

No. 17-1621

**In The
Supreme Court of the United States**

RODNEY YOUNG ANDERSON,

Petitioner,

v.

LORIE DAVIS,

Respondent.

**On Petition For Writ Of Certiorari
To The District Court For The
Southern District Of Texas, Houston Division
[Cause No. 4:16-CV-00652]**

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.1, Rodney Young Anderson respectfully petitions for rehearing of the Court's decision issued on October 1, 2018 denying certiorari. Mr. Anderson moves this Court to grant this petition for rehearing and consider his case with merits briefing and oral argument. Pursuant to Supreme Court Rule 44.1, this petition for rehearing is filed within 25 days of this Court's decision in this case.



REASONS FOR GRANTING THE PETITION

The Court has not resolved the circuit split concerning what level of deference under 28 U.S.C. § 2254(d)(2) and 28 U.S.C. § 2254(e)(1) the federal habeas court should give a State court's unreasonable findings of fact when the record does not support same. *See Burt v. Titlow*, 134 S.Ct. 10, 15 (2013) [discussing *Wood v. Allen*, 558 U.S. 290 (2010) and how the Court "has not defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)"]. This Court should grant Anderson's petition for rehearing in light of Justice Kavanaugh joining the Court and end the circuit split by finding that the habeas trial court and the Fifth Circuit must review the record *de novo* in these circumstances and decide the merits of Petitioner's federal writ of habeas corpus under 28 U.S.C. § 2254(d)(1).

The Ninth Circuit has aptly described the law surrounding this issue as a "state of confusion." *Murray v.*

Schriro, 745 F.3d 984, 1001 (9th Cir. 2014), and this Court’s decision in *Wood v. Allen*, 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010) left the question “for another day.” This Court’s recent decision in *Wilson v. Sellers*, 138 S.Ct. 1188, 200 L.Ed.2d 530 (2018) also did not reach the issue. However, this Court noted that it was setting forth a presumption that one looks through to the last State court opinion instead of establishing a rule since the last State opinion might not be reasonable. *Id.* slip op. at 12-13.

The two distinct provisions address the review of a State court’s findings of fact, 28 U.S.C. § 2254(d)(2) and (e)(1). And each provide a different standard and scope of review.

In *Valdez v. Cockrell*, 274 F.3d 941, 968 (5th Cir. 2001), Judge Dennis’ dissent illustrated the lack of clarity between the two provisions stating, the Supreme Court has failed to demonstrate “how § 2254(d)(2)’s ‘invitation to decide whether the state fact determinations were reasonable . . . fit[s] with the presumption that the state fact determinations are correct’ [under § 2254(e)(1)].” The Third Circuit reaches a conclusion about what they mean and finds that they each apply in different situations. In this manner it harmonizes them by finding that § 2254(s)(2) concerns a review of the State court’s findings considering what evidence was presented in State court; while § 2254(e)(1) addresses individual fact determination made by State courts considering evidence that includes matters outside the State trial record.

“The language of § 2254(d)(2) and § 2254(e)(1) implies an important distinction: § 2254(d)(2)’s reasonableness determination turns on a consideration of the totality of the ‘evidence presented in the state-court proceeding,’ while § 2254(e)(1) contemplates a challenge to the state court’s individual factual determinations, including a challenge based wholly or in part on evidence outside the state trial record. *See generally Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 951 n.17 (5th Cir. 2001). Section 2254(d)(2) and § 2254(e)(1) are, therefore, read together as addressing two, somewhat, different inquiries. The fundamental prerequisite to granting the writ of *habeas corpus* on factual grounds is consideration of the evidence relied upon in the state court proceeding. Section 2254(d)(2) mandates the federal habeas court to assess whether the state court’s determination was reasonable or unreasonable given that evidence. If the State court’s decision based on such a determination is unreasonable considering the evidence presented in the state court proceeding, habeas relief is warranted. Within this overarching standard, of course, a petitioner may attack specific factual determinations that were made by the state court, and that are subsidiary to the ultimate decision.” *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d. Cir. 2004), *cert. denied*, 125 S.Ct. 2516 (2005).



**DESPITE THESE DISTINCT PROVISIONS
CIRCUIT COURTS HAVE APPLIED THESE
PROVISIONS IN ALL MANNER OF WAYS**

Because this Court has not resolved the question of how § 2254(d)(2) and § 2254(e)(1) function, circuit courts have filled the void in a manner that permits similarly situated defendants to experience different rulings. *See Burt v. Titlow*, 134 S.Ct. 10, 15 (2013) [stating that this Court has not defined the precise relationship between 2254(d)(2) and 2254(e)(1)].

The Fifth Circuit has determined that § 2254(d)(2) sets out a general standard by which the federal district court evaluates a State court’s specific findings of fact while it concludes that § 2254(e)(1) provides what showing a petitioner must make for the federal district court to reject a State court’s determination of a factual issue. *See Valdez v. Cockrell*, 274 F.3d 941, 951 n.17 (5th Cir. 2001). The Fifth Circuit recognized that the Third, Fourth¹, Seventh², and Eighth Circuits appear to have a similar understanding of these provisions, while distinguishing the Ninth and Eleventh Circuits’

¹ *See Moore v. Hardee*, 723 F.3d 488, 499 (4th Cir. 2013) citing to *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) and stating “[W]here the state court has before it, yet apparently ignores, evidence that supports [the] petitioner’s claim,’ the state court fact-finding process is defective.”

² The Seventh Circuit has adopted for “review challenges to factual determinations under § 2254(d)(2)’s stringent unreasonable error standard, using § 2254(e)(1)’s clear and convincing evidence standard as ‘the mechanism for proving unreasonableness.’ *Collins v. Gaetz*, 612 F.3d 574, 586 n.5 (7th Cir. 2010) (citation omitted).

opinions, noting that the First Circuit has agreed that the relationship between these provisions has caused confusion and their meaning has not been definitely resolved. *See Fields v. Thaler*, 588 F.3d 270, 279-80 (5th Cir. 2009). The Eleventh Circuit in *Clark v. AG*, 821 F.3d 1270 (11th Cir. 2016), echoed the same concern stating, “[t]he precise standard for reviewing state court factual findings in habeas proceedings is somewhat murky.” *Clark v. AG*, 821 F.3d 1270, 1278 n.3 (11th Cir. 2016).



NEW DEVELOPMENT IN *WILSON V. SELLERS*

Recently, in *Wilson v. Sellers*, 138 S.Ct. 1188, Justice Gorsuch in his dissent addressed the question how summary denials of State court opinions should be reviewed. Writing for Justice Thomas and Justice Alito, Justice Gorsuch stated:

“To determine if a reasonable basis ‘could have supported’ a summary denial of habeas relief under *Richter*, a federal court must look to the state lower court opinion (if there is one), any argument presented by the parties in the state proceedings, and any argument presented in the federal habeas proceeding.”

Wilson v. Sellers, No. 16-6855, at *19 (U.S. Apr. 17, 2018) [dissent rejecting a “look through” presumption and questioning the efficacy of the presumption]. While the dissent did not address the meaning of § 2254(d)(2) and § 2254(e)(1) expressly, Justice Gorsuch did discuss how a reviewing federal court should

address State court summary affirmances of State writs of habeas corpus. Therefore, at least three justices have a concern with how the analysis should be performed.

The split in the federal courts of appeals over the meaning of § 2254(d)(2) and § 2254(e)(1) establishes that guidance from this Court is required to establish uniformity and consistency for equally situated litigants.

The Fifth Circuit, differing from the Third Circuit, has held that “[w]hereas § 2254(d)(2) sets out a general standard by which the district court evaluates a state court’s specific findings of fact, § 2254(e)(1) states what an applicant will have to show for the district court to reject a state court’s determination of factual issues.” *Batchelor v. Cain*, 682 F.3d 400, 405 (5th Cir. 2012). Since the State court findings were unreasonable in light of a record that clearly establishes opposite facts, the federal district court was required to conduct a *de novo* review and affirmed the lower federal court’s grant of habeas relief. The federal district court could not rely on the Court of Criminal Appeals’ affirmation because it was not supported by the record.

Petitioner suggests that § 2254(d)(2) and § 2254(e)(1) require a *de novo* review of the State court summary decision when the facts developed at the State court hearing do not support the lower trial court and summary Texas Court of Criminal Appeals’ decisions. However, the federal district court in Petitioner’s case applied a highly deferential standard of review to

the State court's findings and conclusions and dismissed his writ.

“Factual determinations by state court are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1) and an adjudication on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable *in light of the evidence presented* in the state court proceeding.”

Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) [emphasis added].

Because the Circuit Courts of Appeal are split on the analysis and procedure to be employed when reviewing State court decisions based upon unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2) and (e)(1), this Court should grant this petition for rehearing and order full briefing and argument on the merits of this case.

Respectfully submitted,

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I hereby certify that this petition for rehearing is
presented in good faith and not for delay.

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