No. 24-255

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

REPLY BRIEF FOR THE PETITIONER

JEFFREY A. FUISZ
LORI B. LESKIN
SHEILA BOSTON
ROBERT GRASS
MINDY GORIN
MAX GOULD
IMMANUEL PETRIKOVSKY
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000

JOHN P. ELWOOD
ANDREW T. TUTT
Counsel of Record
HARRY RUBE
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

NINA-MARIE TAUSCHER
ARNOLD & PORTER KAYE SCHOLER LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 243-4199

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes **Page(s)**

Other Authorities

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

REPLY BRIEF FOR THE PETITIONER

This case is an ideal vehicle to resolve the acknowledged circuit split over the relationship between 28 U.S.C. § 2254(d)(2) and (e)(1) that has bedeviled the lower courts (and this Court) for decades. Though Georgia attempts to deny the split, multiple *amici*, including former federal judges who collectively spent over 100 years on the bench, confirm its reality and importance. The split has persisted for years, shows no signs of resolving itself, and affects thousands of habeas petitioners each year. Under the Eleventh Circuit's approach, habeas petitioners face an insurmountable double-deference standard that effectively renders § 2254(d)(2) meaningless. By contrast, the Ninth Circuit's approach gives independent meaning to both provisions while remaining faithful to AEDPA's text and structure. Only this Court can resolve this entrenched division and bring uniformity to this critical area of law.

This question's importance is undeniable. As *amici* confirm, the correct application of subsections (d)(2) and

(e)(1) has profound legal and practical significance. *See* Brief of Former Federal Judges (Former Judges *Amicus* Br.); Brief for United States Conference of Catholic Bishops and Georgia Catholic Conference; Brief of Eleventh Circuit Federal Defender Capital Habeas Units. This Court's review is all the more urgent because the majority of circuits resolve this question incorrectly, meaning district courts misapply 28 U.S.C. § 2254(e)(1) in thousands of cases every year.

Georgia denies the split's existence only by distorting the language of Ninth Circuit opinions. But the Ninth Circuit still embraces the correct reading of § 2254 despite the error of its sister circuits. And Georgia does not contest that even the circuits that disagree with the Ninth Circuit are mired in confusion about how to correctly apply § 2254(e)(1).

The Ninth Circuit's reading of this statute is undoubtably correct. The Eleventh Circuit's reading imports a redundant and ill-fitting evidentiary standard where it has no place and distorts the statute's fundamental structure. Georgia's best (really only) argument is that (e)(1) has no work to do after *Cullen v. Pinholster*, 563 U.S. 170 (2011). But Georgia's argument misunderstands that decision.

Finally, this case presents a straightforward vehicle to resolve this question. Georgia strains to suggest the Court would have to decide thorny factual questions to determine whether the district court misapplied (e)(1). But that is flat wrong and mistakes how this Court reviews legal questions that come before it. The district court, confronting the extensive evidentiary record, granted a certificate of appealability ("COA") because it determined it is possible that its application of (e)(1) in this case changed the outcome. This Court can grant certiorari, hold that the district court should not have applied (e)(1), and remand to permit the district court to

determine in the first instance how its application of (e)(1) affected its decision.

Only this Court can resolve the longstanding conflict over this question. Review is warranted.

ARGUMENT

I. THE CIRCUIT SPLIT IS ENTRENCHED AND EXCEPTIONALLY IMPORTANT

1. This case presents a longstanding and widely acknowledged split. Lower courts, legal scholars, and the former federal judges writing as *amici*—a group that includes former Judge Kozinski, who cemented the circuit split when he authored *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004)—confirm that the split endures and "shows no signs of resolving itself." Former Judges *Amicus* Br. 9; Pet. 3-5 nn.1-2. Georgia's attempt to deny the existence of a circuit split is inexplicable, given that it conceded the existence of the split before this Court just last year, *see* Brief in Opposition at 6, 35, *Pye v. Emmons*, 144 S. Ct. 344 (2023) (No. 23-31), 2023 WL 6311526, and now claims that "[n]othing has changed since *Pye*," Opp. 21. On this point, petitioner agrees. The circuit split still exists and must be resolved.

Ninth Circuit law remains clear: a habeas court cannot apply (e)(1) in a case seeking (d)(2) review of a state trial court determination based solely on the state court record. Georgia claims that the Ninth Circuit has "stepped back from this contrary view." Opp. 14. But Georgia does not point to a single Ninth Circuit case that has held that (e)(1) applies in (d)(2) cases based solely on the state court record.

Georgia bases its argument entirely on *Murray v. Schriro*, 745 F.3d 984 (9th Cir. 2014).[1] But *Murray* held

[1] Georgia also cites two other Ninth Circuit cases that simply flag that *Pinholster* "overruled" *Taylor*'s suggestion that extrinsic

simply that under *Pinholster*, new evidence cannot be introduced in (d)(2) cases—one of the contexts where the Ninth Circuit had previously suggested (e)(1) might apply. *Murray*, 745 F.3d at 999-1000 (calling this an "extrinsic" challenge to the state court factual findings). *Murray* assuredly did not hold that (e)(1) applies to § 2254(d) challenges based purely on the state-court factual record. *See id.* at 1001. Rather than abandoning *Taylor*, *Murray* said that the Ninth Circuit will hold firm in declining to apply (e)(1) to 2254(d) challenges until this Court says otherwise. *See id.*

The Ninth Circuit unequivocally reaffirmed *Taylor* in *Kipp v. Davis*, 971 F.3d 939 (9th Cir. 2020), holding that "where petitioner's challenges are based entirely on the state record, [the Court] would apply section 2254(d)(2)," *id.* at 953 n.12. Georgia tries to confuse the issue by claiming that *Taylor* "continues to guide the Ninth Circuit's application of *(d)(2)*, not its analysis of the relationship between (d)(2) and (e)(1)." Opp. 15. But *Kipp* expressly rejected the argument that a (d)(2) claim should also be "evaluated under the more deferential standard set out under 28 U.S.C. § 2254(e)(1)," because the panel was bound by the Ninth Circuit's "precedent regarding the section 2254(d)(2) analysis." 971 F.3d at 953 n.12. The Ninth Circuit would not apply (e)(1) to situations where most circuits would. That is the definition of a circuit split regarding the "relationship" between (d)(2) and (e)(1), regardless of how Georgia tries to explain it away.

2. The circuit split is also important. The lower courts would not be crying out for "real guidance about

---

evidence can be considered in a (d)(2) proceeding. *See* Opp. 15 (citing *Prescott v. Santoro*, 53 F.4th 470, 480 (9th Cir. 2022); *Crawford v. Hamilton*, 2024 WL 1042994, at *2 (9th Cir. Mar. 11, 2024)). But whether extrinsic evidence can be considered in a (d)(2) proceeding is a *different question* than whether (e)(1) applies in those proceedings.

how the two [subsections] fit together" if this issue did not affect the more than 10,000 Americans who file habeas petitions each year.[2] *See Hayes v. Sec'y, Fla. Dep't of Corrs.*, 10 F.4th 1203, 1222 (11th Cir. 2021) (Newsom, J., concurring). The district court plainly thought the issue was important when it granted a COA. Pet. App. 56a-59a. As did this Court when it granted certiorari to resolve the question. *See Wood v. Allen*, 558 U.S. 290, 299 & n.1 (2010). Georgia's brief does not dispute that courts and commentators believe this to be an "important issue" that demands this Court's attention. *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1057 (11th Cir. 2024) (Jordan, J., concurring in the judgment). The Court should heed the call.

This Court's silence has left the lower courts mired in confusion about how to apply (d)(2) and (e)(1), even in circuits that wrongly apply both provisions. *See* Pet. 4 n.2, 20 (collecting cases). For example, six circuits wrongly merge (d)(2) and (e)(1) into a single heightened standard, despite this Court's admonition that (d)(2) and (e)(1) should not be combined. *See Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003); Pet. 15-17. And the confusion only continues to mount. *See Harris v. Lumpkin*, 2024 WL 4703371, at *10 (N.D. Tex. Nov. 6, 2024) ("It remains unclear . . . whether § 2254(e)(1) applies in every case presenting a challenge to a state court's factual findings under § 2254(d)(2).").

Georgia argues that the circuit split is unimportant because most cases do not turn on any interpretive difference between (d)(2) and (e)(1). Opp. 16. But it is impossible to know how many state court decisions would have been unreasonable under (d)(2) if the underlying factual findings had not been shielded by (e)(1)'s

---

[2] *See* Admin. Office of U.S. Courts, *Federal Judicial Caseload Statistics 2023 Tables* (Mar. 31, 2023), https://bit.ly/3ZnfmDT.

presumption of correctness. Georgia's statements that the question is "rarely" dispositive or lacks an impact in "almost any case," are tacit concessions that the correct application of (d)(2) and (e)(1) makes a difference in *some* cases. Opp. 16. And judging by the number of cases identified by petitioner and *amici* that have raised this as a point of confusion, that number is surely far larger than Georgia claims.

II. THE DECISION BELOW IS WRONG

Section 2254(e)(1) does not apply in every case where a petitioner seeks relief under § 2254(d)(2). The Eleventh Circuit's rule is unsupported by the structure and text of AEDPA. *Pinholster* says nothing to the contrary.

1. As was exhaustively laid out by the former federal judges' brief, AEDPA's text and structure, its statutory history, and common sense all demonstrate that § 2254(d)(2) is the only standard of review that applies when a petitioner seeks relief solely on the state-court record. *See* Former Judges *Amicus* Br. 15-23. The text of § 2254 indicates that (d)(2) and (e)(1) apply in completely different scenarios. The "clear and convincing evidence" standard of § 2254(e)(1) is a burden of proof of the kind a factfinder uses to assess *new* evidentiary submissions. It makes no sense to apply this standard in a (d)(2) challenge in which a petitioner can rely only on the facts in a cold state-court record. This is why (d)(2) instead contains a standard of appellate review, and asks whether the state court made an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

The statute's structure settles any doubt. "Statutory language must be read in context," *Jones v. United States*, 527 U.S. 373, 389 (1999), and the relevant context for subsection (e)(1) is its companion provision (e)(2), which lays out when a petitioner is entitled to an evidentiary hearing in federal court. There would be no reason for

Congress to group (e)(1) and (e)(2) in the same paragraph unless they were both directed to the same subject: how to adjudicate habeas petitions predicated on new evidence.

The Ninth Circuit's approach is the only way to respect this Court's admonition that it is "incorrect . . . to merge the independent requirements of §§ 2254(d)(2) and (e)(1)." *Miller-El*, 537 U.S. at 341. The Eleventh Circuit's approach effectively makes a failure to satisfy (e)(1) the totality of the (d)(2) inquiry, because a petitioner's "failure to carry his burden under subsection (e)(1) necessarily means that he can't carry his burden under subsection (d)(2)." *Hayes*, 10 F.4th at 1225 (Newsom, J., concurring). As *amici* note, "[a]lthough the Eleventh Circuit believes a petitioner can satisfy (e)(1) without satisfying (d)(2) . . . there does not appear to be a petitioner in any Circuit that has ever done so." Former Judges *Amicus* Br. 15.

2. Georgia pins its entire defense of the Eleventh Circuit's rule on *Cullen v. Pinholster*, 563 U.S. 170 (2011). Opp. 20-21. *Pinholster*—Georgia argues—means (e)(1) will never apply in any context unless it applies in (d)(2) challenges. Opp. 20-21. That is incorrect, but even if it were not, that is not how statutory interpretation is done. The solution to (e)(1) being superfluous would not be to jam it into a context where it clearly should not apply.

And the claim that *Pinholster* makes (e)(1) superfluous unless it applies to (d)(2) challenges is false: (e)(1) continues to apply to every habeas case in which there is an (e)(2) hearing. Section 2254(e)(2) permits federal habeas petitioners to introduce new evidence in limited circumstances. If in that habeas application, the petitioner challenges "a determination of a factual issue made by a State court" it "shall be presumed to be correct" and "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *See* 28 U.S.C. § 2254(e)(1).

Georgia argues that (e)(1) sweeps more broadly because it applies in *all* "proceeding[s] instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Opp. 20 (quoting 28 U.S.C. § 2254(e)(1)). That fails to appreciate that (e)(1) is only triggered when *new evidence* is introduced that challenges "a determination of a factual issue made by a State court." The Federal Rules of Civil Procedure apply to all "civil actions" but that does not mean that every rule applies in every case.

3. Georgia argues that Congress intended (d)(2) and (e)(1) double deference "[*b*]*y design*." Opp. 20. That beggars belief. Congress would not write a statute that asks courts to intuit how to layer two different deference standards onto one another—it would have just explicitly provided a single double-deference standard. The Eleventh Circuit takes the most demanding standard in the law and adds a second layer of deference, making it functionally impossible to meet. That is not what AEDPA's drafters intended.

III. THIS CASE IS AN IDEAL VEHICLE

This case presents an ideal vehicle to clarify the proper relationship of (d)(2) and (e)(1). Georgia belabors this case's factual and procedural history in an effort to obscure what is properly before the Court: a single cleanly presented legal issue. The Court need not wade into the record to determine whether the district court correctly applied (d)(2) and (e)(1) to each of its individual decisions. The Court can simply provide much-needed clarity about the correct relationship between these two provisions and remand to the lower courts, where the correct application of (d)(2) and (e)(1) "has potentially life-and-death ramifications" for petitioner. *See Cave v. Sec'y for Dep't of Corr.*, 638 F.3d 739, 747 n.6 (11th Cir. 2011).

1. The only question before this Court is the purely legal issue of whether (e)(1) applies to (d)(2) challenges

that are based entirely on the state court record. There are no factual or procedural obstacles to reaching that issue. The district court granted a COA on "whether the Court properly applied Sections 2254(d)(2) and 2254(e)(1) of the AEDPA . . . when evaluating Petitioner's ineffective assistance of counsel claim." Pet. App. 25a. The Eleventh Circuit's decision was "limited" to that specific issue, Pet. App. 15a, and it resolved the case by holding that petitioner's "proposed application of § 2254(e)(1) does not comport with the law of [the] Circuit." Pet. App. 20a. The petition presents a single question of law for this Court to resolve.

That fact distinguishes petitioner's case from earlier ones where this Court declined to address this issue. Georgia cites this Court's denial of certiorari in *Pye* as evidence that this question is not certworthy. Opp. 12. But *Pye* was dominated by issues not relevant to the narrow question here, such as the correct application of *Wilson v. Sellers*, 138 S. Ct. 1188 (2018). *See* Pet. at i, *Pye v. Emmons*, 144 S. Ct. 344 (2023) (No. 23-31), 2023 WL 4530427. The four other petitions Georgia cites, Opp. 12, never even raised the issue of the relationship between (d)(2) and (e)(1), and instead involved only the *Wilson* issue raised in *Pye*.[3] Prior petitions that *did* raise this specific issue involved multiple legal issues with fact-intensive applications. *See* Pet. at i, *Howes v. Walker*, 567 U.S. 901 (2012) (No. 11-1011); Pet. at i, *Hoffman v. Cain*, 574 U.S. 1122 (2015) (No. 14-567).

2. This disputed legal question goes to the heart of petitioner's habeas claim. Georgia seeks to minimize the issue's importance by claiming that the district court only

[3] Pet. at i, *Presnell v. Ford*, 142 S. Ct. 131 (2021) (No. 20-7932); Pet. at i, *Esposito v. Ford*, 141 S. Ct. 2727 (2021) (No. 20-7185); Pet. at i, *Tollette v. Ford*, 141 S. Ct. 2574 (2021) (No. 20-6876); Pet. at i, *Meders v. Ford*, 140 S. Ct. 394 (2019) (No. 19-5438).

applied (e)(1) to a "single fact finding," and thus any incorrect application of (e)(1) amounts to a "tiny little error." Opp. 19. But that argument incorrectly assumes that Georgia, the Eleventh Circuit, or this Court, can identify exactly where in the district court's analysis (e)(1) made a difference and where it did not. The district court's orders did not slice up the record and identify every point where the application of (e)(1) affected its analysis. But the district court underscored the issue's importance to its decision by granting a COA on this issue, something it would not have done if it considered the error immaterial to the outcome. While the order granting the certificate singled out two examples of where it applied (e)(1), the order was not enumerating an exclusive list. *See* Pet. App. 53a, 94a-95a, 116a-117a.

Georgia also claims that the district court's prejudice ruling is an independent reason to affirm without reaching the (e)(1) issue. Opp. 18. That ignores the likelihood that the district court's incorrect application of (e)(1) extended to its prejudice analysis. The state court's prejudice determination was based on its finding that the mitigating evidence from Drs. James, Ash, and Garbarino was cumulative of the evidence at trial. Pet. App. 89a, 95a. The district court stated that the state court's prejudice determination was not unreasonable under (d)(2), Pet. App. 104a, but it did not state whether it had accorded (e)(1) effect to the factual findings necessary to reach that conclusion—such as the state court's assessment of the cumulative weight of the mitigating evidence.

Given the district court's view that (e)(1) applied to this case and the sheer number of factual determinations the district court reviewed, the likelihood is that the error's effect was dispositive. Opp. 19. That distinguishes this case from *Wood*, where this Court found it unnecessary to clarify the relationship between (d)(2) and (e)(1) to affirm the denial of habeas relief. *Wood*, 558 U.S.

at 293, 300-01. The district court's grant of a COA belies Georgia's claim that it had a basis to deny relief under either standard. Thus, this case presents no obstacles to addressing this pressing issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JEFFREY A. FUISZ
LORI B. LESKIN
SHEILA BOSTON
ROBERT GRASS
MINDY GORIN
MAX GOULD
IMMANUEL PETRIKOVSKY
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019
(212) 836-8000

JOHN P. ELWOOD
ANDREW T. TUTT
Counsel of Record
HARRY RUBE
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

NINA-MARIE TAUSCHER
ARNOLD & PORTER
KAYE SCHOLER LLP
777 South Figueroa Street
Los Angeles, CA 90017
(213) 243-4199

NOVEMBER 2024