No. 09-1431

In The
Supreme Court of the United States

LORETTA K. KELLY, WARDEN,
Sussex I State Prison,

Petitioner,

v.

LEON JERMAIN WINSTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONER'S REPLY

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CAPITAL CASE

QUESTIONS PRESENTED

1. In reversing the district court's denial of habeas corpus relief to a state prisoner, did the Fourth Circuit deny the state court judgment the deference mandated by 28 U.S.C. § 2254 by holding that the state court's judgment was not an adjudication on the merits and thus entitled to no deference because the state court dismissed the claim without an evidentiary hearing, by confusing the application of §§ 2254(d) and (e)(1), by approving a hearing in federal court contrary to AEDPA, and by accepting, without finding cause and prejudice for the default, new evidence to support a claim of mental retardation which the state prisoner affirmatively had told the state court had been destroyed?

2. In granting habeas corpus relief to a state prisoner, did the Fourth Circuit impermissibly enlarge the Sixth Amendment right to effective assistance of counsel, in conflict with *Strickland v. Washington*, by permitting consideration of evidence which did not exist at the time of counsel's representation?

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PETITIONER'S REPLY

Leon Winston essentially argues that this Court should not grant the petition for a writ of certiorari because, in his opinion, the Fourth Circuit correctly ruled in his favor. He re-words the questions presented because he does not want to address them. He re-casts, and cherry-picks, the Fourth Circuit's opinion because he does not want to confront it. He totally ignores the plain language of the Fourth Circuit's decision stating clearly over and over that the state court's decision was not an adjudication on the merits under the Antiterrorism and Effective Death Penalty Act (AEDPA), and should be ignored, simply because the state court decided the claim without an evidentiary hearing and because Winston presented the federal court with new evidence. He ignores the plain language of the Fourth Circuit which not only punished the state court for its summary dismissal, but then went further to hold that, contrary to decades of precedent, the federal habeas court is free to look at new evidence which the state prisoner had *told the state court did not exist.* Finally, in an alarming display of ignorance about the very theory of IQ-manipulation he convinced the Fourth Circuit to consider, Winston mistakenly charges the Warden with falsely arguing that junk science theory did not exist at the time of his trial counsel's representation.

1. Winston's arguments misread the plain language of the federal habeas statute and misconstrue the Fourth Circuit's holding in his case.

Winston argues that AEDPA does not require a threshold inquiry into the reasonableness of the state court's decision because that inquiry is contained in subsection (d) of 28 U.S.C. § 2254, not in subsection (a). (BIO at 13) (Brief in Opposition). His argument makes no sense. Subsection (a) merely provides that the federal court is permitted to consider only claims of constitutional deprivation, but that is a matter not at issue in Winston's case. No one disputes that he has raised claims of constitutional error.

It is subsections (d)-(i) which govern *how* a federal court must conduct its review of an exhausted claim. It is subsection (d) which provides the threshold requirements: the federal habeas courts may not grant relief unless the state court decision was constitutionally unreasonable or based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1)&(2). As the Warden demonstrated in her petition, the statute and this Court have made this reasonableness inquiry a threshold matter; a prerequisite to relief. Winston has no counter-argument to that obvious observation.

However, the Fourth Circuit decided to jettison § 2254(d) altogether simply because the state court dismissed the claim without a hearing and Winston presented new evidence to the federal court. Because the courts are split on whether summary dismissals

and the presentation of new evidence to the federal court permit such jettisoning of the deference standard, certiorari is compelled in this case.

Winston also says certiorari should not be granted because he agrees with the Warden's position that a state court dismissal without a hearing does not warrant *de novo* review in federal court (BIO at 16), but unfortunately it is not Winston's view that is before this Court for review; rather, it is the Fourth Circuit's judgment. The Fourth Circuit made absolutely clear that the federal habeas court is free to ignore the state court's merits judgment when the state court denies an evidentiary hearing and the prisoner presents new evidence to the federal court. That is a very live issue in conflict in the circuits and in dire need of resolution by this Court.

Winston also mistakenly says that the Fourth Circuit agreed with the Warden that both subsections (d) and (e) of § 2254 should govern the federal habeas court's review. (BIO at 18). In fact, the Fourth Circuit expressly held that subsection (d) would *not* apply in Winston's case. (Pet. App. 46a). It adopted Winston's view (Pet. App. 37a) that only § 2254(e)(1) should apply where the federal court has held a hearing and the prisoner has presented new evidence. (Pet. App. 48a-49a). Certiorari is warranted to resolve the conflict over when and how § 2254(d) and (e) apply where a federal habeas court grants an evidentiary hearing.

Finally, Winston simply misstates the Warden's argument regarding the doctrine of procedural

default. He says the Warden is arguing that the federal court must assess diligence under § 2254(d)(2) before a hearing and then under *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), after a hearing. (BIO at 20). What the Warden has argued is that the issue of procedural default exists apart from the AEDPA in any habeas case where the state prisoner presents the federal court with new claims or new facts. This Court has continued to apply the procedural default doctrine with its "cause and prejudice" exceptions in post-AEDPA cases. *See, e.g.*, *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005) (*per curiam*); *Dretke v. Haley*, 541 U.S. 386, 388 (2004); *Stewart v. Smith*, 536 U.S. 856 (2002) (*per curiam*); *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000).

Indeed, even in the context of the different, albeit related, issue of entitlement to a federal court evidentiary hearing which Winston argues supplanted "cause and prejudice" (BIO at 21), this Court's precedent makes clear how far the Fourth Circuit stepped out of bounds in Winston's case. In *Williams v. Taylor*, 529 U.S. 420 (2000), this Court found the prisoner failed to show the necessary diligence under § 2254(e)(2) to obtain a hearing on a claim that the prosecution had withheld a psychiatric report of Williams' accomplice. Williams did not present the report to the state court. His federal habeas investigator obtained the report and Williams submitted it instead only to the federal court. This Court found that Williams was not diligent because, while still in state court, Williams' counsel had the

sentencing transcript of the accomplice that made repeated reference to the report and its possible exculpatory value to Williams. In order to show diligence, Williams' counsel should not have stopped looking for the report when the prosecutor told him to get a court order, but instead should have obtained a court order. 529 U.S. at 437-440.

Winston's case is virtually indistinguishable. Winston's trial and habeas counsel obtained a high school report classifying him as "mentally retarded." At the time of trial, the school had destroyed all records containing any IQ scores to support the classification. When the school told Winston's habeas counsel that their records had been destroyed, they, like Williams' counsel, failed to pursue it further. They did not ask for a subpoena directed to the psychologist who did the testing and they did not speak to her to see if she had an IQ score to support their claim that trial counsel were ineffective for not pursuing a claim at trial under *Atkins v. Virginia*, 536 U.S. 304 (2002). Winston's same habeas counsel later obtained a copy of an IQ score from the school psychologist *simply by asking her for it*. Winston presented that score for the first time to the federal court and only after an evidentiary hearing had been ordered.

This is why the district court found, just as this Court found in *Williams*, that Winston failed to show the necessary diligence to merit review of the new evidence by the federal habeas court. It is also why

the district court rejected Winston's counsel's "perceived futility" excuse. (Pet. App. 116a, 131a).[1] Indeed, under the facts of Winston's case, his new evidence would have been barred from review in federal court even under the now-discredited "deliberate by-pass" test which this Court abandoned in *Keeney*, 504 U.S. at 5-6.

Certiorari review is compelled in this case because the Fourth Circuit failed to analyze Winston's new evidence under the appropriate standards and instead supplanted them with its own

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[1] Contrary to Winston's description (BIO at 22), there is no dispute about state law on the issue of "cause" to excuse Winston's default. Winston never argued below that he could not have spoken to the school psychologist earlier, or could not have sought assistance from the state court to obtain school records to support his claim. What he argued in the district court was that the state court rarely granted discovery and so it would have been futile for him to have asked. (Pet. App. 106a). The district court properly rejected this outdated excuse. (Pet. App. 116a); *see Smith v. Murray*, 477 U.S. 527, 535 (1986) (perceived futility does not constitute cause for a default). It was the Fourth Circuit that first came up with citations to a statute and a state case decision supposedly holding that no subpoenas are allowed without an evidentiary hearing. (Pet. App. 32a). The problem with the Fourth Circuit's citations is not that they support any dispute over state law; it is, rather, that the statute and case cited by the Fourth Circuit *do not support the proposition for which they were cited*. Moreover, no other authority does either, because the proposition does not exist in Virginia law. There simply was no legal impediment to Winston either talking to the psychologist earlier, or asking for and obtaining from the state court a properly justified subpoena to obtain school records to support his habeas claim in state court.

standard: federal court *de novo* review is required where new evidence is presented and the state court did not hold an evidentiary hearing.

2. Winston's new evidence did not exist at the time of trial and neither did the "Flynn effect" theory of IQ score-subtraction.

The Fourth Circuit remanded Winston's claim of ineffective assistance to the district court for the purpose of re-deciding it in conjunction with both Winston's new evidence of a 66 IQ score and his theory that his pre-existing, above-70 IQ scores should be lowered by application of the "Flynn effect." The Warden argues in her petition that that remand is squarely in conflict with *Strickland v. Washington*, 466 U.S. 668, 689 (1984), because neither the 66 score nor the "Flynn effect" theory of subtracting points from an earned IQ score existed at the time of counsel's representation.

Winston counters in his brief in opposition that the 66 IQ score did exist because his federal habeas counsel later contacted the school psychologist who found in her attic a computer disc with what purports to be a copy of Winston's IQ score on it. However, it is beyond dispute, and Winston does not challenge the fact, that all official school records of the high school IQ testing had been destroyed, and thus were not available, at the time of Winston's trial. It also is beyond dispute that Winston's trial counsel obtained all available records at the time of trial and provided

those records to Dr. Nelson, their expert and one of the premier *Atkins* experts at the time.

Any claim that trial counsel were ineffective under *Strickland* would have to fail. Counsel's investigation is measured for reasonableness within the context of counsel's perspective existing at the time of trial. *Strickland*, 466 U.S. at 689. Counsel are not required to pursue every conceivable line of investigation. *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). A decision not to investigate "must be directly assessed for reasonableness in all the circumstances." *Strickland*, 466 U.S. at 691. Given the fact that Winston's own habeas corpus counsel also relied upon the school's official conclusion that the IQ score did not exist, and did nothing more to find it during all the years of post-conviction litigation, a federal court would be hard pressed to find trial counsel ineffective under *Strickland* for having taken the very same action. Trial counsel obtained all available records from the school and provided those records to their expert. They were required to do no more under the Sixth Amendment as applied in *Strickland* to claims of ineffective assistance of counsel.

With respect to Winston's argument that the "Flynn effect" method of lowering individual IQ scores existed at the time of his trial, he is sorely mistaken. The articles he cites (BIO at 29) establish not that Flynn's proposal to subtract points from an individual's score existed at the time of Winston's trial in 2003, but rather only that Flynn's studies at that time showed generally that IQ scores of *large*

populations were increasing over time. Flynn did not propose accounting for that increase by subtracting points from *individuals' scores* until 2006, three years after Winston's trial. *See State v. Dunn*, 2010 La. Lexis 1218 at *61-72 (La. 2010) (Knoll, J., concurring) (comprehensive compilation and discussion of cases addressing the "Flynn effect" after *Atkins*). The Warden's expert testified in the district court to this effect (JA 1108-09, 1210), and Winston never challenged that historical fact.

The theory of point-subtraction espoused by Winston, and now ordered by the Fourth Circuit to be considered by the district court on remand, is something that simply did not exist at the time Winston's trial counsel represented him. Even today it remains highly controversial in the psychological community, and with no recognition in the profession outside of the death penalty context. *Dunn*, 2010 La. Lexis at *61-72; *see also* L.D. Hagan, E.Y. Drogin, & T.J. Guilmette, *Adjusting IQ Scores For The "Flynn Effect": Consistent With The Standard Of Practice?*, Professional Psychology: Research and Practice, Vol. 39, No. 6, 619-25 (2008); L.D. Hagan, E.Y. Drogin, & T.J. Guilmette, *IQ Scores Should Not Be Adjusted For The Flynn Effect In Capital Punishment Cases*, Journal of Psychoeducational Assessment (July 29, 2010). It certainly never could form the basis for a grant of relief under *Strickland v. Washington*, making the Fourth Circuit's judgment all the more in conflict with this Court's precedents.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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