No. 18-___

In the Supreme Court of the United States

DEANNA BROOKHART, Acting Warden,
PETITIONER,

v.

ANTHONY D. LEE, SR.,
RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent claimed on state postconviction review that his counsel was ineffective for failing to investigate and call five witnesses at his state-court trial. To support his claim, he submitted affidavits providing their proposed testimony. The state appellate court accepted the affidavits as true and held there was no reasonable probability that respondent would have been acquitted had the witnesses testified in accordance with their affidavits. On federal habeas review, the district court denied relief, but the Seventh Circuit vacated and remanded for an evidentiary hearing, holding that the state appellate court made an unreasonable determination of fact under 28 U.S.C. § 2254(d)(2) by accepting the affidavits as true rather than conducting a hearing to determine whether the affiants might recant or expand upon their proposed testimony.

The question presented is whether a state court makes an unreasonable determination of fact within the meaning of 28 U.S.C. § 2254(d)(2) by assuming the truth of affidavits provided in support of a claim of ineffective assistance of counsel.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Deanna Brookhart, who appears in her official capacity as acting warden of the Lawrence Correctional Center, where respondent Anthony D. Lee, Sr. is incarcerated. In the habeas proceedings below, the respondent was Kevin Kink, the previous warden of that facility.

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PETITION FOR A WRIT OF CERTIORARI

Deanna Brookhart, acting warden of the Lawrence Correction Center in Sumner, Illinois, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, which, in a published opinion, reversed the district court's judgment denying habeas corpus relief pursuant to 28 U.S.C. § 2254 and remanded for an evidentiary hearing on respondent's claim.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit vacating the district court's judgment denying habeas relief and remanding for an evidentiary hearing (App. 1a–7a) is not yet reported in the federal reporter, but is reported at 2019 WL 361813. This opinion amended and superseded the initial opinion of the United States Court of Appeals for the Seventh Circuit (App. 8a–13a) upon the denial of a petition for rehearing. The memorandum opinion and order of the United States District Court for the Northern District of Illinois denying habeas relief and issuing a certificate of appealability on respondent's claim that trial counsel was ineffective (App. 14a–34a) is unpublished but is reported at 2017 WL 5989775. The order of the Supreme Court of Illinois denying leave to appeal (App. 37a) is reported at 65 N.E.3d 845 (Table) (Ill. 2016). The opinion of the Illinois Appellate Court affirming the judgment denying respondent's successive postconviction petition (App. 38a–67a) is reported at 57 N.E.3d 686.

JURISDICTION

This Court's jurisdiction rests upon 28 U.S.C. § 1254(1). The court of appeals denied rehearing and rehearing *en banc* and entered its judgment on January 25, 2019, App. 1a–7a, 35a–36a, amending and superseding its prior decision entered on December 21, 2018.

STATUTORY PROVISION INVOLVED

Section 2254 of Title 28 of the United States Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

The decision below violates both Congress's mandate requiring federal habeas courts to defer to state-court factual determinations unless they are unreasonable in light of the state-court record, 28 U.S.C. § 2254(d)(2), and this Court's settled precedent. The Court has forcefully disapproved this type of error. *See*, *e.g.*, *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (*per curiam*). The Court should grant review or, in the alternative, consider summary reversal of the Seventh Circuit's error concerning the availability of habeas relief under § 2254(d)(2).

1. Following a bench trial in the Circuit Court of Cook County, Illinois, respondent was convicted of the aggravated kidnapping and aggravated criminal sexual assault of L.M. App. 39a–41a. The trial evidence established that during the early morning of April 15, 1995, respondent raped and beat L.M. in his car, a blue Cadillac. App. 15a–18a, 40a. The trial court credited L.M.'s testimony that respondent and his codefendant forced L.M. into respondent's car, stopped at an establishment where one of them went inside to buy alcohol while the other remained with her in the car, and then drove to a third location where they raped her before she was able to escape. App. 40a, 41a. Her testimony was corroborated by photographs of her injuries—two black eyes and extensive bruising to her nose and mouth; a bite mark on her hand that resulted in a permanent scar; and bruises to her arms and back, App. 18a—which the trial court found were inconsistent with respondent's tale of a consensual sexual encounter, App. 20a, 41a–42a. L.M.'s testimony was further corroborated by a disinterested stranger's testimony that L.M.

appeared at her door at 3:00 a.m., naked, with two black eyes and marks all over her face, screaming that she had been raped, App. 15a–16a, 40a. The trial court disbelieved respondent's testimony that L.M. voluntarily entered his car, engaged in consensual sex with his codefendant (after respondent struck her for stubbing out a cigarette on the floor of his car), and then ran off, naked, into the night. App. 41a, 42a.

2. After unsuccessful direct and collateral review, respondent obtained leave to file a successive collateral attack under Illinois's Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq.* (2016). App. 23a–24a, 42a–47a. The successive petition alleged that trial counsel was ineffective for failing to investigate and call five witnesses. App. 48a–52a. Respondent provided affidavits from the witnesses as evidence of the testimony they would have given if called at trial. *Ibid.* Two of the proposed witnesses, Brian and Gayland Massenburg, averred that on the morning of April 16, 1995, they saw an unidentified woman get into a blue Cadillac with two unidentified men at the location where respondent and his codefendant forced L.M. into respondent's car on the morning of April 15, 1995. App. 48a. None of the five witnesses claimed any personal knowledge of the events that took place between the time respondent drove away from the liquor store and 3:00 a.m., when she appeared naked and beaten at a stranger's door. *See* App. 48a–52a.

The state appellate court rejected respondent's claim because he failed to establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). "[E]ven assuming that all the affiants would testify in accord with their affidavits and that they would all be

found to be completely credible by the factfinder," there was no reasonable probability that respondent would have been acquitted had counsel presented their testimony at trial. App. 66a.

4. Respondent renewed his ineffective assistance claim in a federal habeas corpus petition, App. 20a, which the district court denied, App. 33a. The district court held that, under 28 U.S.C. § 2254(d)(1), the state appellate court reasonably applied *Strickland* "[c]onsidering the strength of the circumstantial evidence in L.M.'s favor and the assorted inconsistencies and ambiguities in the testimony of the five proposed witnesses." App. 32a.

5. Respondent appealed and the Seventh Circuit vacated the district court's judgment and remanded for an evidentiary hearing pursuant to 28 U.S.C. § 2254(e)(2). App. 8a–13a. The Seventh Circuit discussed neither the substance of the witnesses' affidavits nor the state appellate court's decision; instead, it quoted a single paragraph of the district court's opinion addressing Brian and Gayland Massenburgs' affidavits "to give the flavor of how those courts treated the affidavits." App. 10a–11a.

The Seventh Circuit's vacatur was not premised on a finding that the district court erred in determining that the state appellate court's judgment was reasonable under § 2254(d)(1); to the contrary, it found that the district court's analysis "would be convincing, if the law prevented a court from going beyond the affidavits on collateral review." App. 11a. But the court of appeals concluded that the law "does not" so limit a district court on habeas review because "a federal court may hold an evidentiary hearing if,

through no fault of [respondent's], the state-court record lacked essential facts." *Ibid.*

6. Petitioner sought panel rehearing and rehearing *en banc*, *see* App. 6a, arguing that the court's decision directly contravened *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), which "hold[s] that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."

7. On January 25, 2019, the Seventh Court denied panel rehearing and rehearing *en banc*, and the panel issued an amended opinion. App. 1a–7a. The panel did not alter its prior decision except to add two brief paragraphs explaining that *Pinholster* is inapposite because, "[b]y assuming that the language of the five affidavits would have been the totality of the witnesses' testimony had they been called at trial, the state made an unreasonable factual determination under § 2254(d)(2)." App. 7a. The Seventh Circuit conceded that respondent did not "articulate in state court . . . what the affiants would have said, had they been called at trial," beyond the contents of their affidavits. App. 6a. Nevertheless, it reasoned that "by asking for a hearing to explore an ineffective-assistance theory," respondent had "strongly implied what topics would be covered at a hearing" in state court, thereby entitling him to one in federal court. *Ibid.*

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's published opinion evades this Court's clear teaching that habeas review under 28 U.S.C. § 2254(d) is limited to the record that was before the state courts. *Pinholster*, 563 U.S. at 181.

By inviting federal habeas courts to look beyond that record in determining whether the unreasonableness standard of § 2254(d)(2) has been met, the court of appeals contravened AEDPA's plain language and offered habeas petitioners an end run around state-law pleading requirements. If the Seventh Circuit's judgment is permitted to stand, state courts will be required to conduct evidentiary hearings in violation of state law whenever a prisoner raises a claim that depends upon, but inadequately alleges, the existence of extrarecord evidence, lest their judgments be set aside and the claim relitigated *de novo* in federal court years—and sometimes decades—after the inmate's conviction.

The Seventh Circuit's opinion also created a split in the federal circuits regarding whether a state court can run afoul of § 2254(d)(2) by accepting a prisoner's factual allegations as true, rather than conducting an evidentiary hearing to determine whether unalleged extrarecord evidence could support the prisoner's claim.

I. The Seventh Circuit's Decision Contravenes the Plain Language of 28 U.S.C. § 2254(d)(2).

The Seventh Circuit disregarded the plain language of 28 U.S.C. § 2254(d)(2) and this Court's precedent when it held that the state appellate court made an unreasonable determination of the facts by accepting the truth of respondent's allegations rather than conducting an evidentiary hearing to determine whether some additional, unalleged extrarecord evidence might support his claim.

A federal court may not grant habeas relief on a claim adjudicated on the merits by a state court

unless the state-court adjudication was contrary to, or an unreasonable application of, clearly established federal law as determined by this Court, 28 U.S.C § 2254(d)(1), or "resulted in a decision that was based on an unreasonable determination of facts in light of the record presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). Thus, where, as here, a state court reasonably applied clearly established federal law to deny a prisoner's claim, relitigation of that claim is barred unless the state court's judgment rested on an unreasonable factual determination in light of the state-court record. *Ibid.* Review of the reasonableness of a state-court judgment under both § 2254(d)(1) and § 2254(d)(2) is limited to the record that was before the state court. *See Pinholster*, 563 U.S. at 181; *id.* at 185 n.7 (explaining that § 2254(d)(2)'s use of language "in light of the evidence presented in the State court preceding" reveals that it, like § 2254(d)(1), "is plainly limited to the state-court record").

Here, respondent claimed that trial counsel was ineffective for failing to call five witnesses, App. 20a, and supported that claim in state court with affidavits proffering the witnesses' proposed testimony, App. 48a–52a. The state appellate court accepted these affidavits as true, rather than conducting an evidentiary hearing to determine whether the witnesses would have recanted or expanded upon their sworn statements had they been called to testify at trial. That decision cannot be unreasonable "in light of the record presented in the State court proceeding," 28 U.S.C. § 2254(d)(2), for the affidavits were the only evidence in the state-court record regarding the witnesses' testimony. Accordingly, the district court correctly held that the state appellate

court's judgment denying respondent's claim after finding the affidavits insufficient to establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), App. 61a–64a, was not subject to relitigation, App. 31a–32a.

The Seventh Circuit's contrary holding ignores the plain language of § 2254(d)(2). *See Pinholster*, 563 U.S. at 185 n.7 (explaining that § 2254(d)(2)'s use of language "in light of the evidence presented in the State court proceeding" reveals that it, like § 2254(d)(1), "is plainly limited to the state-court record"). The Seventh Circuit held that although the state appellate court reasonably applied *Strickland* to respondent's ineffective-assistance claim, *see* App. 3a (acknowledging reasonableness of state appellate court's application of *Strickland*), the state court judgment nonetheless must be set aside because "[b]y assuming that the language of the five affidavits would have been the totality of the witnesses' testimony had they been called at trial, the state made an unreasonable factual determination under § 2254(d)(2)," App. 7a.

Although the Seventh Circuit characterized petitioner's invocation of *Pinholster* as an attempt to fashion "a rule that state courts may insulate their decisions from federal review by refusing to entertain vital evidence," App. 6a, it nonetheless conceded that there was no such evidence to entertain, because respondent "did not articulate in state court . . . what the affiants would have said, had they been called at trial" beyond the contents of their affidavits, *ibid.* Moreover, the Seventh Circuit acknowledged that there was no evidence that the witnesses would have recanted or expanded upon their affidavits if called to

testify. App. 4a (admitting that "[w]e just don't know" whether witnesses would depart from their affidavits if called to testify). Yet the Seventh Circuit held that because the state court declined to conduct an evidentiary hearing based on speculation that the witnesses *might* recant or expand upon their affidavits, the district court must receive evidence and review respondent's claim *de novo*. App. 6a–7a.

Not only does the Seventh Circuit's decision conflict with the plain language of § 2254(d)(2), it also offers habeas petitioners an end run around state pleading requirements. Illinois prisoners whose collateral challenges raise a claim dependent on extrarecord evidence must support the claim with affidavits or other evidence, or explain why they cannot. 725 ILCS 5/122-2 (2016). The trial court must take as true all well-pleaded facts and supporting affidavits, *People v. Caballero*, 533 N.E.2d 1089, 1091 (Ill. 1989), and may dismiss a postconviction petition without an evidentiary hearing unless the allegations and supporting affidavits, "*if proven* at an evidentiary hearing, would entitle [the prisoner] to relief," *People v. Domagala*, 987 N.E.2d 767, 775 (Ill. 2013) (emphasis original).

By holding that compliance with Illinois's postconviction procedure constitutes an unreasonable determination of fact under § 2254(d)(2), the Seventh Circuit compels Illinois to sacrifice either its postconviction pleading requirements or the finality of its state-court judgments. *Cf. Beard v. Kindler*, 558 U.S. 53, 61 (2009) (habeas court's finding that state procedural rule was inadequate to bar federal habeas review created "unnecessary dilemma" for State, requiring that it sacrifice either the rule or the

finality of its state-court judgments); *Johnson v. Lee*, 136 S. Ct. 1802, 1807 (2016) ("'A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system.") (quoting *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997)).

The frailty of the Seventh Circuit's decision is further apparent from its insistence that state courts hold evidentiary hearings in circumstances where federal courts would not. *See Johnson v. Lee*, 136 S. Ct. 1802, 1805 (2016) (*per curiam*) ("Federal habeas courts must not lightly 'disregard state procedural rules that are substantially similar to those to which we give full force in our own courts.'") (quoting *Kindler*, 558 U.S at 62). For example, federal district courts are not required to conduct evidentiary hearings on motions filed under 28 U.S.C. § 2255, § 2254's cognate for federal prisoners, if the movant's allegations, accepted as true, would not entitle the movant to relief. *See*, *e.g.*, *DeCologero v. United States*, 802 F.3d 155, 167 (1st Cir. 2015) ("A district court may deny an evidentiary hearing [on § 2255 motion] when 'the movant's allegations, even if true, do not entitle him to relief[.]'") (quoting *Owens v. United States*, 483 F.3d 48, 57 (1st Cir. 2007)); *Purkey v. United States*, 729 F.3d 860, 865–69 (8th Cir. 2013) (district court did not err in denying, without evidentiary hearing, § 2255 motion alleging counsel ineffective for failing to call witnesses where witnesses' affidavits, taken as true, could not establish prejudice).

Nor must a federal court conduct an evidentiary hearing on a defendant's claim where the defendant's

allegations regarding extrarecord evidence are insufficiently detailed. *See*, *e.g.*, *Lynne v. United States*, 365 F.3d 1225, 1238–39 (11th Cir. 2004) (district court not required to conduct evidentiary hearing on § 2255 motion claiming witnesses altered testimony based on information learned from government agents where supporting witness affidavits did not name government agents or detail what testimony was altered); *United States v. Balzano*, 916 F.2d 1273, 1296–97 (7th Cir. 1990) (no prejudice from counsel's alleged failure to investigate witnesses because defendant made no "comprehensive showing of what the investigation would have produced") (internal quotation marks omitted); *United States v. Olson*, 846 F.2d 1103, 1111 (7th Cir. 1988) (no prejudice from counsel's alleged failure to investigate witnesses because defendant did not "allege specifically what evidence such investigation and interviews would have uncovered").

Indeed, this Court analyzes *Strickland* claims based on proffers of extrarecord evidence exactly as the state appellate court did here, accepting the truth of the proffer and determining whether it is sufficient to establish prejudice. *See*, *e.g.*, *Harrington v. Richter*, 562 U.S. 86, 112–13 (2011) (habeas petitioner not prejudiced by counsel's alleged failure to present experts' testimony in view of limitations of testimony proffered in the experts' affidavits); *Bobby v. Van Hook*, 558 U.S. 4, 12 (2009) (*per curiam*) (state court reasonably determined that petitioner was not prejudiced by counsel's failure to call witnesses based on contents of uncalled witnesses' affidavits); *Schriro v. Landrigan*, 550 U.S. 465, 481 (2007) (district court did not abuse its discretion by denying *Strickland* claim without evidentiary hearing because "[e]ven

assuming the truth of all the facts that [the petitioner] sought to prove at the evidentiary hearing, he still could not be granted habeas relief . . . because the mitigation evidence he seeks to introduce would not have changed the result"); *Strickland*, 466 U.S. at 700 (habeas petitioner not prejudiced by counsel's decision not to call witnesses at sentencing where witness affidavits established that their testimony would have shown only "that numerous people who knew [the petitioner] thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance").

In each of these cases, this Court assessed prejudice solely from the affidavits and reports submitted in support of the petitioners' claims. The Court did not do what the Seventh Circuit insisted that the state court do here: speculate whether, or how, the uncalled witnesses and experts might depart from or expand upon the contents of their affidavits or reports if examined at an evidentiary hearing. *See Harrington*, 562 U.S. at 112–13; *Schriro*, 550 U.S. at 481; *Strickland*, 466 U.S. at 675–76. And the Court certainly did not find that evidentiary hearings were required to investigate the existence of unalleged, extrarecord evidence simply because a prisoner, "by asking for a hearing to explore an ineffective-assistance theory," had "strongly implied what topics would be covered at a hearing." App. 6a. *Cf. Schriro*, 550 U.S. at 481 (2007) ("If district courts were required to allow federal habeas applicants to develop even the most insubstantial factual allegations in evidentiary hearings, district courts would be forced to reopen factual disputes that were conclusively resolved in the state courts."); *Davis v. Ayala*, 135 S.

Ct. 2187, 2205 (2015) (explaining that Ninth Circuit erred by setting aside state-court judgment based on "speculation about what extrarecord information defense counsel might have mentioned" had he been present to dispute race-neutral explanations for peremptory challenge offered by prosecution because that "is not how habeas review is supposed to work").

II. The Circuit Courts Are Split Over Whether a State Court Makes an Unreasonable Determination of the Facts Under 28 U.S.C. § 2254(d)(2) By Accepting a Prisoner's Allegations as True.

The Seventh Circuit's decision below, holding that a state court unreasonably determines the facts under 28 U.S.C. § 2254(d)(2) by accepting a prisoner's allegations as true rather than conducting an evidentiary hearing, created a split with the Ninth Circuit. That this split is limited to two circuits speaks more to the extremity of the Seventh Circuit's position than a need for further development in the circuit courts, as it appears that no other circuit court has felt it necessary to question whether a state court's acceptance of a prisoner's allegations as true could be an unreasonable factual determination under § 2254(d)(2).

The Ninth Circuit has held that a state court does not make an unreasonable factual determination under § 2254(d)(2) by accepting a prisoner's allegations as true without conducting an evidentiary hearing. *Gulbrandson v. Ryan*, 738 F.3d 976, 991 (9th Cir. 2013). In *Gulbrandson*, the habeas petitioner claimed that counsel was ineffective for failing to present at sentencing a particular expert's testimony regarding the petitioner's state of mind at the time of

the offense. *Id.* at 990. In support, the petitioner provided the state courts with the expert's affidavit attesting to certain conclusions he would have made if called to testify. *Id.* at 985–86. The state court assumed that the expert would have testified in conformity with his affidavit, *id.* at 991, and found that such testimony would not have affected the outcome. *Ibid.* In affirming the denial of habeas corpus relief, the Ninth Circuit rejected the argument that the state court unreasonably determined the facts by declining to hold an evidentiary hearing before rejecting the *Strickland* claim because "[a] state court need not hold an evidentiary hearing when it would not afford relief even assuming the defendant's allegations were true." *Ibid.* (citing *Hibbler v. Benedetti*, 693 F.3d 1140, 1147–48 (9th Cir. 2012)). Thus, certiorari is also appropriate to resolve this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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