QUESTION PRESENTED

Three years before trial, an eyewitness for the state identified the petitioner as the perpetrator of a robbery. At trial, however, she testified unequivocally that the petitioner was "not the man who robbed that store." Over objection, the state asked the eyewitness if "something happened" between the time of her positive identification and trial. This colloquy ensued:

WITNESS: Not nothing to do with this case...It has nothing to do with this case, I don't believe.
THE COURT: He's not asking about that. He just wants to know if there is something different or something happened-or what was your question?
STATE: Did something happen to you?
WITNESS: I got shot.
STATE: And you don't know if it's related to this case or not?
WITNESS: No, it's not.
STATE: How do you know that?
WITNESS: I don't.
STATE: Are you afraid today to testify and identify the defendant because of what happened to you?
WITNESS: No.

The court held that this testimony was relevant to the witness's credibility because it was "evidence" she was afraid to identify the petitioner at trial.

1. Under 28 U.S.C. § 2254(d)(2), did the court unreasonably determine that these facts comprised "evidence" that the witness was afraid to testify?

2. Must a petitioner establish only that the state-court factual determination on which

the decision was based was "unreasonable" to satisfy § 2254(d)(2), or does § 2254(e)(1) additionally require a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence?

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No. _____

In the
Supreme Court of the United States

DEZMON T. BROOKS,
Petitioners,

v.

AMY MILLER, Acting Warden
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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June 7, 2013

PETITION FOR WRIT OF CERTIORARI

Petitioner, Dezmon T. Brooks, respectfully petitions this Court for a writ of certiorari to review the order issued by the United States Court of Appeals for the Ninth Circuit denying a certificate of appealability.

DECISIONS BELOW

The written opinion from the California Court of Appeal, Second District, Division 3, which denied Mr. Brooks's direct appeal, is attached. App. 26. It is unpublished, but available at 2010 WL 553245. Mr. Brooks's petition for review by the California Supreme Court was denied without comment or citation by the California Supreme Court on May 12, 2010.

The Report and Recommendation authored by the Honorable Arthur Nakazato, Magistrate Judge for the United States District Court for the Central District of California, Western Division, which recommended denial of Mr. Brooks's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, is unpublished. App. 9. The Honorable Valerie B. Baker's order adopting the Report and Recommendation, is unpublished. App. 8. The order denying a certificate of appealability issued by the United States Court of Appeals for the Ninth Circuit

is unpublished. App. 1.

STATEMENT OF JURISDICTION

The Ninth Circuit denied Mr. Brooks's request for a certificate of appealability on March 1, 2013. App. 1. On May 24, 2013, this Court extended the time for filing the instant petition to June 7, 2013. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. §§ 2254(d)(2) and (e)(1)

(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--

…

(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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

Facts Established at Trial

On the night of July 20, 2006, Vanessa Madrid and Sarina Soler were working at a Blockbuster Video store on Centinela Avenue in Los Angeles. App. 27. Madrid first noticed defendant Brooks when he came into the store about 11:30 p.m. At midnight, Madrid locked the store's front door to prevent any more customers from entering. Madrid was at the front register with a customer, Nanci Alvarez, when Soler came scurrying over. Brooks then walked up and asked Alvarez to come over to him. When she refused, he pulled a gun from his sweatshirt and announced he was going to rob them. App. 28.

Brooks told Madrid to take Alvarez to the bathroom while Soler remained at the front register. As Madrid was walking toward the rear of the store with Alvarez and Brooks, she signaled to Soler to call 911. When they got to the bathroom, Brooks had Madrid unlock the door and then he ordered Alvarez to go inside. After the bathroom door was closed, Brooks ordered Madrid to unlock the office so he could get the store's surveillance tapes. But the videotape container was locked and Madrid did not have the key. Brooks tried, unsuccessfully, to pry it open. Then he glanced at the surveillance monitor and noticed Soler was on the phone. Brooks ran to the front of the store. App. 28.

At the same time, Soler ran to the rear of the store

and knocked on the office door. Madrid let her in and shut the door. Madrid took the phone from Soler and spoke to the 911 operator. After a while she heard a loud noise, and then sirens and helicopters. Over the phone, the police said it was safe to come out. Madrid saw that the glass in the store's front door had been shattered. App. 28.

Identification Testimony

According to the state appellate court's statement of the facts, which was adopted in full by the federal district court, Soler "positively identified" Mr. Brooks as the perpetrator on two separate occasions before trial: at a preliminary hearing[1] and at a photo line-up organized by law enforcement. App. 29. The statement of the facts section does not equivocate on this point: "Soler positively identified Brooks in a photo array and at the preliminary hearing." App. 29.

However, in its "Discussion" section, the appellate court severely undermines its statement in the facts section that Soler positively identified Mr. Brooks as the perpetrator at the preliminary hearing. To wit, the court reveals, for the first time in its opinion, that Soler actually testified at the preliminary

[1] There were two preliminary hearings in Mr. Brooks's case. The charges were dropped after the first preliminary hearing, and subsequently refiled. Soler testified at the first preliminary hearing, but not the second. App. 39.

hearing that "Brooks looked similar to the perpetrator." App. 39. Mr. Brooks argued to the California Supreme Court, as well as the federal district court, that the appellate court misconstrued this important fact. In fact, Mr. Brooks argued that the state appellate court's backtracking in the discussion section still did not tell the full story. Mr. Brooks alleged that Soler simply testified that he "looked familiar."

The appellate court's description of Soler's photo identification as an unqualified "positive" identification is similarly mischaracterized. The court found:

> After obtaining a photograph of Brooks, Detective Mason put together a black and white six-pack photo array. She showed it to Soler, who "almost immediately ... picked ... out" Brooks, saying: "Yeah, that's him. I know that's him. I didn't see the hair, but I know that's him.

App. 31. This is a misleading portrayal, however, of the nature of Soler's identification of Brooks in the photo array.

First, the quoted language suggests that this is Soler's trial testimony. It is not. It is Detective Mason's testimony regarding her recollection of what Soler told her during the photo identification. Soler's trial testimony regarding her prior photo identification of Mr. Brooks was more uncertain. She stated that she did identify Mr. Brooks as the

perpetrator at the time, but expressed misgivings to Detective Mason as well. At trial, Soler testified that she told Detective Mason that the perpetrator was wearing a "hoodie" and a black cap at the time of the robbery, that she could not see the man's hair, and that the perpetrator had a distinctive facial mark that was not present on Brooks's face. As explained below, Mr. Brooks's challenged the unreasonable characterization of these facts in his state post-conviction motion and his § 2254 petition.

At trial, Soler testified Brooks was definitely not the perpetrator. App. 29.

Nanci Alvarez did not testify at trial. App. 29.

Madrid identified Brooks as the perpetrator at the preliminary hearing and at trial. She did not, however, identify him in a photo array. Madrid testified the photo array pictures had been black and white, not color. At the live lineup, she did not identify Mr. Brooks as the perpetrator, and instead picked another man. App. 28-29.

Disputed Trial Testimony

During the direct examination of Soler at trial, the following colloquy occurred:

> Q. Now, do you think your memory is clearer today as to what happened or do you think it was clearer back when you testified [at the

> preliminary hearing][2]?
>
> A. I really couldn't tell you, but I know that I looked him in his eyes. The man who robbed that store, I looked him in the eyes. The last time I testified against this man, I couldn't look him in his eyes. And now that I'm here today, I feel bad because I know the wrong man is here.
>
> …
>
> Q. By [the prosecutor]: Now, do you remember testifying at the preliminary hearing and identifying the person in court as the person?
>
> A. Yes, sir, I did. I did do that. But I didn't look him in his eyes. I didn't think it mattered. But now I'm here today for a reason. I'm here for a reason today and I know that now. And that's not the man who robbed that store."

App. 33.

The prosecutor asked about the photo array Detective Mason showed Soler, and Soler acknowledged having made a positive identification from the photo array. App. 33-34. The prosecutor continued:

> Q. Now, during ... your testimony, you testified

that you ran [i.e., during the attempted robbery] and today you are in a wheelchair. Is there something that happened since you testified [i .e., at the preliminary hearing]?

A. Not nothing to do with this case. [¶] ... [¶] It has nothing to do with this case, I don't believe.

THE COURT: He's not asking about that. He just wants to know if there is something different or something happened-or what was your question?

Q. By [the prosecutor]: Did something happen to you?

A. Yeah.

Q. What happened?

A. I got shot.

Q. And you don't know if it's related to this case or not?

A. No, it's not.

Q. How do you know that?

A. I don't.

Q. Are you afraid today to testify and identify the defendant because of what happened to

> you?
>
> A. No.

The trial court overruled Brooks's objections to this testimony, reasoning "there have [sic] been some significant changes from her [statements] at two prior occasions" and "there may be a reasonable conclusion that the jury could draw about why she's not identifying the defendant" now. App. 35.

The jury ultimately convicted Mr. Brooks for two counts of robbery and false imprisonment, with firearm use enhancements. He was sentenced to eighteen years and three months in state prison. App. 27.

Appeal

On appeal, Mr. Brooks argued, *inter alia*, that admission of testimony regarding Ms. Soler's shooting rendered his trial fundamentally unfair because the testimony was irrelevant and unduly prejudicial. App. 32. In support, he argued that Ms. Soler's testimony did not constitute "evidence" that she changed her testimony because she was shot, when Ms. Soler testified she was not afraid to appear at trial, and had no reason to believe the shooting was connected to Mr. Brooks. App. 37. The appellate court disagreed:

> We disagree with Brooks's reading of the evidence. Although Soler initially testified she did not believe her shooting had anything to

> do with the case, she ultimately conceded she had no way of knowing one way or the other. Hence, the theory Soler might have changed her testimony because she had been shot was not based on mere speculation and was relevant to the jury's assessment of her credibility.

App. 37.

Mr. Brooks also argued that the trial court unreasonably determined that Ms. Soler's assertion that Mr. Brooks was not the perpetrator represented a "significant change" in her testimony. The appellate court again disagreed, finding that Ms. Soler twice identified Mr. Brooks before trial, but testified at trial that he was definitely not the perpetrator. Based on those facts, the court determined her trial testimony represented not only a "significant change," but a "complete reversal" of her prior identifications. Thus, notwithstanding Ms. Soler's testimony that she had "never look[ed] him in the eyes" and had no reason to fear testifying against him, her previous identification and subsequent retraction automatically constituted relevant evidence for the jury to assess her credibility. App. 39. Finding no error, the appellate court affirmed Mr. Brooks's conviction and sentence.

Petition for California Supreme Court Review

Following denial of his direct appeal, Mr. Brooks, through counsel, filed a "Petition for Review to Exhaust State Remedies" with the California

Supreme Court. He claimed the trial court violated his federal right to due process and a fair trial by admitting testimony from Soler regarding the shooting over defense counsel's objection. Specifically, Mr. Brooks maintained that this testimony was irrelevant and inflammatory, and that its probative value was outweighed by its prejudicial effect. In support, Mr. Brooks argued that the appellate court misconstrued the facts elicited at trial when it affirmed the propriety of the trial court's evidentiary rulings.

First, as in his direct appeal, Mr. Brooks argued that none of the facts elicited during Ms. Soler's trial testimony was evidence that she was afraid to testify. Second, he argued that the state courts' determination that Ms. Soler's identification testimony at trial "significantly changed" (trial court) or represented a "complete reversal" (appellate court) from her prior identifications was not supported by the facts. To wit, Ms. Soler did not, in fact, identify him as the perpetrator at the first preliminary hearing. Instead, argued Mr. Brooks, Ms. Soler testified that he merely "looked familiar."

Third, he argued that what the state appellate court determined was a "positive" identification of Mr. Brooks in the photo array by Ms. Soler was less certain than advertised. The identification testimony was based on Detective Mason's hearsay testimony from the second preliminary hearing that Ms. Soler said "Yeah, that's him. I know that's him. I didn't see the hair, but I know that's him." As discussed above, the state appellate court failed to mention

important testimony from Ms. Soler that undermined the "positive" nature of her identification. Therefore, the determination that Ms. Soler unequivocally identified Mr. Brooks in the photo array was not reasonable.

§ 2254 Proceedings

Mr. Brooks filed his § 2254 petition *pro se*. He used the standard § 2254 form provided by the district court. To it, he attached and incorporated by reference the "Petition for Review to Exhaust State Remedies" filed by post-conviction counsel in the California Supreme Court as his legal argument. App. 10-11. Therefore, he presented the district court with the same arguments he made to the California Supreme Court regarding the Court of Appeal's inaccurate factual determinations.

The district court denied Mr. Brooks's § 2254 petition without analyzing, or even mentioning, any of Mr. Brooks's factual arguments. Instead, it noted that the state appellate court affirmed Mr. Brooks's conviction in an opinion which contained "factual determinations that were drawn from the relevant trial evidence in the record." App. 16. According to the district court, the state court's "factual determinations are presumed correct where, as here, Petitioner has not proffered clear and convincing evidence to the contrary." In support of its explanation, the district court cited to § 2254(e)(1), this Court's decision in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), and *Moses v. Payne*, 555 F.3d 742, 746 n.1 (9th Cir. 2008) ("[b]ecause this initial statement

of facts is drawn from the state appellate court's decision, it is afforded a presumption of correctness that may be rebutted only by clear and convincing evidence.") citing 28 U.S.C. § 2254(e)(1). The district then "adopt[ed] verbatim the court of appeal's" summary of the facts and ultimately denied relief. App. 16.

REASONS FOR GRANTING THE WRIT

In 1951, J.D. Salinger wrote: "It's funny. All you have to do is say something nobody understands and they'll do practically anything you want them to."[3] Salinger may as well have been describing Congress when it passed the AEDPA forty-five years later.

What Congress wanted is clear: to "streamline and simplify" the habeas corpus appeals process. *Hohn v. United States*, 524 U.S. 236, 264-65 (1998) (Scalia, J., dissenting). What is not clear, however, is the AEDPA's language. *See, e.g.,* Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus*, 110 Harv. L. Rev. 1868, 1874 (1997) (the "language of the AEDPA…is highly ambiguous.").

This is particularly true when it comes to the AEDPA's two provisions governing federal-court review of state-court findings. Under 28 U.S.C. § 2254(d)(2), a federal court may not grant a state prisoner's application for a writ of habeas corpus

[3] Salinger, J.D. *The Catcher in the Rye*. Boston: Little, Brown and Company, 1951.

based on a claim already adjudicated on the merits in state court unless that adjudication "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." Under § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

Despite seemingly similar content, a plain language of §§ 2254(d)(2) and (e)(1) engenders more questions than answers about the interplay Congress intended between the two provisions. *See* 17B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4265.2 at 357 (2d ed. 1988 & Supp. 2001) (based on the language of the statute, it "is not clear how" § 2254(d)(2)'s "invitation to decide whether the state fact determinations were reasonable will fit with the presumption that the state fact determinations are correct" under § 2254(e)(1)).

This Court has not provided guidance on the relationship between §§ 2254(d)(2) and (e)(1). In *Wood v. Allen*, 558 U.S. 290, 299 (2010), the Court noted that the Courts of Appeals were divided on the issue and granted certiorari to resolve whether "a petitioner must establish only that the state-court factual determination on which the decision was based was 'unreasonable,'" to satisfy § 2254(d)(2), "or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the

determination was correct with clear and convincing evidence." The Court also held:

> Notwithstanding statements we have made about the relationship between §§ 2254(d)(2) and (e)(1) in cases that did not squarely present the issue, we have explicitly left open the question whether § 2254(e)(1) applies in every case presenting a challenge under § 2254(d)(2)."

Id. at 300 (internal citations omitted) citing *Rice v. Collins*, 546 U.S. 333, 339 (2006). Ultimately, however, as it did in *Rice*, the Court did not answer the question, because the reasonableness of the state court's factual determination "did not turn on any interpretive difference regarding the relationship between" the provisions. *Id*. at 301. Thus, the question is still unanswered. The circuit split persists.

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE DENIAL OF MR. BROOKS' HABEAS CLAIM TURNED ON THE "INTERPRETIVE DIFFERENCE" BETWEEN §§ 2254(D)(2) AND (E)(1).

This case presents the very question this Court sought to resolve in *Wood*. More importantly, it has what *Wood* and *Rice* did not. To wit, the reasonableness of the state appellate court's

factual determinations cannot be assessed without consideration of the interplay between §§ 2254(d)(2) and (e)(1).

The district court denied Mr. Brooks's § 2254 petition without analyzing, or even mentioning, any of Mr. Brooks's erroneous fact finding arguments, which were all based on the state record. Instead, the district court noted that the state appellate court affirmed Mr. Brooks's conviction in an opinion which contained "factual determinations that were drawn from the relevant trial evidence in the record." App. 16. According to the district court, the state court's "factual determinations are presumed correct where, as here, Petitioner has not proffered clear and convincing evidence to the contrary."

The district court's analysis aligns with those circuits which apply § 2254(e)(1) even to erroneous fact finding arguments which stay within the state court record. *See, e.g., Trussell v. Bowersox*, 447 F.3d 588, 591 (C.A.8 2006) (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, 127 S.Ct. 583, 166 L.Ed.2d 434 (2006).

On the other end of the spectrum are courts which only invoke § 2254(e)(1) where a factual challenge

is premised on evidence outside the record. *See, e.g., Lambert v. Blackwell*, 387 F.3d 210, 235 (C.A.3 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").

This Court should resolve the divide amongst the circuits with this case because, unlike *Rice* and *Wood*, the state court's factual determinations in this case were patently unreasonable. Reasonable minds could not disagree that Ms. Soler's testimony regarding the shooting was not evidence that she was afraid to testify. *See Wood*, 558 U.S. at 301 (fact that reasonable minds might disagree about the finding in question will not defeat state court's determination on habeas review).

Ms. Soler testified she was not afraid to identify Mr. Brooks at trial. She testified that she did not think the shooting was at all related to Mr. Brooks's case. The state appellate court held that simply because she could not know for certain whether the shooting was related, the jury could reasonably conclude that she wasn't identifying him because she was afraid. Nothing Ms. Soler said in response to the prosecutor's question could have negated the inference the state was bent on drawing. Ms. Soler's credibility was called into question because she: (a) was shot; (b) testified that she had mistakenly identified a criminal

defendant; (c) and admitted that she did not know who shot her. In essence, she was accused of perjury. Not only was this offensive to Ms. Soler, it violated Mr. Brooks's right to a fair trial.

CONCLUSION

For the reasons described herein, the Petitioner respectfully requests that this Court grant his petition for a writ of certiorari, and review the proceedings below.

Respectfully submitted on this 1st day of May, 2013.

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APPENDIX