

No.

In the Supreme Court of the United States

DARRYL SCOTT STINSKI, PETITIONER,

v.

WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION
PRISON

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Under 28 U.S.C. § 2254(d)(2), habeas applications may be granted where the state court’s adjudication of the claim “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.” Courts have disagreed about the relationship between this deferential standard and the separate standard set forth in § 2254(e)(1) that a state court’s factual determinations “shall be presumed to be correct” absent “clear and convincing evidence” to the contrary. 28 U.S.C. § 2254(e)(1).

This Court previously granted certiorari to address these provisions’ interplay in *Wood v. Allen*, 558 U.S. 290, 299 & n.1 (2010), but declined to resolve the issue.

In the decision below, the Eleventh Circuit panel, bound by recent *en banc* precedent, asserted that courts should apply both deferential standards to habeas claims regardless of whether petitioners have presented new evidence outside the state court record. While many circuits agree, as this Court noted in *Wood*, that issue “has divided the Courts of Appeals,” *id.* at 299.

The question presented is:

Whether the evidentiary standard in § 2254(e)(1) does not apply when a state prisoner seeks federal habeas relief solely on the state court evidentiary record and introduces no new evidence to attack the state court’s factual determinations.

RELATED PROCEEDINGS

Georgia (Sup. Ct. Butts Cty. Ga.):

State v. Stinski, No. CR02-1280-BA (judgment entered June 13, 2007)

Stinski v. Chatman, No. 2011-V-942
(judgment denying petition for a writ of habeas corpus entered Jan. 15, 2017)

Georgia Supreme Court (Ga.):

Stinski v. State, No. S06A1455 (Ga.)
(judgment affirming denial of interlocutory motions entered Feb. 2, 2007; reconsideration denied March 27, 2007)

Stinski v. State, No. S09P1745 (Ga.)
(judgment affirming conviction and sentence entered March 1, 2010)

Stinski v. Chatman, No. S17E1093 (Ga.)
(judgment denying certificate of probable cause to appeal denial of habeas petition entered Feb. 5, 2018)

United States District Court (S.D. Ga.):

Stinski v. Sellers, No. 4:18-cv-00066 (S.D. Ga.)
(judgment denying application for writ of habeas corpus entered Dec. 17, 2021; motion for reconsideration and COA granted July 28, 2022)

United States Court of Appeals (11th Cir.):

Stinski v. Warden GDCP, No. 22-12898 (11th Cir.)
(judgment affirming denial of application for writ of habeas corpus entered Dec. 20, 2023; petition for rehearing en banc denied May 7, 2024).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Eleventh Circuit's opinion is unreported but available at 2023 WL 8801272. The district court's order is unreported but available at 2021 WL 5921386.

JURISDICTION

The Eleventh Circuit issued its opinion on December 20, 2023 and denied a timely petition for rehearing en banc on May 7, 2024. Justice Thomas then extended the time to file a petition for certiorari to September 4, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the petition appendix at App. 161a-164a.

STATEMENT OF THE CASE

Congress enacted AEDPA to ensure that habeas petitioners would treat state court, rather than the federal courts, as the “principal forum for asserting constitutional challenges to state convictions.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011). AEDPA achieves this aim by granting deference to state court decisions and by barring new evidence, except in limited circumstances, from being introduced in federal court. 28 U.S.C. §§ 2254(b)-(e); *see also Rhines v. Weber*, 544 U.S. 269, 276 (2005). Two sections of AEDPA govern these dual purposes as they relate to state court factual determinations. 28 U.S.C. § 2254(d)(2) states that habeas petitions may only be granted where the state court’s adjudication of the claim “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.” 28 U.S.C. § 2254(d)(2). The adjacent section, 28 U.S.C. § 2254(e), discusses the availability of new evidence in federal court

and provides that state courts' factual determinations "shall be presumed to be correct" absent "clear and convincing evidence" to the contrary. 28 U.S.C. § 2254(e)(1).

This case presents an acknowledged, intractable circuit conflict over the proper application of subsections (d)(2) and (e)(1). Despite previously granting certiorari on this question in *Wood v. Allen*, 558 U.S. 290, 299 & n.1 (2010), to resolve a "question that has divided the Courts of Appeals," *id.* at 299, this Court has "not defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)." *Burt v. Titlow*, 571 U.S. 12, 18 (2013).

In the absence of direction, the courts of appeals have employed two different methods for applying these two subsections. The majority of circuits, including the Eleventh Circuit in the decision below, have held that all habeas petitioners must overcome § 2254(e)(1)'s requirement that state-court factual findings be rebutted by clear and convincing evidence in every case where a petitioner seeks relief through § 2254(d)(2). *See, e.g., Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1035 (11th Cir. 2022); *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 950-951 (5th Cir. 2001); *Ben-Yisrayl v. Buss*, 540 F.3d 542, 549 (7th Cir. 2008); *Trussell v. Bowersox*, 447 F.3d 588, 591 (8th Cir. 2006).

The Ninth Circuit, by contrast, "interpret[ing] these provisions sensibly" holds that § 2254(d)(2) applies when a habeas petition is "based entirely on the state record," while § 2254(e)(1) provides the standard under which "[s]tate court fact-finding may be overturned based on new evidence presented for the first time in federal court." *See Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004), *overruled on other grounds by Murray v. Schriro*, 745 F.3d 984 (9th Cir. 2014). And the Ninth Circuit has since been clear, following this Court's

decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011), that *Taylor* will remain binding in that Circuit until overruled “by [the Ninth Circuit] en banc, or by the Supreme Court.” *Murray*, 745 F.3d at 1001.

This case satisfies all the criteria for granting review. How to properly apply these two subsections of AEDPA has vexed the federal courts for decades. The split between the Ninth Circuit and the other Circuits that have opined on the issue is acknowledged, longstanding, and intractable. This conflict has already been recognized by countless courts and commentators.¹ In addition to this

¹ 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 20.2c (2024) (noting that the circuits are “divided” on this issue); Bryan R. Means, *Federal Habeas Manual* § 3:82 (June 2024 Update) (canvassing the various circuit-court approaches to this problem); Justin F. Marceau, *Deference and Doubt: The Interaction of AEDPA § 2254(d)(2) and (e)(1)*, 82 Tul. L. Rev. 385, 385, 389 (2007) (calling the answer to this question “hopelessly unclear”; lamenting that “nearly every federal court of appeals has sheepishly glossed over this critical question of habeas corpus law”); Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 Harv. L. Rev. 1868, 1874-76 (1997); *Hayes v. Sec’y. Fla. Dep’t of Corrs.*, 10 F.4th 1203, 1223 (11th Cir. 2021) (Newsom J., concurring) (describing the circuit split); *Fields v. Thaler*, 588 F.3d 270, 279-80 (5th Cir. 2009) (collecting cases and noting the split); *Lucien v. Spencer*, 871 F.3d 117, 127 n.4 (1st Cir. 2017) (“[C]ourts of appeal have come to different conclusions concerning whether and to what extent the requirement in § 2254(e)(1) . . . differs from Congress’s directive in § 2254(d)(2).”); see also *Staggs v. Lindamood*, 2018 WL 11467310, at *11 (M.D. Tenn. Jan. 22, 2018) (noting the “split”); *Gamboa v. Davis*, 2016 WL 4413280, at *8 (W.D. Tex. Aug. 4, 2016) (“It remains unclear at this juncture whether Section 2254(e)(1) applies in every case presenting a challenge to a state court’s factual findings under Section 2254(d)(2)” because this Court, in *Rice*, did not “resolve the Circuit split.”); *Ebrahim v. LeConey*, 2012 WL 6155655, at *20 (W.D.N.Y. Dec. 11, 2012) (“There remains a split among the circuit courts regarding whether and when the § 2254(e)(1) presumption is applicable during a § 2254(d)(2)

Court, judges in every Circuit with jurisdiction over § 2254 applications have recognized the need for guidance.² Further percolation is futile: the arguments

review.”); *Costella v. Clark*, 2011 WL 940868, at *12 & n.7 (N.D. Cal., Mar. 18, 2011) (maintaining the Ninth Circuit’s approach to the Circuit split after this Court’s decisions in *Wood* and *Pinholster*); *Merzbacher v. Shearin*, 732 F. Supp. 2d 527, 545-46 (D. Md. 2010) (noting that *Wood*, then pending, was granted to resolve the “split.”).

² *Watkins v. Medeiros*, 36 F.4th 373, 385 (1st Cir. 2022) (quoting *Teti v. Bender*, 507 F.3d 50, 57 (1st Cir. 2007)) (noting that the “two different standards . . . ha[ve] caused some confusion,” and that “neither [this Circuit in *Teti*] nor the Supreme Court has definitively resolved the question as to how these two provisions interact.”); *Pye*, 50 F.4th at 1057 (Jordan, J., concurring in the judgment) (explaining “the relationship between 28 U.S.C. §§ 2254(d)(2) and 2254(e)(1)” is an issue “of significant complexity, as evidenced by the literature discussing the caselaw and the different interpretive approaches that exist.”); *Hayes*, 10 F.4th at 1222-23 (Newsom, J., concurring) (“[T]he district court’s confusion is both understandable and forgivable. Questions about the interplay between subsections (d)(2) and (e)(1) have been with us since AEDPA’s enactment. And to this point, anyway, the Supreme Court hasn’t provided any real guidance about how the two fit together.” “In the absence of any controlling decision, the circuits remain split—or, like the district court here, confused—over the exact relationship between subsections (d)(2) and (e)(1)”); *Smith v. Brookhart*, 996 F.3d 402, 405 (7th Cir. 2021) (“ It is unclear how, if at all, these two standards differ, but the state makes nothing of this point, and so neither do we.”); *Carter v. Bogan*, 900 F.3d 754, 769 n.7 (6th Cir. 2018) (finding an inability to definitively say what standard a petitioner must satisfy “because the Supreme Court has yet to clarify the relationship between [the two Sections]”); *McMullan v. Booker*, 761 F.3d 662, 670 (6th Cir. 2014) (“Federal courts have struggled with this question . . . [but a]s with the Supreme Court, we do not—and need not—resolve this tension here.”); *Wood v. Carpenter*, 907 F.3d 1279, 1289 n.9 (10th Cir. 2018) (internal quotation marks omitted) (“Complicating the § 2254(d)(2) inquiry is that . . . [t]he interplay between § 2254(d)(2) and § 2254(e)(1) is an open question . . . [a]nd it is unclear which standard imposes a

have been exhaustively developed and the Ninth Circuit has made clear it will not join the majority. This case is also an ideal vehicle to address this conflict; in granting a certificate of appealability to the Eleventh Circuit on this question, the district court acknowledged that a reversal of Eleventh Circuit precedent on the deference AEDPA requires would potentially result in reversal of the denial of habeas relief.

Finally, the majority view is wrong: The plain language and structure of 28 U.S.C. § 2254 counsels against treating (e)(1) as a standard of review and then layering it on top of the independent standard of review set forth in (d)(2). It would make no sense for Congress to enact two different standards of review directed at the same circumstances and expect courts to apply both of them on top of each other. Congress would not have enacted such a byzantine, layered framework for review without comment.

The majority of circuits have departed from the best and most natural construction of the statute. The result is to take the most demanding standard in the law—requiring the applicant to show that the state court’s decision “was based on an unreasonable determination of the facts in light of the evidence presented”—and make it functionally impossible to meet by requiring the federal court also to “presume[]” that the “determination of [every] factual issue” was “correct.” 28 U.S.C. §§ 2254

greater burden on the petitioner.”); *Murray*, 745 F.3d at 999 (“There is some confusion . . . over the interaction between these two provisions.”); *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004) (“[A] comprehensive interpretation of AEDPA’s factual review scheme has yet to emerge from the federal courts. Specifically, the relationship between the standards enunciated in § 2254(d)(2) and § 2254(e)(1) remains unclear.”); *Finch v. Payne*, 983 F.3d 973, 979 n.5 (8th Cir. 2020) (identifying split); *Tatum v. Lempke*, 481 F. App’x 659, 661 n.2 (2d Cir. 2012) (same).

(d)(2)-(e)(1). Numerous habeas applicants who would otherwise have surmounted (d)(2)—like petitioner here—have nonetheless been denied habeas corpus because they cannot surmount (d)(2) when it is supercharged by (e)(1).

This is an important issue affecting thousands of habeas applicants and would-be habeas applicants. This Court has already granted review once to resolve it. It is more than a decade since this Court first granted review on this important question, and the confusion and division in the lower courts remains. The Court should grant the petition and hold that (e)(1) has no role to play in cases like this one, where a habeas applicant seeks (d)(2) relief based solely on the evidentiary record that was before the state court.

1. Two distinct sections of AEDPA govern the deference that a federal habeas court owes to a state court’s decision. Under § 2254(d)(2), a federal court may grant a writ of habeas corpus where the state court’s adjudication of the claim “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.” 28 U.S.C. § 2254(d)(2). In other words, the state court decision “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 (2003). Separately, under § 2254(e)(1) the state court’s factual determinations “shall be presumed to be correct” absent “clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

2. Petitioner Darryl Stinski was convicted in Georgia state court of two counts of malice murder and related charges and sentenced to death. App. 1a. The Georgia Supreme Court affirmed his conviction and sentence. App. 8a. This Court denied a petition for a writ of certiorari. *Id.*

Petitioner later filed a petition for a writ of habeas corpus in Georgia state court. *Id.* Petitioner alleged that his trial counsel rendered ineffective assistance during the sentencing phase of his capital trial. App. 9a.

The Georgia habeas court ordered an evidentiary hearing on petitioner's claim. App. 9a. Over four days, petitioner's habeas counsel put on evidence establishing that petitioner's capital trial counsel rendered constitutionally deficient performance at the sentencing of his capital trial, that likely led to his death sentence. App. 9a. Petitioner's habeas counsel called three experts whose testimony collectively established that petitioner's trial counsel had utterly failed to introduce substantial mitigating evidence that would have persuaded the capital jury to render a life sentence rather than a sentence of death. Petition For Writ of Habeas Corpus By Petitioner In State Custody Under Death Sentence at 4, *Stinski v. Sellers*, No. 4:18-cv-00066 (N.D. Ga. March 15, 2018), ECF No. 1. The hearing adduced persuasive and compelling scientific evidence that was never adduced at the sentencing phase of his trial that would have established to the sentencing jury that petitioner's youth (18 years old at the time of the crime), deficits in executive functioning, and unspeakably cruel upbringing were powerful mitigators that strongly militated against a death sentence. App. 89a.

The Georgia habeas court nonetheless denied habeas relief, finding that petitioner had failed to establish that his trial counsel rendered deficient performance at the sentencing phase. App. 10a. Despite admitting that trial counsel missed obvious opportunities to present a stronger mitigating defense during the penalty phase of trial, the Georgia habeas court nonetheless held that petitioner's counsel's errors did not fall below an objective standard of reasonableness and that petitioner was not prejudiced by his counsel's errors. App. 89a. The Georgia

Supreme Court denied petitioner's application for a certificate of probable cause. App. 11a.

3. Petitioner filed an application for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Southern District of Georgia, asserting his claim for ineffective assistance of counsel. App. 11a. Petitioner argued—based solely on the evidence adduced in the Georgia state court proceeding—that the Georgia trial court's decision to deny his petition for a writ of habeas corpus was based on an unreasonable determination of the facts in light of the evidence presented under 28 U.S.C. § 2254(d)(2).

The district court denied the application and, initially, denied petitioner a certificate of appealability. App. 11a-12a. In assessing the reasonableness of the Georgia habeas court's factual determinations, the district court applied § 2254(d)(2) and § 2254(e)(1) to the state court's factual determinations—presuming that the district court's factual determinations were “correct” and requiring petitioner to rebut them by “clear and convincing evidence.” App. 83a-84a. The district court concluded that petitioner could not surmount that extraordinarily demanding standard in this case. App. 85a-104a.

On a motion to alter or amend the judgment, the district court granted a certificate of appealability on the question “whether the Court properly applied [s]ections 2254(d)(2) and 2254(e)(1) of the AEDPA in the Habeas Order when evaluating Petitioner's ineffective assistance of counsel claim.” App. 25a.

6. In an unpublished per curiam opinion, an Eleventh Circuit panel affirmed the district court's denial of the habeas petition, holding that the district court had correctly applied (d)(2) and (e)(1) to petitioner's case. App. 1a. The panel acknowledged that this Court has not defined the precise relationship between the two

provisions but cited the Eleventh Circuit’s recent *en banc* decision in *Pye v. Warden, Georgia Diagnostic Prison*, 50 F.4th 1025 (11th Cir. 2022), as controlling and as having definitively resolved this question. App. 15a-16a. The Eleventh Circuit denied a timely petition for rehearing *en banc*. App. 160a.

REASONS FOR GRANTING THE PETITION

This case presents an important recurrent question of federal law that affects thousands of habeas applicants and would-be applicants nationwide. There is an acknowledged entrenched conflict among the circuits on the question of the interplay of subsections (d)(2) and (e)(1), with several circuits applying an approach firmly in conflict with the Ninth Circuit. This Court has previously granted certiorari to resolve this precise question but still has yet to resolve it, and the question remains worthy of review. The Court’s decision in *Cullen v. Pinholster*, 563 U.S. 170 (2011), did not eliminate the need to resolve this question, as reflected by the continuing division among lower courts in their application of subsections (d)(2) and (e)(1). This case is an ideal vehicle to resolve this issue and there are no factual or procedural obstacles to its resolution in this case. The Court should grant the petition.

I. THE CIRCUITS ARE DIVIDED OVER WHEN AND HOW TO APPLY § 2254(e)(1) IN CASES SEEKING RELIEF UNDER § 2254(d)(2)

The decision below cements a circuit split over an important question of habeas law that “has divided the courts of appeals.” *McMullan v. Booker*, 761 F.3d 662, 670 n.3 (6th Cir. 2014); *see Wood*, 558 U.S. at 299 & n.1 (explaining this is a “question that has divided the Courts of Appeals” and collecting cases). This Court has on multiple occasions “declined to clarify the relationship between” subsections (d)(2) and (e)(1) and has “explicitly

left open the question whether § 2254(e)(1) applies in every case presenting a challenge under § 2254(d)(2).” *McMullan*, 761 F.3d at 670 (quoting *Wood*, 558 U.S. at 298); see *Brumfield v. Cain*, 576 U.S. 305, 322 (2015) (quoting *Burt*, 571 U.S. at 18) (declining to “define[] the precise relationship between § 2254(d)(2) and § 2254(e)(1)”); *Rice v. Collins*, 546 U.S. 333, 339 (2006) (same).

This entrenched longstanding circuit split is widely recognized by courts and commentators alike. *See supra* nn. 1-2. This is “an important issue” of “significant complexity, as evidenced by the literature discussing the caselaw and the different interpretive approaches that exist.” *Pye*, 50 F.4th at 1057 (Jordan, J., concurring in the judgment). The Court already recognized that this question is certworthy by granting certiorari to resolve it in *Wood*. 558 U.S. at 299.

The Circuit courts are now divided into two squarely opposing camps.

- The Ninth Circuit holds that (e)(1) applies only when a habeas petitioner seeking relief under (d)(2) presents new evidence in federal court to challenge the state court’s factual findings.³
- Nine circuits—the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh—all apply (e)(1) to every habeas application seeking relief under (d)(2).⁴

³ See *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004).

⁴ See *Field v. Hallett*, 37 F.4th 8, 21 (1st Cir. 2022); *Orie v. Sec’y Pa. Dep’t of Corr.*, 940 F.3d 845, 850 (3d Cir. 2019); *Elmore v. Ozmint*, 661 F.3d 783, 850 (4th Cir. 2011); *Valdez v. Cockrell*, 274 F.3d 941, 951 n.17 (5th Cir. 2001); *Michael v. Butts*, 59 F.4th 219, 225 (6th Cir. 2023); *Shannon v. Hepp*, 27 F.4th 1258, 1267-68 (7th Cir. 2022); *Stephen v. Smith*, 963 F.3d 795, 800 (8th Cir. 2020); *Smith v.*

This Court has recognized that its guidance on this issue is imperative by previously granting certiorari to resolve it. *See Wood*, 558 U.S. at 299 & n.1 (2010); *Miller-El*, 537 U.S. at 330. But the question has evaded this Court’s resolution. The Court should resolve the split in this case and provide vital guidance to the lower courts on this important and recurrent federal question.

A. The Ninth Circuit Holds That § 2254(e)(1) Applies Only When A Habeas Applicant Seeks § 2254(d)(2) Relief Based On New Evidence

1. The decision below squarely conflicts with settled law in the Ninth Circuit. In *Taylor v. Maddox*, the Ninth Circuit held that, to give both § 2254(d)(2) and § 2254(e)(1) independent meaning, § 2254(d)(2) alone applies when a prisoner “challenges the state court’s findings based entirely on the state record.” 366 F.3d 992, 999 (9th Cir. 2004) (Kozinski, J.). Section 2254(e)(1) thus comes into play only where a habeas applicant seeks to contest a factual finding by a state court by presenting evidence “for the first time in federal court.” *Id.* at 1000.

In *Taylor*, the habeas applicant was serving a life sentence without the possibility of parole for a crime committed when he was sixteen years old. *Id.* at 996. The conviction hinged on a full confession the applicant gave after he was arrested in his home late one night and interrogated by two police detectives past 3:00 a.m. *Id.* The applicant maintained throughout his direct appeal and in his state post-conviction proceedings that his confession was inadmissible because it was coerced and obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477 (1981). *See Taylor*, 366 F.3d at 998-999.

Duckworth, 824 F.3d 1233, 1241 (10th Cir. 2016); *Pye*, 50 F.4th at 1035.

After exhausting his state court remedies, the habeas applicant in *Taylor* sought relief in federal court under 28 U.S.C. § 2254(d)(2), contending that the state trial court’s determination that his confession was admissible and not coerced “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Taylor*, 366 F.3d at 999.

To assess the merits of the applicant’s challenge, the Ninth Circuit set forth the framework for assessing challenges to the reasonableness of state court factual determinations under AEDPA. *Id.* at 999-1001. The Ninth Circuit explained—applying “the maxim that we must construe statutory language so as to avoid contradiction or redundancy”—that § 2254(d)(2) “applies most readily to situations where petitioner challenges the state court’s findings based entirely on the state record.” *Taylor*, 366 F.3d at 999.

The Ninth Circuit continued: “Once the state court’s fact-finding process survives this intrinsic review—or in those cases where petitioner does not raise an intrinsic challenge to the facts as found by the state court—the state court’s findings are dressed in a presumption of correctness, which then helps steel them against any challenge based on extrinsic evidence, *i.e.*, evidence presented for the first time in federal court.” *Id.* at 1000. “AEDPA spells out what this presumption means: State-court fact-finding may be overturned based on new evidence presented for the first time in federal court only if such new evidence amounts to clear and convincing proof that the state-court finding is in error.” *Id.* (citing 28 U.S.C. § 2254(e)(1)). “Significantly, the presumption of correctness and the clear-and-convincing standard of proof only come into play once the state court’s fact-findings survive any intrinsic challenge; they do not apply to a challenge that is governed by the deference implicit

in the ‘unreasonable determination’ standard of section 2254(d)(2).” *Id.*

Explaining that the habeas applicant “did not present any evidence in federal court” the Ninth Circuit went on to assess his claim solely under § 2254(d)(2). *Taylor*, 366 F.3d at 1000; *see id.* at 1000-1008. Finding the state court findings unreasonable, *id.* at 1008, the Ninth Circuit made substitute findings, *id.* at 1008-1014. The Ninth Circuit then held that, “[i]n light of our findings, it follows that the court of appeal’s conclusion that [the habeas applicant’s] confession was obtained in a constitutionally acceptable manner, and thus was admissible at trial, was an objectively unreasonable application of Supreme Court precedent.” *Id.* at 1014. Finding that the error was prejudicial the Ninth Circuit granted habeas relief. *Id.* at 1015-1018.

2. In the years since the Ninth Circuit decided *Taylor* it has never been overruled. Just last year, in opposition to a petition for certiorari seeking review of the same question now presented in this case, the State of Georgia conceded that *Taylor* is the law in that Circuit. *See* Brief in Opposition at 6, 35, *Pye v. Emmons*, No. 23-31 (U.S. Sept. 25, 2023), 2023 WL 6311526.

The panel below mistook the criticism of *Taylor* by the panel in *Murray v. Schriro*, 745 F.3d 984, 999-1000 (9th Cir. 2014) as potentially calling into doubt the ongoing validity of *Taylor* in the Ninth Circuit. *See* Pet. App. 20a. But *Murray* correctly recited and applied the law established by *Taylor* explaining that “[i]n *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004), we read these two provisions to apply to two different types of challenges.” *Murray*, 745 F.3d at 999. “First, we read § 2254(d)(2) to govern habeas petitions ‘based entirely on the state record.’” *Id.* (quoting *Taylor*, 366 F.3d at 999). “This we termed an ‘intrinsic’ challenge to the state court’s determination of fact.” *Id.* (quoting *Taylor*, 366 F.3d at

999-1000). “A successful intrinsic challenge may be based on a claim that the state-court decision is based on a ‘finding [that] is unsupported by sufficient evidence’; ‘the process employed by the state court [wa]s defective’; or ‘that no finding was made by the state court at all,’ when it was required to make a finding.” *Id.* (quoting *Taylor*, 366 F.3d at 999). “Second, we read § 2254(e)(1) to apply where the habeas petitioner wishes to introduce facts outside the state court record, ‘i.e., evidence presented for the first time in federal court.’” *Id.* (quoting *Taylor*, 366 F.3d at 1000). “This we termed, an ‘extrinsic’ challenge to the state court’s determination of fact. *Id.* (quoting *Taylor*, 366 F.3d at 1000). “Under *Taylor*, §§ 2254(d)(2) and (e)(1) are read separately and must not be confused.” *Id.*

Murray raised the question whether *Taylor* was in tension with this Court’s holding in *Cullen v. Pinholster*, 563 U.S. 170 (2011). *See Murray*, 745 F.3d at 999. *Murray* asserted (incorrectly and without analysis) that “*Pinholster* eliminated the relevance of ‘extrinsic’ challenges when we are reviewing state-court decisions under AEDPA, however, because it held that petitioners may introduce new evidence in federal court only for claims that we review *de novo*.” *Murray*, 745 F.3d at 999. The *Murray* court also noted ongoing confusion in the Ninth Circuit over how, precisely, to apply § 2254(d)(2) and § 2254(e)(1) even in light of *Taylor*. *See Murray*, 745 F.3d at 999-1001. Nonetheless, *Murray* made clear that *Taylor* remains good law in the Ninth Circuit. *See id.* at 1001. As the *Murray* panel wrote: “any tension between *Taylor* and our cases or between *Taylor* and limited statements by the Supreme Court will have to be resolved by our court en banc, or by the Supreme Court.” *Id.* *Murray* found it unnecessary to resolve whether *Pinholster* had affected the inquiry, and so the Court “review[ed] [the habeas applicant’s] challenges to state-

court findings that are based entirely on the record for ‘an unreasonable determination of the facts.’” *Id.* (citing 28 U.S.C. § 2254(d)(2) and *Kesser v. Cambra*, 465 F.3d 351, 358 n.1 (9th Cir. 2006) (en banc)).

3. The Ninth Circuit continues to apply *Taylor*, considers it controlling, and has not reconsidered it since *Pinholster* or *Murray*. For example, in *Kipp v. Davis*, a Ninth Circuit panel explicitly reaffirmed *Taylor*’s analysis. *Kipp*, 971 F.3d 939, 953 & nn.12-13 (9th Cir. 2020). The Warden argued that a claim based solely on the state court record should “be evaluated under the more deferential standard set out under 28 U.S.C. § 2254(e)(1).” *Id.* at 953 n.12. The panel rejected that argument explaining it was bound by Ninth Circuit precedent to apply only (d)(2) to “intrinsic” claims. *Id.* And, consistent with its concession that *Taylor* is the law in the Ninth Circuit, the State of Georgia recognized that *Kipp* “appl[ied] *Taylor*” in its Brief in Opposition in this Court last year. Brief in Opposition at 27, *Pye v. Emmons*, No. 23-31 (U.S. Sept. 25, 2023), 2023 WL 6311526.

B. Nine Circuits Hold That § 2254(e)(1) Applies (In Some Fashion) to All Petitions Seeking Relief Under § 2254(d)(2)

In contrast with the Ninth Circuit, nine circuits apply § 2254(e)(1) in some fashion to all petitions seeking relief under § 2254(d)(2). But even in these circuits there is variation in the precise verbal formulations used to describe the interplay between § 2254(e)(1) and § 2254(d)(2).

1. The majority of circuits—the First, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits—appear to simply merge § 2254(d)(2) and § 2254(e)(1) into a single heightened Franken-standard that more or less makes the state court’s overall decision on a (d)(2) claim presumptively correct unless the habeas court is

persuaded by clear and convincing evidence that its decision was wrong in light of the evidence presented. *See Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004) (“Courts have tended to lump the two provisions together as generally indicative of the deference AEDPA requires of state court factual determinations.”).

a. Merging subsections (d)(2) and (e)(1) seems to be the approach in the First Circuit. As the First Circuit explained in *Field v. Hallett*, the standard for making out a (d)(2) claim is “exacting” and requires the petitioner to “rebut[] the presumption of [the] correctness” of the state court’s factual determinations “by clear and convincing evidence.” *Field*, 37 F.4th 8, 16-17 (1st Cir. 2022).

b. The Fourth Circuit appears to follow a similar approach, seemingly merging the two standards into one. According to the Fourth Circuit in *Elmore v. Ozmint*, “[t]he Supreme Court has not decided whether § 2254(e)(1)—an ‘arguably more deferential standard’ than § 2254(d)(2)—‘applies in every case’ involving § 2254(d)(2) review.” 661 F.3d 783, 850 (4th Cir. 2011) (quoting *Wood*, 558 U.S. at 300). But “[a]s our Court has interpreted the two provisions, the § 2254(e)(1) standard has a place in § 2254(d)(2) review: We consider whether the state . . . court based its decisions ‘on an objectively unreasonable factual determination in view of the evidence before it, bearing in mind that factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary.’” *Id.* (quoting *Baum v. Rushton*, 572 F.3d 198, 210 (4th Cir. 2009)).

c. The Sixth Circuit also merges the two standards. As the Sixth Circuit explained in *Michael v. Butts*, “when a state court makes an unreasonable determination of the facts” “we give state-court factual findings a ‘presumption of correctness’ that may only be rebutted by ‘clear and convincing evidence.’” 59 F.4th 219, 225 (6th Cir. 2023)

(quoting 28 U.S.C. § 2254(e)(1)). “And, under this avenue, we ask ‘not whether a federal court believes the state court’s [factual] determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.’” *Id.* (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)).

d. The Seventh Circuit takes a similar approach. In *Shannon v. Hepp*, for example, the Seventh Circuit explained that “[i]n order to show that the state court’s decision was based on an unreasonable determination of the facts, [the habeas applicant] must show that the factual determination in question is unreasonable in light of the evidence presented in the state court proceeding.” 27 F.4th 1258, 1267-68 (7th Cir. 2022). But “[w]e presume that the state court’s factual determination is correct, and it is [the habeas applicant’s] burden to rebut that presumption by clear and convincing evidence.” *Id.* (citing 28 U.S.C. § 2254(e)(1)); *see also Ben-Yisrayl v. Buss*, 540 F.3d 542, 546 (7th Cir. 2008) (similarly merging the standards).

e. This is also the Eighth Circuit’s approach. As the Eighth Circuit held in *Trussell v. Bowersox*, a habeas applicant is “only entitled to federal habeas relief if the state court made ‘an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,’ . . . which requires clear and convincing evidence that the state court’s presumptively correct factual finding lacks evidentiary support.” 447 F.3d 588, 591 (8th Cir. 2006); *see also Stephen v. Smith*, 963 F.3d 795, 800 (8th Cir. 2020) (similarly merging the standards).

f. The Tenth Circuit also merges the standards. As the Tenth Circuit explained in *Smith v. Duckworth*, in conducting a (d)(2) analysis “a state court’s factual findings are presumed correct, and the petitioner bears the burden of rebutting that presumption by ‘clear and

convincing evidence.’” 824 F.3d 1233, 1241 (10th Cir. 2016).

2. The Third, Fifth, and Eleventh Circuits use what might be described as a piecemeal approach to applying § 2254(e)(1) in § 2254(d)(2) cases. In these circuits, the federal habeas court is charged with the task of figuring out what parts of a state court’s “decision” constituted “factual determinations.” Those “factual determinations” are then each individually tested against the “record” to determine whether clear-and-convincing evidence shows them to be wrong. Once each “factual determination” has been tested against the standard in § 2254(e)(1) in this way, the habeas court is supposed to assess whether the overall “decision” was based on an “unreasonable determination of the facts in light of the evidence presented” under § 2254(d)(2).

a. The Eleventh Circuit recently adopted the piecemeal approach in its *en banc* decision in *Pye v. Warden, Georgia Diagnostic Prison*, 50 F.4th 1025, 1034-35 (11th Cir. 2022). In *Pye* the Eleventh Circuit took the position that, in determining whether to grant relief to a habeas applicant under subsection (d)(2), “a state court’s factual determinations are ‘presumed to be correct,’ and the petitioner has the burden of proving otherwise ‘by clear and convincing evidence.’” *Id.* at 1035 (quoting 28 U.S.C. § 2254(e)(1)). Moreover, the Eleventh Circuit explained that “even if a petitioner successfully carries his burden under § 2254(e)(1)—showing by clear and convincing evidence that a particular state-court factual determination was wrong—he does not necessarily meet his burden under § 2254(d)(2).” *Id.* “Even if the state court made a clearly erroneous factual determination, that doesn’t necessarily mean the state court’s ‘decision’ was ‘based on’ an ‘unreasonable determination of the facts in light of the evidence presented in the State court proceeding.’” *Id.* (quoting 28 U.S.C. § 2254(d)(2)).

“Depending on the importance of the factual error to the state court’s ultimate ‘decision,’ that decision might still be reasonable ‘even if some of the state court’s individual factual findings were erroneous—so long as the decision, taken as a whole, doesn’t constitute an ‘unreasonable determination of the facts’ and isn’t ‘based on’ any such determination.’” *Id.* (quoting *Hayes v. Sec’y, Fla. Dep’t of Corr.*, 10 F.4th 1203, 1224-25 (11th Cir. 2021) (Newsom, J., concurring)).

b. The Fifth Circuit uses a similar approach. As the Fifth Circuit explained in *Valdez v. Cockrell*, “[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.” 274 F.3d 941, 951 n.17 (5th Cir. 2001). “For example, a district court may find by clear and convincing evidence that the state court erred with respect to a particular finding of fact, thus rebutting the presumption of correctness with respect to that fact.” *Id.* (citing 28 U.S.C. § 2254(e)(1)). “It is then a separate question whether the state court’s *determination* of facts was unreasonable in light of the evidence presented in the state court proceeding.” *Id.* (citing 28 U.S.C. § 2254(d)(2)). “Thus, it is possible that, while the state court erred with respect to one factual finding under § 2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under § 2254(d)(2).” *Id.*

c. The Third Circuit also uses the piecemeal approach. As the Third Circuit explained in *Lambert v. Blackwell*, “[w]e read § 2254(d)(2) and § 2254(e)(1) together as addressing two somewhat different inquiries.” 387 F.3d 210, 235 (3d Cir. 2004). “[Section] 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.” *Id.*; *see also id.* 236 n.19 (citing and discussing *Valdez* and *Taylor*).

3. Numerous scholars and courts have recognized the circuit conflict over this important question and that this Court’s guidance on this question is sorely needed. *See supra* nn. 1-2; *see also Garcia v. Mitchell*, 2024 WL 2938842, at *6 n.3 (N.D. Ill. June 11, 2024) (“Whether § 2254(d)(2) . . . or § 2254(e)(1) . . . applies to the state appellate court’s two determinations enumerated above is unclear.”); *Campbell v. Green*, 2023 WL 2055980, at *4 n.7 (E.D. Ky. Feb. 16, 2023) (“There is some ambiguity concerning the interplay between §§ 2254(d)(2) and 2254(e)(1).”); *Clemons v. Thomas*, 2016 WL 1180113, at *6 (N.D. Ala. Mar. 28, 2016), *aff’d sub nom. Clemons v. Comm’r, Ala. Dep’t of Corr.*, 967 F.3d 1231 (11th Cir. 2020) (noting that subsections (d)(2) and (e)(1) “appear to contradict one another” and that there is no definitive guidance on how to apply those provisions); *Sparks v. Dunaway*, 2020 WL 1816059, at *2 n.4 (E.D. Ky. Apr. 9, 2020) (lamenting that the interplay between the two provisions remains unresolved); *Lynch v. Blades*, 2017 WL 1960664, at *7 (D. Idaho May 11, 2017) (same); *Angelo v. Wingard*, 2016 WL 1714872, at *5 n.3 (W.D. Pa. Apr. 7, 2016) (same), *report and recommendation adopted sub nom. Collazo v. Wingard*, 2016 WL 1718269 (W.D. Pa. Apr. 28, 2016). A more longstanding or widely recognized circuit conflict, implicating a question that has vexed the lower courts so profoundly, would be hard to find.

* * * * *

The conflict over the interplay between § 2254(d)(2) and § 2254(e)(1) is longstanding and entrenched. As the foregoing shows, the approaches vary even among the circuits that apply subsection (e)(1) to every claim for

relief under subsection (d)(2). This is a longstanding source of confusion on a “complex question” that has confounded the federal courts for decades and poses a serious barrier and complication to habeas applicants and would-be habeas applicants nationwide. This Court has already recognized the importance of resolving this split by previously granting certiorari to resolve this question. It should do so again, in this case, and finally bring uniformity to federal law on this crucial, recurrent question.

II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW IN THIS CASE

This case presents an ideal vehicle to clarify the relationship between subsections (d)(2) and (e)(1), which has continued to confuse scholars and courts. This Court has confronted this question repeatedly, but it has never answered it. Each time, the Court concluded that determining the relationship between subsections (d)(2) and (e)(1) was not necessary to decide the case; it therefore declined to reach the question. *See Burt*, 571 U.S. at 18; *Wood*, 558 U.S. at 300-01; *Rice*, 546 U.S. at 339. This case offers an opportunity to answer this important recurrent question and bring clarity and uniformity to this critically important area of federal law.

1. The question presented is of exceptional legal and practical importance for the more than 10,000 Americans who file habeas petitions each year.⁵ For many of them, like for the petitioner here, the outcome of their habeas petitions will depend upon the correct application of the standards in §§ 2254(d)(2) and (e)(1).

AEDPA is now almost 30 years old, yet “commentators[] and practitioners all continue to

⁵ *See* Federal Judicial Caseload Statistics 2023 Tables (Mar. 31, 2023), <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023-tables>.

struggle to make sense of [these two] provisions dealing with questions of fact in federal habeas proceedings.” Marceau, *supra* note 1, at 387; see *Teti v. Bender*, 507 F.3d 50, 57 (1st Cir. 2007) (“The relationship between § 2254(d)(2) and § 2254(e)(1), both of which apply to state court fact determinations, has caused some confusion.”); *Lambert*, 387 at 235 (“Despite the Supreme Court’s pronouncements in *Miller-El* and *Wiggins*, a comprehensive interpretation of AEDPA’s factual review scheme has yet to emerge from the federal courts.”); 17B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Jurisdiction* § 4265.2 (3d ed. 2024) (“It is not clear how this invitation to decide whether the state fact determinations were reasonable will fit with the presumption that the state fact determinations are correct.”).

2. The Eleventh Circuit’s interpretation of AEDPA is wrong. Correctly interpreted, the entirety of § 2254(e) applies only when a federal habeas court conducts independent factfinding. That is why subsection (e)(2) focuses on the availability of federal evidentiary hearings and why subsection (e)(1) uses a standard—clear and convincing evidence—that is ubiquitous in the context of evidentiary submissions but makes little sense when applied to a cold record.

3. This case is an ideal vehicle to resolve this important question. As the district court concluded below, the question presented is outcome determinative in this case. The district court granted the petitioner a certificate of appealability specifically to address “whether the Court properly applied Sections 2254(d)(2) and 2254(e)(1) of the AEDPA in the Habeas Order when evaluating Petitioner’s ineffective assistance of counsel claim.” App.25a. The district court would not have granted that certificate unless the district court regarded it as at least debatable that the application of solely the

§ 2254(d)(2) standard to petitioner's case might have resulted in a grant of habeas relief. There are no obstacles to the Court's review of the question presented. The district court granted a certificate of appealability on this question, it is purely legal, and the resolution of the question was outcome determinative in the court of appeals below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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