No. 15-986

IN THE

Supreme Court of the United States

VINCENT DAVID WERNER,

Petitioner,

v.

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition for Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. Its approximately 9,200 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous *amicus* briefs each year in the Supreme Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* state that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Due to the late retention of counsel, notice was given eight days prior to the filing date, but the parties have consented to this filing.

NACDL has an interest in ensuring the integrity of the administration of justice in criminal cases, including in post-conviction proceedings. NACDL believes that this case presents important issues relating to the standard by which federal courts review state-court decisions under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

SUMMARY OF THE ARGUMENT

This Court granted certiorari in *Wood v. Allen*, 558 U.S. 290 (2010), to resolve a split among the courts of appeals over "whether, in order to satisfy § 2254(d)(2), a petitioner must establish only that the state-court factual determination on which the decision was based was 'unreasonable,' or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence." *Id.* at 299. Issues specific to that case, however, prevented the Court in *Wood* from answering this question.

In the past six years, this circuit split has persisted, and discord among the lower courts has grown. Federal law on the proper reconciliation of § 2254(d)(2) and § 2254(e)(1) thus remains in a "state of confusion." *Murray v. Schriro*, 745 F.3d 984, 1001 (9th Cir. 2014). And this confusion presents a substantial and unjustified risk that courts resolving federal habeas corpus claims under § 2254(d)(2) will reach different conclusions in different jurisdictions on similar facts.

The decision below illustrates that inequity, for the outcome of this case turns on which of the competing circuit court rules applies. There is no

question that the factual findings of the judge who presided over the state post-conviction proceedings in this case were unreasonable, for the district court based those findings on the state-court judge's erroneous recollection of having presided over petitioner's trial. Accordingly, applying only the "reasonableness" standard in § 2254(d)(2), petitioner is entitled to habeas relief. It was only by adding the burden of § 2254(e)(1)'s "clear and convincing" standard that the district court could plausibly deny petitioner habeas relief.

The need for this Court's review is thus even more compelling now than it was when the Court agreed to hear *Wood*. Further delay in resolving the question presented by this case will only perpetuate the disparate treatment that federal habeas petitioners now experience. *Amicus* NACDL thus urges the Court to grant certiorari and use this case to resolve the ongoing uncertainty over how 28 U.S.C. §§ 2254(d)(2) and (e)(1) fit together.

ARGUMENT

I. *Wood* Did Not Resolve The Confusion Among Lower Federal Courts Over The Standard Applicable To Habeas Challenges To State-Court Factual Findings.

The law is in a "state of confusion" regarding the interplay between § 2254(d)(2) and § 2254(e)(1). *Murray*, 745 F.3d at 1001. As a result, federal courts apply at least two inconsistent rules in federal habeas challenges to the reasonableness of a state court's factual findings under § 2254(d)(2). Resolving this confusion, which only this Court can do, is

necessary to ensure that habeas petitioners in all circuits receive an equal opportunity to challenge the factual reasonableness of their criminal convictions.

A. For A Decade, This Court Has Recognized Confusion Over The Interplay Between § 2254(d)(2) and § 2254(e)(1).

In *Rice v. Collins*, this Court first acknowledged uncertainty over the relationship between § 2254(d)(2) and § 2254(e)(1). 546 U.S. 333, 339 (2006) ("Although the Ninth Circuit assumed § 2254(e)(1)'s presumption applied[,] . . . [w]e need not address that question."). Four years later, the Court in *Wood* acknowledged that "the question of how §§ 2254(d)(2) and (e)(1) fit together" has "divided the Courts of Appeals." *Wood*, 558 U.S. at 299-300. But *Wood* did not reach the issue, "leav[ing] for another day the questions of how and when § 2254(e)(1) applies in challenges to a state court's factual determinations under § 2254(d)(2)." *Id.* at 304-05.

Twice in recent years—in 2013 and 2015—this Court noted the continuing confusion over whether the § 2254(e)(1) presumption of factual accuracy applies to habeas claims of factual unreasonableness under § 2254(d)(2). *See Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) (citing *Wood* and noting "[w]e have not defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)"); *Brumfield v. Cain*, 135 S. Ct. 2269, 2282 (2015) (citing *Burt* and noting that "[w]e have not yet 'defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)'"). Yet neither

Burt nor *Brumfield* resolved the uncertainty first identified in *Rice* and *Wood*.

B. Discord Among Lower Courts Has Only Increased Since *Wood*.

Since this Court decided *Wood*, lower courts "have continued to struggle with the relationship between §§ 2254(d)(2) and (e)(1) when reviewing state-court factual findings under AEDPA." *Murray*, 745 F.3d at 1001. The disorder has become so profound that the Ninth Circuit's own "panel decisions appear to be in a state of confusion as to whether § 2254(d)(2) or (e)(1), or both, applies to AEDPA review of state-court factual findings." *Id.* (collecting cases).

The courts of appeals have attributed this confusion to the "limited statements by the Supreme Court" on the precise relationship between § 2254(d)(2) and § 2254(e)(1). *Id.* For instance, the courts of appeals have observed that the Court in *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 341 (2003), said it is "'incorrect for [a] Court of Appeals, when looking at the merits, to merge the independent requirements of § 2254(d)(2) and (e)(1),'"[2] *Cave v. Sec'y for the Dep't of Corr.*, 638 F.3d

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[2] Language from this Court's subsequent decision in *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231 (2005), further muddied these waters by seeming to undermine its language from only two years earlier in *Miller-El I*. *Id.* at 240 ("Under [AEDPA], Miller-El may obtain relief only by showing the Texas conclusion to be 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' 28 U.S.C. § 2254(d)(2). Thus we presume the Texas court's factual findings to be sound unless Miller-El rebuts the

739, 745 n.4 (11th Cir. 2011) (quoting *Miller-El I*, 537 U.S. at 341), before saying in *Wood* that the Court had "explicitly left open the question whether § 2254(e)(1) applies in every case presenting a challenge under § 2254(d)(2),'" *id.* (quoting *Wood*, 558 U.S. at 300). Similarly, courts have contrasted *Wood*'s *dicta* that § 2254(e)(1) is "arguably more deferential" to state courts than § 2254(d)(2), 558 U.S. at 301, with earlier statements by this Court purportedly "implying [that] § 2254(d)(2)'s standard is more exacting than § 2254(e)(1)'s," leading those courts to wonder whether it is § 2254(d)(2) or § 2254(e)(1) that "imposes a greater burden on the petitioner." *Sharp v. Rohling*, 793 F.3d 1216, 1228 n.10 (10th Cir. 2015) (citing *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)).[3]

The post-*Wood* landscape lays bare the ongoing confusion over how § 2254(d)(2) and § 2254(e)(1) interact. The Third Circuit, for example, reasons that "§ 2254(e)(1) applies to a state court's subsidiary factual findings, and that a challenge under that section may be 'based wholly or in part on evidence outside the state trial record,'" while "§ 2254(d)(2) applies to a state court's ultimate factual findings, and that a challenge under that section is based on 'the totality of the evidence presented in the state-

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'presumption of correctness by clear and convincing evidence.' 28 U.S.C. § 2254(e)(1).").

[3] *Sharp*'s analysis of *Schriro* is flawed. *Schriro* concludes that § 2254(d)(2)'s unreasonableness standard presents "a substantially higher threshold" than the standard of "whether a federal court believes the state court's determination was incorrect"; *Schriro* did not compare § 2254(d)(2) with § 2254(e)(1). 550 U.S. at 473. *Sharp* nevertheless illustrates the confusion among the courts of appeals.

court proceeding.'" *Eley v. Erickson*, 712 F.3d 837, 846 n.11 (3d Cir. 2013) (citation omitted); *cf.* Trans. of Oral Arg. at 49-50, *Wood v. Allen*, 558 U.S. 290 (2010) (No. 08-9156) (Breyer, J., expressing concern over threat of "the habeas corpus jurisprudence of what is a subsidiary and what is a major fact and what is a finding"; Kennedy, J., noting "tremendous confusion" in lower federal courts). The Fifth Circuit, in contrast, holds that "[w]hereas § 2254(d)(2) sets out a general standard by which the district court evaluates a state court's specific findings of fact, § 2254(e)(1) states what an applicant will have to show for the district court to reject a state court's determination of factual issues." *Batchelor v. Cain*, 682 F.3d 400, 405 (5th Cir. 2012). Meanwhile, the Seventh Circuit "review[s] challenges to factual determinations under § 2254(d)(2)'s stringent unreasonable error standard, using § 2254(e)(1)'s clear and convincing evidence standard as 'the mechanism for proving unreasonableness,'" *Collins v. Gaetz*, 612 F.3d 574, 586 n.5 (7th Cir. 2010) (citation omitted).

In short, *Wood* left the lower courts' confusion intact.

C. The Ongoing Circuit Split Risks Different Outcomes For Petitioners With Identical Claims.

The circuit split that persists in the wake of *Wood* is not merely of academic concern. As the Eleventh Circuit has observed, "this important question of statutory construction . . . has potentially life-and-death ramifications for habeas petitioners." *Cave*, 638 F.3d at 747 n.6. Indeed, this case

illustrates that the ongoing differences among the courts of appeals can be dispositive—whether a habeas petitioner prevails may turn entirely on the circuit where he or she files. Thus, in this case, the state post-conviction judge based a credibility finding critical to petitioner's ineffective-assistance-of-counsel claim on the judge's recollection of how petitioner's counsel performed at the original trial. But as petitioner explains, that judge did not preside over petitioner's trial, and there can be no dispute that it is unreasonable for a judge to base a credibility finding on purported observations from a proceeding that the judge never attended. It is therefore safe to assume that courts in the Third, Eleventh, and Ninth Circuits would have granted petitioner relief under § 2254(d)(2). In the Fifth Circuit, in contrast, the addition of § 2254(e)(1)'s "clear and convincing" standard has foreclosed relief. *See* discussion *infra* Part III. The same result may well have obtained in the Fourth and Seventh Circuits, which apply this same rule. *Moore v. Hardee*, 723 F.3d 488, 499 (4th Cir. 2013); *Collins*, 612 F.3d at 586 n.5.

If habeas corpus is to serve as "a safeguard against imprisonment of those held in violation of the law," *Harrington v. Richter*, 562 U.S. 86, 91 (2011), its availability cannot be subject to random chance dictated by geography. At present, it is. This Court should grant certiorari to prevent this fundamentally unfair result.

II. This Case Is An Ideal Vehicle To Resolve The Circuit Split.

Because the success or failure of the habeas petition in this case turns on which of the conflicting lower court rules applies, this case presents an ideal vehicle to resolve the split. The Court could not answer the question in *Wood* because it "assume[d] for the sake of argument that the factual determination at issue should [have] be[en] reviewed . . . only under § 2254(d)(2) and not under § 2254(e)(1)" and then concluded that the factual determination in that case was reasonable under any standard. 558 U.S. at 300-01. Here, in contrast, the Court would have to address the relationship between the two provisions because the disputed factual finding—dependent on an in-person observation that did not occur—is indisputably unreasonable. Indeed, while "[t]he term 'unreasonable' is no doubt difficult to define," *id.* at 301 (internal quotation marks omitted), it must apply to such an obviously untrue factual finding that cannot be debated by "reasonable minds reviewing the record." *Id.* Consequently, the outcome below could survive only if § 2254(e)(1)'s "clear and convincing" standard also applies.

III. Applying The § 2254(e)(1) Presumption To § 2254(d)(2) Claims, As The Fifth Circuit Did Here, Offends Statutory Text And Congressional Intent.

The Fifth Circuit erred by applying the § 2254(e)(1) presumption to claims challenging the reasonableness of a state court's factual findings

under § 2254(d)(2). Indeed, this approach fails on multiple grounds.

First, as the Ninth Circuit explained in *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004), the two sections apply in two entirely different contexts. Section 2254(d)(2)'s reasonableness standard governs when the habeas challenge depends solely on "the evidence presented in the State court proceeding." *Id.* at 999. In contrast, § 2254(e)(1) applies when—unlike in this case—federal habeas review involves material beyond the state-court record. *Id.* at 1000. That is, the former provides the standard for an "intrinsic" review of the existing record, while the latter governs an "extrinsic" review of new evidence. *Id.* at 1000-01; *see also Murray*, 745 F.3d at 1000 (recognizing continuing "force of *Taylor*" in resolving "intrinsic" challenges to state-court factual findings under § 2254(d)(2), and acknowledging continued confusion between and among circuit panels on precisely how to read § 2254(d)(2) and § 2254(e)(1) in that context).

This distinction not only gives independent force to each section, but it makes sense of the language Congress used in each. Section 2254(d)(2) applies when reviewing state-court factual determinations, based on the same body of evidence that had been before that court, for the "reasonableness" of the state court's determination. It would make little sense to ask whether a state court acted reasonably in light of new evidence that was not before that court. Section 2254(e)(1), in contrast, looks not to the reasonableness of the state court's finding, but to the effect of new evidence, requiring that this new

material be "clear and convincing" before upsetting a state-court judgment.

Second, the Fifth Circuit rule, applied to deny habeas relief in this case, would foreclose relief in a whole range of deserving cases, including where (i) "the state court should have made a finding of fact but neglected to do so"; (ii) "the state courts [made] factual findings infected by substantive legal error"; (iii) "the fact-finding process itself [was] defective"; (iv) "the state court [had] before it, yet apparently ignore[d], evidence that support[ed] petitioner's claim"; and (v) "the state courts plainly misapprehend[ed] or misstate[d] the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim." *Taylor*, 366 F.3d at 1000-01; *see also Wiggins v. Smith*, 539 U.S. 510, 528 (2003) (recognizing that state habeas court's "reliance on an erroneous factual finding . . . highlights the unreasonableness of the state court's decision").[4] These are precisely the types of claims for which the habeas writ exists, yet a misplaced reliance on § 2254(e)(1)'s extrinsic, "clear and convincing"

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[4] Petitioner correctly observes in Part II of his Petition that *Wiggins* stands for the proposition that "'where the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material fact[ual] issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable.'" Pet. at 20-22 (quoting *Taylor*, 366 F.3d at 1001). There is no question that the state court in this case "plainly misapprehend[ed] or misstate[d] the record." A court correctly applying *Wiggins*, therefore, would have evaluated that credibility finding solely by reference to § 2254(d)(2) and granted Petitioner's request for habeas relief.

standard in intrinsic, § 2254(d)(2) cases makes these claims effectively unwinnable. This cannot have been Congress' intent.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Association of Criminal Defense Lawyers requests that the petition for a writ of certiorari be granted.

March 3, 2016

Respectfully submitted,

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