No. 14-1516

In the
Supreme Court of the United States

STEPHEN DUNCAN, Warden,
PETITIONER,

v.

LAWRENCE OWENS,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Stephen Duncan, Warden of the Lawrence Correctional Center in Sumner, Illinois, demonstrated in his petition for a writ of certiorari that this Court should reverse the Seventh Circuit's judgment below, either summarily or after briefing and argument, because it violates Congress's prohibition on habeas relief in the absence of clearly established precedent of this Court supporting respondent's claim. *See* 28 U.S.C. § 2254(d)(1). In his brief in opposition, respondent makes three basic arguments: (1) the petition seeks only error correction; (2) the Seventh Circuit's holding was correct on the merits; and (3) the case presents vehicle problems due to potential mootness issues. But this petition presents an important issue of federal law, the Seventh Circuit's judgment was wrong as a matter of law, and the case is not moot. Thus, none of respondent's arguments should dissuade this Court from granting certiorari and either summarily reversing or setting the case for argument.

I. This Case Presents An Important Issue Of Federal Law That Warrants This Court's Review.

This Court has taken a special interest in the proper application of § 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act, ("AEDPA"), 28 U.S.C. § 2254(d)(1), and in giving effect to that statute's emphasis on "comity, finality, and federalism," *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Specifically, in a series of cases, this Court has

repeatedly admonished lower courts that habeas relief may be granted only where a state court's holding was either contrary to, or an unreasonable application of, clearly established precedent of this Court. *See, e.g.,Woods v. Donald*, 135 S. Ct. 1372, 1378 (2015) (per curiam) (no clearly established precedent); *Glebe v. Frost*, 135 S. Ct. 429, 430-32 (2014) (per curiam) (same); *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam) (same); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (same); *Wright v. Van Patten*, 552 U.S. 120, 124-26 (2008) (per curiam) (same; reversing Seventh Circuit); *Hardy v. Cross*, 132 S. Ct. 490, 495 (2011) (per curiam) (reversing Seventh Circuit and focusing on "unreasonable application" prong of § 2254(d)(1)). The absence of a circuit split did not deter this Court from insisting on compliance with § 2254(d)(1) in any of these cases.

Respondent does not and cannot claim otherwise. Indeed, he makes no effort to distinguish this long line of cases, and instead merely recites the general proposition that this Court does not engage in error correction. *See* Brief in Opposition (BIO) at 14-16. But as this Court has shown again and again, the proper application of AEDPA is, in and of itself and even in the absence of a circuit split, worthy of the Court's attention. Because the Seventh Circuit's grant of habeas relief in this case is impossible to reconcile with AEDPA, or with the decisions of this Court construing it, this Court should grant certiorari and either summarily reverse the judgment in this case, or, in the alternative, set the case for full briefing and argument.

II. The State Court's Rejection Of Respondent's Claim Was Neither Contrary To, Nor An Unreasonable Application Of, Any Clearly Established Supreme Court Precedent.

The Seventh Circuit's opinion in this case failed to adhere to § 2254(d)(1)'s bar on relitigating a claim decided on the merits in state court. The only relevant exception to that rule is when the state court's opinion was contrary to, or an unreasonable application of, clearly established Supreme Court precedent. But that exception does not apply in this case because the cases on which the Seventh Circuit relied simply do not address the circumstances here.

Respondent claims the Seventh Circuit made only three legal determinations: (1) "only clearly established violations of a defendant's constitutional rights permit us to reverse a state court decision challenged in a federal habeas corpus proceeding"; (2) "a judge or a jury may not convict a person on the basis of a belief that has no evidentiary basis whatsoever"; and (3) the trial court's "error" was not harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). BIO at 13-14. But even if these assertions were wholly uncontested, they are insufficient to support habeas relief under § 2254(d)(1). To obtain relief, respondent *also* had to show that the state court's rejection of respondent's specific claim was contrary to (or an unreasonable application of) clearly established Supreme Court precedent. Federal courts may not grant habeas relief on the basis of overly general readings of this Court's precedents, *see Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam); or in the absence of

precedent from this Court holding that a specific alleged error violates a defendant's constitutional rights, *see Wright*, 522 U.S. at 124-26; *Musladin*, 549 U.S. at 77. The Seventh Circuit's decision violates this rule.

Respondent claimed that he was denied the right to a fair trial by the trial court's "extrajudicial findings regarding [his] motive to commit murder." Pet. App. at 75a. But the Illinois Appellate Court rejected this claim, and this Court has never held that a defendant's constitutional rights are violated where the factfinder infers a non-element of the crime—as the trial judge did with motive in this case, *see People v. Hobbs*, 220 N.E.2d 469, 472 (Ill. 1966) (holding that motive is not an element of murder).

In contrast, the cases on which respondent and the Seventh Circuit rely stand for the proposition that a defendant's constitutional rights can be violated where the trier of fact is improperly influenced by external factors beyond the evidence introduced at trial. *See Taylor v. Kentucky*, 436 U.S. 478, 485-88 (1978) (no fair trial where prosecution invited jury to infer defendant's guilt from fact that defendant had been arrested and indicted and court provided inadequate instructions regarding burden of proof); *Estelle v. Williams*, 425 U.S. 501, 512 (1976) (no fair trial where defendant compelled to appear before jury in prison attire); *Holbrook v. Flynn*, 436 U.S. 478, 572 (1978) (fair trial despite presence of additional, uniformed security personnel in courtroom). But respondent does not suggest that the trial judge's inference resulted from

such outside influences. Therefore, he cannot properly rely on these cases to obtain habeas relief.

Respondent argues that *Taylor, Williams,* and *Flynn* stand for the general, and undisputed, proposition that a defendant cannot be found guilty on the basis of evidence not in the record. BIO at 19. The Seventh Circuit agreed. Pet. App. at 10a (describing this Court's precedent as holding that "a judge or a jury may not convict a person on the basis of a belief that has no evidentiary basis whatsoever"). But this approach violates this Court's repeated admonishments "against 'framing [its] precedents at such a high level of generality.'" *Smith*, 135 S. Ct. at 4 (2014) (quoting *Jackson*, 133 S. Ct. at 1994 (per curiam)).

In fact, not only has this Court explicitly warned against such generalizations, but it has rejected an attempt to generalize from the holdings of *Williams* and *Flynn* themselves in factual circumstances much closer to them than the circumstances presented here. In *Musladin*, the habeas petitioner argued that his right to a fair trial was violated when members of the victim's family sat in the front row of the gallery during trial wearing buttons with the victim's picture on it. 549 U.S. at 72. The state court denied this claim. *Id.* at 73. The Ninth Circuit subsequently granted habeas relief, holding that the state court's opinion was contrary to the rule of federal law clearly established by *Williams* and *Flynn*. *Id.*

This Court summarily reversed, holding that *Williams* and *Flynn* dealt only with the effect of state-

sponsored courtroom practices on defendants' fair-trial rights—in *Williams*, granting relief due to a requirement that the defendant appear before the jury in prison garb, 425 U.S. at 51, and in *Flynn*, denying relief where extra uniformed security personnel were in the courtroom, 475 U.S. at 572. As a result, this Court held that those cases did not clearly establish that similarly prejudicial *spectator* conduct could violate a defendant's right to a fair trial. *Musladin*, 549 U.S. at 75-76. The distinction between respondent's claim here and the rule established by *Williams* and *Flynn* is even starker: these cases cannot be said to clearly establish any rule applicable to this case, where respondent has never argued that any such prejudicial factor influenced the verdict.

Where, as here, this Court has never clearly held that respondent's claim (or one very close to it) would result in a violation of his federal constitutional rights, the state court did not unreasonably apply clearly established Supreme Court precedent in denying him relief. *See, e.g.*, *Wright*, 522 U.S. at 125; *Musladin*, 549 U.S. at 77; *see also Davis v. Ayala*, 576 U.S. ___, slip. op. at 11 (2015) (state court decision holding a constitutional claim harmless constituted adjudication on the merits, and accordingly, habeas relief could not be granted unless state court's rejection of claim was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent). And because there is no error warranting relief under § 2254(d)(1), respondent's claim that there are fact-specific questions of harmless error at issue, BIO at 1,

likewise fails. Questions of harmlessness are irrelevant where there is no error.

To be sure, the finder of fact must find all *elements* of a crime proven beyond a reasonable doubt based on the evidence introduced at trial. *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 499-500 (2000); *In re Winship*, 397 U.S. 358, 364 (1970). But neither respondent nor the Seventh Circuit cites *Apprendi*, *Winship*, or other precedent in that line of cases. Nor does respondent argue that there was insufficient evidence with respect to any particular element of respondent's crime. Instead, respondent and the Seventh Circuit try to suggest that the trial court found respondent guilty *solely* on a ground without support in the record. BIO at 18, Pet. App. at 6a-7a. That argument, however, is not only forfeited because of respondent's failure to argue the correct legal theory in any federal court, *see, e.g., 14 Penn Plaza LLC v. Pyett,* 556 U.S. 247, 273 (2009) (arguments not raised below are forfeited); *Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (deeming waived argument not raised in federal appeals court or in brief in opposition in this Court), but it is also utterly implausible. There would have been no reason for the trial court to infer motive in the absence of the evidence that respondent in fact committed the crime.

Likewise, the two "facts" that respondent claims were "made up", BIO at 18, by the trial court—that respondent knew the victim was a drug dealer and that he killed the victim for that reason—have nothing to do with the elements of first degree murder. *See* 720 ILCS 5/9-1(a) (1999) (defining first degree murder in

Illinois). As a result, respondent's claim that reviewing the Seventh Circuit's judgment would require this Court to parse the trial judge's comments, BIO at 15-16, is misplaced. Even if it were true that the judge "made up" those facts, respondent cannot prevail because the evidence was sufficient to convict him.

Because the state court's rejection of respondent's claim is neither contrary to, nor an unreasonable application of, any precedent of this Court, respondent is barred from obtaining habeas relief on that claim.

III. The Petition Is Not Moot Because The State Trial Court Retains Jurisdiction To Reverse Its Own Order Granting Respondent A New Trial.

This case is not moot. In Illinois, individual State's Attorneys, elected at the county level, Ill. Const. Art. VI, § 19, represent the State in most criminal prosecutions in the state trial courts, 55 ILCS 5/3-9005(a). The Illinois Attorney General represents the State in the Supreme Court. 15 ILCS 205/4. When the Cook County State's Attorney's Office informed the federal district court that actions it would have to take to retry respondent might open the door to arguments that this petition had become moot, petitioner was obligated to notify this Court of that possibility. As respondent observes, petitioner did so in his second application for a stay to Justice Kagan, which was renewed for consideration by the entire Court. *See* BIO at 16-17. That application was denied. *Duncan v. Owens*, No. 14-1516, Order denying stay of mandate (U.S. July 30, 2015) (No. 15A111) (Kagan, J.); *Duncan*

v. Owens, No. 14-1516, Order denying stay of mandate (U.S. Aug. 13, 2015) (No. 15A111). But the petition is not moot, and respondent does not even argue that it is.

To comply with the Seventh Circuit's judgment, the State had to decide whether to retry respondent before this Court could rule on this petition for certiorari. The first step in such a retrial was to ask the Circuit Court of Cook County to vacate the prior conviction. *See People v. Bailey,* 4 N.E.3d 474, 479 (Ill. 2014). As respondent explains, that court has now vacated the conviction. BIO at 13.

There is no precedent in Illinois expressly precluding or allowing reinstatement of that conviction should petitioner be successful in this Court. But the general rule is that so long as the Illinois trial court retains jurisdiction over the retrial it has the authority to reverse its order granting respondent a new trial. *See People v. Mink*, 565 N.E.2d 975, 978-79 (Ill. 1990) (trial court had jurisdiction to reconsider order granting defendant new trial so long as case was pending before it). Because the better reading of Illinois law would allow reinstatement of respondent's original conviction—and even respondent does not argue otherwise—no vehicle problem prevents this Court from reviewing and reversing the Seventh Circuit's judgment, either summarily or after briefing and argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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