No. _____

In The Supreme Court of the United States

LORETTA K. KELLY, WARDEN,

Petitioner,

v.

LEON JERMAIN WINSTON,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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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OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, reversing the judgment of the United States District Court, is reported as *Winston v. Kelly*, 592 F.3d 535 (4th Cir. 2010). The order of the Fourth Circuit denying the Warden's petition for rehearing and for rehearing *en banc* is unpublished. The opinion of the District Court denying the habeas corpus petition is reported as *Winston v. Kelly*, 600 F.Supp.2d 717 (W.D. Va. 2009). The order of the Supreme Court of Virginia dismissing the habeas corpus petition is unpublished. Each of these decisions is reproduced in the Appendix to this petition.

The opinion of the district court granting an evidentiary hearing in the habeas corpus case is reported as *Winston v. Kelly*, 624 F.Supp.2d 478 (W.D. Va. 2008). The opinion of the Supreme Court of Virginia affirming on direct appeal is reported as *Winston v. Commonwealth*, 604 S.E.2d 21 (Va. 2004).

STATEMENT OF JURISDICTION

The Fourth Circuit entered judgment on January 27, 2010, reversing the district court's denial of habeas corpus relief. It denied the Warden's timely petition for rehearing and for rehearing *en banc* on February 23, 2010. The jurisdiction of this Court is timely invoked under 28 U.S.C. §§ 1254(1) and 2101, and by Rule 13(3) of the Rules of this Court. On

March 9, 2010, the Fourth Circuit granted the Warden's motion to stay its mandate pending disposition of this petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

2. Section 2254 of Title 28 of the United States Code provides the standard for a federal court's collateral review of a state court criminal judgment. Subsections (a) through (e) are reproduced in the Appendix to this petition. (App. 176a).

3. Virginia Code § 19.2-264.3:1.1 provides the Virginia General Assembly's definition of mental retardation and procedures by which a person charged with capital murder or sentenced to death may prove a claim of mental retardation. The statute in existence at the time Leon Winston was sentenced is reproduced, in pertinent part, in the Appendix to this petition. (App. 173a).

STATEMENT OF THE CASE

Summary

A jury convicted Leon Winston of the capital murders of Anthony Robinson and his wife, Rhonda. Prior to trial, Winston's two defense counsel obtained all of Winston's school, medical, and other background records. They obtained the appointment of Dr. Evan Nelson, who evaluated Winston for mental retardation.[1] Dr. Nelson concluded that Winston could not prove he was retarded under Virginia's post-*Atkins* statute because Winston's IQ scores all were above the statutory cut-off of 70, and because no sources, including Winston himself, described deficits in adaptive functioning.[2] He also concluded that Winston had an antisocial personality and elements of a psychopath, and that the defense should not use him as an expert. Defense counsel did not present Dr. Nelson or a claim of retardation.

In later state habeas corpus proceedings, Winston's new lawyers argued that trial counsel rendered ineffective assistance of counsel because they decided not to claim that Winston met Virginia's statutory

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[1] Dr. Nelson was the same forensic psychologist who determined that Daryl Atkins was retarded in the case of *Atkins v. Virginia*, 536 U.S. 304, 308 (2002).

[2] The Virginia Supreme Court interprets Virginia Code § 19.2-264.3:1.1's significant sub average intellectual functioning element as requiring an IQ score under 70. *Johnson v. Commonwealth*, 591 S.E.2d 47, 59 (Va. 2004), *vacated on other grounds*, 544 U.S. 901 (2005).

definition of mental retardation. The state habeas court found the claim lacked merit under *Strickland v. Washington*, 466 U.S. 668 (1984). Winston's habeas attorneys presented the claim, with new facts, to the federal district court which conducted a full evidentiary hearing. It found the new facts procedurally defaulted and the state habeas court's decision not unreasonable under 28 U.S.C. § 2254(d).

A panel of the Fourth Circuit, Judges Michael, Gregory, and Duncan presiding, in an opinion authored by Judge Michael, reversed the district court's decision. The Fourth Circuit held that the Virginia habeas court's decision was due no deference under § 2254(d) and remanded for another decision on the claim, although this time as a *de novo* matter and to include Winston's new evidence.

The Crimes

Anthony Robinson was shot eight times and killed in his home on April 19, 2002. His wife, Rhonda, who was pregnant, also was shot eight times and killed in the home. Rhonda's eight-year-old daughter, Niesha, witnessed two black men, one with a "big dog" tattoo, enter the house and take Anthony downstairs, while the other intruder stayed upstairs with Niesha, Rhonda, and Niesha's five-year-old sister, Tiesha. Niesha heard gunshots downstairs and watched as the shooter with the tattoo came back upstairs and shot and killed her mother in the

presence of the two children. *Winston*, 604 S.E.2d at 27.

In addition to Niesha's testimony, the evidence showed that Winston had a "big dog" tattoo and Winston admitted he was present during the murders. *Id.* A cab driver and two women who had driven the killers to and from the Robinsons' house that morning testified. *Id.* A friend of Winston's testified that Winston confessed he had killed the Robinsons and stolen their money and drugs. *Id.*, 604 S.E.2d at 27-28. Forensic testing identified a gun belonging to Winston as the murder weapon. DNA testing of the gun matched Winston to it with a one in six billion chance of it being someone else. *Id.*, 604 S.E.2d at 28. Before trial, and in the presence of his trial counsel, Winston made a lengthy proffer of incriminating facts to the prosecutor in hopes of producing a plea agreement. The proffer was not used at trial, but came into evidence during Winston's state and federal habeas cases in connection with his frivolous claims of innocence. (CA4 JA 479-567).[3]

The Trial

In June of 2003, a jury in the Circuit Court for the City of Lynchburg, Virginia found Winston guilty of capital murder of Anthony Robinson in the commission of attempted robbery, capital murder of Rhonda Robinson in the commission of attempted

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[3] References to the joint appendix filed below in the Fourth Circuit are denoted herein as "(CA4 JA ___)."

robbery, capital murder of Rhonda Robinson during the same transaction in which Winston willfully, deliberately and with premeditation killed another, attempted robbery (2 counts), statutory burglary, maliciously discharging a firearm, and use of a firearm in the commission of a felony (5 counts).

At sentencing, the prosecution presented evidence of Winston's prior criminal record of violence. Defense counsel presented the jury with a vast array of background information about Winston: an employee of the jail to say he behaved well; his mother, grandmother, and great-grandmother to describe his impoverished and neglectful upbringing; and four written evaluations of Winston as a child which demonstrated, and corroborated, the parental neglect. (App. 50a-55a); *Winston*, 624 F.Supp.2d at 512. The jury sentenced Winston to three death sentences for the capital murder convictions, finding both the future dangerousness and vileness aggravating circumstances.

State Post-Trial Proceedings

The Supreme Court of Virginia unanimously affirmed Winston's convictions and sentences on November 5, 2004. *Winston*, 604 S.E.2d at 54. The court specifically found that Winston "deliberately declined to raise a claim of mental retardation under the statutory provisions that apply to him and his trial." *Id.* at 51. On October 3, 2005, this Court denied

certiorari review. *Winston v. Virginia*, 546 U.S. 850 (2005).

With new counsel, Winston claimed on state habeas corpus review in the Virginia Supreme Court that he was mentally retarded based on the record as it existed when his trial counsel had him evaluated by Dr. Nelson. (App. 163a-164a). Winston also claimed that his trial counsel acted ineffectively under *Strickland* when they declined at trial and on appeal to claim that he was retarded. (App. 164a). Winston presented to the state habeas court documents which had been reviewed by Dr. Nelson, including three IQ test scores of 77, 73, and 76, obtained when Winston was seven, ten, and fifteen years of age. (App. 164a). He argued that the scores should be "adjusted" downward by use of a theory called the "Flynn effect" and a standard error of measurement (SEM). (App. 96a-97a). He presented his high school's special education classification of "mentally retarded," but no IQ score supporting the classification. (*Id.*). Winston's state habeas exhibits showed that the school could classify students as mentally retarded, and thus eligible for special education services, even if they achieved IQ scores above 70. (App. 164a). His exhibits also showed that the school had destroyed any supporting records regarding its classification of retardation, including IQ scores, testing data, and the like. (App. 95a).

The Virginia Supreme Court found the claim of retardation barred under its rule in *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974), because Winston could have raised the claim at trial and on appeal,

but deliberately chose not to. (App. 163a-164a). It dismissed his claim of ineffective assistance because the claim presented no evidence that counsel could have used to demonstrate that Winston was mentally retarded under Virginia law. (App. 164a-165a). It explained that a capital murderer must have a qualifying IQ score lower than 70, Winston's scores all were higher than 70, and the school could have classified him "mentally retarded" despite his above-70 IQ scores. (*Id.*). The state court noted, but implicitly rejected, Winston's score-lowering theories. (*Id.*). The Virginia Supreme Court thus found no ineffective assistance under both prongs of the *Strickland* analysis. (App. 164a).

On June 27, 2007, the Circuit Court for the City of Lynchburg ordered that Winston be executed on August 1, 2007, as mandated by Virginia Code § 53.1-232.1.

Federal Habeas Corpus Proceedings

On July 30, 2007, the United States District Court for the Western District of Virginia stayed the execution, and Winston filed a habeas corpus petition under 28 U.S.C. § 2254. On May 30, 2008, the district court ordered an evidentiary hearing on Winston's *Atkins*-related claims over the Warden's objections. *Winston*, 624 F.Supp.2d at 517. The district court believed it had discretion to hold a hearing under *Schriro v. Landrigan*, 550 U.S. 465 (2007). (App. 108a).

Two weeks before the hearing, and for the first time ever, Winston's habeas counsel talked to the psychologist who had tested him in conjunction with the high school's classification. (App. 11a). These were the same habeas attorneys who had told the state court that the records had been destroyed. The psychologist did not remember Winston or her testing (CA4 JA 792), but she found in her attic a floppy disk with a report on it that said Winston had obtained an IQ score of 66. (App. 100a-101a; CA4 JA 822). She was not part of the eligibility committee meeting that determined Winston's classification. (CA4 JA 809). She had no supporting documents such as the IQ test, her scoring, or notes. (CA4 JA 791, 820). She did not know if the report on the disk was used by the school or was a final report, but assumed so. (App. 100a; CA4 JA 818).

At the hearing, the evidence demonstrated that Dr. Nelson advised trial counsel that Winston "ran a drug business, managed his own finances, bought his own clothes, found places to live, knew how to drive and generally navigate" and thus did not demonstrate adaptive deficits. (App. 94a). Dr. Nelson told trial counsel that Winston had an antisocial personality and some elements of psychopathy. (CA4 JA 2115, 2117, 2127). Dr. Nelson "strongly advised defense counsel not to call [him] for sentencing" because there would be a high risk he would add to aggravation. (CA4 JA 2117). Counsel viewed Dr. Nelson's potential testimony as "a minefield." (CA4 JA 2127).

After hearing two days of conflicting evidence from experts, the district court found: Winston's newly-presented IQ score of 66 was a fact that should have been presented to the state court first; Winston's habeas counsel's "perceived futility" excuse for not attempting to discover it was not legally justifiable; and the new evidence thus was procedurally barred from review. (App. 116a, 131a). It held that the ineffective assistance claim must be decided by application of the deference standard in § 2254(d), and upon the record which was before the state court at the time of decision. (App. 122a-131a).[4] It found that the state court had rejected the "Flynn effect" theory of score-reduction.[5] (App. 128a-129a). Finding the

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[4] However, the district court did consider the new IQ score in connection with its determination of whether Winston had shown actual innocence under *Sawyer v. Whitley*, 505 U.S. 333 (1992), as a gateway to consideration of the defaulted facts. (App. 119a-122a). The court found that, "Winston cannot show that no reasonable juror would have found him eligible for the death penalty" because the record was so conflicting on the issue of retardation. (App. 122a).

[5] Virginia Code § 19.2-264.3:1.1 does not mention the "Flynn effect," the SEM, or any other theory by which an individual's earned IQ score may be lowered. At the district court hearing, the Warden's expert explained that the "Flynn effect" was not scientifically recognized or professionally sanctioned. (App. 104a); *see Green v. Johnson*, 515 F.3d 290, 300 (4th Cir.) (Virginia statute does not include these score-adjustments), *cert. denied*, 128 S. Ct. 2527 (2008); *Walton v. Johnson*, 440 F.3d 160, 178 (4th Cir.) (too speculative to reduce, rather than increase, an IQ score for the SEM), *cert. denied*, 547 U.S. 1189 (2006). Winston's expert admitted the "Flynn effect" was controversial

(Continued on following page)

Virginia Supreme Court's decision not unreasonable, the district court denied relief on March 6, 2009.

On January 27, 2010, the Fourth Circuit reversed the district court's judgment, finding that it was error not to consider the newly-presented 66 IQ score. (App. 46a). The Fourth Circuit concluded that when a state court denies an evidentiary hearing, then "comity and federalism do not require deference when material evidence later surfaces in a federal habeas hearing." (App. 37a).[6] It held that when a state court denies a hearing, the State forfeits the exhaustion/procedural default doctrine. It held that § 2254(d) applies only in cases where a federal evidentiary hearing develops no new facts, or where the new facts fundamentally alter the claim. (App. 27a). It found that Winston's new 66 IQ score did not fundamentally alter the claim he had presented to the state habeas court. (App. 27a-32a). It ordered the district court to: re-determine Winston's ineffective

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and that there was no consensus on its use to lower an individual's earned IQ score. (App. 102a).

[6] The Fourth Circuit implied that no deference was due to the Virginia Supreme Court's habeas decision because that court denied Winston's discovery motion. (App. 25a). However, the record shows that Winston did not seek discovery from the state court with respect to any *Atkins*-related claim. (State Habeas Motion for Discovery filed March 24, 2006, in the Virginia Supreme Court shows discovery sought only on *Brady* claims). Indeed, Winston admitted to the district court that he had not sought help from the state habeas court to find any IQ records because he believed such a motion would have been futile. (App. 116a).

assistance claim *de novo*, without deference to the state court decision (App. 46a: "we hold that § 2254(d) does not apply . . . and that the district court should not afford deference to the Supreme Court of Virginia's application of *Strickland*."); and make its own determination of whether the "Flynn effect" should apply in deciding that claim. (App. 48a-49a).

REASONS FOR GRANTING THE WRIT

Introduction

Three years ago, the Court of Appeals for the First Circuit observed that "a comprehensive interpretation of AEDPA's factual review scheme has yet to emerge from the federal courts." *Teti v. Bender*, 507 F.3d 50, 58 (1st Cir. 2007) (referencing AEDPA, the Antiterrorism and Effective Death Penalty Act of 1996), *cert. denied*, 552 U.S. 1287 (2008). This was an understatement: the state of the law and practice in the lower federal courts, with respect to implementation of the "factual review scheme" in federal habeas corpus cases, is in considerable disorder. Given that the Antiterrorism and Effective Death Penalty Act was enacted *fourteen years ago*, the time is long overdue for this Court comprehensively to resolve this clear and persistent schism among the circuits.

The issues in conflict are well known: whether and how § 2254(e)(1)'s presumption of correctness fits with § 2254(d)(2)'s deference to facts, *see Wood v.*

Allen, 130 S. Ct. 841, 848 (2010) (describing but declining to address conflict); whether § 2254(d)'s deference standard applies to new facts permitted to be developed in federal court, *see Holland v. Jackson*, 542 U.S. 649, 653 (2004) (describing but declining to address conflict); *see also Bell v. Kelly*, 129 S. Ct. 393 (2008) (dismissing writ as improvidently granted on the conflict); and whether § 2254(d) deference applies at all if the state court did not hold an evidentiary hearing or did not provide a "full and fair" review. *See Teti*, 507 F.3d at 58 (describing cases in conflict).

To be sure, there are ancillary factual review matters at issue in the courts below: whether a federal habeas court can hold an evidentiary hearing (and develop new facts) as a threshold matter before deciding whether the state court decision was unreasonable under § 2254(d), *see Valdez v. Cockrell*, 274 F.3d 941, 952 (5th Cir. 2001), *cert. denied*, 537 U.S. 883 (2002); whether a federal habeas court's assessment of the prisoner's presentation of new facts is governed by a determination of whether and how they alter the state court claim, or instead is governed by the twin principles of the exhaustion and procedural default doctrines, *compare Morris v. Dretke*, 413 F.3d 484, 494 n. 7 (5th Cir. 2005) (discussing "fundamentally alters" cases) *to Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992) (requiring showing of "cause and prejudice" as gateway to development of new facts in federal habeas review); and whether a state court's summary rejection of a claim without an evidentiary hearing removes application

of § 2254(d)'s deference standard altogether, *see Harrington v. Richter*, 176 L. Ed. 2d 108 (2010) (certiorari granted to decide, among other things, whether a state court's summary dismissal is owed deference under § 2254(d)); *Smith v. Spisak*, 130 S. Ct. 676, 688 (2010) (describing issue but declining to decide it).

Rarely, if ever, has a case come to this Court that would permit resolution of all these issues. This case, however, presents this Court with just such an opportunity.

In addition, the Fourth Circuit's judgment orders the district court to re-determine, as a *de novo* matter, Walker's claim of ineffective assistance of counsel by taking into consideration both his new evidence of a 66 IQ score and his "Flynn effect" theory to reduce his old IQ scores. However, it is uncontested that all school records to support his high school special education classification had been destroyed (and remain so to this day), and thus were not available to either trial counsel or habeas counsel. It is uncontested that his own expert at the federal district court evidentiary hearing agreed that the "Flynn effect" theory of reducing individuals' earned IQ scores was controversial and without scientific consensus. And it is unchallengeable that the "Flynn effect" theory of adjusting an individual's IQ score did not even exist at the time of Winston's trial.

The Fourth Circuit's judgment thus is irreconcilable with, not only the mandate of § 2254(d), but also with the settled standard of *Strickland*, 466 U.S.

at 689, which commands that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689.

I. The Fourth Circuit's judgment conflicts with the decisions of this Court, and the lower courts continue to be in conflict, regarding the application of AEDPA both to claims which a state court decided, and to new facts which the state prisoner presents for the first time to the federal court.

A. AEDPA mandates that federal habeas corpus courts must determine, as a threshold matter, whether a state court's merits adjudication was constitutionally unreasonable.

This Court held long ago that federal habeas rules respecting federalism and finality possess:

> the salutary effect of making the state trial on the merits the "main event," so to speak, rather than a "tryout on the road" for what will later be the determinative federal habeas hearing. There is nothing in the Constitution or in the language of § 2254 which requires that the state trial on the issue of guilt or innocence be devoted largely to the testimony of fact witnesses directed to the elements of the state crime, while only later

> will there occur in a federal habeas hearing a full airing of the federal constitutional claims which were not raised in the state proceedings.

Wainwright v. Sykes, 433 U.S. 72, 90 (1977). Nineteen years later, Congress overhauled § 2254, making mandatory a prohibition that a federal habeas petition filed by a state prisoner "shall not be granted" unless the decision of the state court was constitutionally *unreasonable*. 28 U.S.C. § 2254(d). Congress mandated that the granting of relief would be the exception, not the rule. Its intent in enacting the Antiterrorism and Effective Death Penalty Act in 1996 could not have been more plain:

> Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, see *Williams* v. *Taylor,* 529 U.S. 362, 386 (2000) (opinion of STEVENS, J.) ("Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law"); see also *id.*, at 404 (majority opinion), and "to further the principles of comity, finality, and federalism," *Williams* v. *Taylor,* 529 U.S. 420, 436 (2000). One of the methods Congress used to advance these objectives was the adoption of an amended 28 U.S.C. § 2254(d). *Williams,* 529 U.S., at 404 ("It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved"). As we have explained before, § 2254(d) places "new

> constraints on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Id.*, at 412. Our cases make clear that AEDPA in general and § 2254(d) in particular focus in large measure on revising the standards used for evaluating the merits of a habeas application.

Woodford v. Garceau, 538 U.S. 202, 206 (2003).

Section 2254(d) is not a discretionary matter. It does not provide that the federal courts may apply its standard of deference *unless*, as the Fourth Circuit held in this case, the state prisoner comes up with new evidence in federal court that is compelling or dispositive, much less "material."

Now, fourteen years after Congress revamped the statute, the lower federal courts still are ignoring, or interpreting away, the mandatory standard. As recently as May 3, 2010, this Court had to reverse yet another federal habeas decision which had ignored § 2254(d)'s command:

> It is important at the outset to define the question before us. That question is not whether the trial judge should have declared a mistrial. It is not even whether it was an abuse of discretion for her to have done so – the applicable standard on direct review. The question under AEDPA is instead whether the determination of the [state court] that there was no abuse of discretion was "an

> unreasonable application of . . . clearly established Federal law." § 2254(d)(1).
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> * * *
>
> AEDPA prevents defendants – and federal courts – from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts. Whether or not the [state court's] opinion reinstating Lett's conviction in this case was *correct*, it was clearly *not unreasonable*.

Renico v. Lett, 559 U.S. ___ (2010) (emphases in original) (slip op. at 5, 12) (reversing Sixth Circuit's judgment that disagreed with the state court conclusion on merits of claim of error in granting mistrial and retrial); *see also Thaler v. Haynes*, 130 S. Ct. 1171, 1173 (2010) (reversing Fifth Circuit's judgment that state court decision on *Batson* claim was entitled to no deference); *McDaniel v. Brown*, 130 S. Ct. 665, 672 (2010) (*per curiam*) (Ninth Circuit made "egregious error" in concluding state court decision was unreasonable); *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009) (reversing Ninth Circuit's grant of habeas relief because a state court's decision on a claim of ineffective assistance of counsel must receive "doubly deferential judicial review"); *Waddington v. Sarausad*, 129 S. Ct. 823, 831 (2009) (reversing Ninth Circuit and holding that a federal court under the AEDPA must find state court decision both erroneous and objectively unreasonable before granting relief).

That the deference standard, with its inquiry into the reasonableness of the state court decision, is a

threshold matter, cannot be questioned. Congress placed the deference language at the threshold of the statute. (App. 177a). This Court has described it so: "our cases have [used the 'deference' description] . . . over and over again to describe the effect of the *threshold restrictions* in 28 U.S.C. § 2254(d). . . ." *Lett* (slip op. at 6 n. 1) (emphasis added).

To interpret § 2254(d) as making the reasonableness inquiry some sort of *last* step, only after a re-do in the federal court of the merits of the claim, would defeat the entire purpose of avoiding delays and retrials, and of furthering the interests of comity, finality and federalism. The Fourth Circuit's decision in Winston's case, jettisoning entirely the state court decision without even attempting to make the reasonableness inquiry mandated by § 2254(d), is in direct conflict with the statute and this Court's oft-repeated command that the lower courts must first undertake § 2254(d)'s direction.

Just as in *Lett*, the Virginia "Supreme Court's adjudication involved a straightforward application of our longstanding precedents to the facts of [Winston's] case." *Lett*, slip op. at 9. The Virginia Supreme Court cited this Court's precedent of *Strickland* as governing Winston's claim of ineffective assistance of counsel. (App. 164a). It then applied the two-part test to the facts of Winston's case. It found that all his IQ scores were above the statutory 70 cut-off line, his own exhibits showed that the records to support his special education classification were unavailable, and his own exhibits showed that the classification could

have been supported by a score above 70. Winston had no evidence he was diagnosed as retarded under the statutory definition, and thus failed to demonstrate either deficient performance or actual prejudice under *Strickland*. (App. 163a-165a).

That decision was due "dual layers of deference" by § 2254(d). *Lett*, slip op. at 11, *citing Mirzayance*, 129 U.S. at 1420 (*Strickland* claim due "doubly deferential judicial review" in federal court). The Fourth Circuit's failure to accord the proper deference, and especially its bizarre ruling that the state court decision was due *no deference*, must be addressed lest it become the standard in the Fourth Circuit, adding to the other circuits which have chosen to disregard AEDPA. The Court should grant certiorari to clarify for the lower courts that they are not authorized to disagree with a reasonable state court judgment.

B. A federal habeas corpus court may not set aside the deference standard based upon state court procedures such as summary dismissal or denials of evidentiary hearings.

The Fourth Circuit held that the Virginia Supreme Court's decision – that Winston's trial counsel had not been ineffective under *Strickland v. Washington* – was not "adjudicated on the merits" under § 2254(d), and thus was entitled to no deference, because the state court denied Winston's request for an evidentiary hearing. That holding conflicts with

§ 2254(d), and with this Court and other courts of appeals.

It cannot be denied that summary disposition of state prisoners' applications is the norm in state court post conviction review proceedings. *See* Brief Of *Amici Curiae* State Of Idaho And 30 Other States In Support Of Respondent, *Bell v. Kelly*, 2007 U.S. Briefs 1223 (2008). It also cannot be denied that every circuit except the Ninth, *see Brazzel v. Washington*, 491 F.3d 976, 981 (9th Cir. 2007), and now the Fourth, requires § 2254(d) deference to summary state court decisions. *See* Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 1262 (6th ed. 2009); *Wright v. Secretary for Department of Corrections*, 278 F.3d 1245, 1255 (11th Cir. 2002); *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) (*per curiam*); *Sellan v. Kuhlman*, 261 F.3d 303, 311-12 (2d Cir. 2001); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997); *Rashad v. Walsh*, 300 F.3d 27, 45 (1st Cir. 2002); *Chadwick v. Janecka*, 312 F.3d 597, 606 (3d Cir. 2002); *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999); *Irick v. Bell*, 565 F.3d 313, 320 (6th Cir. 2009); *Brown v. Luebbers*, 371 F.3d 458, 462 (8th Cir. 2004) (*en banc*).

Before 1996, the federal habeas statute permitted a federal habeas court to re-decide a state prisoner's claim if the state court did not hold a hearing or if its procedures were not "full and fair." *Valdez*, 274 F.3d at 949-50 (comparing § 2254(d) under prior law providing for a presumption of

correctness with various exceptions, to the new § 2254 with no exceptions to deference standard). The Anti-terrorism and Effective Death Penalty Act jettisoned those exceptions to the deference requirement. *Id.* *See Chadwick*, 312 F.3d at 606 (then-Judge Samuel Alito finding that, under *Weeks v. Angelone*, 528 U.S. 225, 231-37 (2000), summary dismissals are due deference under § 2254(d)).

Indeed, in reversing the court of appeals for failure to apply the presumption of correctness appearing in the pre-1996 § 2254(d), this Court observed that:

> Section 2254(d) applies to cases in which a state court of competent jurisdiction has made "a determination after a hearing on the merits of a factual issue." It makes no distinction between the factual determinations of a state trial court and those of a state appellate court. Nor does it specify any procedural requirements that must be satisfied for there to be a "hearing on the merits of a factual issue," other than that the habeas applicant and the State or its agent be parties to the state proceeding and that the state-court determination be evidenced by "a written finding, written opinion, or other reliable and adequate written indicia."

Sumner v. Mata, 449 U.S. 539, 546 (1981). Given that the current § 2254(d) and (e) did away altogether with any mention of "a hearing on the merits" in state court, indeed, does not even mention *any procedure* whatsoever in state court, it is not surprising that the

great weight of authority is against the Fourth Circuit's decision in Winston's case.

A grant of certiorari in this case to decide the issue of whether a state court's summary dismissal on the merits is owed the deference mandated by § 2254(d) would complement and round out the Court's grant of certiorari in *Harrington v. Richter*, 130 S. Ct. 1506 (2010), that will decide whether a state court's summary reasoning on the merits is owed deference.

C. Section 2254(d)(2)'s reasonableness requirement and § 2254(e)(1)'s presumption of correctness are part of the same deference to state court judgments that Congress mandated.

This Court, in *Wood*, 130 S. Ct. at 845, held that it would not decide the issue upon which certiorari had been granted: the relationship between the fact-review-standards in § 2254(d)(2) and § 2254(e)(1). It appears that the Fourth Circuit was holding its decision in Winston's case for this Court's decision in *Wood* because, seven days after *Wood* was decided, the Fourth Circuit explicitly noted that this Court did not decide it, and then it proceeded to resolve it in Winston's case. (App. 40a).

The Fourth Circuit held that § 2254(d) would not apply to Winston's case because Winston had presented new evidence in the federal court. It then paradoxically held that § 2254(e)(1)'s presumption of

correctness *would* apply to any facts found by the state court, while at the same time, ordering the district court to re-decide the claim of ineffective assistance of counsel based on a *new fact never presented to the state court*: Winston's new evidence of a 66 IQ score that he had told the state court did not exist. This holding presents the Court with an opportunity to decide the issue left open in *Wood v. Allen*.

The courts of appeal clearly are at odds on the issue of when and how § 2254(e)(1) and § 2254(d)(2) should apply. *See, e.g.*, *Wood v. Allen*, 542 F.3d 1281, 1285, 1304, n. 23 (11th Cir. 2008); *Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir.) (where a habeas petitioner challenges state-court factual findings "based entirely on the state record," the federal court reviews those findings for reasonableness only under § 2254(d)(2), but where a petitioner challenges such findings based in part on evidence that is extrinsic to the state-court record, § 2254(e)(1) applies), *cert. denied*, 543 U.S. 1038 (2004); *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004) ("§ 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"); *Trussell v. Bowersox*, 447 F.3d 588, 591 (8th Cir.) (federal habeas relief is available only "if the state court made 'an unreasonable determination of the facts in light of the evidence presented in the State

court proceeding,' 28 U.S.C. § 2254(d)(2), which requires clear and convincing evidence that the state court's presumptively correct factual finding lacks evidentiary support"), *cert. denied*, 549 U.S. 1034 (2006); *Ben-Yisrayl v. Buss*, 540 F.3d 542, 549 (7th Cir. 2008) (§ 2254(d)(2) can be satisfied by showing, under § 2254(e)(1), that a state-court decision "rests upon a determination of fact that lies against the clear weight of the evidence" because such a decision "is, by definition, a decision so inadequately supported by the record as to be arbitrary and therefore objectively unreasonable" (internal quotation marks omitted)).

This Court must be sensitive to the predicament presented by these issues. The Antiterrorism and Effective Death Penalty Act mandates deference to state court decisions and fact-finding. *Renico*, slip op. at 5. It prohibits evidentiary hearings in federal court absent the most extraordinary circumstances, *e.g.*, where the prisoner has been diligent but the state has thwarted his ability to develop the facts. *See Williams v. Taylor*, 529 U.S. 420 (2000) (withholding evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), about which the prisoner could not have known or presented to the state court). However, the lower federal courts, as the Fourth Circuit has done in Winston's case, have reinterpreted the Act in such a way as to liberally permit the federal courts to authorize new fact-finding, and then to reason backwards to conclude that the state court's decision was not deserving of either deference or a presumption of

correctness. The Act simply does not authorize this "cart before the horse" method of review.

For example, it is illogical to say that the *Sumner* holding, and present-day § 2254(e)(1)'s presumption of correctness (deference to the facts), would apply to a state court's finding of a fact, but that § 2254(d)'s deference to the decision would not. Yet that is exactly what the Fourth Circuit held in Winston's case.

Moreover, it does no good, and is harmful to the States' considerable interest in the principles of federalism and finality which are codified in the AEDPA, for the federal courts to continue to parse the mandated deference into two separate categories – one for the state court record and one for the federal court (real) record. To do so is to nullify AEDPA's clear intent that the trial is the main event, the state court is the main decider, and the federal court is available only as a last resort for relief from extraordinarily rare, *unreasonable* decisions by the state court, made against all presumptions to the contrary.

The lower federal courts' persistence in disobeying AEDPA and this Court's precedents should not be avoided by the familiar judicial device of finding "no merit in any event," or "no harm, no foul" method of upholding a correct state court judgment in order to avoid deciding lower court conflicts. *See Mirzayance*, 129 S. Ct. at 1419 n. 2. Each time a federal court ignores, or disagrees with, a state court's reasonable judgment, and each time it permits new

fact-development without meeting the stringent exceptions in § 2254(e)(2), it does great harm and offense to the principles of comity, federalism and finality of state court criminal judgments.

Winston's case presents the opportunity to decide the issue of when and how § 2254(e)(1) and § 2254(d)(2) will apply to an issue decided by the state court and then presented to the federal court with a new set of facts.

D. New facts presented to a federal habeas corpus court may not be considered unless the state prisoner proves cause and prejudice for his failure to present them to the state court.

The Antiterrorism and Effective Death Penalty Act simply does not address the procedural default doctrine. Congress had no need to address it because it was, and remains, a robust doctrine based on settled precedents from this Court. *See, e.g., House v. Bell*, 547 U.S. 518, 522 (2006). The familiar doctrine generally forecloses federal court review of any state prisoner's claim that was either procedurally defaulted in state court, *see Coleman v. Thompson*, 501 U.S. 722 (1991), or unexhausted and would be barred upon reapplication to the state court. *See Gray v. Netherland*, 518 U.S. 152 (1996). It permits review only upon a showing of "cause" to excuse the default and prejudice flowing therefrom, *Coleman*, 501 U.S. at 747, or a showing of actual innocence. *House*, 547 U.S. at 522.

In *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), this Court held that facts, as well as claims, come under the procedural default doctrine. Presentation of a fact to the federal court that was not presented to the state court will be barred from federal habeas review absent a showing of "cause and prejudice" or "actual innocence." 504 U.S. at 8-9 ("cause and prejudice" accommodates concerns of finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum).

When Winston expressly told the state habeas court that the documents supporting his claim of ineffective assistance had been destroyed by the school, and then, in federal court, presented the federal judge with a document he previously said had been destroyed, he forfeited review of his new facts, exactly as the district court held. The district court's analysis precisely followed this Court's precedents: it found, after a full evidentiary hearing, that Winston did not diligently attempt to develop his facts in state court. (App. 105a-106a, 112a-118a).[7] It thus properly found

[7] The Fourth Circuit's opinion inexplicably misstates Virginia law in its conclusion that Winston could not have requested from the state court a subpoena to obtain any existing school records in the possession of third parties in the absence of an evidentiary hearing. (App. 32a). The Fourth Circuit cited a Virginia statute and a decision of the Virginia Supreme Court (App. 32a), but neither authority in any manner supports that gross misstatement of state law. Discovery in a Virginia habeas corpus case most certainly is *not* limited to instances wherein an evidentiary hearing has been ordered, and no authority so holds. The Virginia Supreme Court Rules, Part 4, govern discovery in habeas corpus proceedings, and the *only* limitations are that the requested discovery must be relevant and authorized by prior

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no "cause" for the default. It also properly found no "actual innocence" under *House*. (App. 118a-122a).

Against this backdrop of historical record and the district court's findings, the Fourth Circuit nevertheless held, in a tortured opinion, that the procedural default doctrine was inapplicable after a federal evidentiary hearing. (App. 26a). It erroneously followed a pre-*Keeney* case, *Vasquez v. Hillary*, 474 U.S. 254 (1986), to hold that, where the new facts do not fundamentally alter the claim, the federal court is free to consider them. (App. 27a).

It then confusingly discussed § 2254(e)(2)'s diligence requirement (App. 34a), a statute which addresses when the federal court may *hold a hearing, not when it may consider defaulted facts*. Rather, the determination of whether defaulted facts can be considered is one governed by exhaustion, default, and "cause and prejudice." The Fourth Circuit's out-of-place discussion of § 2254(e)(2), its reliance on a pre-*Keeney*, pre-"cause and prejudice" case, and its alarming misstatement of state law, all in furtherance of its goal of permitting a re-trial in federal court of a reasonably-decided state court decision, must be reversed.[8]

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leave of court. Rule 4:1(b)(5). Rule 4:9A in fact specifically permits subpoenas directed to third parties for the production of documents. None of the discovery rules are preconditioned on a grant of an evidentiary hearing.

[8] The Fourth Circuit said it was "puzzling" that the Warden contended that the district court found Winston failed to exercise the required diligence to constitute "cause." (App. 35a).

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This case affords a unique opportunity for the Court to resolve the conflict identified in the courts between the Court's established "cause and prejudice" standard barring new facts in federal court, and § 2254(e)(2)'s separate conditions precedent to any evidentiary hearing in federal court. *See Holland*, 542 U.S. at 653 (declining to decide conflict over what deference is due to new facts presented to federal court); *Monroe v. Angelone*, 323 F.3d 286, 297-99 (4th Cir. 2003) (refusing deference to new facts supporting *Brady* claim).

E. AEDPA presents a simple, decisional tree for federal court review of state prisoners' habeas corpus claims.

The lower courts unnecessarily have confused the standard of review mandated by Congress. When presented with a claim of constitutional error by a state prisoner, AEDPA gives the federal court a natural

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However, it was the Fourth Circuit that misread the record when it stated that the district court had found that Winston *had* been diligent. The district court's initial finding of "diligence" was made when it (mistakenly) ordered the evidentiary hearing, *before* Winston came up with his new evidence. *After* the hearing with the new evidence, and *after* Winston failed to satisfy the judge with his excuse for not presenting it to the state court, the district court, in considerable detail, outlined Winston's *lack* of diligence. (App. 110a: "the court exercised its *perceived* discretion to grant an evidentiary hearing" (emphasis added); App. 113a: "he has demonstrated no valid reason why he could not have presented that same evidence to [the state court]").

progression of inquiries. First, the federal court must determine under § 2254(b)(1) whether the prisoner presented his claim to the state court. If so, it must determine under § 2254(d) whether the state court decided the claim on its merits. If there was a merits adjudication, then, under § 2254(d)(1), the federal court must defer to it unless it was contrary to, or an unreasonable application of, clearly established precedent of this Court. *See Renico*, slip op. at 5-6.

If the decision was not unreasonable under (d)(1), the federal court must determine (if at issue) under § 2254(d)(2) whether the state court decision was based on an unreasonable determination of the facts, *e.g.*, where the state court record refutes the state court finding. *See Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (a finding that counsel's records contained information of sexual abuse in client's childhood was unreasonable because the records contained no such information). Section 2254(e)(1) provides the presumption of correctness of state court findings as well as the burden and standard of proof to overcome them.

In either instance under § 2254(d) – the law or the facts reached by the state court – if the federal court determines them to be *unreasonable*, then the federal court is free to give no deference to the state court decision and to give the claim *de novo* review. But if the federal court finds in each instance that the state court was *not* unreasonable, then the federal court must dismiss the claim without any further consideration.

If the prisoner presents the federal court with new claims or facts which he did not present to the state court, *the inquiry regarding those new matters falls outside the scope of § 2254 entirely*. Rather, they are handled by the existing, familiar, settled standards governing all exhaustion and default questions which pre-dated the AEDPA.

Section 2254(e)(2) comes into play if, and only if, the prisoner first has demonstrated that his claim can be reviewed *de novo*, either because the state court dealt with it unreasonably, or by demonstrating cause and prejudice or actual innocence to excuse his failure to present the new matter first to the state court. But even then, if the prisoner requests an evidentiary hearing on his unreasonably decided (or default-excused) claim, the federal court may not grant his request unless the prisoner shows he diligently tried to develop his facts in the state court under § 2254(e)(2), or, under § 2254(e)(2)(A-B), either that he was not diligent but can demonstrate his claim relies on a new rule made retroactive by this Court, *or* that he could not have discovered the facts earlier *and* he is innocent. *See Williams*, 529 U.S. at 432. Thus, even if the state court decision was unreasonable, or a default is excused, Congress even then requires some respect to the state court decision by prohibiting new fact-finding in evidentiary hearings unless the prisoner was diligent in state court, or he can show one of the extraordinary exceptions to the prohibition *against* evidentiary hearings.

AEPDA is not confusing or unclear. The lower federal courts, however, have chafed at its mandate and are reluctant to relinquish any perceived authority to conduct their own *de novo* review of prisoners' claims. This Court must make absolutely clear that, after AEDPA, the federal courts' role in reviewing state prisoners' claims has been dramatically, and appropriately, reduced.

The Fourth Circuit (App. 34a) misapprehended this Court's language in *Schriro v. Landrigan* – that discretion to hold a hearing in federal court which existed before AEDPA "has not changed," 550 U.S. at 473 – as a license for plenary review.[9] At least one other court of appeals similarly has misread this Court's decision. *See Wilson v. Sirmons*, 536 U.S. 1064, 1082 (10th Cir. 2008). This Court needs to clarify that *Landrigan's* holding requires a prisoner first to overcome the prohibition against the granting of a hearing in federal court in § 2254(e)(2), and that even then, the federal court still retains the discretion to deny a hearing under pre-AEDPA standards. 550 U.S. at 473 n. 1 The Fourth Circuit's decision in Winston's case, that it was unconstrained by AEDPA to hold a hearing, even without conducting the § 2254(e)(2) diligence inquiry, was squarely in conflict with *Landrigan*.

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[9] The district court likewise mistook *Landrigan* as a green light to hold a hearing (App. 98a), however, it then correctly applied § 2254(d).

II. The Fourth Circuit's habeas corpus decision conflicts with *Strickland v. Washington* by holding that a claim of ineffective assistance of counsel may be based upon evidence or theories which were non-existent at the time of trial counsel's representation.

The Fourth Circuit's decision remanding for yet another determination by the district court of Winston's claim of ineffective assistance, is so squarely inconsistent with *Strickland v. Washington* and *Knowles v. Mirzayance*, that certiorari and reversal is required. Under § 2254(d), "evaluating whether a rule application [by the state court] was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). *Strickland* claims, governed by a presumption of effectiveness and great deference to counsel's decisions, involve the application of a broadly general rule. *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). *Strickland* claims thus must receive double deference by the federal courts. *Id.*; *Mirzayance*, 129 S. Ct. at 1420.

The Fourth Circuit held that Winston's claim that his trial attorneys were ineffective because they decided not to raise a claim of retardation at trial must be determined by reference to (1) Winston's newly-presented IQ score and (2) his argument that the "Flynn effect" theory should reduce his other IQ scores. However, Winston's own state court exhibits demonstrated that Winston's new IQ score was not

available to trial counsel at the time of their representation, and Winston never has contested this fact. Further, the uncontradicted evidence in the district court (CA4 JA 1108-09) established that the first article even suggesting that an individual's IQ score should be adjusted downward (and only in death penalty cases), was published in 2006, *three years after Winston's trial. See* Flynn, J., "Capital Offenders and the Death Sentence: A Scandal That Must Be Addressed," *Psychology in Mental Retardation and Developmental Disabilities Newsletter,* Vol. 32, No. 3 at 3 (Spring 2007) (referencing Flynn's own novel theory first put forth in 2006 in his article, "Tethering The Elephant: Capital Cases, IQ, and the Flynn Effect," *Psychology, Public Policy, and Law*, Vol. 12, No. 2 at 170 (2006)).

Under *Strickland*, Winston's trial counsel cannot be found ineffective. The reviewing court is prohibited from using hindsight and must assess counsel's performance based on the circumstances existing at the time of the representation. *Strickland*, 466 U.S. at 689.

While *Strickland* cases are usually distinguishable on their facts, in this case, the Fourth Circuit is in direct conflict with the Eleventh Circuit on a virtually indistinguishable case. In *Wood v. Allen*, the court of appeals upheld the state's reasonable determination that trial counsel made a reasonable, strategic decision not to claim mental retardation at trial. 130 S. Ct. at 846-47. Just as in Winston's case, Wood's trial counsel also had an expert's opinion that Wood

was not retarded and who otherwise would not be beneficial to their client's case. *Id.* at 846. The Fourth Circuit's judgment on this issue conflicts not only with AEDPA and this Court's continuing requirement for deference under AEDPA, but also with *Wood v. Allen* and *Strickland v. Washington*. Certiorari review is warranted to ensure both that this Court's *Strickland* standard is followed and that Congress' intent in AEDPA is carried out.

CONCLUSION

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

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Respectfully submitted,

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