No. 11-7882

IN THE
SUPREME COURT OF THE UNITED STATES

TERRANCE WILLIAMS,
Petitioner,

v.

JOHN E. WETZEL, Secretary, Pennsylvania Department of Corrections, et al.,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Petitioner argues that, under *Harrington v. Richter*, a federal habeas court cannot deny relief on consideration of any legal reasoning that does not appear in the state court's opinion. Should *certiorari* be granted where the argument was waived below and in any case misreads *Harrington*?

2. Petitioner argues that, under *Cullen v. Pinholster*, a federal habeas court cannot deny relief on consideration of any evidence that was not part of the state court record. Should *certiorari* be granted where the argument was waived below, the evidence in question was in fact part of the state court record, and petitioner in any case misreads *Cullen*?

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COUNTER-STATEMENT OF THE CASE

More than twenty-five years ago, petitioner Terrance Williams was convicted by a Philadelphia jury of a brutal murder – his second – and was sentenced to death. On collateral review a decade later, the state courts rejected Williams' claim that counsel was ineffective for not attempting to portray him as mentally ill and from an abusive home. The state courts based their rulings on the second prong of the *Strickland* ineffective assistance standard, *Strickland v. Washington*, 466 U.S. 668 (1984), finding that Williams was not prejudiced by counsel's conduct of the sentencing hearing. Another decade later, the federal courts – while phrasing their prejudice analysis in different terms and discussing some pieces of evidence that the state courts did not specifically discuss – held that the state court decision was not unreasonable. Now Williams argues that *Harrington v. Richter*, 131 S. Ct. 770 (2011), and *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), which limit the grounds for *granting* federal habeas corpus relief, should instead have limited the grounds for *denying* federal habeas corpus relief. His claims are waived, without factual basis, and legally in error. Review is not warranted.

A. Trial

On Monday, June 11, 1984, Williams and a friend, Marc Draper, both on summer break after their college freshman year, were gambling on a street corner and ran out of money. Williams said he knew a man named Amos who he could extort for money by threatening to expose the man as homosexual. He went to a nearby house and returned with a small sum. Later the man, 56-year-old Amos Norwood, drove by. Williams

flagged him down, and the victim picked up both young men. Before they got in the car, Williams signaled to Draper, his cohort, that this would be a robbery. Draper directed Mr. Norwood to a residential area by a locked cemetery. The robbers forced Norwood to jump the gate and walk inside. By a headstone, they removed his pants, bound and gagged him, and took his wallet, money, and keys. Then Williams announced they were going to "do something." While Draper guarded the victim, Williams went back to the car. Returning with a tire iron and socket wrench, he started to beat Norwood's head. Williams told Draper to join in and handed him the wrench. They bludgeoned Norwood to death. Draper then went to his night-shift summer job. Williams, driving Norwood's car, met up with another friend, Rucker. Williams said he had killed a guy named Amos, displayed blood spatters on his sneakers, and announced his plan to burn Norwood's corpse to destroy fingerprints or other evidence. Williams purchased some gasoline, returned, and incinerated Norwood's remains. The next day, Williams, Draper, and Rucker went gambling using the victim's car and credit card. Williams also gave Norwood's phone calling card number to his friends. *See* Cert. App. 9-10 (Third Circuit opinion); Third Circuit Appendix A15-A16 (District Court opinion) A1195-1210, A1223, A1486-A1519, A1629-30, A1672-75, A1700-10, A1727-35, A1803-36, A2002-21 (trial notes of testimony, i.e., transcripts).

Williams also took numerous additional steps to cover up his culpability. He instructed his friends to lie, inventing a fictional character who supposedly gave them the calling card. He fled on a bus for California, and when he realized police were on his trail, returned and turned himself in through a newspaper columnist and photographer, publicly denying his guilt in a printed story. In prison, he wrote increasingly angry

letters to Draper, demanding that he recant his confession and proposing various exculpatory lies. At trial, Williams testified that a different person (conveniently dead) had been in the car, too, and that he himself had left the car as soon as it became clear that his friends were going to rob the victim. He contended that his letters to Draper were actually dictated to him by Draper, but could not explain why Draper would dictate letters addressed to himself. He admitted lying when he swore in an earlier proceeding that he had not written the letters. He presented friends who took the stand in an effort to shift blame from himself to Draper. One of the friends claimed he had seen Draper dictating to Williams in prison, although in fact they were not housed together there because of a judicial separation order. Another friend supported Williams' claim that he left before the murder, although her testimony concerned a Sunday, while the murder occurred on a Monday. Williams even presented a pair of red-stained sneakers, claiming that these were the shoes his friend Rucker had seen him with after the murder, but that the stains were just ketchup, not blood. But in fact the shoes were a different color than the ones he had shown Rucker, and the ketchup stains were an inaccurate imitation of the blood spatters that Rucker had seen. *See* Cert. App. 10; Third Cir. App. A1382-99, A1524-37, A1570-71, A1675-76, A2113-25, A2185-86, A2194-08, A2235, A2262, A2280, A2304-44, A2451-14, A2533-53, A2683-88, A2706-08, A2728-29, A2956-57. In February 1986, the jury, crediting the evidence of guilt and disbelieving Williams' deceptions, found the defendant guilty. A2927-37.[1]

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[1]Williams' willingness to lie had become an issue even before the trial, when he filed a *pro se* motion to remove his attorney. Counsel made clear that he would diligently represent the defendant, but emphasized his refusal to "suggest to a witness a course of perjured testimony" – apparently the source of Williams' dissatisfaction. Third Cir. App. A236.

B. Sentencing

The penalty hearing followed. Cert. App. 11; Third Cir. App. A2948-3023. There were two aggravating circumstances: that Williams had murdered Norwood while committing a felony (robbery), and that he had a significant history of felony convictions involving the use or threat of violence. 42 Pa. C.S. Sections 9711(d)(6), (9). The Commonwealth sought to present extensive detail about William's prior crimes – a home invasion robbery and a murder – in order to fully illuminate his character. The request was supported by directly controlling state law, *see Commonwealth v. Beasley*, 479 A.2d 460, 465 (Pa. 1984) (permitting admission at capital sentencing of information about prior crimes, beyond a simple description of charges of which the defendant was convicted, in order to show defendant's character). Defense counsel opposed admission of a narrative account of the other crimes, and attempted to exclude any reference at all to the prior murder, on the ground that Williams' cohort Draper had been a prosecution witness in that case, as in this one, and the case was still on appeal. The court was in large part swayed by counsel's argument. Although the prior cases were not excluded altogether, the court limited the evidence to the minimal description necessary to show that the crimes constituted violent felonies as required by the sentencing statute. Third Cir. App. A2941-48.

The jury therefore heard only certain facts concerning the two prior crimes. The first was the home invasion. Williams and a co-defendant broke into the house of a couple in their sixties, the Dorfmans, on Christmas Eve, 1982. During the incident, Williams held a rifle to Mrs. Dorfman's neck, then raised it and fired three times above

Mr. Dorfman's head. Williams was convicted of two counts of felony robbery, burglary, simple assault, unauthorized use of an automobile, and conspiracy. Cert. App. 51-52; Third Cir. App. A2949-53. On cross-examination, defense counsel emphasized that the Dorfmans were not physically injured in the attack, and that Williams was a juvenile at the time. Third Cir. App. A2953-55.

The second crime was a murder. The victim was Herbert Hamilton, age 50, killed in January of 1984 (six months before Williams murdered the victim in this case). Hamilton's body was discovered with a butcher knife protruding from the throat. There were twenty stab wounds, together with several blunt force injuries to the head inflicted by a baseball bat. The victim's body was found in a pool of blood mixed with kerosene and burned-out matches, which had apparently failed to ignite because there was too much blood. Williams was convicted in that offense of third-degree murder, theft, and possession of an instrument of crime. Cert. App. 52-53; Third Cir. App. A2955-57. On cross-examination, counsel emphasized that Draper had testified in that case as part of his plea bargain in this case, and that Williams was 17 years old at the time. Third Cir. App. A2958-61. Redirect examination clarified that Williams committed the Hamilton murder all alone, and that his bloody palm-print was on the baseball bat. Third Cir. App. A2961-63.

Damaging as it was, the prior crimes evidence recited to the jury was only a small part of the evidence contained in the official court records of the Dorfman robbery and the Hamilton murder.[2] The full records made clear the extent of the double life that

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[2] A court clerk brought the files of both cases into the courtroom and testified to their validity. The files were marked as exhibits and admitted into evidence in this case. A2963-2976. The official court record in the Philadelphia court system is referred to as

Williams had masterfully maintained for himself. To the world, he was no street thug; he was the star quarterback of the football team with a brilliant future. Numerous character witnesses in the prior proceedings swore he was the person he projected – not knowing, for example, that he had been taking payment to have sex with the man who became his first murder victim, Herbert Hamilton. After he stabbed and beat Hamilton to death, he used the dead man's bathroom to have a thorough bath and wash off all the blood. Then before leaving the house he took the time to leave a note implicating one of Hamilton's other young lovers as the murderer. The killing behind him, he returned to college for another semester of classes, until summer break, when he killed the victim in this case.

In response to the limited evidence of aggravating circumstances heard by the jury in this case, Williams called several witnesses in mitigation to show that he was well-liked, a good student and an excellent athlete. He had a supportive family (though his mother admitted his step-father had beaten him) and a loyal girlfriend (by whom he had a baby, shown to the jury). She still believed him innocent and could not understand how such a sweet person could have been found guilty. Cert. App. 53-55. In closing argument, defense counsel stressed Williams' youth, and suggested that there was a residual doubt of guilt because Williams' accomplice, Draper, had testified under a plea bargain. Counsel observed that even with life imprisonment, Williams would still never be an active father, and despite being a star athlete, would experience "the brutalities that are associated with prison life." Cert. App. 55. The jury found two aggravating

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the "Quarter Sessions" file and includes transcripts (called the "notes of testimony") and other trial-level materials including pleadings and exhibits. The Dorfman and Hamilton Quarter Sessions files, which were incorporated into the official court record in this case, contained the bulk of the materials that Williams now claims, erroneously, were not available to the state reviewing courts.

circumstances and rejected the mitigation claims, including the claim that William's youth diminished his culpability. Accordingly, a verdict of death was returned. Third Cir. App. A2976-3023; Cert. App. 55-56.

C. State post-conviction review

1. Post-trial and direct appeal: Before formally imposing the jury's sentence, the trial court ordered a pre-sentence investigation and mental health report.[3] In the meantime Williams, represented by new counsel, filed post-trial motions seeking relief from the verdict. He claimed that counsel was ineffective for not presenting more positive character evidence at sentencing – roughly the opposite of his eventual habeas ineffectiveness claim. New counsel submitted a letter report from Williams' former prison superintendent and counselor dated April 13, 1987, showing that his adjustment had been generally satisfactory. Third Cir. App. A3084-3086; A3168-3170. [4]

The trial court conducted an evidentiary hearing on the ineffectiveness claim. Trial counsel testified at the hearing that he was very concerned about similarities between the Dorfman and Hamilton crimes and the present murder, and that it was essential to limit details about the prior trials. He explained that he chose to focus his mitigation strategy on community and family members testifying to Williams' good character, in an effort (which succeeded) to avoid opening the door to the admission of further damaging details about Williams' past. *See*, *e.g.*, A3071. After concluding the hearing, the trial court denied the ineffective assistance claim, Third Cir. Suppl. App.

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[3] The resulting reports, Third Cir. Suppl. App. SA794-97, are part of the state court record of this case, contrary to Williams' erroneous contention.

[4] The report, *see* Commonwealth's Penalty Phase Response below, Exhibit VV, was thus part of the state court record, contrary to Williams' erroneous contention.

SA913, and imposed sentence. On direct appeal, Williams did not pursue the issue.

2. State collateral (PCRA) petition and hearing: Ten years later, represented by current counsel, Williams filed a third amended petition under Pennsylvania's Post-Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541 *et seq*.[5] The petition included the penalty-phase ineffectiveness claim he later presented on federal habeas review. He asserted that counsel was ineffective at sentencing for failing to present mitigation evidence of mental illness and abuse, in support of three statutory mitigating circumstances.[6] Third Cir. Suppl. App. SA945. The PCRA court conducted an extensive evidentiary hearing. Williams was unable to produce any evidence contemporaneous with the crime that showed mental illness or abuse; instead, all his evidence proved to be newly created accounts based on his own recent statements. As demonstrated through cross-examination, those accounts were highly suspect. *See* Brief for Appellees (3d Cir. No. 07-9002) at 45-102. During the PCRA hearing, Williams' witnesses were questioned extensively about the Dorfman and Hamilton crimes, including materials that the jury in this case had not been permitted to hear, but that had been made part of the record.

3. PCRA court adjudication: The PCRA court issued an opinion denying

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[5] The federally-funded anti-death-penalty defense team now known as the Federal Community Defender Office (FCDO) represented Williams in state court during the PCRA and its appeal, as well as in the subsequent federal habeas case. It has changed names repeatedly during this case. It was referred to as "Federal Defenders" or "Defenders" below.

[6] That Williams was under the influence of extreme emotional disturbance while murdering, that he was unable to realize what he did was wrong or was incapable of controlling himself while murdering, or that there was some other evidence of mitigation concerning his character and record and the circumstances of the murder. 42 Pa. C.S. §§9711(e)(2), (3), (8).

relief. Cert. App. 125-128. The court noted that, to show trial counsel ineffective for failing to present evidence, Williams had to demonstrate prejudice, *i.e.*, a reasonable likelihood that the jury not only would have found one or more of the claimed statutory mitigating factors (where it found none), but would also have concluded that they outweighed the uncontested aggravating factors. Cert. App. 126-127.

Observing that Williams' mother had testified at sentencing that his stepfather had abused him, the PCRA court found that counsel was not ineffective for failing to put on further evidence of abuse – implicitly discrediting the new evidence, none contemporaneous to the murder, that Williams had presented about other alleged abuse. As for the mental illness claim, the court observed that Williams' mental health testimony at the PCRA hearing, and the post-trial court-ordered mental health report, included damaging aspects that would have undermined the defense mitigation. *Id.; see, e.g.,* Third Cir. App. A3431, A3662-68, A3678, A4050-51. The court's opinion indicated that the trial evidence strongly contradicted Williams' newly claimed mitigating factors, because it showed that Williams had planned and premeditated the murder (contradicting mitigating factor (e)(2)), and that he was conscious of his guilt (contradicting mitigating factor (e)(3)); "he went to great lengths to cover it up by returning to the scene and burning the body." Cert. App. 128. There was no reasonable probability that the newly-presented evidence would have made a difference in the sentence. *Id.* There being no prejudice, held the court, trial counsel was not ineffective.

4. Pennsylvania Supreme Court opinion: The state high court affirmed. Cert. App. 106-108. It reasoned that further investigation at the time of trial would have been unlikely to produce proof of mental illness, since there was no contemporaneous

evidence and at the time Williams himself had denied any mental health problems. Thus, based on a lack of prejudice, trial counsel was not ineffective for failing to further investigate or present evidence of mental illness. Cert. App. 106-107.

The supreme court further held that the PCRA court had properly discredited Williams' new evidence of mitigation, which was significantly undermined by the circumstances of the crime and damaging information in post-conviction mental health reports. Cert. App. 107-108. The supreme court acknowledged that the mitigation case counsel did present was not particularly compelling, Cert. App. 107, but recognized that counsel had little option. While additional character witnesses had testified on Williams' behalf at his prior trials, they began to drop away as the true extent of his violent criminal behavior became clear. Thus, concluded the court, Williams had not met his burden of demonstrating *Strickland* prejudice. App. 107-108.

D. Federal habeas review

Roughly a decade later, represented again by the federal defender office, Williams filed a lengthy habeas corpus petition. The Commonwealth's response included excerpts from the Dorfman and Hamilton files that had been incorporated into the record in this case, and referred to at the PCRA hearing. Commonwealth's Penalty Phase Response, Exhibits GG-UU. Williams did not object to this material or move to strike it.

These exhibits undermined William's ineffective assistance claim by demonstrating, for example, that mental health evaluations performed just before the murder in this case showed that Williams had no signs of mental illness. In addition, some of the same witnesses who, on post-conviction review, testified to Williams'

allegedly horrible childhood, had previously insisted that he came from a loving family background. Such information, along with the powerful evidence of Williams' guilt and deceptions at trial, and the weakness of the new mitigation claims presented on post-conviction review, made clear that Williams was not prejudiced by trial counsel's conduct of the penalty phase – as the state courts had reasonably concluded.

Applying AEDPA, 28 U.S.C. § 2254(d), the federal habeas courts found the state court adjudication not unreasonable. The federal courts recognized that, had trial counsel presented allegedly mitigating evidence of abuse and mental illness, he would have opened the door to rebuttal with damaging evidence from the records of Williams' prior criminal trials. Thus, *Strickland* prejudice could not be shown. Cert. App. 34-46 (Third Circuit); 51-90 (District Court).

REASONS TO DENY THE WRIT

I. *Harrington v. Richter* provides no basis for further review.

Williams maintains that, under *Harrington v. Richter*, the federal courts were precluded from considering any legal argument for upholding the state court ruling, unless the state court ruling itself articulated that argument. The claim is both waived and meritless, and therefore cannot justify the grant of *certiorari*.

First, the claim is not properly before this Court because it was not properly raised below. Williams was aware from the beginning of the federal habeas proceedings that the Commonwealth's briefs did not merely retype the opinions issued by the state courts. While the Commonwealth properly relied on evidence from the state court record, it was free to make arguments based on that evidence that went beyond the points

that the state courts chose to address. Williams knew that the Commonwealth was urging the federal courts to consider legal arguments, such as "opening the door," in addition to those enunciated by the state courts. Williams responded to those arguments on their substance; but he never made the claim that the federal courts must ignore any such arguments altogether, as "extra." Not until after the Third Circuit opinion was released did Williams ever suggest the theory on which he now seeks this Court's review – and even then he merely cited *Harrington* in a footnote. *See* Rehearing Petition, 7/12/11, at 22 n.16. That was too little too late. Williams' claim is therefore not properly presented. *See e.g., Morrison v. Olson*, 487 U.S. 654, 669-670 (1988).

In any case, Williams' theory is specious. *Harrington* held that, "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." 131 S. Ct. at 784. "There is no text in the statute requiring a statement of reasons." *Id.* Williams interprets this to mean that, where a state court's decision is accompanied by an explanation, then the federal habeas court is locked into that explanation, and cannot engage in any reasoning not articulated by the state court itself.

While Williams asserts that his position flows from *Harrington*, it in fact completely contradicts the Court's rationale. As the Court made quite clear, its holding on this point was required by the language of the habeas statute, which provides that the state court adjudication must be upheld unless it "resulted in a decision" that was unreasonable. 28 U.S.C. § 2254(d)(1). It is the *decision*, held the Court, not the reasoning, that must be deferred to. That principle plainly applies whether the state court provides no reasoning, as in *Harrington*, or some reasoning, as here. The state court

decided that there was no *Strickland* prejudice; the federal courts found that the no-prejudice decision was reasonable; that is the end of the matter.

The practical consequences of a contrary approach further demonstrate that Williams' theory is frivolous. If the scope of federal review is dictated by the substance of the state court opinion, then the state courts, to protect their judgments, will have to address a laundry list of every possible legal theory in order to ensure that there will be at least one that finds favor on federal habeas review. Conversely, federal habeas courts will now have to parse every word of the state opinion, in order to ferret out whether the state judges were thinking the same thoughts that everyone else is now thinking. The result will be either endlessly long state court opinions, or none at all.

Nonetheless, Williams maintains that there is a post-*Harrington* circuit split on the question, and that two circuits go his way. That is incorrect. He relies on a Sixth Circuit case and an unpublished Ninth Circuit case. The Sixth Circuit case, *Walker v. McQuiggan*, 656 F.3d 311, 318 (6th Cir. 2011), stated merely that, "[b]ecause the state appeals court clearly explained its reasoning ..., we need not ... hypothesize." That is just a statement of what was obvious even before *Harrington*. What Williams needed the court to say, in order to support his position here, is that, because the state court explained its reasoning, we *cannot go beyond that reasoning*. But the Sixth Circuit did not say that. On the contrary, it granted habeas relief only because it concluded that "*there can be no reasonable argument*" in support of the state court's decision. *Id.* at 322.

The unpublished Ninth Circuit case on which Williams relies is even less helpful to him. In *Kazas v. Woodford*, 436 Fed. Appx. 813 (9th Cir. 2011), the court of appeals –

completely consistently with *Harrington* – held that, *if any* of the rationales identified by the state court for its decision was reasonable, then the decision must be upheld. Williams attempts to twist this unremarkable observation into a holding that, in his words, the federal court "should not look to other possible rationales" not identified by the state court. Cert. Pet. at 17. Once again, the circuit court opinion simply does not say what Williams wants it to say. There is no circuit split.

2. *Cullen v. Pinholster* provides no basis for further review.

Williams maintains that, under *Cullen v. Pinholster*, the federal courts were precluded from upholding the state court decision on the basis of any evidence not addressed by the state court itself. The claim is waived and without factual or legal basis.

First, the claim was not preserved below. Williams asserts that some of the evidence relied on by the courts below was not before the state courts. But Williams knew that copies of these materials had been attached to the Commonwealth's habeas filings and presented to the lower courts. Yet he never objected to these items or moved to strike them in the District Court. His only reference to their status was in the context of his own motion to expand the record to include new mental health reports that he procured at the time of the habeas proceeding. That motion was denied, since his mental status on habeas was irrelevant to the case. Because Williams did not ask the lower courts to issue a ruling on the evidence he now challenges – until his Third Circuit rehearing petition – he cannot ask this Court to do so.

In any case, the evidence in question *was* part of the state court record. The materials to which Williams objects come from the official court files of Williams' other two trials, for the Dorfman burglary and the Hamilton murder. Those files were brought

to court in this case and formally admitted into evidence. Although the jury was not allowed to see the entire contents of these files – at the understandable behest of Williams' lawyer – the materials were properly available to the state reviewing courts, and in fact were heavily used during the PCRA evidentiary hearing.[7]

Finally, Williams is wrong on the law. He contends that a federal habeas court cannot base any part of its ruling on evidence not before the state courts. But *Cullen* did not say that. Rather, the *Cullen* Court held that a state decision may not be deemed unreasonable on the basis of evidence that was not before the state court. 131 S. Ct. at 1398. The courts below did not deem the state decision unreasonable on that basis – or on any other basis. Instead, the courts below upheld the state decision, on the basis of evidence that was available to the state courts even if the state courts did not make a point of discussing all of it. That result simply does not implicate *Cullen*. There is no issue warranting the grant of review.

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[7]Williams also objects to certain newspaper articles published about his trials. But these were matters of public record, and their authenticity has not been challenged. Copies were provided to the courts below for their convenience.

CONCLUSION

WHEREFORE, respondents respectfully request that this Court deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief for Respondents in Opposition to Petition for Writ of Certiorari was duly served by United States Mail, first-class postage prepaid, on

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Date: May 23, 2012