's decision in this case, *McDaniel v. Polley*, 847 F.3d 887 (7th Cir. 2017). (Pet. App. 1a-16a.)

I. Despite Respondent's Incorrect Argument To The Contrary The Decision Below Relies On *Utah v. Strieff* In Conflict With This Court's Holding In *Greene v. Fisher*.

Respondent argues that "*Greene* is not relevant here" because "[t]he Seventh Circuit did not hold that *Strieff* was clearly established law for purposes of § 2254(d)(1)" and instead held that *Strickland v. Washington*, 466 U.S. 668 (1984), "provided the clearly established law governing petitioner's ineffective assistance claim." (Opp. at 10.) Respondent reads both *Greene* and the Seventh Circuit's opinion too narrowly.

Greene clearly holds that "review under § 2254(d)(1)" is limited to the record and law before the state court. *Greene* in no way authorizes federal habeas petitioners, respondents, *or courts* to sidestep this Court's mandate "to focu[s] on what a state court knew and did, and to measure state-court decisions against this Court's precedents *as of the time the state court renders its decision*." 565 U.S. at 38 (Court's emphasis; internal quotation marks and citations omitted). (*See* Pet. at 18-20.)

Moreover, while the Seventh Circuit correctly noted that *Strickland v. Washington* was one of the rules governing the case (Pet. App. 7a-8a), this case involved complex Fourth Amendment issues that required resolution before the habeas court could adjudicate the Sixth Amendment ineffective assistance claim. Accordingly, the Seventh Circuit discussed at length this Court's Fourth Amendment jurisprudence. (Pet.

App. 9a-16a.) Ultimately the Seventh Circuit relied squarely—and improperly—on *Strieff* in resolving these Fourth Amendment issues.

Consequently, Respondent cannot now fairly argue that only *Strickland*, and not the Fourth Amendment jurisprudence, is "clearly established law for purposes of § 2254(d)(1)" in this case. (Opp. at 10.) This is particularly true because Respondent interpreted and applied this Court's Fourth Amendment case law when he argued at length in his brief to the Seventh Circuit that "the Illinois Appellate Court's determination that probable cause supported petitioner's arrest was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent." (App. Dkt. 22 at 17-29[1] (capitalization omitted).)[2]

Respondent cites *Price v. Vincent*, 538 U.S. 634, 643 & n.2 (2003), for the proposition that "this Court has recognized that precedents irrelevant to the 'clearly established' analysis may be relied upon to bolster a finding of reasonableness under § 2254(d)(1)." (Opp. at 11.) But *Price* is readily distinguishable. After discussing at length this Court's established precedent at the time of the state court adjudication, *Price* noted in a footnote, other cases, *from other courts*, that came to conclusions similar to the conclusion of the state court.

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[1] Throughout this reply, citations to "App. Dkt." are to documents entered on the Seventh Circuit Docket in this matter, Case No. 15-3638.

[2] Notably, Respondent did not cite *Strieff* in so arguing. *See* App. Dkt. 22, *id.* at iii-vi (Table of Authorities).

538 U.S. at 643 & n.2. Those cases, therefore, unlike *Strieff*, could not even qualify as "clearly established Federal law" as determined by this Court. Moreover, rather than mention *Strieff* in a passing footnote, the Seventh Circuit placed substantial reliance on *Strieff* in holding that Mr. McDaniel's confession was not sufficiently attenuated from the illegal arrest (*see* Pet. at 13-14; Pet. App. 11a-16a), making clear that it thought *Strieff* was *the* precedent from this Court that controlled the case, not merely a case "bolster[ing]" its finding of reasonableness.

Respondent misreads Mr. McDaniel's Petition when he asserts that Mr. McDaniel's "main complaint" is that "it was unfair for the Seventh Circuit to rely on a case not cited by the parties." (Opp. at 11.) The Petition clearly asserts that certiorari should be granted here because the Seventh Circuit's decision conflicts with this Court's precedent in *Greene*, not because it was "unfair" for the Seventh Circuit to rely on *Strieff*. (Pet. at 18-20.) To be sure, Mr. McDaniel does explain how he was prejudiced by the Seventh Circuit's reliance on *Strieff*, but this was in the context of explaining how *Strieff* is readily distinguishable from Mr. McDaniel's case, and how by following the directive in *Greene*, Mr. McDaniel was not afforded the opportunity to demonstrate how *Strieff* does not control his case. (Pet. at 20-24.)

Respondent himself demonstrates this prejudice in his Opposition when he argues that *Strieff* is "instructive" to Mr. McDaniel's case. (Opp. at 13.) Respondent, however, ignores the many ways in which *Strieff* is distinguishable from Mr. McDaniel's case

(*Compare* Pet. at 21-24 *with* Opp. at 13.) As explained in the Petition, the intervening circumstance in *Strieff*, a prior outstanding arrest warrant, was completely unconnected to Strieff's detention. (Pet. at 21.) In contradiction, the tentative photo identification here was part of the investigation into Mr. McDaniel's case. (Pet. at 22.)

It bears repeating that by holding that the tentative photo identification was an intervening circumstance, the Seventh Circuit has created a rule whereby an arrest can be effectuated without probable cause, and continued detention is lawful so long as the investigation eventually reveals evidence to support a probable cause determination.[3] Such a rule is unsupported by this Court's precedents and is hostile to the Fourth Amendment protections and the purpose of the exclusionary rule. It would encourage officers to make unlawful arrests in hopes that evidence sufficient for probable cause would surface with continued investigation. (*See* Pet. at 22.) *Cf. Brown*, 422 U.S. at 602 ("If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation . . . [a]rrests made without

[3] The tentative photo identification cannot serve as an intervening circumstance because Mr. McDaniel was not told about it, and thus it could not have affected Mr. McDaniel's free will. *Brown*, 422 U.S. at 602 (confession must be "'an act of [the defendant's] free will'") (quoting *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)). Indeed, Mr. McDaniel was very clear that he "*was never told of the photo identification*. . . . meaning the identification could not have affected McDaniel's thinking." (App. Dkt. 15 at 48-49 (emphasis added).)

warrant or without probable cause, for questioning or 'investigation,' would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expendent of giving Miranda warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated.")

II. Despite Respondent's Incorrect Argument To The Contrary The Decision Below Conflicts With *Brown v. Illinois*.

Respondent seeks to ignore the undisputed facts of Mr. McDaniel's detention and interrogation. (*Compare* Opp. at 3 *with* Pet. at 6-7; *see also* Pet. App. 4a-5a, 112a-115a, 129a-137a., 141a.) But as Mr. McDaniel explained in his Petition, these facts are of vital importance to the analysis under the third *Brown* factor—the purpose and flagrancy of official misconduct—and the Seventh Circuit erred in refusing to consider them. (Pet. at 25-27; *see also* Pet. App. 13a-16a & n.6.) Indeed even Respondent does not deny that it is "true generally" that the circumstances of an arrestee's detention and interrogation should be considered when analyzing the third *Brown* factor. (Opp. at 15.)

Instead, Respondent argues that the circumstances of the interrogation and detention need not be analyzed "in this case" because the detectives who interrogated Mr. McDaniel were different from the officers who effectuated his initial arrest. (*Id.*) Respondent claims, without citing any supporting case

law, that this fact distinguishes *Brown*, *Dunaway*, and *Taylor*. (*Id.* at 16.) Respondent misses the mark.

The rule as set out in *Brown* is clear that the appropriate analysis is "the purpose and flagrancy of the *official misconduct*," not just the arresting officer's misconduct. *Brown*, 422 U.S. at 604 (emphasis added). *Brown* directs that statements "induced by the continuing effects of unconstitutional custody" must be suppressed. *Id.* at 597. The question, this Court explained, is whether the "evidence to which instant objection is made has been come at by exploitation of that illegality." *Id.* at 599 (citing *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)). This encompasses an analysis of a detention and interrogation that leads to a confession, and that is the analysis this Court performed in *Brown*, *Dunaway*, and *Taylor*. (Pet. at 25-27.)

Respondent is also wrong that the "officers who were responsible for the Fourth Amendment violations also conducted the interrogations at issue" in *Taylor* and *Dunaway*. (Opp. at 16.) As the dissenting opinion makes clear in *Taylor*, the officers who arrested Taylor, "turned Taylor over to detectives" for the interrogation. 457 U.S. at 694 (O'Conner, dissenting); *see also id.* at 689. Likewise, the facts in *Dunaway* suggest that the arresting officers were not the same as the interrogating officers. *Dunaway*, 442 U.S. at 203 (noting that Dunaway was taken into custody by "detectives" and questioned by "officers"). Respondent stretches these cases beyond their facts in an attempt to support his unsupportable arguments.

III. Mr. McDaniel Is Entitled To Habeas Relief.

Had the Seventh Circuit not violated this Court's mandate in *Greene* and placed substantial reliance on *Strieff*, it would have concluded—under the 2009 record available to the Illinois Appellate Court when it adjudicated the merits of Mr. McDaniel's case—that both the second and third *Brown* factors favor suppressing Mr. McDaniel's confession. (*See* App. Dkt. 15 at 45-53; App. Dkt. 27 at 21-26.) Moreover, had the Seventh Circuit properly considered the undisputed circumstances of Mr. McDaniel's detention and interrogation, it likewise would have concluded that the third *Brown* factor favored suppression. (*See* App. Dkt. 15 at 51; App. Dkt. 27 at 25-26.)

Respondent contends that even if this Court were to decide both of the questions presented in Mr. McDaniel's Petition in Mr. McDaniel's favor, Mr. McDaniel still would not be entitled to habeas relief because: (1) his arrest was effectuated with probable cause and was thus lawful, and (2) even if Mr. McDaniel could demonstrate the requisite prejudice, he could not show deficient performance under *Strickland*'s first prong. Respondent is wrong on both counts. (Opp. at 17-19.)

First, the Seventh Circuit was clear that it was not addressing probable cause, and thus this is a question that has yet to be adjudicated. (Pet. App. 9a.) Indeed, the District Court held that there was not probable cause for Mr. McDaniel's arrest. (Pet. App. 36a-39a; *see also* App. Dkt. 15 at 39-45; App. Dkt. 27 at 11-21.)

Respondent reads far too much into the Seventh Circuit's passing statement that whether there was probable cause was "debatable." (Opp. at 17; Pet. App. 9a.)

Second, as the District Court rightly held, Mr. McDaniel's counsel on direct appeal to the Illinois Court of Appeals *was* deficient. (Pet. App. 37a-39a.) The Seventh Circuit did not adjudicate the deficient performance prong of *Strickland*, concluding that it was a more difficult question. (Pet. App. 8a.) As Mr. McDaniel explained to the Seventh Circuit, his appellate counsel's performance was deficient when she failed to raise the obvious and significant illegal arrest and suppression issue, and instead only raised one, weaker issue. (App. Dkt. 15 at 31-39; App. Dkt. 27 at 1-10.) Therefore, contrary to Respondent's assertion, the Seventh Circuit would not render the same judgment if this Court were to reverse on one or both of the questions presented.

CONCLUSION

For the foregoing reasons, as well as those stated in Mr. McDaniel's Petition, this Court should grant Mr. McDaniel a writ of certiorari.

Respectfully submitted,

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