OCTOBER TERM 2011

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED IN THIS CAPITAL CASE

Petitioner is a state prisoner seeking habeas relief from his death sentence under 28 U.S.C. § 2254(d), because trial counsel was ineffective at capital sentencing for failing to investigate and present mitigating evidence of Petitioner's traumatic life history of physical and sexual abuse, and the serious mental disturbances that resulted from that abuse. The state supreme court denied relief in a written opinion explaining its reasons for its ruling that Petitioner was not prejudiced. The federal habeas courts, in holding that the state court's no-prejudice ruling was "reasonable" under § 2254(d)(1), relied upon evidence that was not before the state court and a rationale that was not present in the state court's opinion. The questions presented are:

1. Does Harrington v. Richter, 131 S.Ct. 770 (2011), which interpreted § 2254(d)(1) as requiring federal habeas courts to determine what arguments or theories could have supported the state court judgment when the state court ruling is unexplained, also apply when the state court has explained the basis for its ruling, a question that has divided the Courts of Appeals?

2. Should this Court grant certiorari, vacate the Third Circuit Court of Appeals' ruling, and remand for reconsideration in light of Cullen v. Pinholster, 131 S.Ct. 1388 (2011) – which was decided after the Third Circuit issued its opinion – where the Third Circuit assessed reasonableness under § 2254(d)(1) in the light of evidence that was presented for the first time in federal court?

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This Court should grant certiorari and review the Third Circuit's ruling, see § I, infra; or, in the alternative, grant certiorari, vacate the Third Circuit's ruling and remand for reconsideration in light of Cullen v. Pinholster, 131 S.Ct. 1388 (2011), as this Court recently did under materially identical circumstances in Lovell v. Duffey, 132 S.Ct. 1790 (March 26, 2012), see § II, infra.[1]

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE A DISPUTE AMONG THE COURTS OF APPEALS AS TO WHETHER 28 U.S.C. § 2254(D)(1), AS INTERPRETED IN HARRINGTON V. RICHTER, 131 S.CT. 770 (2011), ALLOWS FEDERAL HABEAS COURTS TO DEEM A STATE COURT DECISION "REASONABLE" ON THE BASIS OF ARGUMENTS OR THEORIES THAT WERE NOT PROPOUNDED BY THE STATE COURT IN ITS OPINION EXPLAINING THE BASES FOR ITS RULING.

A. This Argument is Properly Before this Court.

Respondents ("the Commonwealth") erroneously assert that this issue "is not properly before this Court because it was not properly raised below." Brief In Opposition ("BIO") at 11. Although this case was briefed and argued in the Third Circuit before this Court decided Richter, Petitioner anticipated Richter in his Third Circuit arguments, and then expressly raised Richter in his rehearing application.

In his Third Circuit brief, Petitioner argued that the District Court's application of § 2254(d) was improper because, inter alia, the District Court supplied rationales for the state courts that were not included in the state courts' opinions. See Williams v. Beard, No. 07-9002, Initial Brief for Appellant at 90-100 (3d Cir. June 3, 2009) (Argument section captioned as, "The District Court Made Unfounded Assumptions about the Bases for the State Court Rulings"; arguing that the District Court erroneously "fill[ed] in the numerous errors and gaps in the state court opinions" by "creat[ing] multiple unfounded, and contrary-to assumptions about what the state courts 'really meant'"; by engaging in "speculation" about possible bases for the state court rulings that were not articulated

[1]All emphasis herein is supplied, unless otherwise indicated.

by the state courts; by "conjur[ing] this reason [for the state courts' denial] from whole cloth"; and by "assigning made-up" rationales to the state courts).

After the Third Circuit rejected Petitioner's argument and took the same approach as the District Court, Petitioner sought rehearing and rehearing en banc, arguing:

> The Panel Opinion misapplied 28 U.S.C. § 2254(d) by finding that the state court did not unreasonably apply Strickland ... based on rationales never considered, adopted or articulated by the state courts.
>
> * * *
>
> Alternative rationales that buttress a state court's otherwise unreasonable application of Supreme Court precedent have no place in § 2254 analysis. See, e.g., Wiggins, 539 U.S. at 529 (prosecution's interpretation of the post-conviction record ha[d] no bearing on whether the Maryland Court of Appeals decision reflected an objectively unreasonable application of Strickland."). Harrington v. Richter, 131 S.Ct. 770 (2011) does not counsel otherwise. To ensure that federal courts accord AEDPA deference to state court decisions, Richter held that when there is a "silent denial," the federal court must decide whether there exists any objectively reasonable basis to support the state court's decision. It does not permit substitution of a new analysis when the state court addresses the claim.

Williams v. Beard, No. 07-9002, Appellant's Petition for Panel Rehearing and for Rehearing En Banc, at iii, 22 & n.16 (3d Cir. July 12, 2011) (footnote placed in text).

The issue is properly before this Court.

B. There is a Split in the Circuits.

The Commonwealth argues unpersuasively that there is no Circuit split on the question of Richter's application to reasoned state court decisions. See BIO at 13-14. As set forth in the Petition at 15-16, Richter held, and all Circuits agree, that when the state court has not given any reasons for denying relief the habeas court must consider the reasonableness vel non of any "theories [that] could have supported" the state court's denial. 131 S.Ct. at 786. The division in the lower courts has arisen over the question of what to do when the state court provides a rationale for its ruling, with some Circuits holding that they "need not apply" Richter and, instead, look only to the "reasoning [actually] given" by the state court, Walker v. McQuiggan, 656 F.3d 311, 318 (6th Cir. 2011); and

other Circuits holding that even when the state court explains its reasoning the federal courts should "fill any gaps" in that reasoning with hypothetical theories that "could have supported" the state court's ultimate conclusion, Jardine v. Dittman, 658 F.3d 772, 777 (7th Cir. 2011). This Court should grant certiorari to resolve the confusion in the lower courts on this important question about the application of Richter.

II. THIS COURT SHOULD GRANT CERTIORARI, VACATE THE THIRD CIRCUIT'S JUDGMENT, AND REMAND FOR RECONSIDERATION IN LIGHT OF CULLEN V. PINHOLSTER, 131 S.CT. 1388 (2011), WHICH WAS DECIDED AFTER THE THIRD CIRCUIT ISSUED ITS OPINION, BECAUSE THE THIRD CIRCUIT ASSESSED REASONABLENESS UNDER 28 U.S.C. § 2254(D)(1) IN THE LIGHT OF EVIDENCE THAT WAS PRESENTED FOR THE FIRST TIME IN FEDERAL COURT.

A. This Court's Recent GVR in Lovell v. Duffey, 132 S. Ct. 1790 (2012), Confirms That a GVR Is Appropriate Here.

In Lovell v. Duffey, 132 S. Ct. 1790 (March 26, 2012), this Court issued a GVR order, for reconsideration in light of Pinholster, under circumstances materially identical to those in Petitioner's case. As in Lovell, because Pinholster is an intervening development that the courts below did not fully consider, and because the decision below relied on a § 2254(d)(1) analysis, a GVR is appropriate here.

In Lovell, the Sixth Circuit denied relief on Lovell's ineffective assistance of counsel claim before this Court decided Pinholster. Lovell v. Duffey, 629 F.3d 587 (6th Cir. 2011). Lovell sought certiorari on, inter alia, the following question:

> Whether a federal court can deny habeas relief under 28 U.S.C. § 2254(d)(1) based upon new evidence elicited by the state for the first time at a federal evidentiary hearing?

Lovell v. Duffey, No. 10-10543, Petition for Writ of Certiorari, at i. In seeking this Court's review of this issue, Lovell argued:

> **§ 2254(d)(1) is irrelevant to new claims and evidence presented by the state for the first time at a federal evidentiary hearing**
>
> The decision below was rendered before Cullen v. Pinholster, __ U.S. __, 131

S.Ct. 1388 (2011). Pinholster stands for the proposition that habeas review under 28 U.S.C. § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.

In the instant case, the Sixth Circuit violated Pinholster by applying § 2254(d)(1) to new claims and evidence elicited by the state for the first time at a federal evidentiary hearing. ... The Sixth Circuit violated Pinholster by considering the state's new evidence under § 2254(d)(1) to conclude that the state court was objectively reasonable ....

Lovell v. Duffey, No. 10-10543, Petition for Writ of Certiorari, at 9-10 (boldface in original).

On March 26, 2012, this Court issued the following order in Lovell:

On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of Cullen v. Pinholster, 563 U.S. ___, 131 S. Ct. 2951, 180 L. Ed. 2d 239 (2011).

Lovell v. Duffey, 132 S.Ct. 1790 (2012).

On remand, the Sixth Circuit issued the following opinion:

This court's judgment ... was vacated by the Supreme Court ... and the case remanded for further consideration in light of Cullen v. Pinholster .... The Court in Pinholster held that federal habeas review under 28 U.S.C. § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits." 131 S.Ct. at 1398.

In the case before us, Lovell petitioned ... for habeas relief from her state-court drug conviction, asserting that she had received ineffective assistance of counsel .... Lovell had properly exhausted her ineffective-assistance-of-counsel claim in state court, where the court held an evidentiary hearing and denied the claim on its merits. The district court nevertheless conducted its own evidentiary hearing on Lovell's ineffective-assistance claim, allowing both parties to present evidence that was not in the state-court record. Relying at least in part on the newly presented evidence, the district court conditionally granted habeas relief under § 2254(d)(1).

We reversed the judgment of the district court on appeal and reinstated Lovell's conviction. But in doing so, we also relied on evidence that was not in the state-court record, which Pinholster now prohibits. We therefore REMAND this case to the district court for reconsideration in light of Pinholster.

Lovell v. Duffey, 2012 WL 1506025, *1 (6th Cir. April 30, 2012).

Lovell is on all fours with Petitioner's case. In both cases, the government introduced new

evidence in the federal habeas proceedings that it had not introduced in state court. In both cases, the Court of Appeals, ruling before Pinholster, relied upon the new evidence in deeming the state court decision "reasonable" under § 2254(d)(1). Here, as in Lovell, this Court should grant certiorari, vacate the lower court's judgment, and remand for reconsideration in light of Pinholster.

B. This Argument is Properly Before This Court.

The Commonwealth erroneously argues that this issue is "waived," because Petitioner did not object when the Commonwealth introduced new evidence in federal court. BIO at 14.

Petitioner's failure to object to the Commonwealth's new evidence does not distinguish this case from Lovell, supra, since Lovell did not object to the federal courts' consideration of new evidence. See Lovell, 629 F.3d at 599 n.1 (White, J., dissenting) ("Although this evidence was not before the state courts, the parties have not challenged the procedure employed by the district court below, and both sides cite to the expanded record."). As stated, a GVR is appropriate here for the same reasons it was appropriate in Lovell.

Further, Petitioner still does not challenge the Commonwealth's introduction of new evidence in federal court. That is not the issue here. Instead, Petitioner's argument is that the Court of Appeals erred under Pinholster by considering the new evidence in its § 2254(d) assessment of the reasonableness of the state court decision. As such, Petitioner's case is indistinguishable from Pinholster itself, where the challenge was to the federal courts' consideration of new evidence in their § 2254(d) analysis, not to the fact that new evidence was introduced in federal court. See 131 S.Ct. at 1397-98.

C. The Commonwealth Inaccurately Asserts That it Did Not Introduce New Evidence in Federal Court.

The Commonwealth falsely asserts that it did not introduce new evidence in federal court. According to the Commonwealth, all of the "evidence in question *was* part of the state court record" and "available to the state reviewing courts." BIO at 14-15 (emphasis in BIO). The

Commonwealth's current assertion is contrary to its own admission in the lower courts.

Both the District Court and the Third Circuit, in denying relief under § 2254(d), relied upon a 1984 mental health report by Dr. Marvin Heller. See, e.g., Petition at 9, 11; App. 41, 43-44 (Third Circuit opinion); App. 66, 82, (District Court opinion). In its Third Circuit brief, the Commonwealth admitted that the Heller report was not in the state court record and was not considered by the state courts; instead, it was first introduced in the federal habeas proceedings when the Commonwealth found it in "a rarely-used secure archive":

> The Defenders' PCRA and habeas petitions did not mention Heller's report .... Like [another mental health report, by Dr. Elliot Davis], it was *missing from the [state] court*'s and prosecutor's files. Williams' 1998 PCRA experts did not see it; *nor did the [state] PCRA or Supreme courts*. Undersigned obtained a copy from a rarely-used secure archive while preparing the habeas response, the district court considered it, and it is part of this case and claim.

Williams v. Beard, No. 07-9002, Brief for Appellees at 55 n.48 (3d Cir. Dec. 7, 2009); see also id. at 103 ("The PCRA court did not review Dr. Heller's report because it was then missing; had it, that would have strengthened its findings."); id. at 104 ("Dr. Heller's report ... was missing at the time of the state supreme court's PCRA opinion").

The Commonwealth's about-face on the Heller report is the most brazen of its current misrepresentations, but not the only one. The Commonwealth's arguments appear to be premised upon the assumption that evidence was considered by the state courts and relevant under § 2254(d) if it was in some state court record at some time, even if for a different case. Given the absolute clarity of the fact that the Heller report was new to federal court, other questions about the content of the state court record can be addressed, if necessary, on remand in the lower courts.

D. Pinholster Applies.

The Commonwealth erroneously contends that Pinholster does not apply here. According to the Commonwealth, Pinholster prohibits a federal court from deeming a state court decision unreasonable on the basis of new evidence, but allows a federal court to consider new evidence in

deeming a state court decision reasonable. BIO at 15.

The Commonwealth's one-way-street assertion about Pinholster is contradicted by this Court's GVR in Lovell, supra, where this Court applied Pinholster to a case, like Petitioner's, in which the Court of Appeals considered new evidence in deeming a state court decision reasonable. The Commonwealth's assertion is also contrary to the plain language of Pinholster and § 2254(d) itself, neither of which distinguish new evidence that favors the habeas petitioner in the § 2254(d) analysis from new evidence that favors the government in that regard. See Petition at 18-19.

If the Court takes seriously the Commonwealth's argument that Pinholster applies only when it helps the government, the Court should grant certiorari and permit briefing and argument on this issue. Otherwise, the Court should GVR Petitioner's case, as it did in Lovell.

CONCLUSION

For the reasons stated, this Court should grant certiorari and review the Third Circuit's ruling or, in the alternative, grant certiorari, vacate the Third Circuit's ruling and remand for reconsideration in light of Cullen v. Pinholster.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b) of the Rules of this Court, I hereby certify that I am a member of the Bar of the United States Supreme Court and that on this 6th day of June, 2012, I placed a copy of the above Reply In Support of Petition for Writ of Certiorari in the United States Mail for delivery to counsel for Respondents, John W. Goldsborough, Esq., Office of the Philadelphia District Attorney, 3 South Penn Square, Philadelphia, PA 19107-3499.

Respectfully submitted,

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