No. 18-1197

IN THE

Supreme Court of the United States

DEANNA BROOKHART, Acting Warden,
Petitioner,

vs.

ANTHONY D. LEE, SR.,
Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

KENT S. SCHEIDEGGER
Counsel of Record
KYMBERLEE C. STAPLETON
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345
briefs@cjlf.org

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

QUESTION PRESENTED

Is a state collateral review court's decision "based on an unreasonable determination of the facts," within the meaning of 28 U. S. C. § 2254(d)(2), when that court assumed that the affidavits submitted by the petitioner were true, decided that they were insufficient to meet the petitioner's burden of proof, and denied relief without an evidentiary hearing on that basis?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Statutes

Rules of Court

State Statute

Secondary Authorities

IN THE

Supreme Court of the United States

DEANNA BROOKHART, Acting Warden,
Petitioner,

vs.

ANTHONY D. LEE, SR.,
Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

   Counsel of record for all parties received notice at least 10 days prior to the due date of CJLF's intention to file this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

This case raises a question regarding a frequently occurring source of delay in habeas corpus cases, including capital cases. The problem is a misunderstanding of the nature of 28 U. S. C. § 2254(d) and the correct way to apply it in order to achieve Congress's purpose in enacting it. The resulting delay impairs the interests of victims of crime in timely enforcement and thus is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

L.M., the victim in this case, testified to a harrowing night of kidnapping, multiple sexual assaults, and beatings by defendant (respondent in this certiorari proceeding) Anthony Lee and codefendant Burlmon Manley. Her story was corroborated by witness Teresa Baragas, who testified that she was awakened at 3 a.m. by L.M. banging on her door seeking help, "naked, with black eyes and a 'marked up and scarred' face, screaming that she had been raped." App. to Pet. for Cert. 40a (state appellate opinion on collateral review).

Defendant was convicted "of five counts of aggravated criminal sexual assault and one count of aggravated kidnapping, and sentenced to a total of 100 years in" state prison. *Id*., at 39a. The judgment was affirmed on appeal, and an initial collateral review petition was denied.

Defendant was eventually allowed to file a successive petition claiming ineffective assistance of counsel, and he attached affidavits from five witnesses that he claims his trial lawyer should have interviewed and called. *Id*., at 47a. The state trial court denied relief without an evidentiary hearing, and the Illinois Appellate Court affirmed. "Even assuming that the affiants would testify at an evidentiary hearing and that they

would testify to what is stated in their affidavits, we cannot find a reasonable probability that the result would have been different." *Id*., at 63a.

On federal habeas corpus, the District Court found that the case was "a close call" but "the Appellate Court's conclusion was not unreasonable in light of the strength of the state's case against Lee." *Id*., at 31a. Applying the standard of 28 U. S. C. § 2254(d), the District Court denied habeas relief but issued a certificate of appealability.

On appeal, the Court of Appeals for the Seventh Circuit vacated and remanded for an evidentiary hearing. The Court of Appeals found that the state court's denial of an evidentiary hearing was unreasonable, amounting to "refusing to entertain vital evidence." *Id*., at 6a. Therefore, the Court of Appeals held, the exception of § 2254(d)(2) for "unreasonable determination of the facts" applied, and *Cullen* v. *Pinholster*, 563 U. S. 170 (2011), was not controlling.

The State has petitioned this Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

" 'Both the State and the victims of crime have an important interest in the timely enforcement of a sentence,' " this Court noted recently. *Bucklew* v. *Precythe*, 587 U. S. __ (Apr. 1, 2019) (slip op., at 29). That interest was frustrated in that case, see *ibid*., and many others. The people and the victims deserve better. See *ibid*.

The fact that such unconscionable delays persist nearly a quarter century after Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 to curtail them, see *Woodford* v. *Garceau*, 538 U. S. 202,

206 (2003), is due in significant part to the frequent failure of federal courts to follow the law. See, *e.g.*, *Sexton* v. *Beaudreaux*, 585 U. S. __, 138 S. Ct. 2555, 2560, 201 L. Ed. 2d 986, 992 (2018) ("fundamental errors that this Court has repeatedly admonished courts to avoid"). Although this case is not a capital case, the question presented is one that arises regularly in capital cases, and clarity in this murky area of habeas corpus law would go far toward fixing the problem.

Cullen v. *Pinholster*, 563 U. S. 170 (2011), should have had a much greater delay-reducing effect than it has had to date. Evasions of its rule like the one in the present case seriously extend the delay in the resolution of habeas corpus cases generally and capital cases in particular, defeating the purpose of AEDPA and delaying and denying justice.

A. A Modified Rule of Res Judicata.

When Congress added new subdivision (d) to 28 U. S. C. § 2254, it "stop[ped] short of imposing a *complete* bar on federal-court relitigation of claims." *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011) (emphasis added). Instead, Congress imposed a partial bar on relitigation. Like the toughened successive petition rule of § 2244(b), AEDPA's so-called "deference" standard is a modified rule of res judicata. See *ibid*.

The language at the top of subdivision (d) sets out the general principle that federal courts will not grant relief on claims adjudicated in state court. See 141 Cong. Rec. 15,058, cols. 1-2 (June 7, 1995) (statement of Sen. Biden); Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 946 (1998). This is a rule of res judicata. The two paragraphs that follow are exceptions to this general rule. They are what make it a *modified* rule of res judicata.

Rules that preclude a suit are not only for the purpose of protecting the defending party from an erroneous judgment. They are just as important in protecting that party from the burden, delay, and expense of defending at all. In this sense, § 2254(d) is similar to the qualified immunity rule in that much of the purpose of the rule is defeated if the case goes through protracted litigation, even if the defendant prevails in the end. Cf. *Mitchell* v. *Forsyth*, 472 U. S. 511, 525-527 (1985); *Behrens* v. *Pelletier*, 516 U. S. 299, 306 (1996).

Understanding the nature of the § 2254(d) rule makes its application more clear. It is not a rule for deciding the merits of a claim. It is a rule against relitigating a claim, with exceptions. The threshold question is whether an exception applies, and that question must be decided solely on the state court record. If the answer is that no exception applies, then discovery and an evidentiary hearing in federal court are unnecessary because no facts can be discovered or found that will alter the result. See *Harrington* v. *Richter*, 562 U. S., at 102 (" 'only question that matters' "); *Cullen* v. *Pinholster*, 563 U. S., at 185 (additional evidence "has no bearing").

B. Habeas and Haystacks.

The vast majority of habeas corpus petitions are meritless. This is not a recent development. See *Brown* v. *Allen*, 344 U. S. 443, 536-537 (1953) (Jackson, J., concurring in the judgment); V. Flango, National Center for State Courts, Habeas Corpus in State and Federal Courts 61 (1994) (pre-AEDPA, 17 grants in sample of 1626 federal petitions). In order to find the meritorious needle in the haystack of worthless petitions, see *Brown*, at 537, and yet keep the burden manageable, some kind of sorting mechanism is needed.

The federal system's rules for its own prisoners, like the parallel rules for state prisoners, includes a multi-stage filter. Rule 4 of the Rules Governing Section 2255 Proceedings for the United States District Courts provides for a preliminary review by the judge and, if the petition is plainly meritless on its face, dismissal without the need for an answer from the Government. That is the first stage. If the case passes the first stage, the Government answers, and the petitioner replies. See Rule 5. The case might or might not need further factual development, so the court may authorize discovery and expansion of the record through prior pleadings and affidavits. See Rules 6 and 7. Then the court must decide whether to decide the case on the paper record or go to a third stage, an evidentiary hearing. See Rule 8(a).

Illinois' collateral review statutes are largely the same as the federal rules. See Ill. Comp. Stat. ch. 725, §§ 5/122-5, 122-6. The Illinois Supreme Court has expressly characterized this as a three-stage process, with an evidentiary hearing as the third stage. See *People* v. *Domagala*, 987 N. E. 2d 767, 775 (Ill. 2013); App. to Pet. for Cert. 56a-57a.

Illinois' approach to the haystack problem is certainly a reasonable one, not differing significantly from the federal model. In this case, the federal court of appeals disagrees with the state appellate court's application of that structure to decide the case at stage two, assuming the truth of the habeas petitioner's affidavits, rather than go to stage three for an evidentiary hearing. The question is how that disagreement fits into the § 2254(d) framework.

C. "Unreasonable Determination of the Facts."

Most of this Court's decisions on § 2254(d) have been concerned primarily with the first exception, relating to the selection of the appropriate rule of law and the application of that law to the facts of the case. See, *e.g., White* v. *Woodall*, 572 U. S. 415, 420, 426 (2014). In cases where there has been a full evidentiary hearing with findings of fact in the state court, the second exception has been much less of a problem. Taking the facts as found by a prior court unless they are clearly wrong is largely what appellate courts do every day throughout the country.

The more difficult problems arise when the state court decides that the case is not one of the few that should go the full distance to an evidentiary hearing but instead one of the many that can be decided at an earlier stage. *Harrington* v. *Richter*, *supra*, was such a case. Richter filed his state habeas petition directly in the state supreme court and supported it with affidavits from experts. See 562 U. S., at 96. The issue of law before this Court in *Richter* was how to treat summary denials under § 2254(d)(1), but the *Richter* Court's approach to the facts was similar to the Illinois Appellate Court's treatment in the present case. The Court looked at the affidavits submitted, evidently assuming them to be true for the purpose of the analysis, considered that evidence in light of the evidence at trial, and decided it was not unreasonable for the state court to conclude there was no reasonable probability it would have made a difference. See *id*., at 112-113.

Brumfield v. *Cain*, 576 U. S. __, 135 S. Ct. 2269, 192 L. Ed. 2d 356 (2015), is also a case where the state court proceeding was terminated short of an evidentiary hearing. See *id*., 135 S. Ct., at 2275. This case involved an unusual state procedure established by the state supreme court to cope with the retroactivity of *Atkins*

v. *Virginia*, 536 U. S. 304 (2002). The state rule required the petitioning inmate to demonstrate only a reasonable doubt of intellectual disability to qualify for an evidentiary hearing. See *Brumfield*, 135 S. Ct., at 2274.

As in *Richter*, this Court looked at the affidavits, but this time the Court found that the two factual inferences the state trial court drew from the affidavits were unreasonable determinations of fact based on the state court record. An IQ test of 75 does not preclude a finding of intellectual disability. It is within the margin of error, although just barely so. See *id*., at 2277-2278.[2] The trial court's finding that the affidavits did not raise a reasonable doubt of the existence of adaptive skill deficits was also unreasonable based on the facts before that court. See *id*., at 2279-2280.

Brumfield did not clarify the waters regarding treatment of cases with affidavits but no hearing because it involved two quirks not present in most cases. First, it involved a peculiar, temporary rule requiring only the raising of a reasonable doubt.[3] Second, it was not a simple case of the state court going straight from an assumption of truth of the affidavits to decision of the question of law on the merits but rather involved an intermediate step of factual inference from the affidavits that this Court found to be unreasonable.

---

2. *Brumfield*'s statement that 75 is "*squarely* in the range," *id*., at 2278 (emphasis added), is mistaken. A score of 75 is at the far end of the tail of the bell-shaped curve and admits only a very remote possibility that the examinee's true IQ is 70 or below. See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Hall v. Florida*, No. 12-10882, pp. 13-15.

3. The Louisiana Legislature has enacted a different procedure for cases that go to trial post-*Atkins*. See *State* v. *Dunn*, 974 So. 2d 658, 661-662 (La. 2008).

The present case involves a much more typical scenario. The state court assumes the affidavits to be true and applies the correct rule of law to those facts. If the petitioner attacks the application of law to fact as unreasonable, that would be a straight § 2254(d)(1) problem. But here the Court of Appeals held, in essence, that it was procedurally unreasonable to go straight to decision from the facts in the affidavits without giving the petitioner a chance to expand further on his factual showing via an evidentiary hearing.

The habeas haystack processing rules must necessarily require some kind of showing to go past stage two into stage three, *i.e.*, to be granted an evidentiary hearing. But how much is required is a matter on which rulemakers may differ. The state appellate court in this case essentially required the petitioner to make a *prima facie* showing in the traditional sense of that term, *i.e.*, a showing that would have been sufficient for judgment in his favor unless rebutted. See B. Garner, Black's Law Dictionary 1209 (7th ed. 1990).

The Seventh Circuit seems to be implying that state courts must grant evidentiary hearings on a lower, but undefined, showing or else risk having their findings declared unreasonable for § 2254(d)(2) purposes, with the attendant cost to the state of defending its judgment through a full round of federal habeas litigation instead of having it dismissed at the threshold. In capital cases, the state and the victims of the crime will also suffer the injustice of badly delayed justice because the state court crossed an as-yet-undefined line. The people of the State and the surviving victims deserve better. See *Bucklew* v. *Precythe*, 587 U. S. __ (Apr. 1, 2019) (slip op., at 29). The line, if there is one, needs to be drawn clearly for all to see.

CONCLUSION

The petition for writ of certiorari should be granted.

May, 2019

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation